

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____	)	Civil Action No.
SAMUEL BARTLEY STEELE,	)	08-11727-NMG
BART STEELE PUBLISHING,)	
STEELE RECORDZ,)	
)	
Plaintiffs)	
)	
v.	)	LEAVE TO FILE GRANTED:
	)	JULY 26, 2010
TURNER BROADCASTING)	
SYSTEM, INC,)	
Et al,)	
)	
Defendants.)	
_____)	

PLAINTIFFS’ REPLY TO DEFENDANT MAJOR LEAGUE BASEBALL PROPERTIES, INC.’s OPPOSITION TO PLAINTIFFS’ RULE 55(a) MOTION FOR ENTRY OF DEFAULT AS TO DEFENDANT MLB ADVANCED MEDIA, L.P.

Plaintiffs Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz (“Steele”) hereby reply to Defendant Major League Baseball Properties, Inc.’s (“MLB”) Opposition to Plaintiffs’ Motion for Entry of Default Against MLB Advanced Media, L.P. (“MLBAM”).

PRELIMINARY STATEMENT

Steele is compelled to reply to the MLB’s Opposition to Steele’s Motion for Default (“MLB’s Opposition”) insofar as it confuses and distracts from the undisputed evidence that MLBAM has, as a factual matter, defaulted. MLB’s Opposition raises a number of distractions and detours in what is essentially a sideshow to the very simple issue before this Court: whether the Clerk should formally recognize MLBAM’s de-facto default by entering it in the record. MLB’s Opposition further asserts numerous false statements of purported fact and false representations and

applications of law.

Entry of default is proper and MLB's Opposition on MLBAM's behalf is without merit because, as fully detailed below:

- (1) MLB's Opposition fails to provide any facts disputing Rule 55(a)'s elements: (1) proper service and (2) failure to appear or defend. See Fed.R.Civ.P. 55(a);
- (2) This Court's summary judgment ruling excluded MLBAM because MLBAM failed to appear and also as the direct result of MLB's own misrepresentations in this Court;
- (3) Longstanding First Circuit law holds that MLBAM is not exempt from appearing or defending because of Steele's "misnomer," if any;
- (4) Rule 55(c)'s "good cause" factors, prematurely raised by MLB, nonetheless do not excuse MLBAM's willful and bad faith failure to appear;
- (5) Entry of default would not be futile;
- (6) MLB represented to the First Circuit that conferring would be "fruitless," and successfully waived a mandatory settlement conference on this basis; MLB misled the *pro se* Steele repeatedly in prior conferences, and has further failed to meaningfully respond to the undersigned's recent attempts to confer in good faith.

I. MLB FAILS TO DISPROVE SERVICE OR FAILURE TO APPEAR

1. MLB Fails to Show Facts Challenging Service of Process on MLBAM

MLB fails to dispute that:

(1) Service of Process was properly effected on November 17, 2008 at MLBAM's principal place of business, 75 Ninth Avenue, 5th Floor, New York, NY 10011 on MLBAM and/or MLB.com (which are one and the same – see below). See Exhibit 3 to Steele's Memo in Support of Motion for Default ("Steele's Motion").

(2) MLBAM does business and is otherwise known as both "MLB.com" and "Major League Baseball." See Washington Secretary of State's Commercial Fundraiser Profile Report, attached as

Exhibit 1 (MLBAM lists “MLB.com” and “Major League Baseball” under “other names used”).

MLBAM’s President and CEO Bob Bowman confirmed this in a 2008 interview:

“[ML]BAM’s nature is stealthy by design, only because the only brand that matters is MLB.com, RedSox.com, Dodgers.com, etc. It’s interesting, some people here have their voicemail saying they are MLB Advanced Media. I always say I’m with MLB.com, because that’s the only brand that matters.”

See Bob Bowman Interview, attached as Exhibit 2;¹ See also Exhibits 5-8 to Steele’s

Motion.

MLB.com is, in fact, MLBAM’s preferred name, as when MLB.com formed a “partnership” with Bloomberg L.P., on February 18, 2010.² MLB.com, contrary to MLB’s characterization, is just another way of referring to MLBAM.³

(3) MLBAM/MLB.com operates out of the above fifth-floor New York address where service was effected.⁴

2. MLB Fails to Refute MLBAM’s failure to Appear or Otherwise Defend

MLB fails to meaningfully address this point, asserting only that any default against MLBAM would have to be set aside because MLB – *not* MLBAM - has “filed a notice of appearance and *defended the interests of Major League Baseball entities*,” without noting the obvious contradiction that MLB also claims that MLBAM is a “separate legal entity” that was never served and has never

¹See http://www.bizofbaseball.com/index.php?Itemid=81&cid=1810&option=com_content&task=view

²See http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20100218&content_id=8090252&vkey=pr_mlbcom&fext=.jsp&c_id=mlb

³ This is no small point. MLB’s Opposition specifically argues that “MLB.com” is nothing but a “URL” and that because the words “Advanced Media” do not appear on the summons successfully served on MLB.com at MLBAM’s headquarters, MLBAM is exempt from responding to a valid summons and complaint.

⁴ MLB, in fact, makes no serious attempt to argue deficiency in the service of process on MLBAM stating matter-of-factly: “[o]ne of those summonses” - MLB evaded the other one – “was subsequently served successfully by the Marshals,” leaving out that the “one” that was “subsequently successfully served” was the one for MLB.com, served at MLBAM’s headquarters. MLB Opposition at 2. See Exhibit 1; see also Exhibit 3 to Steele’s Motion.

been a party (which would necessarily include not being a party to MLB's Summary Judgment Motion, which is true). See MLB Opposition at 8 (emphasis supplied). Although unclear, MLB seems to be attempting to make some sort of "limited appearance" without actually doing so, for MLBAM by filing an Opposition. Obviously, MLBAM has either appeared or it has not – clearly it has not - and MLB's position (if it can be called that) is legally and procedurally untenable.

MLB is unable to disprove service on MLBAM or MLBAM's failure to appear and, therefore, the Clerk must formally recognize MLBAM's de-facto default by entering it into the record. See U.S. v. \$23,000 in U.S. Currency, 356 F.3d 157, 163 (1st Cir. 2004) (clerk's entry of default formally recognizes a party's failure to plead or defend); see also Coon v. Grenier, 867 F.2d 73, 76 (1st Cir. 1989) ("entry of default [is] a clerical act and not a final judgment"); New York Life v. Brown 84 F.3d 137, 141 (5th Cir. 1996) ("*default* occurs when a defendant has failed to plead or otherwise respond to the complaint within the time required by the Federal Rules. An *entry of default* is what the clerk enters when the default is established by affidavit or otherwise") (emphasis original).

II. THIS COURT'S SUMMARY JUDGMENT RULING DID NOT APPLY TO MLBAM; MLBAM DEFAULTED AND MLB'S OWN MISREPRESENTATIONS ENSURED MLBAM WAS NOT PART OF MLB'S MOTION OR THIS COURT'S RULING AND ORDER

MLB's argument that its Summary Judgment Motion and this Court's order allowing it applied to "all defendants" barely merits a response, other than to refer this Court to Exhibits 10, 11, and 12 to Steele's Motion. Indeed, MLB made its own bed in this regard by voluntarily entering its appearance (while MLBAM defaulted), claiming misidentification, and changing the case caption so that, ultimately, the final motion and order related *specifically and only* to "Major League Baseball

Properties, Inc.” (i.e., MLB), which MLB affirmatively admits is a distinct entity from MLBAM.

See MLB Opposition at 4-5.

III. MLBAM’S WILLFUL DEFAULT CANNOT BE EXCUSED BY ANY ALLEGED “MISNOMER”

1. MLB Misrepresents Applicable Law, Affirmatively and by Omission

MLB makes much of the technical details of how MLBAM was named in the *pro se* Steele’s Complaint and Amended Complaint, and the Court’s docket, yet cites to only one case – an inapposite one at that - and then blatantly misrepresents and falsely applies its holding: Specifically, MLB cites U.S. v. Feher, 2004 WL 1664011 (D. Mass.) for the propositions that (1) Steele “has only himself to blame” for his alleged misnomer, MLB Opposition at 1-2, and that (2) “it was Steele’s obligation” to “remedy that perceived inaccuracy” in the docket, MLB Opposition at 6. A copy of Feher is attached as Exhibit 3 for this Court’s convenience and analysis. Suffice it to say that the one paragraph unpublished decision exclusively addressed ambiguity as to proper service of process on an individual, and in no way spoke to or even referenced misnomer of a corporation (or otherwise) nor the accuracy of docket entries.

2. The “Misnomer Rule,” Omitted from MLB’s Opposition, Prevents MLBAM From Avoiding Default⁵

MLB’s Opposition ignores the 600 pound gorilla in the room: the numerous “misnomer cases” that apply squarely (and unfavorably to MLBAM) to the instant situation. As detailed below – with ample citation - MLBAM’s default cannot be defeated by pointing to a technical naming error in Steele’s complaint or summons – if one exists - because MLBAM was properly served; put

⁵ MLB’s omission here appears intentional, given the many – and easily found - cases addressing nearly identical facts, both in the First Circuit and elsewhere.

another way, MLBAM, once served, cannot hide behind MLB, which voluntarily appeared in its stead - and then, when caught out, make a post-facto “I didn’t know you meant me” argument.⁶

This is particularly the case where, as here, there is no doubt MLBAM had actual notice of the suit: MLBAM not only claimed copyright ownership of the infringing work, but someone – MLB, MLBAM, another defendant - we don’t know – *spoliated evidence by deleting MLBAM’s copyright notice from the infringing audiovisual prior to filing it (on three separate occasions) with this Court.*

For a detailed description of MLB’s altered version of MLBAM’s copyrighted audiovisual – what MLB calls the “TBS Promo” (itself a misnomer – an intentional one) – and related facts and the parties’ arguments thereto, which defendants filed with this Court, see Steele June 18, 2010 Affidavit with Steele September 15, 2009 Affidavit appended thereto, attached for the Court’s convenience as Exhibit 4 (originally attached to Steele’s Motion as Exhibit 13); see also Steele’s Appellate Brief, at 18-19, 38-41, attached as Exhibit 5 and Steele Appellate Reply Brief at 8-19, attached as Exhibit 6, 09-2571 (1st Cir.) (pending); see also July 28, 2010 Rule 11 letter to Clifford M. Sloan, attached at Exhibit 7; June 30, 2010 Letter to Christopher A.D. Hunt, attached as Exhibit 8; July 3, 2010 Letter to Clifford M. Sloan and Kenneth A. Plevan attached as Exhibit 9.

There is also strong evidence that MLB and possibly other defendants, and likely their counsel, *engaged in – and continue to engage in - a well-orchestrated plan to deceive this court, my client, and myself during these proceedings in order to conceal MLBAM.* See, e.g., Exhibits 4-9. As

⁶ Lacking a substantive challenge to default, MLB resorts to high-handed dismissals of the *pro se* plaintiff’s “convoluted language.” However, consider this: in 1987 the MLB Promotion Corporation became MLB Properties, Inc., with a division d/b/a MLB Productions, owned by MLB Enterprises, Inc., promoted by MLB Advanced Media, L.P., owner of MLB.com, in turn owned by MLB Media Holdings, L.P. and MLB Advanced Media, Inc. MLBAM manages all internet business for MLB entities, yet has no website of its.

noted above, in the business world, MLBAM is already known (or not known, as the case may be) as a “stealthy” company. Indeed, MLBAM has been called “The Stealthy Money Machine” in part because it runs all of MLB’s websites (and hosts many more lucrative non-baseball websites, e.g., Bon Jovi’s, in addition to producing audiovisual commercials, such as the audiovisual at issue here), yet *has no website of its own*.⁷

a. Misnomer is not a “Get Out of Jail Free Card”

“As a general rule of federal law, the misnomer of a corporation in a summons is immaterial if it appears that the corporation could not have been, or was not, misled.” See In Re: Pharm. Indus., 307 F.Supp. 190, 196 (2004) (D. Mass) (“pivotal determination is whether plaintiff actually serves the real party in interest with a copy of the complaint and summons,” so that “notice of the need to respond has been given to the party in interest, albeit incorrectly named.”) See Id. at 195-196 (emphasis supplied); (“service of process is not legally defective simply because the complaint misnames the defendant in some insignificant way. Technical defects in the form of the summons and the complaint do not invalidate an otherwise proper and successful delivery of process”). Id. at 196.

The longstanding objective standard in misnomer cases, as long ago explained by Professor Moore, is whether “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; or whether plaintiff actually meant to serve and sue a different person.” 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).

⁷ See <http://www.hardballtimes.com/main/article/mlbam-the-stealthy-money-machine/>

As the Supreme Court put it: “the spirit and inclination of the rules favored decisions on the merits and rejected an approach that pleading is a game of skill in which one misstep may be decisive.” See Schiavone v. Fortune, 477 U.S. 21, 27 (1986), as quoted in Hill v. Shelander, 924 F.2d 1370, 1374-1375 (7th Cir. 1991) (the Supreme Court, “along with numerous lower court decisions, recognizes that legitimate legal claims may not be squelched when a party mistakenly identifies a party to be sued”) (*pro se* plaintiff’s complaint, “when read in its entirety plainly show[ed]” plaintiff’s intended defendant; “linchpin is notice”).

While Steele’s complaint arguably may “technically [contain] an inaccurate reference to [MLBAM], there is no question that [MLBAM] received adequate notice that it was being sued, and that it owned [MLB.com], from which the liability at issue here stemmed.” See U.S. v. Davis, 261F.3d 1, 33 n. 25 (1st Cir. 2001) (intended defendant, notified of an action, may not defeat the action on account of misnomer defect in pleading). See also 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.”).

Where MLBAM/MLB.com is (1) in the multimedia business (baseball and non-baseball) and the claimed copyright owner of the work at issue – clearly the target of Steele’s complaints; (2) located at 75 9th Avenue, Fifth Floor, New York City; and (3) accepted service of process directed to “MLB.com” at that address;

And MLB, on the other hand, is (1) strictly in the baseball business (given the limitations of

their anti-trust exemption); (2) located at 245 Park Avenue, 31st Floor, New York City; and (3) actively evaded service of process directed to “Major League Baseball c/o Bud Selig” at 245 Park Avenue, neither MLB nor MLBAM can credibly claim to have been “misled” by an alleged defect in naming MLBAM in the summons and complaint: “[w]ithout amendment the process... adequately named [MLBAM] and was sufficient to bring it into court.” 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... 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.”)

b. MLB and MLBAM Jointly Attempted to Conceal MLBAM

MLB successfully evaded service on the same day that MLBAM was successfully served. See Steele Motion at 2-3 and Exhibits 3 and 4 thereto. MLB later voluntarily appeared, stating in its filings that it had been “misidentified in the Complaint as ‘Major League Baseball/MLB Productions.’”⁸ MLBAM, following MLB’s appearance, simply laid low, let Skadden Arps, ostensibly appearing only for MLB, fight the *pro se* Steele, while MLBAM waited and “hoped that it would all go away.” See McKinnon v. Kwong Wah, 83 F.3d 498, 503-504 (1st Cir. 1996) (affirming District Court’s denial of defendants’ motion to lift default and file late answer where record showed each defendant properly served and “at least some of the defendants” were aware of

⁸ See e.g., Defendants’ Motion to Dismiss, attached as Exhibit 10.

pending legal problems).⁹

MLB's appearance - voluntary, though not obviously so, given that service on MLBAM had been confirmed - and MLB's casual claim that it was "misidentified" in the complaint, kept MLBAM hidden, lulled the *pro se* Steele (and this Court) into reasonably trusting that the intended party was served and had filed its appearance.

Of course, "misidentified" or not; voluntary or not, MLB's appearance provides no legal cover for MLBAM's failure to appear. See FDIC v. Francisco Inv. Corp., 873 F.2d 474, 478 (1st Cir. 1989) ("upon proper notification of pending action parties must respond diligently" or face "harsh consequences."), and cases cited above.

In fact, MLB's skillful – and, indeed, ongoing - misrepresentation of itself by appearing to "defend the interests of Major League Baseball entities," MLB Opposition at 8, in order to intentionally hide the willfully defaulting MLBAM constitutes sanctionable conduct. See Zocaras v. Castro 465 F.3d 479, 484 (11th Cir. 2006) (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."). MLBAM may not turn this case into "as masquerade party" or "game of judicial hide-n-seek" by offering Steele the "added challenge of uncovering [MLBAM's] real name." Id. (litigation sometimes spoken of as "a search for truth, but the parties ought not have to search for each other's true identity").

In addition, MLBAM, "[i]n a spell of speciousness... argues [that Steele] could have

⁹ Here, of course, MLBAM denies - without evidence or explanation - proper service and default has not yet entered.

uncovered [MLB's] falsehood earlier if [he] had diligently pursued [his] discovery rights." Id. at 485. See also MLB's Opposition at 6-8.

Finally, as referenced above, MLB cites no contrary authority, instead falsely citing to inapposite law, i.e., Feher, 2004 WL 1664011 (D. Mass.). See Exhibit 3.

IV. MLB FAILS TO SHOW "GOOD CAUSE" PURSUANT TO RULE 55(c) FOR MLBAM'S WILLFUL DEFAULT

MLB argues entry of default would be removed "for good cause in any event." MLB Opposition at 8. MLB appears to invoke Rule 55(c), albeit prematurely. In so doing, MLB carries the burden of demonstrating good cause, including showing that its default was not "willful." See Indigo America v. Big Impressions, 597 F.3d 1, 3 (1st Cir. 2010); see also KPS v. Designs by FMC, 318 F.3d 1, 12-13 (1st Cir. 2003).¹⁰

Entry of default provides the Court with "a useful remedy when a litigant is confronted by an obstructionist adversary" and the entry of default "plays a constructive role in maintaining the orderly and efficient administration of justice." Id. at 13.

Intentional default – willfulness, as well as good faith – may be weighed heavily in considering removal of a default because Rule 55(c) expresses the "inherent equity power of the federal courts" and a district court may, therefore, "accord dispositive weight to one of the familiar factors or other relevant equitable factors." Id. at 12-13.

The First Circuit has held - in the analogous context of a Rule 60(b) motion - that it will "ordinarily uphold a refusal to vacate a default judgment entered against a willfully defaulting party."

¹⁰ Other Rule 55(c) factors commonly – but not necessarily - looked at include prejudice to plaintiff, whether defendant has a meritorious defense, defendant's explanation for its default, the parties' good faith, the amount of money involved, and the timing of the motion to set aside the default. See Indigo America 597 F.3d at 3, citing KPS, 318 F.3d at 12.

See Ungar v. PLO, 599 F.3d 79, 84 (1st Cir. 2010) (also noting that the Supreme Court “wrote that to justify relief [under Rule 60(b)], a party must show extraordinary circumstances suggesting that the party is faultless in the delay,” citing Pioneer Investment Services v. Brunswick Associates, 507 U.S. 380, 393 (1993)).

In KPS, 318 F.3d 1, above, the district court denied a defendant’s Rule 55(c) motion on the basis of defendant’s misconduct in willfully defaulting, characterizing defendant’s behavior as “stonewalling” and remarking on defendant’s “duplicitousness,” pointing to “inconsistencies and implausibilities” in defendant’s representations, and finding several of defendant’s “representations” in affidavits “to be incredible.” Id. at 14.

The KPS district court “explicitly disbelieved” one of defendant’s stories - but believed the plaintiff’s affidavit “concerning [defendant’s] intransigence.” Id. The district court denied defendant’s motion to remove the default from the bench, stating: “And 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.” Id.

The First Circuit affirmed, holding that the district court’s lack of analysis of other Rule 55(c) factors was not an abuse of discretion: “Indeed, we think that the district court’s ruling was entirely defensible.” Id. The Court explained that when the district court rejected defendant’s attempt to “demonstrate a lack of willfulness,” defendant “was effectively left with *no* explanation for the default.” Id. (emphasis original).

Here, MLB does not even attempt to explain co-defendant MLBAM’s default, instead, MLB – apparently with inside knowledge of what happened at 3:00 p.m. on November 17, 2008,

at MLBAM headquarters on the fifth floor of 75 Ninth Street – denies MLBAM was even served.

The KPS Court also examined two other common Rule 55(c) factors – despite the district court’s failure to explicitly address them - finding that the district court did not err in its implicit rejection of defendant’s meritorious defense claim, which the Court inferred from the district court’s comment on defendant’s “stonewalling.” Id. at 14-15. The Court pointed out that defendant’s evidentiary materials in support of its case on the merits were all “internally generated,” on which the district court took “a dim view.” Id. at 15.

A “dim view” - at a minimum - is equally warranted here because the defaulting MLBAM’s covert proxy, MLB, submitted an altered audiovisual with MLBAM’s copyright notice removed.

In examining the prejudice factor, the KPS Court noted that “[t]he issue is not mere delay, but rather its accompanying dangers: loss of evidence, increased difficulties of discovery, or enhanced opportunity for fraud or collusion.” Id.

Unfortunately, the record here indicates that “fraud or collusion” has already occurred. See Exhibits 4-9; see also Steele’s Motion and Exhibits thereto. As for discovery, MLB refused to provide Steele (or, by extension, this Court) with a copy of the unaltered audiovisual and continues to “stonewall” in defending its indefensible spoliation. See Exhibit 7 at 6-7, Exhibits 4-6, 8, 9.

Despite the district court’s limited analysis on other Rule 55(c) factors, the Court found that the district court “correctly gave significant weight to two other factors – the nature of [defendant’s] explanation for the default and the good faith of the parties.” Id. The Court noted that defendant had “fabricated” an explanation – which “goes to the nature of the explanation as well as to [defendant’s] good faith.” Id.

The Court continued:

We have noted before that “courts have 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.” *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir.1989) (quoting *Wyle v. R.J. Reynolds Indus.*, 709 F.2d 585, 589 (9th Cir.1983)); *see also id.* (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)) (“It is apodictic that federal courts possess plenary authority ‘to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’ ”). 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.

Id. at 15.

MLBAM has yet to appear - even with default looming.¹¹ Instead, MLB defends the “separate legal entity,” MLBAM, with which MLB can only say it is “familiar.” See Orlinsky Declaration ¶ 4 (appended to MLB’s Opposition). MLB’s vicarious Opposition to a motion to which it is neither a party nor the target - as with MLB’s voluntary notice of appearance to defend the properly served but furtive MLBAM - is, to put it mildly, curious.

MLB’s actions make sense only if MLB and MLBAM are working together – colluding, in fact - to improperly shield MLBAM from Steele’s lawsuit and corrupting the entire judicial process in the proceedings. See, e.g., *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir.1989).

Common sense dictates that a non-colluding defendant might be indifferent – or even relieved – by the entry of default against a co-defendant, given that the defaulting defendant may offset or otherwise absorb some of a victorious plaintiff’s award or even result in termination of the

¹¹I have twice asked, in writing, both MLB’s counsel and MLBAM’s General Counsel whether MLB’s counsel also represents MLBAM, but my requests have been ignored. See Exhibits 7-9.

litigation entirely.

Here, MLB, on the other hand, vigorously defends MLBAM, suggesting they are working in concert, *sub rosa*. See Godfrey v. Eastern Gas, 71 F.Supp. 175 (D. Mass. 1947) (in “misnomer” case, fact that counsel for named party defended motion to amend complaint as to misnamed party “would make it appear” that counsel represented both entities, since “effect of allowance of that motion” would have eliminated named party from case; held case was one of “misnomer,” not “mistake of parties;” defendant’s motion for summary judgment based on “mistake of parties” denied).¹²

V. ENTRY OF DEFAULT WOULD NOT BE FUTILE

MLB’s claim of futility as to entry of default against its co-defendant MLBAM lacks basis in fact and law. First, this Court’s Order allowing summary judgment as to certain defendants – but not MLBAM – in no way precludes default against “any possible defendant.” MLB Opposition at 8 (emphasis original). This Court’s order did not apply to MLBAM – in part because of MLB’s (thus far successful) efforts to hide MLBAM from the outset - and was narrowly tailored to the issue of substantial similarity. See Exhibits 10-12 to Steele’s Motion.

The order, therefore, by design did not address Steele’s numerous factual allegations that “state a claim” of copyright infringement through, for example, unauthorized digital “copying and dragging or cutting and pasting parts of [Steele’s] music.” See Steele Complaint (October 8, 2008 ¶ 29). This factual allegation claims infringement by digital reproduction, a claim that was not

¹² MLB’s conclusory assertion – on behalf of MLBAM, no less – that it did not have notice until June 18, 2010 is not credible given that they were properly served and given the undisputed facts referenced.

addressed by this Court's Order.¹³ See 17 U.S.C. 106 (1); See also Exhibits 10-12 to Steele's Motion.

Second, MLB has already challenged – and lost - Steele's ability to "state a claim. See Defendants' Motion to Dismiss attached as Exhibit 10, and Order on Motion to Dismiss, Docket Entry 85. MLB seeks to apply this Court's Summary Judgment ruling to facts the Court did not address and on a legal standard upon which MLB lost, in order to benefit a party to whom this Court's ruling did not apply,. Id. MLB's twisted logic cannot refute that MLBAM, in defaulting, will admit facts which constitute copyright infringement by digital duplication.

VI. MLB HAS FAILED TO CONFER IN GOOD FAITH

The undersigned failed to include a Local Rule 7.1(A)(2) Certification in Steel's Motion.¹⁴ My omission was not intentional as I misread the rule as requiring a conference between counsel to necessarily include counsel to the party subject to the motion. Given MLBAM's failure to appear, there was – and is, as far as I can divine – no counsel for MLBAM with whom to confer.

More to the point, a conference with MLB's counsel – even if they did represent MLBAM - on my request for entry of default as to MLBAM would have been fruitless. See Struzziero v. Lifetouch National School Studios, 677 F.Supp. 2d 350, 354 (D. Mass 2009) (declining to decide pending motions based on failure to confer and file 7.1(A)(2) certificate because "counsel conferred throughout the case" and attended a settlement conference one year prior and "another conference was, therefore, likely to be futile.") See also A.G. Edwards v. New England Telephone, 86 F.3d

¹³ Digital duplication by "[U]sers who download files containing copyrighted music violate[s] plaintiffs' reproduction rights." A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

¹⁴ The undersigned recognizes that Local Rule 7.1 certification requirement is not optional and takes responsibility for the omission. However, as detailed below, and as supported by prior decisions of this Court and the First Circuit, the omission of a Rule 7.1 certificate will be found harmless when conferring would, as here, clearly be fruitless.

1146, 1996 WL 267276 (C.A. 1 (Mass) (unpublished)) (affirming district court's denial of Rule 7.1(A)(2) motion because the parties "attended a non-productive settlement conference" a year and a half earlier, six weeks after which the motion without the 7.1(A)(2) certificate was filed).

Here, Steele has repeatedly sought to confer with defendants in good faith, starting at least six months prior to filing suit on October 8, 2008. See, e.g., Steele letters to and from ASCAP, which purported - but failed - to act as mediator between Steele and defendants Bongiovi, Sony/ATV Tunes LLC, and Sambora, among others (March 25 & April 20, 2008); Steele's handwritten note to defendant Bongiovi (which ASCAP confirmed was personally handed to Mr. Bongiovi) (April 10, 2008); cease and desist letter to TBS (September 29, 2008), attached as Exhibit 11.

Once Steele filed his complaint, he communicated in good faith regularly with defense counsel Christopher Clark during the course of the litigation. Unfortunately, Clark's communications were not made in reciprocal good faith, as detailed in Exhibit 4.¹⁵

On March 17, 2009, Steele issued a good faith and detailed written settlement offer to defendants, stating that he was "willing to negotiate with any of the parties." See Exhibit 12. Defendants rejected Steele's settlement offer and negotiation overture.

The First Circuit, on December 1, 2009, issued a Notice of Mandatory Pre-Argument Settlement Conference to be held on January 14, 2010. See Exhibit 13. On December 18, 2009, MLB's counsel, Clifford M. Sloan, wrote the First Circuit Settlement Counsel, Justice Patrick J.

¹⁵ Among other things, Steele assented to Clark's request to file a reply to Steele's opposition to defendants' summary judgment motion. However, defendants later stated falsely in their motion for leave that Steele had refused Clark's request. See Exhibit 4, at 7-8.

King, requesting the conference be waived and stating that settlement discussions would be “futile and unproductive” and that there is “no possibility of settlement prior to a decision by the First Circuit unless the appellants withdraw this appeal for no consideration.” See Exhibit 14.

That evening I wrote to Justice King in response to Mr. Sloan’s letter, objecting to the requested waiver and pointing out that defense counsel “never once agreed to settlement discussions with Steele, despite numerous requests” and, therefore, Sloan’s comments about the futility of a settlement conference were speculative “since defendants have never engaged in good faith settlement talks with Steele.” See Exhibit 15 (emphasis original). Justice King, after conferring with Mr. Sloan, called me to inform me that he was allowing Mr. Sloan’s request for waiver. See Exhibit 16.

Finally, it is worth pointing out that nine days ago - on June 28, 2010 – I attempted in good faith to resolve a number of very serious and contentious issues in a letter to Mr. Sloan, and invited him to address the issues raised in my letter. See Exhibit 7. My letter was sent after I filed Steele’s Motion, but two days before MLB filed their Opposition in which they accused me of failing to confer in good faith. On July 1, 2010, after filing their Opposition, MLB’s counsel Kenneth A. Plevan, on Mr. Sloan’s behalf, responded to my letter, but failed to meaningfully respond to the serious issues raised in good faith in my letter. See Exhibit 8.

Despite MLB’s accusation in their Opposition and MLB’s counsel’s failure to address the issues raised in my letter, I nonetheless wrote back to Mr. Plevan on July 3, 2010, again inviting, in good faith, information, explanation, or clarification of certain events that I believed – and still believe – constitute sanctionable misconduct. See Exhibit 9.

As I stated in both of my letters, I was reaching out informally, in good faith, and out of an abundance of caution, in an effort to obviate the need for a Rule 11 motion for sanctions. See Exhibits 7-9. Rule 11 does not require such informal communications prior to serving a formal motion, but I felt it was the right thing to do.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court allow Plaintiffs' Rule 55(a) Motion for Entry of Default as to Defendant MLB Advanced Media, L.P. for Failure to Plead or Otherwise Defend.

Dated: July 26, 2010

Respectfully submitted,

/s/ Christopher A.D. Hunt
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cadhunt@earthlink.net

CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on July 26, 2010.

Dated: July 26, 2010

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

EXHIBIT 1



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Registration #23377

<p>Mailing Address: ATTN: M. Sapherstein, VP/Dep Gen Counsel 75 Ninth Avenue, 5th Floor NEW YORK NY 10011</p>	<p>Street Address: 75 Ninth Avenue 5th Floor NEW YORK NY 10011</p>
--	---

Registration Status	Not Registered
Other Names Used	Major League Baseball MLB.com
Phone	(212)485-3444
Fax	()-
Email	
Web Site	www.mlb.com
Federal EIN	13-4138913

The following financial information has been provided to the Office of the Secretary of State by the above-named organization. Figures are for the organization's fiscal year ending .

Contributions	According to the financial information shown at left, % of the contributions raised by this organization were returned to or retained by the charity client(s).
Amount to Charity Clients	

Some Commercial Fundraisers are not required to submit financial information. If the financial report displayed contains zeros or outdated information, it is possible that the organization is newly registered. Please contact the Charities Program for more specific information.

- Commercial Fundraiser's Comments Regarding Solicitation Report
- Commercial Fundraiser's Solicitation Comments
- Charities Who Have Retained the Services of the Commercial Fundraiser
- None reported

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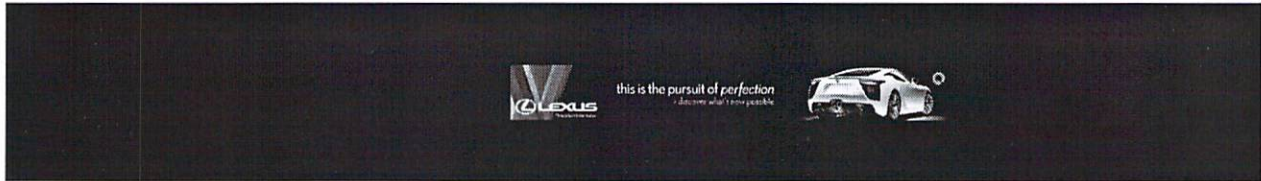
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EXHIBIT 2

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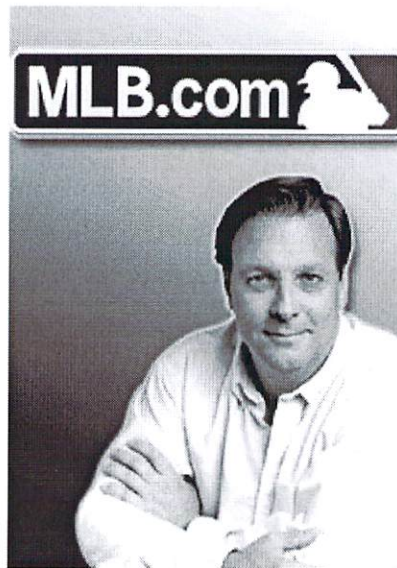
Interview: Bob Bowman - President and CEO - MLBAM

User Rating: / 9

Poor Best

Written by Maury Brown

Tuesday, 01 January 2008 20:02



business, that really could not be further from the truth.

Bowman was made President and Chief Executive Officer of **MLB Advanced Media (MLBAM)**, the interactive media and Internet company of Major League Baseball, in November of 2000, took an initial \$80 million investment by the 30 clubs, and in less than a decade turned it into the benchmark by which all other sports industries gauge their

At the beginning of this interview, I mention that **Bob Bowman** is the most influential person in sports that no one has heard of. If you have your finger on the pulse of sports

Tues., 6/22 - "The Ticket" SportsRadi 104.1FM in Dallas (following conclus game) - *More by Maury Brown on jud regarding the Texas Rangers*

Tues., 6/22 - ESPN Dallas (103.3 FM) - *on judge's ruling regarding the Texa*

Thurs., 5/6 - ESPN 1150AM The Zone Station, TX (4:30pm CT) - *Maury Brov possibly taking control of the Texas*

Tues., 5/4 - WBAP Newstalk 820AM a Dallas/Ft. Worth (7:45am CT) - *Maury stalled sale of the Texas Rangers*

Sun., 5/2 - MLB Network Radio (XM17 (10pm PT/1am ET) - *Maury Brown on Texas Rangers, early MLB attendanc contract, AZ immigration law and ML*

Fri., 4/23 - 90.3 WCPN, Cleveland - *M: MLB competitive balance, revenue-si Indians and Yankees (LISTEN HERE)*



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Media News

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- Internet
- Television
- Mobile Devices
- Print Media

digital media offerings and platforms. This past year alone, MLBAM (or as it is sometimes referred to as "BAM") pulled in a staggering \$450 million in revenues. That initial investment by the owners in 2000 has now been paid off, and each club has received dividend checks of \$3 million each for the past two years. Bank of America, Goldman Sachs, First Boston and J.P. Morgan valued a possible IPO of MLBAM at between \$2-\$2.5 billion... in 2005. There's little doubt that BAM's value is higher still in 2008.

Through it all, Bowman has been at the helm. He was voted the 29th most influential person in sports business for 2007 by the *Sports Business Journal*, up five places from his ranking in 2006. Odds seem very good that his influence will continue to climb.

The following interview covers BAM's "stealthy" nature, how baseball is the core business of MLBAM, while ventures with other clients in digital media continues to be important, how programming on MLB.TV will continue to compliment traditional television broadcasts, the lucrative StubHub deal, the "Fantasy Stats" case, his critical views on Nielsen Research's online metrics rating system, whether near real-time video game updates are coming to a Cellphone near you, and much, much more. - *Maury Brown*

(Select Read More to see the interview with Bob Bowman, President and CEO of MLB Advanced Media)

Maury Brown for the Business of Sports Network: You've been referred to on more than one occasion as the most influential person in sports that no one has heard of, yet MLBAM is considered a sports industry leader for digital media, and is really reaching well beyond just sports. It is, in many ways, virtually unknown of by many fans. Is BAM's stealthy nature somewhat by design?

"It's interesting, some people here have their voicemail saying they are MLB Advanced Media. I always say I'm with MLB.com, because that's the only brand that matters."

Bob Bowman: BAM's nature is stealthy by design, only because the only brand that matters is MLB.com, RedSox.com, Dodgers.com, etc. It's interesting, some people here have their voicemail saying they are MLB Advanced Media. I always

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 - CBAs
 - CBA Summaries
 - PEDs
 - Mitchell Report

say I'm with MLB.com, because that's the only brand that matters. I don't know if I answered your question, but to us there are 31 brands that matter: the 30 clubs' URLs and MLB.com. Those are the brands that promote.

Bizball: MLBAM has seen incredible growth, posting \$450 million in revenues this year, with the owners now receiving dividend checks now that BAM's initial investment is paid off. Did you foresee this growth, and how does the vertical and horizontal growth such as the partnerships with likes of U.S. Figure Skating, Elton John, Tiger Woods, etc. that BAM has seen factor into its success?

Bowman: The more important one is the vertical, and by that I mean the Hall of Fame, Minor League Baseball—we're trying to extend and deepen our deal with Minor League Baseball, stay tuned on that—and USA Baseball and maybe even getting down to youth baseball. So to us, it's more important to focus on the vertical integration of all things baseball: professional at the major league level, professional at the minor league level and getting to amateur as well because that's where we can start to reach fans who are fans of maybe a little league team or they're fans of a collegiate team or they're fans of a player who gets drafted, then goes to the minors for two years and they further become fans of the minor league team, and ultimately they become fans of the major leagues. So, if you look at our vertical integration that is where we are more extensive, and it's far more important to us. You know, at some business level while we are trying to run this like a business the best we can, we are first and foremost about baseball and first and foremost about the 30 teams. But, baseball is broader—40 million people went to minor league baseball, that's more than goes to any other professional sport. So that's an important part of us, too. The list for vertical integration is quite extensive, has just started, and so the economics are de minimis.

"You know, at some business level while we are trying to run this like a business the best we can, we are first and foremost about baseball and first and foremost about the 30 teams."

anything, in those areas and we are optimistic that they will be in place for future growth.

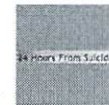
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Maury Brown
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The horizontal is not unimportant either, and it's going to vary from client to client as to what we do, but what we do about as much as anybody—if not much more than anybody—we stream a lot of video and rely on video for either live games, on-demand video, talking heads, whatever it may be. But, to the extent that the fans like it, for those businesses that have customers like that in and out of sports, it's a natural fit.

For content publishers who are much more text based—much more two dimensional—the fit is probably not as good. And so music we thought was a natural fit because there's a lot of live action and a lot of video. But it turns out that was a tough one. Music is a tough industry because there are a lot of rights holders and a lot of labyrinthine negotiations involved in that. As we say in baseball, it's a long run for a short slide. And so, sports is a far better area where I think the rights are far more, if not mature, more thought through.

Bizball: From a vertical standpoint should we look for more online programming that compliments MLB's television offerings, such as we saw with *TBS Hot Corner* this year, and from a horizontal aspect, will BAM continue to aggressively pursue acquisitions and partnerships?

"Nobody's going to prefer watching on their laptop to watching on TV."

Bowman: Absolutely. TBS is a great partner, and FOX is too. They were both great partners in the playoffs. We would anticipate trying to do that more during the regular season, on our own, and with partners, including possibly even local RSNs. We find that people consume content based on where they are, as it relates to baseball. If they are at work, or on their way home and they want to hear about the game, we make sure we give it to them on devices they can see it. If it at home, their going to turn on TV. Fantasy fans will turn on both screens, they'll have their laptop open watching stats and watching their home team on satellite or whatever. Nobody's going to prefer watching on their laptop to watching on TV.

Bizball: On BAM's growth, much as you did by pulling all, the club's websites under MLB.com early on, the recent 5-year partnership agreement with StubHub would seem to show that there is a push to consolidate secondary ticket sales for MLB, as opposed to seeing clubs inking individual deals. Since some clubs had already had deals in place regarding the secondary ticket market, was there reservation by any of the owners to the StubHub deal?

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Bowman: I'm sure there were. I'm not sure I heard them, but I'm sure they were out there. You could get someone to comment on that. The online secondary rights were vested in partnership here at MLBAM, so all the deals that were out there were actually deals with us. So all we did is instead of having basically a separate deal for clubs—Ticketmaster had a deal. Tickets.com had a deal. ProTix had a separate deal—instead of having three separate secondary ticket deals with clubs where we sort of oversaw them all, we, by aggregating them got StubHub to step up and pay a huge number.



economics, is what we have a pretty standard path to buy a primary ticket regardless if you're a Ticketmaster club, like the Yankees, or a Tickets.com club like the Cubs. The path looks almost identical. The importance of that is not everyone buys tickets for their home team. They travel, they go away, they're on vacation, they do a lot of things, and making it easy to go is really important. We sold 27 million primary tickets online last year. So, in the secondary market we wanted to try to replicate that and make it a straightforward, "one size fits all", straight line for those fans. And that's why a national deal with one secondary ticketing partner was in our interest, and the economics were overwhelming as well. But I think from a real fan point of view, they are going to find it easy to buy tickets from the secondary market. And for us, you know, we are not Hanna Montana. We don't have only one concert is in Hartford, CT where tickets are going for \$43 million dollars, or whatever it is. We have 81 home games in a city and sometimes we have two ballparks in a city too, and the ticketing people and the owners of the clubs do an unbelievable job—79.5 million in attendance—an unbelievable job getting people to buy tickets to the extent there is a vibrant, robust, legal, and easy to use secondary market in StubHub with us. We think that helps sell primary tickets. If you're stuck to sell an eight pack with the Yankees or 81 game season pack with the SF Giants, and you know there's going to be a very robust secondary market for the four games you can't go to that you can probably re-sell than your much more likely to buy a primary ticket. And so our view is having a strong and vibrant secondary market will actually pay dividends in the primary market.

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Bizball: Are the clubs starting to get educated and now realize that the secondary ticket market is a strong revenue stream?

Bowman: I think we all have been getting educated together; there's no question. Anybody who puts on a live event, has understood the secondary market. Secondary market has been around since primary market has been there.

Through the internet, it has made it available to common people like you and me. Where as before, people would sneak a call through a pay booth to a broker to get a ticket. Now we go use eBay, or StubHub, through other places, that's what everyone does. If their trying to go to one baseball game with their family, they want to get good seats, so their going to go buy tickets. I think everyone has seen that grow. Given the importance of our fans—who's coming, who's not—the economics of the StubHub deal were certainly impressive and made clear the value to business. Equally important to our owners, we would find out who's selling who's buying, and that data list is important to us too. We're not doing ways like Facebook, we're going to start sending them targeted ads. Someone showing up buying on the secondary market purchasing \$300-\$400 dollar tickets three times a year... Maybe you ought to call that person up and see what you can do with them. You got a target rich environment with these data lists, and I think that is important with these owners. Ours is an industry where selling tickets is a vital part of what we do. It's not an afterthought, it's what we do.

Getting people to a baseball game is what we do, even online, if you go to our site, you see buy ticket links everywhere, that's why we sold 27 million last year.

Bizball: With the Mitchell Report being released last week on MLB.com, what, if any, actions did BAM do to prepare for what may have been the highest traffic day for MLB.com in its history?

Bowman: It was not even close. Not even close to the highest traffic day for mlb.com. The document itself is mostly a text based document. We stream 2, 2.5, sometimes 3 million videos a day. We stream more videos in a day as most sites do in a year, so our



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infrastructure is gargantuan because to stream video, especially live video, it takes a massive backend. The text based document, let me say this, a 400 page document which the Mitchell Report was, which is what we had up on our site, downloaded in PDF, in which 2.2 million people did. That 400 page document is probably 2 seconds maybe 3 seconds worth of video, in terms of data. It's not even comparable. And that's how straightforward it is. You know five years ago it may have been an interesting thing, but the traffic was up substantially, but we've had days where we had 11 million visitors during the season during a regular day, and we didn't get anywhere near that on the day of the Mitchell Report. We were in the 6 million-range which is our high for a longtime, but it's a busy time of the year, people are shopping. There is no downtime in baseball given the trades. It used to be just about the players right, but now it's about the players, managers, coaches, GMs. And there's the whole industry and again we could credit people like you, among others, but the whole industry is far more transparent to the fans and the fans love it. Fans love talking about GMs as much as they love talking about players.

Bizball: Regarding the CDM Fantasy case, which MLBAM and the MLBPA are involved in... **We interviewed CDM's lead counsel Rudy Telscher in early November**, and I'm wondering if you might comment on one of his statements? He said, "The 8th Circuit decision stands for the proposition that use of player statistics in fantasy is protected under the First Amendment. MLB would be bound by the decision and could not ever relitigate it."

Bowman: Categorically false. Without getting into the subject of the case, the case can be brought into 49 other states. Last I checked, there's more court of Appeals that were never ruled on. It wouldn't be the first time the court of appeals had different opinions. Ultimately, say, Cincinnati appeals could say no we see it this way, and one that affirmed the one from Missouri say well, its that way we have a Supreme Court.

Bizball: Have you thought about appealing to the 2nd Circuit in New York?

Bowman: Yeah. This issue while we are intimately involved and while we believe the commercial exploitation of players' names in any manner is something I would argue is not protected by the First Amendment, but obviously it doesn't matter what I think, it matters what the courts think.

But this is really a P.A. (Players Association) issue. We're involved because we bought the

rights from them, but this is narrowly a P.A. issue and a question that is more properly addressed to them, in terms of what their strategy is, but again I think Mr. Telscher will be the first to admit someone could bring a case in other states in a different court of appeals and end up in a different way. We are focusing on what we do and I think the P.A. will focus on the legal strategies and we're focusing on the business side.

Bizball: Does it impact the \$50 million agreement between BAM and the MLBPA in any way shape or form with the agreement in place right now?

Bowman: It absolutely does.

Bizball: Have you decided whether MLBAM will consider revisiting that agreement?

"It seems like the first thing you do when you enter into an agreement is worry about how you're going to exit."

Bowman: We have to look at it. We are partners with the P.A. We like the partnership with the P.A. We manage their site.

If you put aside the economics, which have been favorable for everybody, it has been an important and a good relationship. One that we want to build on and that is why we did the deal initially is that we thought we should be partners with them and that the players individually and collectively, we should help them; part of that vertical integration we talked about before. So, we're their partners, but that does not mean that partners don't build in safeguards in case things happen. It seems like the first thing you do when you enter into an agreement is worry about how you're going to exit.

Bizball: In 2009 we will see the launch of the *MLB Network*, which at this time will be the largest cable channel launch in history. How do you and BAM fit into the equation? As one example, I understand that a \$500,000 production truck was recently purchased by BAM that might be leveraged for the *MLB Network*, as well.

Bowman: I think it's too early to tell. I think at best there can be some back end overlap, that obviously would be best to do. From an editorial point of view, it's a very different business, programming an internet portal likes ours versus programming a cable channel. I believe that those who are trying to integrate everything up and down technologically; I'm not sure that's the best thing for the fan. I wouldn't mind a pro side of things to

serve the fan best by having someone worry about the editorial side of the cable and not worry about what's happening on the internet, and vice versa. It may be the same fan at different time of the day, it could be a different fan completely that never crossed over. I think you've got to be pretty laser focused on your business and your fan. I think a lot can be said about an overlap editorially, although I don't think it's true. I think as a backend basis in terms of getting content, that is something that ends up getting sliced and diced and something to be examined in the future. From management business, and managing editorial, I would land on a different side of that equation.

Bizball:
One of
the more



MLB.TV

technologically vexing issues BAM has had to address is how MLB's complex television territories. In 2009 with the launch on the *MLB Network*, the TV territories will garner further focus. With the overlapping aspects of the territories, and other complexities, how is BAM approaching this matter as it pertains to MLB.TV and the continued emergence of video streaming by way of smartphone technology?

Bowman: A few things. First, you are right in that the issue is an intriguing one. So it is an interesting issue. Second of all, this is an issue that Bob DuPuy raised two to three years ago. In terms of should these territories, which we had in place for sometime be revisited, not just because there is a new technology, though that would be one reason, but because they have been in place for a long time – should they be revisited – the world has changed, let's take a look at them again, and I think he is. And the answer to a third point, I would make is clearly, we are the tail on that dog. There are far bigger issues there in terms of territories: local rights, national rights, satellite rights, the outer market satellite package and cable package, national TV rights. There's a myriad of rights holder that are in front and center on that issue that Bob has raised as an issue to examine, and we are clearly a market taker. Whatever Bob and the commissioner ultimately decide should or should not be done, you know BAM is the recipient. We are not at that table. We get told what's going to happen. It is more

important in terms of managing the local rights and the national rights than what BAM's rights are.

Bizball: I know that you have been a critic of the Nielsen Media's online rating system. For those that do not understand it, could you maybe touch on your position on it and BAM's position on it?

"You are being generous calling it a 'rating'. I call it a shot in the dark."

Bowman: You are being generous calling it a "rating". I call it a shot in the dark. My position on it is BAM's position and is very simple: that a survey of folks doesn't work if your site is heavily used during the working hours, as our site is. The reason why, is that people behave differently at work if they think their being watched or monitored. That is why the best companies in the world, Proctor & Gamble, Johnson & Johnson, General Mills, any political candidate – the smartest marketing people in the world – do not survey at work. They only survey at home. So if you are going to run a survey, as Nielsen does for TV, do it at home. People are honest at home, people say I'm watching *Dancing With the Stars*. They'll openly say that. You're going to call someone at work, or monitor their machine at work, they are going to go to Yahoo, AOL, MSN, because those are the safe sites. They are not going to go to MLB.com, TNT.com, NFL.com; they are just not going to go. But, people do. We know fully well people go. So the survey just doesn't work if you are a network site as we are.

There's a really simple way to do it: look at our logs. Come in and we'll show you our logs, come in and examine our logs. But they are very leery of that because they haven't built a business model around examining logs.

We're talking to the Audit Bureau of Circulations, which does that for a living for periodicals, and starting to do that for the internet. So we'll see where that goes, we may end up employing them to do that for us for three months on a trial basis, and see what we can do. We can't just go out there on our own because ad agencies and clients themselves listen to Nielsen. They are, if you will, the standard bearer. They are just wrong.

Bizball: Has it impacted BAM...

Bowman: No question.

Bizball:.. in terms of getting advertisers?

Bowman: I mean, once someone comes in, no. But you don't get the call. But if you're an agency and you're trying to find a place to put some million dollars with a client, you look at Nielsen

and mlb.com had 17 million uniques that month, well that puts us smack dab in the middle of where ever... 93rd... 49th... whatever the number is. When in fact, if we had 62 million uniques that puts us 7th and it's a totally different site and so again once somebody calls up and starts entering a conversation about what we are, they trust our log files.. They know exactly what we are doing. You never know what you don't know and so if you never get the call. And there's no question, we don't get calls because of the dramatic under reporting.

Bizball: Finally, what type of innovations should we look for in the future from BAM?

"The thing we're working on right now is near real-time highlights on a cell device."

Bowman: The thing we're working on right now is near real-time highlights on a cell device. I don't think it's penetrated [the market]. I don't think consumers are watching a lot of live video on their phone. On the other hand, instead of a text alert, if I got a video alert that Alex Rodriguez hit a home run that might be pretty cool. I'd be showing that to all my friends around the table. That's what we're working on. It can't come after the 7th inning or the 9th inning... it can't be a recap, because everyone will know the score of the game. It has to be current, and timely. If it's not timely, it's not relevant. The trick is getting a highlight in, cut, clipped, distributed and out to phones on a basis that is still relevant.

Bizball: Have you considered leveraging some of the online services? You had the deal with Joost and obviously YouTube is out there. Have you considered any secure methods or would it be strictly proprietary through mlb.com?

Bowman: The wireless would obviously be with the carrier, but in terms of the wired world, the PC world, we did an experiment with Joost for the postseason. So much as economic activity is so important to our site and whether you're buying tickets, buying merchandise and obviously that is not unimportant either. We are still in the mode of we would like most of this occurring on our site. And we are still working on building our brand which is very important to us, we're only 7 years old, so I think right now that's where we are headed. All that could change, at some point it might make some sense to experiment like we did in the postseason with Joost.

• Interview conducted by Maury Brown on 12/20/07

- Transcribed by Business of Sports Network interns **Nick Kappel** and **Christopher Mitchell**
- Edited by Maury Brown
- Brown gives thanks to Kappel and Mitchell for helping turn around the interview in short order
- **Read other interviews on the Business of Sports Network**

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EXHIBIT 3

Not Reported in F.Supp.2d, 2004 WL 1664011 (D.Mass.)
(Cite as: **2004 WL 1664011 (D.Mass.)**)

Only the Westlaw citation is currently available.

United States District Court,
D. Massachusetts.
UNITED STATES OF AMERICA

v.

Jayne E. FEHER
No. Civ.A.04-10504-RWZ.

July 26, 2004.

[Christopher R. Donato](#), United States Attorney's Office, Boston, MA, for Plaintiff.

MEMORANDUM OF DECISION

[ZOBEL, J.](#)

*1 Plaintiff United States moves for a default judgment. However, it is unclear that defendant was properly served under Rule 4(e), which requires delivery of “a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein....” [Fed.R.Civ.P. 4\(e\)\(2\)](#). Although the return of service by the U.S. Marshal states that personal service was made, it also contains the cryptic remark “no response.” Because there exists significant ambiguity as to whether proper service was in fact effected, plaintiff's motion is denied.

D.Mass.,2004.

U.S. v. Feher

Not Reported in F.Supp.2d, 2004 WL 1664011 (D.Mass.)

END OF DOCUMENT

EXHIBIT 4

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

AFFIDAVIT OF SAMUEL BARTLEY STEELE

I, Samuel Bartley Steele, state the following under the pains and penalties of perjury:

1. In 2004 through 2006, I repeatedly sent internet "links" to my copyrighted song, "(Man I Really) Love This Team" ("Song") and my ideas for how my song could be used as a national marketing campaign by changing the lyrics to fit with any team and town (not just Boston) to MLB.com at its "Contact Us" link, http://mlb.mlb.com/mlb/help/contact_us.jsp.
2. My purpose in contacting MLB.com was to discuss a joint business venture with Major League Baseball.
3. At no time did I submit anything to TBS.
4. I am not an attorney and prior to this case I had no litigation experience.
5. After becoming aware of Major League Baseball's 2007 audiovisual advertisement featuring a Bon Jovi soundtrack ("MLB Audiovisual") in August 2007, I immediately saw it was a derivative of my Song and attempted to contact various defendants, including, based on publicly available information put out by the defendants, those I believed the parties most responsible for copying my Song, including John Bongiovi,

TBS, TBS musical consultant, Mark Shimmel, Vector Management 's Jack Rovner (Bon Jovi's manager), the Boston Red Sox, Sony, and Universal Music Group.

6. After more than a year of attempting to work out my grievance with these defendants, as well as contacting the American Society of Composers and Publishers ("ASCAP") and being repeatedly ignored or rebuffed by defendants' attorneys, as well as ASCAP, I filed suit, *pro se*, in the U.S. District Court in Boston.
7. I filed *pro se* because I could not find an attorney willing to take my case. I was told by each of the several attorneys I approached that they either had a conflict or that they simply did not want to litigate against such wealthy and powerful defendants and Skadden Arps, on a contingent fee basis. I could not afford to pay an attorney or law firm by the hour.
8. Prior to and during the Court proceedings I was not aware that Major League Baseball Advanced Media, L.P. ("MLBAM") owned and operated MLB.com and also called itself MLB Productions, and that it was not the same thing as Major League Baseball Properties, Inc. ("MLB").
9. Nonetheless, I named and served (or tried to serve) both MLBAM (insofar as I knew MLBAM at the time, as "MLB Productions" and on the service of process papers as "MLB Productions/MLB.com") and MLB. During the litigation, I was lead to believe - through conversations with Skadden, defendants' court filings, and conversations with Skadden attorneys - that Skadden's appearance on behalf of, and defense of MLB, included both MLB and MLBAM. This is further detailed below.
10. Also as detailed below, defendants' representations to me and in the this Court lead me - and this Court, apparently - to believe that the MLB Audiovisual was essentially a TBS, Time Warner, and Bon Jovi creation and that MLBAM played only a minor role, rather than being its producer, owner, and distributor, which I discovered later.
11. I was learning legal procedure as best I could, but often would contact Christopher Clark, a Skadden associate with whom I had developed a rapport, to ask about procedural issues. For the most part, Attorney Clark readily answered my questions, though - as I later learned - many of his answers were misleading or simply incorrect.
12. In addition, the one time I informed Skadden that I might be retaining counsel, they barraged him with threatening letters, misstating facts and - I believe - misstating this Court's order, causing him to abruptly drop me as a potential client. This is explained in detail below.

13. I believe defendants and Skadden misled me (and likely this Court) and obstructed my ability to fairly litigate my case based on the following facts:

- a. MLB incorrectly stated in its court filings that I had “misidentified” MLBAM as MLB, even though they were two separate defendants, each of whom I identified and attempted to serve.
- b. Initially, this Court’s docket sheet correctly listed MLB and MLBAM (as “MLB Productions”), as did defendants’ early filings. However, Skadden changed their filings’ captions mid-way through the litigation so that it only listed MLB, rendering it inconsistent with the facts as well as the docket. When they changed their filings’ captions, they simultaneously stopped inserting their “misidentified as” language in their filings.
- c. As a *pro se* plaintiff, I trusted that Skadden would not have made such a representation to a federal court unless it was true. Therefore, I did not think to question their “misidentification” language or their changing of their filings’ captions.
- d. I did not know what “default” was or that MLBAM failed to appear in this case.
- e. Skadden’s filings called the MLB Audiovisual “the TBS Promo” for short, which this Court and I adopted in our papers. This shorthand was misleading because TBS’s role in creating the MLB Audiovisual was lesser than other defendants’, MLBAM in particular – TBS was not even allowed to air the full audiovisual.
- f. Also, MLBAM claims copyright to the MLB Audiovisual (though deleted its copyright notice from the version of the MLB Audiovisual Skadden filed in this Court) and, as stated in my appeal brief and reply – which MLB has never denied – MLBAM paid for and produced the MLB Audiovisual.
- g. Skadden submitted false evidence – three times in this Court – in the form of a DVD containing a previously unpublished draft of the MLB Audiovisual that had been edited to remove the MLBAM copyright notice in the last few seconds. I discovered this after the district court proceedings ended and the case was pending in this Court.
- h. Skadden’s unpublished and edited MLB Audiovisual ends on the TBS logo, rather than the MLBAM copyright notice, which furthered the appearance - misleadingly - that it was a TBS – rather than MLBAM - production. This issue is further addressed in my Appellate brief and Reply.

- i. On April 7, 2009, Skadden served me with interrogatories, requests for production of documents, and a deposition notice. Skadden's interrogatories and request for production asserted that my responses were due no later than May 7, 2009. Their deposition notice was for "each person" I was planning to have testify on substantial similarity, and was set for May 12, 2009.
- j. Skadden's deadline to me was - as with their summary judgment "deadline" - once again, incorrect.
- k. This Court in fact had stated twice during the March 3, 2009 hearing that it was inclined to give me "60 days" to "come up with an expert, some affidavit," that I "[hadn't] given [the court] already" to "produce to the Court" on substantial similarity (on pages 13 and 27 of the hearing's transcript).
- l. This Court's April 3, 2009 written order stated that I was allowed to "offer, by affidavit, expert analysis" of the works at issue, which "the Court will consider... in making the substantial similarity determination."
- m. This Court's April 3, 2009 written order gave me until May 31, 2009 - 58 days - to provide an expert report or affidavit.
- n. This Court's April 3, 2009 written order was silent as to depositions. My understanding was that I had to provide a written expert report or affidavit by May 31, 2009.
- o. On May 11, 2009, I informed Skadden Arps that - in accordance with the Court's well-grounded advice to continue to seek counsel - I was consulting with, but had not yet formally retained, an attorney (one of many I approached prior to and during this Court's proceedings), Kevin McCullough, about possibly taking my case.
- p. I authorized Skadden to communicate with Attorney McCullough, but made clear he was not (yet) "my attorney."
- q. On that same day, May 11, 2009, Skadden Attorney Kenneth Plevan sent Attorney McCullough an e-mail stating - incorrectly - that "[w]e have been advised by Samuel Bartley Steele... that you are his counsel." I have this e-mail and others, as well as letters from Plevan discussed below, which I can produce to this Court if required.
- r. Attorney Plevan's May 11, 2009 e-mail further asked Attorney McCullough to contact Plevan immediately, stating incorrectly that I had "defaulted on discovery

requests due last Thursday, and [that I] advised [Skadden] today that [I] will not be producing a witness for the deposition schedule (sic) for tomorrow."

- s. Plevan's e-mail continued: "[g]iven the status of the lawsuit, we request that you promptly file a notice of appearance on behalf of the plaintiffs, if you will in fact be representing them."
- t. The next day, May 12, 2009, Plevan sent Attorney McCullough a letter via e-mail and overnight mail again misrepresenting that I had told them that Attorney McCullough was "Plaintiffs' counsel" and incorrectly stating that my "responses to the request for production and the interrogatories were due on Thursday, May 7."
- u. Plevan's same May 12, 2009 letter informed Attorney McCullough: "In my email yesterday, I asked you to promptly file a notice of appearance, if you were in fact planning to be counsel for Plaintiffs herein. As of now, we have not seen any such notice of appearance."
- v. Finally, Plevan's May 12, 2009 letter stated that defendants "reserved the right" to move for summary judgment "if we do not hear from you promptly" and that they also "reserved the right" to "move to preclude any expert report Plaintiffs may seek to use in opposition to said motion."
- w. The next day, May 13, 2009, Plevan e-mailed defendants' discovery requests to Attorney McCullough, concluding "we look forward to hearing from you as to whether you will be representing Mr. Steele in this lawsuit."
- x. Six days later, on May 19, 2009, Plevan sent another letter to Attorney McCullough via e-mail and overnight mail noting that Attorney McCullough had "failed to file a notice of appearance in the lawsuit on behalf of plaintiffs."
- y. Plevan's May 19, 2009 letter further asserted – incorrectly, at least as far as I understood the plain language of this Court's discovery order - that my discovery responses were "now almost two weeks overdue," that "neither you nor Mr. Steele has offered a date on which the responses would be submitted, or asked defendants to agree to an extension."
- z. Plevan's May 19, 2009 letter stated that this Court had "specifically advised Mr. Steele that whether or not he retained an attorney, he would be 'required to abide by rules of procedure that are sometimes arcane and hard to understand, but nevertheless, you will be required to abide by them,'" citing "Transcript at 6."

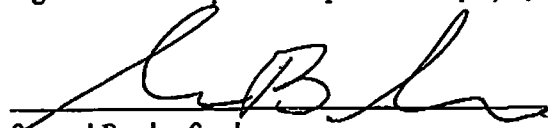
- aa. Plevan's May 19, 2009 letter to Attorney McCullough continued: "Here, we are dealing with a requirement that was and is easy to understand – responses to requests were due on May 7, 2009, and to date plaintiffs have ignored the requests."
- bb. Finally, Plevan's May 19, 2009 letter stated "please consider this defendants final request at clarification. If responses to the written discovery requests at (sic) not received by close of business [that same day], defendants will conclude that plaintiffs will not be relying on any expert analyses on the issue of substantial similarity, and will proceed accordingly."
- cc. On May 19 or 20, 2009, I was disappointed, but not surprised when Attorney McCullough informed me that he had no interest in taking the case.
- dd. Attorney McCullough's abrupt turnabout, suddenly withdrawing any consideration of representing me were, to me, clearly the result of Skadden's numerous and insistent demands and threats to him, which were, based on my understanding of this Court's order, baseless, false, and specifically designed to scare Attorney McCullough from taking my case.
- ee. I was unable to obtain counsel, despite additional efforts, for the remainder of this Court's proceedings.
- ff. In early June 2009 I had a conversation with Attorney Clark in which I asked him if he was aware that MLBAM ran the websites of many non-baseball entertainers, including Bon Jovi's, to which he replied he was not. I jokingly advised Mr. Clark that he should know the clients he's representing a little better. This conversation was part of this Court's record in an affidavit I filed on September 15, 2009 (as docket entry 109). A copy is attached.
- gg. During the same early June 2009 conversation, Attorney Clark failed to inform me that Skadden had not appeared for MLBAM or that MLBAM had not filed an appearance in the case at all.
- hh. Several days later, on June 10, 2009, Skadden suddenly - more than two weeks before the June 26, 2009 deadline - filed its motions for summary judgment on behalf of its clients, including MLB, and submitted their altered and misleading version of the MLB Audiovisual for the third time.
- ii. Surprised by this early filing, I immediately called Attorney Clark and asked him what his early filing meant for my deadline to oppose his summary judgment

motion, which I understood to be July 17, 2009 based on the Court's April 3, 2009 order. Clark told me - falsely, as I later learned - that I had two weeks from their June 10, 2009 filing to file my opposition.

- jj. In that same conversation with Attorney Clark, I informed him that, in addition to opposing their motions, I was planning on filing a summary judgment motion of my own. I asked him how long I had to file my own motion for summary judgment. He informed me – again, falsely, as I later discovered – that I “didn’t need to” file my own motion for summary judgment because they had filed theirs, and that I only needed to file my opposition. Unfortunately, I believed him.
- kk. I began scrambling to prepare an opposition under enormous pressure, both because of Skadden's early filing and because I was misled to believe that my opposition was, as a result of Skadden's early filing, now due on June 24, 2009 instead of July 17, 2009, as ordered by this Court.
- ll. I began to work on my opposition immediately, but as June 24, 2009 approached, I knew I would need more time. I contacted Attorney Clark and asked for another week to file my opposition, to which he agreed.
- mm. A week later, with my extended deadline nearly up, I asked Attorney Clark for another one-week extension, to which he agreed.
- nn. Finally, as what I believed was my twice-extended deadline approached, and on the verge of calling Attorney Clark for a third extension, I instead called district court clerk, Diep Duong, who informed me that Clark's representation to me was incorrect and that I actually had until July 17, 2009 to file my opposition.
- oo. I filed my opposition to summary judgment on July 17, 2009. At 1:37 p.m. (based on my phone records) on July 24, 2009 I received a call from Attorney Clark asking for my consent to allow defendants to file a reply brief. I consented. This conversation and resulting events are also detailed in my September 15, 2009 affidavit (as docket entry 109), copy attached.
- pp. In the same July 24, 2009 conversation with Attorney Clark, I asked for similar consent to file a sur-reply. He thanked me for my consent, but stated he did not have authority to give consent to my reciprocal request and promised to check with his clients and get back to me.

- qq. Attorney Clark never got back to me. Instead, five days later, on July 29, 2009, Skadden filed a motion for leave to file a reply, falsely claiming that I had not given consent for them to file their reply.
- rr. The next morning I called district court deputy clerk Nicewicz and left a voicemail stating that MLB "was being dishonest" in their motion for leave, and to please inform the judge that I had, in fact, consented.
- ss. My attached affidavit relates additional details about these events, including how my reliance on Attorney Clark's statements resulted in a fatal delay to the filing of my sur-reply because I was still waiting to hear from him when the Court allowed MLB's summary judgment motion on August 19, 2009, three weeks before the scheduled hearing date of September 10, 2009. I had assumed, reasonably, I believe, that I had those three weeks to finish my sur-reply and obtain MLB's consent or file a motion for leave to file my sur-reply.

Signed under the pains and penalties of perjury this 18 of June, 2010:



Samuel Bartley Steele

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**FILED
IN CLERKS OFFICE**

2009 SEP 15 P 1:21

**U.S. DISTRICT COURT
DISTRICT OF MASS.**

**SAMUEL BARTLEY STEELE,)
BART STEELE PUBLISHING)
STEELE RECORDZ,)
Plaintiffs)
v.)
)
TURNER BROADCAST SYSTEM,)
et al,)
)
Defendants.)
_____)**

Case No. 08-11727-NMG

**AFFIDAVIT OF
SAMUEL BARTLEY STEELE**

I, Samuel Bartley Steele, swear that the following statement is true to the best of my knowledge under the penalty of perjury:

1) In early July 2009, after the defense had filed their Motion for Summary Judgment, but before I had filed my Opposition to that Motion, defendants' attorney Chris Clark of Skadden, Arps called me and asked me if I was willing to agree to change the date set for hearing his clients' Motion for Summary Judgment. The Court had set that hearing for August 12, 2009. Attorney Clark wanted my agreement to move the hearing to July or possibly early September. I said that I would probably be busy on tour in September and would gladly agree to any of dates in July that they had proposed, however I was not sure about extending the hearing until September because of scheduling and the fact that I wanted the case to move forward. After that discussion, I reluctantly agreed to file a joint motion asking the Court reset the hearing, and suggesting several alternative dates in July (and some in September).

2) While I was still waiting to learn the outcome of that joint motion to reset the hearing date, I continued to work on my Opposition to defendants' Motion for Summary Judgment. I filed that Opposition on July 17, 2009, the date set by the Court in its April 3 Order. At 1:37pm on Friday, July 24, 2009, I received a friendly phone call from defense attorney Chris Clark in which I was asked for consent to file a Reply brief to my Opposition. I politely said "yes" and did give him my consent and said both sides had been very courteous up to this point, so why stop now?

3) In that same July 24 phone conversation, I politely asked Clark for consent to file a sur-reply brief. Clark thanked me for my courtesy in allowing him to file a reply. He told me that he could not give consent himself to my filing a sur-reply, but would let me know in the next week or two once he had contacted all the defendants. He has yet to call me back.

4) On July 29, 2009, five days after this phone conversation with Clark, defendants filed a Motion for Leave to File Reply claiming I did not give my consent to their filing a reply brief. This was clearly a blatant misrepresentation by defense attorneys to mislead this Court, intended to portray me as unreasonable and uncooperative in the critical weeks before the Court's judgment.

5) The next morning, at approximately 10am, July 30, 2009, I called Deputy Clerk Nicewicz and left him a voicemail saying that the defense was being dishonest (and to please tell the Judge) because I did in fact consent and I had a question as to procedure going forward.

6) Despite defendant's untrue statements in their reply, I waited to hear back from defendants about their consent to my sur-reply. Because I was waiting to hear from them, I was not sure whether I should file a sur-reply, or a motion for leave to file a sur-reply. Defendants' attorneys had been of some assistance on procedure in the past, and I believed it was best to attempt to cooperate with defendants' attorneys on procedural issues. I now see that this belief was misplaced, as those attorneys have twisted my words and actions against me.

7) I felt blindsided by the Court's August 19 ruling, which came well before the re-scheduled hearing date of September 10, 2009. When I received notice of the August 19 ruling, I was still waiting on the defenses' consent to my filing of a sur-reply, and still believing that I could eventually tell the Court about the defenses' misrepresentations at the hearing on that motion which was pushed back a month (against my wishes), to September 10.

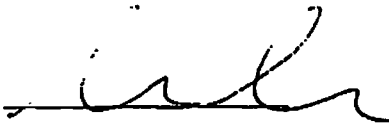
8) I cannot and do not blame this Court for its ruling. The defense, by untruthfully portraying me as an unreasonable Pro Se plaintiff, purposely misled the Court by claiming I did not extend a standard professional legal courtesy like 'consent' to file a motion (which defendants would do whether I consented or not). So I can certainly understand the Court's frustration with me. But the defendants' assertions were intentionally dishonest: I immediately gave consent to their reply, and even agreed to move the hearing date back a month, even though it was not at all convenient for me. The defense never gave reciprocal consent to my sur-reply. Instead, they hung me out to dry and abused the goodwill I had extended to them. Their underhanded scheming and disrespect for me and the Court should not go unnoticed.

9) The defense has misled the Courts in many other ways. Examples: their contradictory statements regarding access to my song, references to baseball in their works (addressed in previous motion) and their repeated attempts to distance Bon Jovi from baseball. I had a polite conversation with Clark in June in which both sides assessed the strengths and weaknesses of their case. In that June conversation, I asked Clark if he knew that MLBAM (Major League Baseball Advanced Media, the copyright owner of the MLB/TBS promo) and FSG (Fenway Sports Group, the Red Sox's non-baseball operations) run the websites of and directly profit from (as well as sell online advertising for) all 30 MLB teams, NASCAR, MLS, Madonna, U2, Bon Jovi and many others. Mr. Clark shockingly said he did not know about this relationship. This is publicly available information. In an article dated May 2007, Sports Business Journal states "MLBAM can even take on other clients...and even rock acts like Jon Bon Jovi". I jokingly advised Mr. Clark that he should know the clients he's representing a little better. Yet defendants continue to claim that Bon Jovi has nothing to do with baseball, despite their intimate business relations. Then a month after this conversation, the defendants filed their Reply, which states (at p.2) that defendants do NOT concede access to my song anymore. This clearly

contradicts statements made in the Answer filed by the Red Sox in April.

10. The defendants have demonstrated a pattern of deception and contradiction in an attempt to mislead the Court, and have shown contempt for me, a Pro Se Plaintiff, and the Court in their dishonest procedural maneuvers and misrepresentations.

Respectfully submitted,



Samuel Bartley Steele (Pro Se)

Dated 9/15/09

EXHIBIT 5

No. 09-2571

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

SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING; STEELE RECORDZ

Plaintiffs – Appellants

v.

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

Defendants – Appellees

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

Defendants

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

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

Christopher A.D. Hunt
The Hunt Law Firm LLC
10 Heron Lane
Hopedale, MA 01747
(508) 966-7300

II. The MLB Audiovisual

In July 2006, appellees MLB, TBS, and Fox announced a seven-year deal whereby baseball playoffs would be broadcast exclusively on cable television beginning in 2007. App-26. To promote this new arrangement, MLB produced the 2:38:90-long audiovisual advertisement at issue ("MLB Audiovisual"), which included a 2:38:90-long version of "I Love This Town" as part of its soundtrack. App-26-27, 65.

A company called "MLB Advanced Media" ("MLBAM") owns the copyright to the MLB Audiovisual; unfortunately, as detailed in the next section, MLB submitted an altered or otherwise inaccurate copy of its Audiovisual with its summary judgment papers, which no longer shows the MLBAM copyright notice at the end.⁴ The actual MLB Audiovisual (with the MLBAM copyright notice at the end) can be seen by clicking on this link to MLB's website:

http://mlb.mlb.com/media/player/mp_tpl_3_1.jsp?w_id=595113&w=/2007/open/commercial/082707_tbs_bonjovi_ps_promo_400.wmv&pid=gen_video&vid=1&mid=200708272173402&cid=mlb&fid=gen_video400&v=2

a. The Altered MLB Audiovisual

MLB filed with the district court an altered or otherwise incorrect - and materially different - version of the MLB Audiovisual (the "Altered Audiovisual").

⁴The record, therefore, does not contain a copy of the actual MLB Audiovisual.

App-68, 511.⁵ The Altered Audiovisual has 12 seconds of "dead air" in the beginning and does not have the final seconds showing the MLBAM copyright notice, "© 2007 MLBAM". App-68, 511. The Altered Audiovisual is 2:46-long; not 2:38:90-long like both the actual MLB Audiovisual and Steele's Song. App-515.⁶

III. The District Court's *Sua Sponte* Discovery Limitation

On March 24, 2009, Steele, *pro se*, and MLB filed their Joint Statement Pursuant to Rules 26(f) and Local Rule 16.1(d) ("Joint Statement"). App-366. Steele and MLB agreed to a phased discovery schedule. App-369-371.

On March 31, 2009 the district court stated "what I am inclined to do is to permit the plaintiff to have a limited amount of discovery on specifically that issue, that is, do substantial similarity of the composition and the alleged copyright infringing song... before we get into the more extensive discovery that would be called for in this case gets beyond the summary judgment point of view." App-394 (emphasis supplied). Neither side had requested such a limited discovery period. App-369-370.

⁵ The CD Exhibit with the Altered Audiovisual is attached to App-511.

⁶ The MLB Audiovisual with Steele's Song substituted for the original soundtrack, is on a CD at App-515.

to numerous facts showing substantial similarity between the MLB Audiovisual as a whole to Steele's Song. See X, below.

The confusion and resulting prejudice to Steele could have easily been avoided. The district court's order disallowing discovery on access and copying prevented Steele from effectively pursuing his claim of – or even discovering evidence of - infringement by reproduction or synch rights violations. The district court's analyses of these claims – to extent it did any - was superficial, at best, because it did not consider any evidence that did not fit into the rubric of “substantial similarity.” See Section XI, below.

V. MLB's Altered Audiovisual, Misstatements and Misrepresentations, Led the District Court's Analysis Astray¹⁶

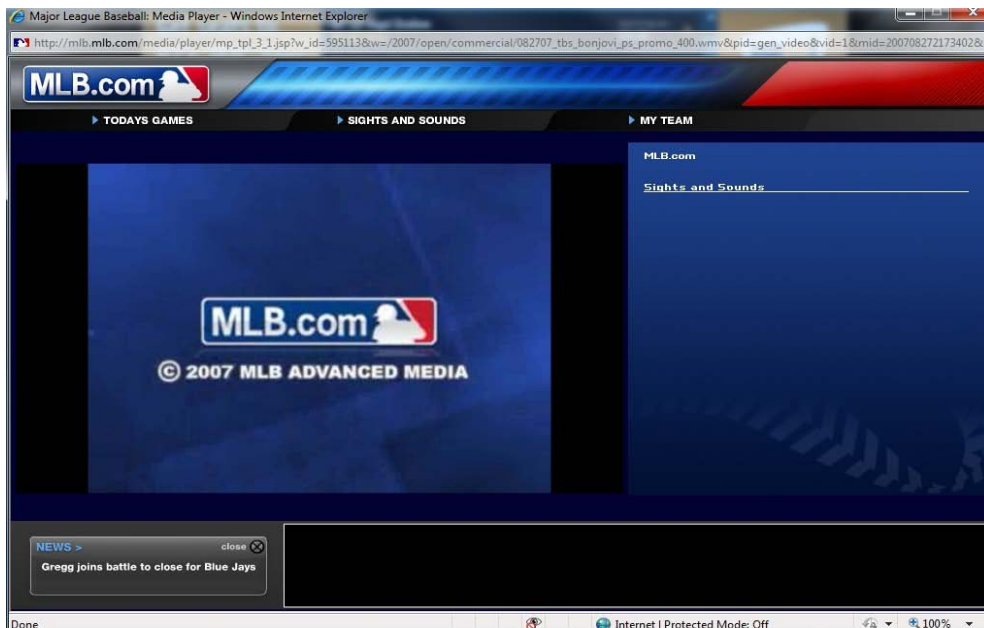
MLB filed misleading evidence and made inaccurate factual and legal statements in the district court. The district court's errors likely resulted from adopting – oft-times verbatim – the flawed arguments set forth by MLB.

¹⁶ MLB's evidence and statements in the district court are relevant insofar as they were relied upon heavily by the district court at summary judgment.

a. MLB's Altered Audiovisual

MLB attached to its summary judgment papers (and, earlier, to its motion to dismiss papers) a supposedly "true and correct" copy of the MLB Audiovisual that was, in fact, materially different from the actual MLB Audiovisual. App-511.

The Altered Audiovisual was materially different from the actual MLB Audiovisual in at least two ways: First, the copyright notice at the end of the MLB Audiovisual (seen below) did not appear on the Unpublished Audiovisual submitted to the district court. App-511.¹⁷



¹⁷ To see the actual MLB Audiovisual, including the copyright notice, see: http://mlb.mlb.com/media/player/mp_tpl_3_1.jsp?w_id=595113&w=/2007/open/commercial/082707_tbs_bonjovi_ps_promo_400.wmv&pid=gen_video&vid=1&mid=200708272173402&cid=mlb&fid=gen_video400&v=2

This omission - intentional or not - buttressed MLB's other efforts, in its papers and at argument, to blur the statutory distinction between "musical" and "audiovisual" works, which then directly contributed to the district court's flawed summary judgment analysis. In fact, the district court's summary judgment opinion closely followed the flawed analysis urged by MLB in its motion to dismiss and motion for summary judgment, which improperly divided and subdivided the works into nearly-identical subheadings: "Music Comparison;" "Lyrics Comparison;" and a last section on the MLB Audiovisual (called "Turner Promo" in district court). App-51-55 (Motion to Dismiss); App-465-472 (Motion for Summary Judgment); App-773-778 (District Court's Summary Judgment Opinion).

The MLBAM copyright notice of the MLB Audiovisual, which, by definition, includes the Bon Jovi soundtrack, clearly showed the legal unity of copyrighted audiovisual works. See 17 U.S.C. § 101. Unity of authorship and legal indivisibility of the MLB Audiovisual, however, were inconsistent with the analytical framework MLB invented for the district court. MLB focused on separate comparisons between (1) the MLB Audiovisual's video and the Steele Song's "lyrics," and (2) the MLB Audiovisual's soundtrack with the Steele Song's music. App-51-55. The absence of

the copyright notice also kept from the district court the major role of MLBAM – who was not a defendant - in the creation of the MLB Audiovisual.

Second, on playback the Altered Audiovisual does not start until twelve seconds of "dead air" have passed, whereas the actual MLB Audiovisual begins immediately. Id. The Altered Audiovisual, accordingly, is 2:46 long, unlike the Steele Song and MLB Audiovisual, each of which is 2:38:90 long. App-511, 515. This longer version appeared to support MLB's incorrect assertions that the MLB Audiovisual and Steele Song don't start at the same time and don't line up. App-55-56.

b. MLB's Misstatement of Facts and Law to the District Court

MLB misrepresented crucial facts, misstated applicable law, and otherwise pushed a misguided legal analysis on the district court from the outset of the district court proceedings, with MLB's first substantive papers – their motions to dismiss. App-40-58. While there are too many instances to list here of MLB misstatements in its attempt to misdirect the district court in its analysis - which was largely successful - but the following examples are illustrative:

MLB asserted, in its Memorandum in Support of its Motion to Dismiss that the MLB Audiovisual combined baseball images with "a song entitled 'I Love This Town' by Bon Jovi," App-46. This is false. "I Love This Town" is a 4:38 musical

EXHIBIT 6

No. 09-2571

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

SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING; STEELE RECORDZ

Plaintiffs – Appellants

v.

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

Defendants – Appellees

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

Defendants

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

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

Christopher A.D. Hunt
The Hunt Law Firm LLC
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(508) 966-7300

appellate review applies legal and procedural standards to the district court’s rulings that will bind all defendants equally. MLB concedes that the issue of which appellees are before this Court does not affect this Court’s analysis. MLB Brief at 45 n. 25.³

II. MLB Knowingly Submitted False Material Evidence to the District Court: MLB’s Misconduct Requires Immediate Reversal

MLB, in its brief, fails to rebut, explain, or, more importantly to correct its submission of the Altered Audiovisual. MLB Brief at 47-49. MLB asserts neither inadvertence, mistake, or excusable neglect. MLB’s submission was, therefore, knowing and willful. MLB’s position requires immediate reversal, remand, and an order for entry of judgment in Steele’s favor in the district court or, at a minimum, reversal, remand, and an order to allow full and true discovery in the district court. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Aguiar-Carrasquillo v. Agosto-Alicea, 445 F.3d 19 (1st Cir. 2006).

MLB’s defends its thrice-submitted false evidence – sworn to as a “true and correct” copy of the MLB Audiovisual – while incongruously attempting to explain

³ MLB’s related argument that specific Defendants-Appellees should be dismissed because Steele’s Brief did not elucidate liability or appellate theories against each of them individually is baseless. Steele is under no obligation to re-allege his underlying – and unchanged – liability theories or to repeat, laundry list style, his (identical) grounds for appeal as to each Defendant-Appellee.

away the material differences between Altered Audiovisual and the true MLB Audiovisual. MLB Brief at 47-49.⁴ Accordingly, MLB's selection, alteration, and submission of the Altered Audiovisual were deliberate. Hazel-Atlas Glass Co. 322 U.S. at 249-250, n.5 (circuit court had "duty and power" to vacate judgment based in part on willfully submitted false documents and noting that responsible party "never questioned" the documents' falsity).

MLB's defense of its materially-altered evidence before this Court shows MLB's intent to subvert judicial process at the appellate level. Hazel-Atlas Glass Co., 322 U.S. at 246 (litigant submitted false documentary evidence to district court; Supreme Court held that circuit courts have inherent power in equity to address false evidence on appeal, despite opponent's failure to raise issue earlier; "This matter does not concern only private parties. There are issues of great moment to the public in a patent suit... Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public,

⁴ Steele's Brief addressed the Altered Audiovisual in the expectation that MLB would explain or correct the obvious discrepancies between the true MLB Audiovisual and MLB's Altered version. Steele allowed for the possibility that MLB had mistakenly submitted the wrong audiovisual and would correct its "mistake."

institutions in which fraud cannot complacently be tolerated consistently with the good order of society.”).

1. MLB’s False Submission, Whether in Fact or by Presumption, “Substantially Interfered” with Steele’s Ability to Fairly Litigate His case

MLB’s misrepresentations either “substantially interfered” with his ability to fairly litigate his case or, alternatively, “*that [MLB’s] misconduct was knowing or deliberate,*” which, by “presumption or inference,” satisfies the element of “substantial interference.” Aguiar-Carrasquillo 445 F.3d at 28 (discussing Fed.R.Civ.P. 60(b)(3) (emphasis supplied)); Hazel-Atlas Glass Co., 322 U.S. at 247 (intentional deception does not require Supreme Court’s “attempted appraisal” of influence the deception may have exerted on the court; party submitting false evidence “in no position now to dispute its effectiveness” or to “escape the consequences” of its deception); Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988) (“knowing and deliberate” misconduct is presumed to have interfered with other side’s ability “fully and fairly to prepare for, and proceed at, trial”).

Here, Steele need not (but does, below) show “substantial interference,” given MLB’s willful conduct. Id. (“There is no need for us to determine how many angels

danced on the head of that particular pin, however, for what transpired thereafter was unarguably in dereliction of appellee’s duty”).⁵

2. MLB’s Willful Misconduct: “Substantial Interference” is Presumed

The Altered Audiovisual was intended to, among other things, shield its copyright owner of the infringing work from liability. It is difficult to think of a more reprehensible litigation “tactic” in an infringement action: removing the copyright notice from the infringing work, particularly when the notice shows ownership by a non-party.

MLB, in deleting the copyright notice image, also cut off the TBS logo fadeout, an organ “slide-down” synchronized to the TBS logo fadeout, the final drum “hit,” and other accompanying sounds (bottles clinking) from the *true* MLB Audiovisual – strong evidence that these material elements in the final seconds were deleted in toto, prior to court submission.⁶ See App-511, compared with actual MLB Audiovisual viewable at link at Steele Brief at 18, and below:

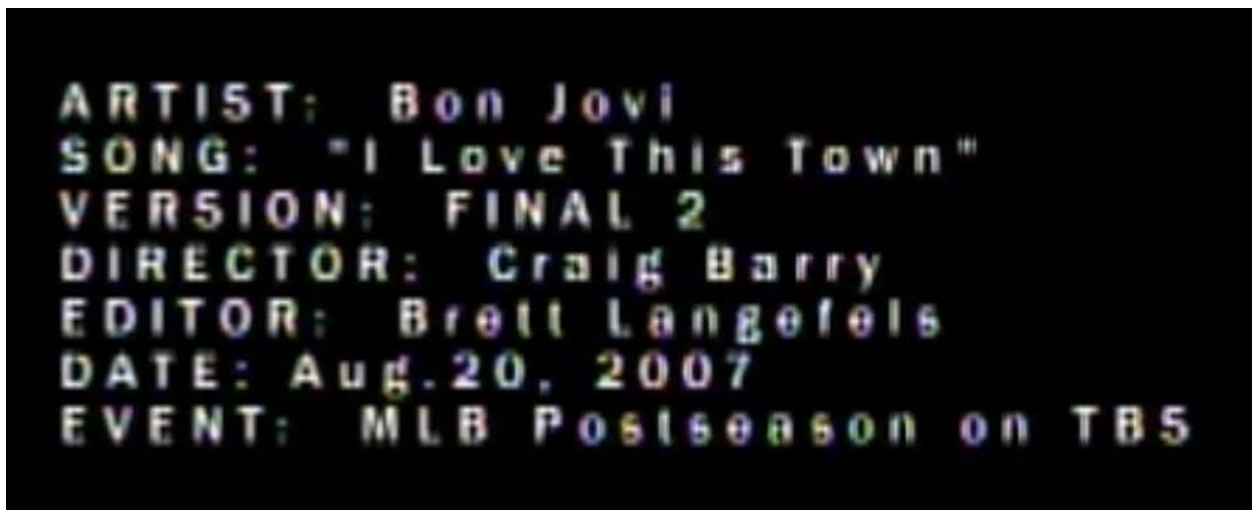
⁵ MLB “neither amended nor supplemented [its] representations at any time. This was an outright breach.” *Id.* (citing Fed.R.Civ.P. 26(e)(2)(A)- now Rule 26(e)(1)).

⁶ In other words, it wasn’t a prior version to which the copyright notice was later added: The true MLB Audiovisual ends after the TBS logo/copyright notice/organ slide/last drum hit; deleting these additional elements caused the Altered Audiovisual to have an abrupt ending, unlike the true MLB Audiovisual, consistent with deletion.

http://mlb.mlb.com/media/player/mp_tpl_3_1.jsp?w_id=595113&w=/2007/open/commercial/082707_tbs_bonjovi_ps_promo_400.wmv&pid=gen_video&vid=1&mid=200708272173402&cid=mlb&fid=gen_video400&v=2

MLB explicitly (and mockingly) denies that the Altered Audiovisual arose from an earlier working draft – labeling such drafts “phantoms.” MLB Brief at 23 n.14.

MLB is contradicted by its own evidence: the Altered Audiovisual reveals itself as an earlier “phantom” draft or an earlier draft that MLB selected and edited prior to filing in the district court. See beginning credits at App-511 (“VERSION: FINAL 2”), below:



The true MLB Audiovisual’s opening credits (viewable at above link) have no version name or number, or date. Steele Brief at 18.

After deleting the copyright notice (and other material elements), MLB sought to cover its tracks by adding 12 seconds to the beginning of the Altered Audiovisual.

The extra 12 seconds made the Altered Audiovisual longer than the true MLB Audiovisual – even with the last few seconds deleted, obscuring MLB’s deletion.⁷

Consistent with the above efforts to conceal MLBAM’s copyright ownership and its role in the creation and promotion of the MLB Audiovisual, MLB also claimed - falsely – that the MLB Audiovisual was first “released” by TBS on August 31, 2007. App-46. The MLB Audiovisual was actually released on August 27, 2007, and by MLBAM, not TBS.⁸

MLB references the MLB Audiovisual in its papers as the “TBS Promo,” even though MLBAM – not TBS – owns its copyright, first broadcast it, and, as owner of the baseball images and Bon Jovi’s website operator and promoter, App-817, co-produced it.⁹

⁷ The 12 seconds may have existed in the “Final 2” version or they may have been added. Regardless, the 12 seconds do not appear in the true MLB Audiovisual and, by selecting to submit a draft version containing the 12 seconds or by editing a draft version to add the 12 seconds, MLB’s sought to conceal its deletion of the final seconds.

⁸ See App-330, online version viewable here (with link to video dated August 27, 2007):
http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20070827&content_id=2173003&vkey=pr_mlb&fext=.jsp&c_id=mlb

⁹ TBS, in fact, never aired the MLB Audiovisual, but only brief “interstitials,” shorter derivatives of the MLB Audiovisual. App-328.

MLB’s “knowing or deliberate” submission of false evidence to the district court, as well as its defense of its misconduct in this Court, satisfies a “presumption or inference” of “substantial interference” with Steele’s ability to fairly litigate his claim. Aguiar-Carrasquillo 445 F.3d at 28; Hazel-Atlas Glass Co., 322 U.S. at 247

3. MLB’s False Evidence “Substantially Interfered” with Steele During Discovery

Even if this Court finds MLB’s misconduct unintentional, MLB’s misconduct nonetheless “substantially interfered” with Steele’s ability to fairly litigate during discovery and, accordingly, warrants reversal.

MLB initially submitted the Altered Audiovisual on December 8, 2008. App. 46 n.3. Nearly four months later, the district court issued its discovery order, stating that the MLB Audiovisual was “produced” by TBS, and that it “feature[d] a song” by Bon Jovi. App. 377. Unsurprisingly, the district court made no reference to MLBAM or otherwise indicated awareness of any issues as to the genesis, production, or ownership of the MLB Audiovisual. App-375-387.

MLBAM’s copyright ownership of the MLB Audiovisual necessarily includes ownership of its constituent Soundtrack, including the 2:38:90 of Bon Jovi-performed music. 17 U.S.C. §101. MLB’s false mantra in the district court and here – that the

MLB Audiovisual incorporated a “Bon Jovi song” – misleadingly labeled the Soundtrack and perpetuated MLB’s concealment of MLBAM’s role.

The extent to which the district court relied upon MLB’s Altered Audiovisual and false characterizations in excluding “access” and “creation” from discovery is unknown. Likely the district court believed – based on MLB’s misrepresentations and the Altered Audiovisual – that TBS alone “produced” the MLB Audiovisual and that Bon Jovi produced and “owned” the “copyright” to the Soundtrack, mislabeled the “Bon Jovi Song.”

The district court, under this false impression, disallowed discovery on “creation” and “access,” otherwise crucial issue normally subject to extensive discovery in copyright cases, and which would have revealed the true roles of the parties in this case (as well as revealing MLB’s false submissions and statements in the district court, rather than on appeal).

Steele’s detailed descriptions in his district court filings of defendants’ concerted actions in creating – and then concealing the origin and purpose of – the MLB Audiovisual would also have had an impact on the district court (which all but ignored Steele’s allegations in this regard) had it been aware of MLBAM’s true role in creating (and owning) the MLB Audiovisual.

The district court’s discovery order was based, in part, on MLB’s false evidentiary submissions and misrepresentations and, therefore, was tainted, along with the rest of the district court proceedings. Hazel-Atlas Glass Co., 322 U.S. at 246-247.

4. MLB’s False Evidence “Substantially Interfered” with Steele at Summary Judgment

If this Court finds that MLB unintentionally submitted the Altered Audiovisual and that MLB’s Altered Audiovisual (and misrepresentations) did not substantially interfere with Steele at the discovery stage, MLB’s misconduct nonetheless substantially interfered with Steele’s ability to fairly oppose summary judgment.

In its summary judgment opinion, the district court stated it had “carefully... viewed both the *original* [MLB Audiovisual] and [Steele’s version with the soundtrack replaced].” App. 773 (emphasis supplied). The district court did not, in fact, view the *original* MLB Audiovisual because it was not in evidence. Steele Brief at 39; MLB Brief at 47-49.

Accordingly, the district court relied on the Altered Audiovisual as “true and correct” at summary judgment. App. 773. The district court, in fact, it had unknowingly relied on an edited draft that was materially different from the true MLB Audiovisual. Id.

The district court reasonably – but mistakenly – assumed MLB submitted a “true and correct” copy at summary judgment. The district court’s failure to notice the Altered Audiovisual’s extra length (2:46 vs. 2:38:90), different opening credits, and sudden ending substantially interfered with Steele at summary judgment.¹⁰

MLB’s argument that Steele suffered no harm because “both” versions – neither “true and correct” – of the MLB Audiovisual were before the district court is absurd: First, by acknowledging there were two “versions” before the district court, MLB necessarily admits that it failed to submit a “true and correct” copy (there can be only one “true and correct” version, and it was never before the district court or this Court). Second, the prejudice to Steele arising from the district court having before it two very different versions of the allegedly infringing work – neither being “true and correct” – is hardly “difficult to understand.” MLB Brief at 48. The district court should have had one – and only one – “true and correct” version of the MLB Audiovisual, and it should have come from MLB (who claimed – and maintain – that they provided it), not Steele.

¹⁰ Duration, as a linear “dimension,” is a protectable element. Coquico Inc., v. Rodriguez-Miranda, 562 F.3d 62, 69 (1st Cir. 2009). Similarly, a “fade” ending, as part of an original arrangement, merits copyright protection. Three Boys Music v. Michael Bolton, 212 F.3d 477, 482 (9th Cir. 2000).

Even though the extent to which the district court relied upon MLB's false evidence – and misleading statements – cannot be known with certainty, certitude is not required in the context of willful submission of false evidence. Aguiar-Carrasquillo, 445 F.3d at 28; Hazel-Atlas Glass Co., 322 U.S. at 246-247.

5. MLB Cannot Justify or Negate its Intentional Submission of False Evidence

MLB defends its misconduct, arguing lack of relevance, waiver, lack of harm, and failure to conduct discovery. MLB Brief at 47-49. MLB's arguments stem from the brazen assumption that this Court will countenance MLB's willful misconduct unless Steele can show diligence, objection, and specific harm from MLB's misconduct. Id. No law supports MLB's position. Id.

The law contradicts MLB's arguments.

First, where false evidence is willfully submitted, as here, prejudice is presumed and need not be shown. Aguiar-Carrasquillo, 445 F.3d at 28.

Second, MLB cannot submit deceptive evidence – intentionally concealing and obscuring material facts – in lower court proceedings and then claim on appeal that Steele's objections are waived because the false submission is a *fait accompli*. Hazel-Atlas Glass Co., 322 U.S. 238, 246 (“[s]urely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The

public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud”).

Third, MLB’s claims that its edits to the Audiovisual appear “before” and “after” the Audiovisual are simply false: an Audiovisual – whether altered or true version – is a single work. 17 U.S.C. § 101. MLB cannot disclaim its willful alterations by labeling them “before” and “after.”

The credits in the opening 12 seconds and the deleted MLBAM © notice/TBS logo frames/organ slide/final drum hit/bottles in the missing final seconds make clear that these sections appear at the beginning (not “before”) and end (not “after”) of the MLB Audiovisual. The duration, presentation, and selection, as well as “overall arrangement” are integral elements of a work and cannot be disregarded at the whim of the infringer for the expediency of litigation. Steele Brief at 55.

III. **Steele’s Unwavering Liability Theory has Always Been Infringement by Temp-Tracking in Violation of Steele’s Exclusive Rights to Reproduce, Synchronize to Video, and Create Derivative Works**

Steele has pleaded and argued consistently that MLB used Steele’s Song as a “temp track” during the creation of the MLB Audiovisual. App-27, 31-32, 151, 156, 158, 307-308, 591, 594, 785, 787, 792, 796. MLB’s unauthorized and secret use of

EXHIBIT 7

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VIA ELECTRONIC MAIL

June 28, 2010

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

**Re: Notice of Intent to File Rule 11 Motion for Sanctions
Steele v. Turner Broadcasting System, Inc., et al., No: 08-11727**

Dear Attorney Sloan:

This is to notify you that on Monday, July 5, 2010, I intend to serve a Rule 11 motion for sanctions ("Motion") against your firm, your clients, you personally, as well as other attorneys (hereinafter collectively "Skadden"), where warranted. After service of my Rule 11 motion, Skadden will have a 21 day "safe harbor" period to withdraw or correct the papers subject to Rule 11 sanctions.

If and when I file the Motion, I will request an evidentiary hearing in order to allow the Court to obtain testimony from attorneys and parties, as well as non-party witnesses, likely to have personal knowledge of Skadden's alleged misconduct. Specifically, in addition to requesting testimony from parties and counsel involved in the misconduct, I will seek testimony from Anthony Ricigliano, who I believe either contributed to, or has knowledge of, Skadden's misconduct. I may also seek testimony from Brett Langfels, other persons with knowledge of Skadden's digital records pertaining to this case, and persons with knowledge of Skadden's standard and litigation-related document retention policies and conformance therewith.

As further detailed below, upon review of the record and case file to date, I believe that Skadden acted in its filings in the District Court and First Circuit and that Skadden's acts were (1) willful; (2) repeated; (3) done with intent to injure my client and abuse the judicial process; (4) done in a manner that have infected - and

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continues to infect – the full scope of proceedings to date. Further, the sophistication, expertise, and resources of Skadden, Arps (and its clients) - particularly when opposing a *pro se* plaintiff (or a solo practitioner) - will likely be considered by the Court as a factor in determining whether sanctions are appropriate, as well as the nature and extent of such sanctions.

1. Notice and Timing of This Motion

Although informal notice is not a prerequisite for serving a Rule 11 Motion, I offer advance notice out of professional courtesy and to allow Skadden to bring to my attention any bases for Rule 11 sanctions Skadden believes are incorrect or to take remedial measures for those bases Skadden does not dispute.

I reserve the right to file a motion for sanctions pursuant to the Court's inherent authority to maintain the integrity of the judicial process at any time. I further reserve the right to move for similar sanctions, if appropriate, against Dwyer & Collora LLP and its individual attorneys personally.

My review of Skadden's conduct both in and out of Court during the course of this litigation continues. It appears, however, that Skadden acted improperly to conceal a properly served defendant (MLBAM), filed false evidence, made numerous material factual and legal misrepresentations to, and improperly withheld evidence from, my formerly *pro se* client who, as such, was unable to divine, much less challenge, Skadden's actions.

The Motion, if filed, will be timely. See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 57 (1991) (sanctions, including under Rule 11, "may be imposed years after a judgment on the merits"); see also Cooter v. Hartmax Corp., 496 U.S. 384, 395-396 (1990); U.S. v. Coloian, 480 F.3d 47, 51 (1st Cir. 2007) (citing Chambers); Young v. Providence 404 F.3d 33, 38 (1st Cir. 2005); Muthig v. Brant Point Nantucket, 838 F.2d 600, 603-604 (1st Cir. 1988).

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I reserve the right to take additional action in response to newly uncovered prior misconduct as well as any ongoing misconduct, if warranted. I again stress that if I my understanding of any of the matters discussed below is mistaken, I respectfully request that you immediately contact me and explain where and how I have erred.

2. Sanctions Sought

I will seek some or all of the following sanctions, based on Skadden's misconduct including, but not limited to, the acts described below (section 3), see, e.g., Chambers, 501 U.S. 32, 54-55 (sanctions properly imposed for party's conduct during litigation, including the "fraud [] perpetrated on the court and the bad faith [] displayed toward both [the party's] adversary and the court throughout the course of the litigation"):

a. Vacation of the District Court's judgment and entry of default judgment for plaintiffs.¹

¹ See, e.g., Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1119, 1122 (1st Cir. 1989) ("[w]e find the caselaw fully consonant with the view that a federal district judge can order dismissal or default where a litigant has stooped to the level of fraud on the court," where 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; [opponent], having undergone extra trouble and expense, had a legitimate claim to dismissal; and the court, jealous of its integrity and concerned about deterrence, was entitled to send a message, loud and clear"); Chambers, 501 U.S. 32, 44, 49 ("inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court") (citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)); John's Insulation, Inc. v. L. Addison and Assoc., 156 F.3d 101, 109 (1st Cir. 1998) (default judgment on counterclaim appropriate sanction for misconduct, noting "[t]he purpose of sanctions, moreover, is not merely to penalize violations of court procedures, but also to deter future violations by other parties, and thus sanctions do not have to be strictly proportional to the severity of a given party's violations.").

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b. Attorney's fees and costs for all proceedings to date, given the "bad faith" and "frequency and severity" of Skadden's "abuses of the judicial system."²

c. Additional monetary sanctions as the Court may deem appropriate to be paid into the Court.³

d. Disqualification of Skadden, Arps from the remainder of these proceedings.⁴

e. Admissions or presumptions of facts favorable to Steele as to issues subject to the Motion, including, but not limited to, Steele's digital temp-tracking allegations.⁵

3. Bases for Rule 11/Sanctions Motion

If, as I believe, Skadden's misconduct was carefully conceived and executed, then Skadden, of course, has actual knowledge of the complained-of acts (and likely other acts of which I am yet unaware). This informal notice, in that event, serves to inform Skadden that *my client and I* are also now aware of at least some of Skadden's actions that may constitute Rule 11 violations.

² See, e.g., Chambers, 501 U.S. 32, 45-46, 56-57 (defendant part of "sordid scheme of deliberate misuse of the judicial process" designed to "defeat [plaintiff's] claim")

³ See e.g., Fed.R.Civ.P. 11(c), Advisory Committee Notes.

⁴ See e.g., Zavala Santiago v. Gonzalez Rivera, 553 F.2d 710, 712 n.1 (1st Cir. 1977) (noting "dismissal of the suit unless new counsel is secured" is a "lesser sanction" than dismissal for attorney misconduct).

⁵ Based on remedies available for intentional spoliation and/or bad faith destruction or alteration of evidence, including digital evidence submitted to the court, willful failure to correct digitally altered submissions, and bad faith denial of same, even after being put on notice by plaintiffs. See e.g., Spoliation of Digital Evidence - A Changing Approach to Challenges and Sanctions, Steven W. Teppler, *TheSciTechLawyer* (Fall 2007) and cases cited therein. Default judgment is also an appropriate remedy for willful spoliation. Id.

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Skadden is also already aware of the assertions of misconduct my client and I have made, both in the District Court and the First Circuit. *See*, e.g., September 15, 2009 Steele Affidavit; Steele's Appellate Brief; Steele's Reply to Appellees' Brief; Steele June 18, 2010 Affidavit, attached as Exhibit 13 to Plaintiffs' June 18, 2010 Motion for Entry of Default as to MLBAM (with September 15, 2009 Steele Affidavit attached thereto). Steele's Memorandum in Support of Motion for Entry of Default as to MLBAM and Exhibit 13 thereto are attached as Exhibit 1.

a. Digital Spoliation & Fraud on the Court: The Altered MLB Audiovisual

Skadden's submission of false evidence in the form of the "FINAL 2" MLB Audiovisual, in and of itself, was clearly a Rule 11 violation. Worse, Skadden submitted it three times in District Court and once in the First Circuit – there was no objection to the Joint Appendix that I created, which was understandable, given that it included the very DVD Skadden had previously served on my client – showing a pattern of Rule 11 violations.

Willfulness is obvious, since once Steele's Appeal Brief pointed out the alterations, Skadden nonetheless denied them (or at least failed to acknowledge them) ("in *conclusory* fashion... Steele's alteration *theory*..."), argued Steele had waived his false evidence claim, argued the alterations were non-prejudicial, and posited that Steele failed to "use the discovery opportunity provided by the court to explore such questions." Skadden App. Br. At 47-49.

Skadden emphasized that "Steele's failure to conduct discovery or to develop an argument is particularly notable in light of his statement at the motion to dismiss stage that there were 'various different promo versions that were all released.'" *Id.* at 49.

This last argument is particularly offensive and dishonest.

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First, the District Court informed Steele that he was to provide an expert report for the Court to consider at summary judgment and was specifically forbidden from seeking discovery as to access and creation of the MLB Audiovisual.

Second, as Skadden well knows – and I as I learned two days ago - my client did ask Skadden for the “FINAL 1” version of the MLB Audiovisual during the District Court proceedings. Skadden rebuffed him. By then, Skadden had already filed “FINAL 2” in the District Court for the *third time*, Attorney Scott Brown claiming “under the pains and penalties of perjury” that it was “true and correct.” I can only assume Skadden hoped that Steele would fail to retain an attorney or that Steele’s request for “FINAL 1” would not be remembered or considered significant by Steele should he manage to retain counsel that late in the proceedings.

Third, Skadden’s dismissive, sarcastic, and contemptuous treatment of the idea that “earlier drafts” or “various different” versions of the MLB Audiovisual had been created were designed to mislead the Court – even while Skadden knew the truth: Unless Brett Langefels or TBS Studios have uncovered magical production software, drafts of the MLB Audiovisual exist. That it could be otherwise is impossible (unless they have been destroyed, of course). I’m sure Mr. Langefels would agree.

Ultimately, Skadden’s submission of the “FINAL 2” draft to the District Court in sworn-to statements by counsel – three times, no less – conclusively disproves Skadden’s contrary insinuations. Skadden’s untenable and disingenuous position is further evidenced by Skadden’s refusal to honor Steele’s request for the “FINAL 1” version.

Moreover, as Skadden knows – because, among the dozens of other stories in 2007 touting various versions of the MLB Audiovisual to be played worldwide in a variety of media and venues - on August 27, 2007, Turner Sports senior vice president of marketing and programming, Jenny Storms, stated that “[t]here will be hundreds of spots, which are taggable, on the local level.”

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Finally, it goes without saying – or should – that fraud on the Court cannot be waived.

b. Concealing MLBAM

The District Court record makes it abundantly clear that one of Skadden’s motives was to improperly conceal MLBAM’s role in creating the MLB Audiovisual and, if possible, to conceal MLBAM’s very existence from Steele and the District Court. A number of facts point to this these improper goals:

First, MLBAM was easily served with process. On the other hand, that same day – likely after MLB caught wind of the service – MLB successfully evaded service by physically preventing a United States Marshal from performing his Court-ordered task, going so far as refusing to provide a telephone number or name. Nonetheless, it appears that, on reflection, MLB and MLBAM determined that, for whatever reason, they both preferred MLB to defend the case rather than MLBAM. Of course, this was not Skadden’s decision to make.

MLB later filed its appearance voluntarily – which might have raised an attorney’s eyebrow, but not a *pro se* litigant’s – and began a well-planned but highly improper scheme to shift the District Court and Steele’s attention from MLBAM to MLB.

Second, to further the scheme, Skadden claimed that MLB – *not MLBAM* – had been “misidentified” as “Major League Baseball/MLB Productions,” knowing full well that MLBAM *is* MLB Productions and that MLBAM - *not MLB* – had been properly served. In each of Skadden’s initial filings, as well as later filings, it included the false “misidentified” language.⁶ Skadden later stopped inserting the above

⁶ Skadden made these misrepresentations in later filings, including, among others, its Local Rule 83.5.3(b) motion asking permission for attorneys Kenneth Plevan and Clifford Sloan to practice in the District Court for this case.

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language in its papers – presumably to stop bringing attention to the issue in the event Steele retained counsel or the Court otherwise took note of it – only to use it again in its Appeal Brief.

Once again, Skadden’s clever nomenclature claiming “misidentification” of MLB (which, true or not, did not relieve MLBAM of the duty to defend or face default), would have gotten the attention of opposing counsel, had there been one – and therefore the attention of the Court – but was easily slipped by the *pro se* Steele. It was a fraud designed to shield MLBAM from the Court by taking advantage of Steele’s *pro se* status and inability to obtain counsel (a situation in which Skadden played no small role).⁷

Third, Skadden’s deletion of the MLBAM copyright notice from the MLB Audiovisual was such a blatantly self-evident – though clumsy - attempt to maintain MLBAM’s low (or non-existent) profile that it barely merits further mention. I refer Skadden to Steele’s Appellate filings.

c. Knowingly Misrepresenting Copyright Law

Skadden knows full well that “synchronization rights” have nothing whatsoever to do with protecting “intervals of time,” the District Court’s summary judgment opinion notwithstanding.

Nonetheless, Skadden expressly adopted the District Court’s incorrect application of “synch rights” as relating to “intervals” of time, as opposed to Steele’s proper application of the law, i.e., infringement occurred during Skadden’s use of his song in “timed relation” to a series of images. See Defendants’ Opposition to

⁷ MLB’s answer to Steele’s Amended Complaint also explicitly denied that it was the parent company of MLBAM and MLB.com.

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Plaintiffs' Motion to Reconsider at 6 (“[t]he court squarely and *accurately* addresses the issue of synchronization rights in its August 19 Order at pages 15-16.”)

Skadden did not, however, merely adopt the Court's misapplication of the law, but helped sow it.⁸ Skadden knowingly and intentionally sought to confuse the Court with incorrect, incomplete, or misleading interpretations of copyright law, sometimes contradicting its own expert, Anthony Ricigliano. In its Reply to Steele's Opposition to Summary Judgment, Skadden mocks Steele, asserting Steele is trying to “tar defendants with a ‘temp tracker’” label.

Putting aside that defendants have yet to deny using Steele's Song as a temp track (in fact, as we all know and has been widely reported, temp tracking is standard operating procedure for several defendants), Ricigliano has repeatedly stated – in industry publications (and his report for this case) – that he has worked for years “clearing” hundreds of commercials for advertising companies that use temp tracks during the creation of their audiovisual commercials. Ricigliano's sole purpose in this endeavor, by his own admission, is to help advertisers or other producers – like MLBAM and TBS - skirt the very same copyright laws Steele seeks to enforce.

Ricigliano's role in clearing temp-tracks, including his likely clearance of the MLB Audiovisual as to Steele's Song, was underscored by Skadden's refusal to answer Steele's questions as to whether Ricigliano cleared the MLB Audiovisual and how many hours he billed to this case. Skadden instead would only provide the dollar amount paid Ricigliano.

As with Steele's request for the “FINAL 1” version of the MLB Audiovisual, Skadden's abrupt refusal to answer Steele's question about whether Ricigliano cleared the MLB Audiovisual reveals more than it hides.

⁸ For example, Skadden's insistence that synch rights are reserved only for those works present in the final, “actual,” or published version, is disingenuous and contrary to basic copyright doctrine.

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Skadden's strategy from the outset has been to distract and mislead the Court by setting forth irrelevant arguments and incorrect legal interpretations, and by patronizing – if not ridiculing outright – my client in subtle and not-so-subtle ways. Skadden's strategy worked, resulting in a Federal Court decision on synch rights that, if not reversed, will eventually harm defendants, my client, and others similarly situated by making synch rights violations nearly impossible to prove.

In similar fashion, Skadden's argument that without substantial similarity there can be no copyright infringement is flat wrong – and Skadden knew it was wrong. Several defendants, e.g., Time Warner, have successfully prosecuted infringers without addressing substantial similarity. Now those same defendants reverse their positions, hoping for short term gain by misleading the Court, while risking long-term harm to themselves – and to all publishers and labels – as well as to all authors of original works.

Skadden has put forth other misstatements of law as well. Concededly, some of Skadden's statements of law or their applications, individually, may not violate Rule 11. Skadden's consistent and repeated misstatements of law, however, collectively constitute a pattern of misrepresentations in Court filings amounting to a Rule 11 violation.

d. Intentional Misstatements of Fact

Several of Skadden's factual misrepresentations to the Court are described in Steele's Appeal Brief and Reply and need not be repeated here. Considering the context of, and improper motive behind the misrepresentations – some minor, some glaring - Skadden's conduct again arises to a Rule 11 violation. Skadden was engaged in an all-out effort to conceal MLBAM and otherwise "win at all costs," without regard to attorney or party obligations to the Court, to Steele, or to the truth.

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Skadden's misstatements are numerous and I continue to unearth more. The trend is clear: Skadden said whatever needed to be said to the Court and my client in order to mislead the Court, e.g., by defining and characterizing the MLB Audiovisual as a "song" (rather than a soundtrack) and conflating the MLB Audiovisual soundtrack with Bon Jovi's 4:38 "song" from Lost Highway. The fruits of Skadden's misdeeds are contained in the District Court's statements and rulings, from the hearing through its decision on Steele's Motion to Reconsider.

Skadden presented other misleading themes in this manner as well, e.g., falsely stating that the Bon Jovi song has nothing to do with baseball (directly contradicted by defendants' own public comments, several of which were published online in 2007 but later edited); asserting that there is not a "single reference" to baseball in the Bon Jovi "song" (also directly contradicted by defendants' public comments); that Steele's affiants were incredible because they were "all" his friends or acquaintances (factually incorrect and marginally relevant; identifying the MLB Audiovisual as the "TBS Promo" (despite MLBAM's claimed copyright ownership and control over its use).

Some of Skadden's misrepresentations mix law and fact, as with Skadden's surreal argument that Steele waived "musicological" elements of his claim on appeal when a major pillar of Steele's argument explicitly asserted the exact opposite; arguing that the Court should look at the MLB Audiovisual (rather than Steele's Song) "as a whole" to determine infringement, pointing to numerous irrelevant facts in support of its incorrect statement of law; listing dissimilarities between Steele's Song and the MLB Audiovisual and arguing they disprove infringement (in contradiction to established law); pointing out similarities between the MLB Audiovisual's own images and sounds, a legally meaningless exercise designed to mislead and confuse the Court; arguing that infringement cannot be proven without a mandatory "side by side" comparison of the works – the lyrics, in particular.⁹

⁹ Skadden's submissions purporting to show Steele's Song's lyrics "side by side" with the MLB Audiovisual and Bon Jovi lyrics appear to have been edited so that they do not line up on the page when literally viewed "side by side." Skadden's submission of Steele's lyrics in a separate exhibit

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e. Skadden's Misconduct Towards Steele and Counsel Considering His Case

Skadden's consistent and repeated factual and procedural misrepresentations to Steele, to attorney Kevin McCullough, and to the District Court are detailed in Steele's June 18, 2010 affidavit, Exhibit 13 to Steele's Memorandum in Support of Motion for Entry of Default as to MLBAM, attached as Exhibit 1.

Steele's earlier affidavit, filed in the District Court on September 19, 2009, showed that Steele, even as a *pro se* litigant, had begun to see through Skadden's misconduct, noting defendants have shown a "pattern of deception and contradiction in an attempt to mislead the Court, and have shown contempt for me, a Pro Se Plaintiff, and the Court in their dishonest procedural maneuvers and misrepresentations." Steele's September 19, 2009 Affidavit, appended to his June 18, 2010 Affidavit, is attached as Exhibit 1.

Three months prior to that, Steele sent Attorney Scott Brown a letter, a copy of which is attached as Exhibit 2, addressing Skadden's threatening and abusive tactics, as to both Steele and Attorney McCullough. Attorney McCullough declined to take Steele's case in part due to Skadden's repeated and false assertions that Steele had already "defaulted" on discovery requests as well as Skadden's bombardment of unreasonable demands that McCullough either file his appearance immediately (as in *today*), respond to Steele's "overdue" discovery responses, and inform Skadden "whether" he will be representing Steele.¹⁰

were blown up to huge proportions, taking up two pages, where MLB's lyrics were kept their normal size, further giving the impression that they were not similar. In any other circumstance, I would not give these seemingly trivial edits a second thought – someone made a mistake in the word processor or copy room. But here, as I have learned, Skadden has gone to great lengths and paid excruciating attention to detail to mislead the court whether through direct action – altering evidence – or through subtle suggestion using careful editorial tweaks.

¹⁰ As detailed in Steele's June 18, 2010 affidavit, Skadden misrepresented to Attorney McCullough that Steele had told Skadden he had already retained McCullough. Skadden followed this untruth

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3. Additional Matters

Please advise me immediately if Skadden, Arps has represented MLBAM at any time in this case or the matters addressed herein and, if so, the date on which that representation began, if that representation is ongoing or has been terminated and, if applicable, the date of termination.

I further request that Skadden continue the mandatory "hold" (assuming the required hold was implemented) pertaining to all potentially discoverable materials, including, but not limited to, documents and things maintained in digital form, including cached and locally stored web pages, as well as digital and analog files relating to creation of the MLB Audiovisual, given the likelihood of future proceedings upon remand or otherwise.

The compulsory hold, of course, includes retention of all documents and things, digital or otherwise, that otherwise would be destroyed pursuant to Skadden's document retention policies. While digital spoliation is difficult to detect, it is not impossible. Skadden's lack of candor to the Court and my client, moreover, provides strong grounds for questioning any claim that such files either do not exist or have been "inadvertently" destroyed or lost.

As one might imagine, Mr. Steele is extremely upset by Skadden's abuse of him and the Court and reasonably feels he was taken advantage of, deceived, and treated unfairly during the District Court proceedings. I have scoured the record, researched the law, and searched my own conscience, and I am, as of now, unable to disabuse him of that notion.

with harassing letters and calls, in the midst of which Skadden cleverly gave McCullough an "out" from Skadden's onslaught by once again "requesting" that Attorney McCullough inform them whether he was going to be representing Steele. Skadden succeeded, McCullough declined Steele's case.

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In closing, if I am mistaken on any of the facts, the record, or the law I ask that Skadden so inform me immediately in order to mitigate or eliminate the need to file a Rule 11 Motion.

Otherwise, I will assume Skadden is unable or unwilling to explain the matters addressed herein and will proceed with the Motion as planned.

Thank 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)
Amy B. Auth, Esq. (via e-mail)
David A. Bunis, Esq. (via e-mail)
Daniel J. Cloherty, Esq. (via e-mail)
Michael Mellis, Esq., MLBAM, (via e-mail: Mike.Mellis@mlb.com)

EXHIBIT 1

PLEASE NOTE THIS IS PART OF EXHIBIT 7
TO STEELE'S REPLY NOT EXHIBIT 1 THERETO

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' RULE 55(a) MOTION FOR ENTRY OF DEFAULT AS TO DEFENDANT MLB ADVANCED MEDIA, L.P FOR FAILURE TO PLEAD OR OTHERWISE DEFEND

Plaintiffs Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz ("Steele") move this Honorable Court, pursuant to Fed.R.Civ.P. 55(a), for entry of default as to MLB Advanced Media, L.P. ("MLBAM"). MLBAM was properly served on November 17, 2008, but failed to appear, plead, or otherwise defend and, accordingly, "the clerk must enter"

MLBAM's default. See Fed.R.Civ.P. 55(a).¹

FACTUAL BACKGROUND

I. Steele Sues Major League Baseball Properties, Inc. ("MLB") and MLBAM

Steele filed this lawsuit, *pro se* and proceeding *in forma pauperis*, on October 8, 2008 in the U.S. District Court in Boston against several parties, including MLBAM and Major League Baseball Properties, Inc. ("MLB"), which are two discrete corporate entities. See U.S.D.C. (MA) Docket Sheet, C.A. 08-11727, attached as Exhibit 1. See also Steele Complaint, attached as Exhibit 2.

Steele's Complaint named MLB as "Major League Baseball" and MLBAM as "MLB Productions." See Exhibit 2 at 1. Steele's Process Receipt named MLBAM as "MLB Productions/MLB.com," and was properly served at MLBAM's principle place of business. See United State's Marshals Service Process Receipt and Return, attached as Exhibit 3.

MLB, on the other hand, was *not* successfully served, but later appeared voluntarily.

¹ Although this Court's August 19, 2009 ruling and entry of Judgment allowing certain defendants' motions for summary judgment has been timely appealed to the First Circuit Court of Appeals (09-2571), this Court's August 19, 2009 ruling and Judgment did not apply to MLBAM because, as detailed below, MLBAM failed to appear, failed to move for summary judgment, and this Court's ruling and Judgment excluded MLBAM. This Court, therefore, may consider and rule on this motion. See Standard Oil of Cal. v. United States, 429 U.S. 17, 18 (1976) ("the appellate mandate relates to the record and issues then before the court," addressing Rule 60(b) motion filed during pendency of appeal); Boston Car Co. v. Acura, 971 F.2d 811, 815 (1st Cir. 1992); Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39, 41 (1st Cir. 1979) (district court directed to review Rule 60(b) motions expeditiously and either deny or issue memorandum stating it is inclined to allow motion, after which movant can seek remand from Court of Appeals so district court can vacate judgment and proceed accordingly). Here, however, there is no judgment against MLBAM to vacate and this is not (and could not be) a Rule 60(b) motion).

Specifically - and also on November 17, 2008 (likely after serving MLBAM) – the same United States Marshal, “Michelle V.,” attempted Service on MLB at their headquarters at 245 Park Avenue, 31st Floor, New York, NY 10167. See MLB Process Receipt and Return, attached as Exhibit 4. In the “Remarks” section of the Process Receipt and Return, the U.S. Marshal stated:

“11-17-08 Michelle V. supervisor of security spoke with someone in the legal dept. of Major League Baseball. Legal dept. refused to let me up to the 31st fl. to serve summons. Legal would not speak with me on the phone or give their names.” See Exhibit 4.

Nonetheless, on December 8, 2008, MLB filed Notices of Appearance (Docket entries 10 and 11), Corporate Disclosure Statement (Docket entry 13), Motion to Dismiss and Memorandum in Support (Docket entries 17 and 18, respectively), and Transmittal Declaration of Scott D. Brown in Support of MLB’s Motion to Dismiss.

Accordingly, MLB appeared voluntarily in this Court, despite actively evading service by having a security guard prevent the U.S. Marshal from serving, calling, or even obtaining a name from MLB. See Exhibit 4.

II. MLBAM, Properly Served, Fails to “Plead or Otherwise Defend”

MLBAM owns, operates, and does business as both MLB Productions and MLB.com (www.mlb.com). See, e.g., MLB.com website pages, attached as Exhibits 5-8.²

² The URL links for Exhibits 5-8 are http://mlb.mlb.com/mlb/official_info/about_mlb_com/, http://mlb.mlb.com/mlb/official_info/about_mlb_com/terms_of_use.jsp, http://mlb.mlb.com/mlb/help/contact_us.jsp, and http://mlb.mlb.com/mlb/video/mlb_productions/feature.jsp?content=overview, respectively.

MLBAM has “owned the MLB.com URL since January 2001.” See Exhibit 9, at 2 (quoting Kristen Ferguson, vice president of marketing for MLBAM). See also Exhibit 5 (“MLB.com Official Info,” directing inquires about MLB.com to MLBAM at the above address); Exhibit 7 (MLB.com “Contact Us” information giving same address); Exhibit 8 (MLB Productions’ website and “About Us” page part of MLB.com and subject to MLB.com’s “Terms of Use,” which are attached as Exhibit 6, and “© 2001-2010 MLB Advanced Media, L.P”).

MLBAM is a Delaware Corporation with its headquarters and principal place of business located at 75 Ninth Avenue, New York, NY 10011. See Exhibit 6 (“MLB.com Terms of Use Agreement” at page 2, section 2 “Notice and Procedure for Making Claims of Copyright Infringement,” listing MLBAM at the above address as “Service Provider” and “Designated Agent to Which Notification Should Be Sent”).

At 3:00 p.m. on November 17, 2008, the United States Marshals Service properly completed service of process on MLBAM at the above address. See Exhibit 3. Proof of service on MLBAM was filed with the district court on December 17, 2008 and entered into the docket on December 22, 2008. See Exhibit 3; see also Exhibit 1, docket entry #35.

MLBAM failed to plead or otherwise defend itself during the year-long pendency of the district court action. See Exhibit 1. Nor did MLBAM attempt a special appearance challenging process or service of process. Id. Accordingly, MLBAM defaulted in the district court and Steele requests that this Honorable Court order the clerk to enter the required default as to MLBAM. See Fed.R.Civ.P. 55(a) (“the clerk must enter default” given

MLBAM's failure "to plead, or otherwise defend" (emphasis supplied)).

III. This Court's August 19, 2009 Judgment did not Dismiss MLBAM

Attached as Exhibit 10 is this Court's Judgment, entered on August 19, 2009, in accordance with the Court's Memorandum and Order of the same day, granting certain defendants' motions for summary judgment ("Judgment"). Attached as Exhibit 11 is this Court's Memorandum and Order allowing certain defendants' motions for summary judgment ("Order").

Neither the Judgment nor the Order dismissed – or even addressed – MLBAM. See Exhibits 10 and 11. The Court's Order and Judgment were logical insofar as they excluded MLBAM, given that MLBAM had not appeared and was not a party to defendants' motion for summary judgment. See Defendants' Motion for Summary Judgment Dismissing the Copyright Claim, attached as Exhibit 12 (the other motion for summary judgment, docket entry 98, was filed solely on behalf of defendant Kobalt Music Publishing America, Inc.).

MLBAM is therefore not a party to Steele's appeal (which appeals only this Court's summary judgment ruling) and default must be entered in *this* Court for failing to appear. See Fed.R.Civ.P. 55(a); see also Standard Oil of Cal, 429 U.S. at 18; Boston Car Co, 971 F.2d at 815; SS Zoe Colocotroni, 601 F.2d at 41, cited above at note 1.

IV. First Circuit Precedent and Judicial Economy Warrant an Expeditious Ruling on This Motion³

Steele requests that this Court “review [this motion] expeditiously, within a few days of [its] filing,” given that “any delay in ruling could delay the pending appeal.” See SS Zoe Colocotroni 601 F.2d at 42. If this Court is “unable conscientiously to dispose of [this] motion within a few days of its filing,” this Court may “issue a brief memorandum” stating that this Court “will require a specified number of more days to complete its review and issue an order,” which Steele may present to the First Circuit to “enable [the First Circuit] to act intelligently on extension requests made in the appeal.” Id. Finally, if the party losing this motion appeals, the First Circuit “will entertain a request to consolidate that appeal with the pending appeal from final judgment where feasible.” Id.

V. Timing of This Motion

Steele, *pro se* in the district court proceedings, did not move for entry of default because he was unfamiliar with default options or proceedings and did not notice MLBAM’s failure to appear in the case. See Affidavit of Samuel Bartley Steele (“Steele Affidavit”), attached as Exhibit 13. Moreover, the undersigned, who did not represent Steele in the district court proceedings – other than appearing to file Steele’s Notice of Appeal – did not become aware of MLBAM’s default until six days ago, on June 12, 2010, while reviewing the district court docket and my client’s case file.

³ This is not an emergency motion. The undersigned is fully aware that this is being filed on a Friday afternoon, but represents to the Court that, as a solo practitioner working 12-15 hours a day for the past six days, I filed this when it was completed and not a minute later.

Confounding my review was the fact that several docket entries are inconsistent with actual filings including, for example, docket entries 92 and 93, which indicate a summary judgment motion and supporting memorandum filed on behalf of “Major League Baseball” (i.e., “MLB”) and “MLB Productions” (i.e., “MLBAM”) whereas the actual motion and memorandum papers moved only on behalf of Major League Baseball Properties, Inc., i.e., “MLB.” See Exhibit 1; Exhibit 12. Significantly, docket entry 35 incorrectly states that both MLB and MLBAM were served, when in fact only MLBAM was, though MLB later appeared voluntarily. See Exhibit 1.

More pertinent to the substance of this motion, in further reviewing the docket and file in this case, partially prompted by my June 12, 2010 discovery of MLBAM’s failure to plead or defend, it has become clear that MLBAM’s failure to appear was intentional, part of a coordinated effort among the appearing defendants (including MLB - explaining their otherwise inexplicable voluntary appearance) and MLBAM to improperly conceal and protect MLBAM from this litigation. No doubt Steele’s *pro se* status entered into the equation as well. The undersigned addressed several of defendants’ efforts to hide MLBAM in Steele’s Appellate Brief and Reply, which have been filed in the First Circuit (09-2571) (“Steele’s Appellate Papers”).⁴

For example, the undersigned, in preparing Steele’s Appellate Papers, learned that defendants’ submitted a false and altered version of the so-called “TBS Promo” to *this* Court on three separate occasions in its various motions. See Steele’s Appellate Papers (pointing

⁴ Steele’s appeal has been briefed, but not yet assigned a date for argument.

out that defendants intentionally filed an unpublished draft version of the “TBS Promo” in *his* Court that was materially different from the true “TBS Promo” at issue). Of great significance, the MLBAM Copyright Notice (“© 2007 MLB Advanced Media”) appearing at the end of the true “TBS Promo” had been deleted prior to defendants’ submission of the false TBS Promo to this Court. *Id.* Defendants’ false audiovisual ends showing the TBS logo rather than the MLBAM copyright notice. *Id.* See also Exhibit 13.

VI. Defendants’ Misrepresentations and Filings in This Court

Just as disturbing, the undersigned has uncovered in the past six days, after extensive review of both the district court record and Steele’s case file, that defendants made a number of material misrepresentations to Steele during the district court proceedings that severely hampered his ability to fairly litigate his case, unbeknownst to this Court. See Exhibit 13. Defendants also made material misrepresentations and issued unfounded threats to an attorney Steele was seeking to retain pursuant to this Court’s advice, which resulted in that attorney quickly withdrawing his consideration of Steele’s case, further hampering Steele’s efforts by forcing Steele to continue to litigate *pro se*. *Id.* Defendants’ improper tactics and intentional misrepresentations are more fully detailed in Exhibit 13, Steele’s Affidavit.

Defendants’ abusive, deceptive, and reprehensible tactics were designed to improperly screen MLBAM from this litigation, frustrate Steele’s ability to pursue his claim, and to interfere with Steele’s attempts to obtain counsel. *Id.*

WHEREFORE, plaintiffs respectfully request that this Honorable Court allow Plaintiffs' Rule 55(a) Motion for Entry of Default as to Defendant MLB Advanced Media, L.P., for Failure to Plead or Otherwise Defend.

Dated: June 18, 2010

Respectfully submitted,

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

I, Christopher A.D. Hunt, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on June 18, 2010.

Dated: June 18, 2010

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

EXHIBIT 13

PLEASE NOTE THIS IS PART OF EXHIBIT 7
TO STEELE'S REPLY NOT EXHIBIT 13 THERETO

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

AFFIDAVIT OF SAMUEL BARTLEY STEELE

I, Samuel Bartley Steele, state the following under the pains and penalties of perjury:

1. In 2004 through 2006, I repeatedly sent internet "links" to my copyrighted song, "(Man I Really) Love This Team" ("Song") and my ideas for how my song could be used as a national marketing campaign by changing the lyrics to fit with any team and town (not just Boston) to MLB.com at its "Contact Us" link, http://mlb.mlb.com/mlb/help/contact_us.jsp.
2. My purpose in contacting MLB.com was to discuss a joint business venture with Major League Baseball.
3. At no time did I submit anything to TBS.
4. I am not an attorney and prior to this case I had no litigation experience.
5. After becoming aware of Major League Baseball's 2007 audiovisual advertisement featuring a Bon Jovi soundtrack ("MLB Audiovisual") in August 2007, I immediately saw it was a derivative of my Song and attempted to contact various defendants, including, based on publicly available information put out by the defendants, those I believed the parties most responsible for copying my Song, including John Bongiovi,

TBS, TBS musical consultant, Mark Shimmel, Vector Management 's Jack Rovner (Bon Jovi's manager), the Boston Red Sox, Sony, and Universal Music Group.

6. After more than a year of attempting to work out my grievance with these defendants, as well as contacting the American Society of Composers and Publishers ("ASCAP") and being repeatedly ignored or rebuffed by defendants' attorneys, as well as ASCAP, I filed suit, *pro se*, in the U.S. District Court in Boston.
7. I filed *pro se* because I could not find an attorney willing to take my case. I was told by each of the several attorneys I approached that they either had a conflict or that they simply did not want to litigate against such wealthy and powerful defendants and Skadden Arps, on a contingent fee basis. I could not afford to pay an attorney or law firm by the hour.
8. Prior to and during the Court proceedings I was not aware that Major League Baseball Advanced Media, L.P. ("MLBAM") owned and operated MLB.com and also called itself MLB Productions, and that it was not the same thing as Major League Baseball Properties, Inc. ("MLB").
9. Nonetheless, I named and served (or tried to serve) both MLBAM (insofar as I knew MLBAM at the time, as "MLB Productions" and on the service of process papers as "MLB Productions/MLB.com") and MLB. During the litigation, I was lead to believe - through conversations with Skadden, defendants' court filings, and conversations with Skadden attorneys - that Skadden's appearance on behalf of, and defense of MLB, included both MLB and MLBAM. This is further detailed below.
10. Also as detailed below, defendants' representations to me and in the this Court lead me - and this Court, apparently - to believe that the MLB Audiovisual was essentially a TBS, Time Warner, and Bon Jovi creation and that MLBAM played only a minor role, rather than being its producer, owner, and distributor, which I discovered later.
11. I was learning legal procedure as best I could, but often would contact Christopher Clark, a Skadden associate with whom I had developed a rapport, to ask about procedural issues. For the most part, Attorney Clark readily answered my questions, though - as I later learned - many of his answers were misleading or simply incorrect.
12. In addition, the one time I informed Skadden that I might be retaining counsel, they barraged him with threatening letters, misstating facts and - I believe - misstating this Court's order, causing him to abruptly drop me as a potential client. This is explained in detail below.

13. I believe defendants and Skadden misled me (and likely this Court) and obstructed my ability to fairly litigate my case based on the following facts:

- a. MLB incorrectly stated in its court filings that I had “misidentified” MLBAM as MLB, even though they were two separate defendants, each of whom I identified and attempted to serve.
- b. Initially, this Court’s docket sheet correctly listed MLB and MLBAM (as “MLB Productions”), as did defendants’ early filings. However, Skadden changed their filings’ captions mid-way through the litigation so that it only listed MLB, rendering it inconsistent with the facts as well as the docket. When they changed their filings’ captions, they simultaneously stopped inserting their “misidentified as” language in their filings.
- c. As a *pro se* plaintiff, I trusted that Skadden would not have made such a representation to a federal court unless it was true. Therefore, I did not think to question their “misidentification” language or their changing of their filings’ captions.
- d. I did not know what “default” was or that MLBAM failed to appear in this case.
- e. Skadden’s filings called the MLB Audiovisual “the TBS Promo” for short, which this Court and I adopted in our papers. This shorthand was misleading because TBS’s role in creating the MLB Audiovisual was lesser than other defendants’, MLBAM in particular – TBS was not even allowed to air the full audiovisual.
- f. Also, MLBAM claims copyright to the MLB Audiovisual (though deleted its copyright notice from the version of the MLB Audiovisual Skadden filed in this Court) and, as stated in my appeal brief and reply – which MLB has never denied – MLBAM paid for and produced the MLB Audiovisual.
- g. Skadden submitted false evidence – three times in this Court – in the form of a DVD containing a previously unpublished draft of the MLB Audiovisual that had been edited to remove the MLBAM copyright notice in the last few seconds. I discovered this after the district court proceedings ended and the case was pending in this Court.
- h. Skadden’s unpublished and edited MLB Audiovisual ends on the TBS logo, rather than the MLBAM copyright notice, which furthered the appearance - misleadingly - that it was a TBS – rather than MLBAM - production. This issue is further addressed in my Appellate brief and Reply.

- i. On April 7, 2009, Skadden served me with interrogatories, requests for production of documents, and a deposition notice. Skadden's interrogatories and request for production asserted that my responses were due no later than May 7, 2009. Their deposition notice was for "each person" I was planning to have testify on substantial similarity, and was set for May 12, 2009.
- j. Skadden's deadline to me was - as with their summary judgment "deadline" - once again, incorrect.
- k. This Court in fact had stated twice during the March 3, 2009 hearing that it was inclined to give me "60 days" to "come up with an expert, some affidavit," that I "[hadn't] given [the court] already" to "produce to the Court" on substantial similarity (on pages 13 and 27 of the hearing's transcript).
- l. This Court's April 3, 2009 written order stated that I was allowed to "offer, by affidavit, expert analysis" of the works at issue, which "the Court will consider... in making the substantial similarity determination."
- m. This Court's April 3, 2009 written order gave me until May 31, 2009 - 58 days - to provide an expert report or affidavit.
- n. This Court's April 3, 2009 written order was silent as to depositions. My understanding was that I had to provide a written expert report or affidavit by May 31, 2009.
- o. On May 11, 2009, I informed Skadden Arps that - in accordance with the Court's well-grounded advice to continue to seek counsel - I was consulting with, but had not yet formally retained, an attorney (one of many I approached prior to and during this Court's proceedings), Kevin McCullough, about possibly taking my case.
- p. I authorized Skadden to communicate with Attorney McCullough, but made clear he was not (yet) "my attorney."
- q. On that same day, May 11, 2009, Skadden Attorney Kenneth Plevan sent Attorney McCullough an e-mail stating - incorrectly - that "[w]e have been advised by Samuel Bartley Steele... that you are his counsel." I have this e-mail and others, as well as letters from Plevan discussed below, which I can produce to this Court if required.
- r. Attorney Plevan's May 11, 2009 e-mail further asked Attorney McCullough to contact Plevan immediately, stating incorrectly that I had "defaulted on discovery

requests due last Thursday, and [that I] advised [Skadden] today that [I] will not be producing a witness for the deposition schedule (sic) for tomorrow."

- s. Plevan's e-mail continued: "[g]iven the status of the lawsuit, we request that you promptly file a notice of appearance on behalf of the plaintiffs, if you will in fact be representing them."
- t. The next day, May 12, 2009, Plevan sent Attorney McCullough a letter via e-mail and overnight mail again misrepresenting that I had told them that Attorney McCullough was "Plaintiffs' counsel" and incorrectly stating that my "responses to the request for production and the interrogatories were due on Thursday, May 7."
- u. Plevan's same May 12, 2009 letter informed Attorney McCullough: "In my email yesterday, I asked you to promptly file a notice of appearance, if you were in fact planning to be counsel for Plaintiffs herein. As of now, we have not seen any such notice of appearance."
- v. Finally, Plevan's May 12, 2009 letter stated that defendants "reserved the right" to move for summary judgment "if we do not hear from you promptly" and that they also "reserved the right" to "move to preclude any expert report Plaintiffs may seek to use in opposition to said motion."
- w. The next day, May 13, 2009, Plevan e-mailed defendants' discovery requests to Attorney McCullough, concluding "we look forward to hearing from you as to whether you will be representing Mr. Steele in this lawsuit."
- x. Six days later, on May 19, 2009, Plevan sent another letter to Attorney McCullough via e-mail and overnight mail noting that Attorney McCullough had "failed to file a notice of appearance in the lawsuit on behalf of plaintiffs."
- y. Plevan's May 19, 2009 letter further asserted – incorrectly, at least as far as I understood the plain language of this Court's discovery order - that my discovery responses were "now almost two weeks overdue," that "neither you nor Mr. Steele has offered a date on which the responses would be submitted, or asked defendants to agree to an extension."
- z. Plevan's May 19, 2009 letter stated that this Court had "specifically advised Mr. Steele that whether or not he retained an attorney, he would be 'required to abide by rules of procedure that are sometimes arcane and hard to understand, but nevertheless, you will be required to abide by them," citing "Transcript at 6."

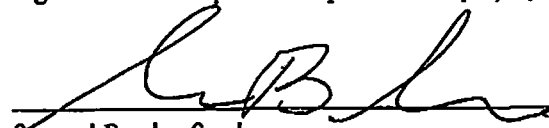
- aa. Plevan's May 19, 2009 letter to Attorney McCullough continued: "Here, we are dealing with a requirement that was and is easy to understand – responses to requests were due on May 7, 2009, and to date plaintiffs have ignored the requests."
- bb. Finally, Plevan's May 19, 2009 letter stated "please consider this defendants final request at clarification. If responses to the written discovery requests at (sic) not received by close of business [that same day], defendants will conclude that plaintiffs will not be relying on any expert analyses on the issue of substantial similarity, and will proceed accordingly."
- cc. On May 19 or 20, 2009, I was disappointed, but not surprised when Attorney McCullough informed me that he had no interest in taking the case.
- dd. Attorney McCullough's abrupt turnabout, suddenly withdrawing any consideration of representing me were, to me, clearly the result of Skadden's numerous and insistent demands and threats to him, which were, based on my understanding of this Court's order, baseless, false, and specifically designed to scare Attorney McCullough from taking my case.
- ee. I was unable to obtain counsel, despite additional efforts, for the remainder of this Court's proceedings.
- ff. In early June 2009 I had a conversation with Attorney Clark in which I asked him if he was aware that MLBAM ran the websites of many non-baseball entertainers, including Bon Jovi's, to which he replied he was not. I jokingly advised Mr. Clark that he should know the clients he's representing a little better. This conversation was part of this Court's record in an affidavit I filed on September 15, 2009 (as docket entry 109). A copy is attached.
- gg. During the same early June 2009 conversation, Attorney Clark failed to inform me that Skadden had not appeared for MLBAM or that MLBAM had not filed an appearance in the case at all.
- hh. Several days later, on June 10, 2009, Skadden suddenly - more than two weeks before the June 26, 2009 deadline - filed its motions for summary judgment on behalf of its clients, including MLB, and submitted their altered and misleading version of the MLB Audiovisual for the third time.
- ii. Surprised by this early filing, I immediately called Attorney Clark and asked him what his early filing meant for my deadline to oppose his summary judgment

motion, which I understood to be July 17, 2009 based on the Court's April 3, 2009 order. Clark told me - falsely, as I later learned - that I had two weeks from their June 10, 2009 filing to file my opposition.

- jj. In that same conversation with Attorney Clark, I informed him that, in addition to opposing their motions, I was planning on filing a summary judgment motion of my own. I asked him how long I had to file my own motion for summary judgment. He informed me – again, falsely, as I later discovered – that I “didn’t need to” file my own motion for summary judgment because they had filed theirs, and that I only needed to file my opposition. Unfortunately, I believed him.
- kk. I began scrambling to prepare an opposition under enormous pressure, both because of Skadden's early filing and because I was misled to believe that my opposition was, as a result of Skadden's early filing, now due on June 24, 2009 instead of July 17, 2009, as ordered by this Court.
- ll. I began to work on my opposition immediately, but as June 24, 2009 approached, I knew I would need more time. I contacted Attorney Clark and asked for another week to file my opposition, to which he agreed.
- mm. A week later, with my extended deadline nearly up, I asked Attorney Clark for another one-week extension, to which he agreed.
- nn. Finally, as what I believed was my twice-extended deadline approached, and on the verge of calling Attorney Clark for a third extension, I instead called district court clerk, Diep Duong, who informed me that Clark's representation to me was incorrect and that I actually had until July 17, 2009 to file my opposition.
- oo. I filed my opposition to summary judgment on July 17, 2009. At 1:37 p.m. (based on my phone records) on July 24, 2009 I received a call from Attorney Clark asking for my consent to allow defendants to file a reply brief. I consented. This conversation and resulting events are also detailed in my September 15, 2009 affidavit (as docket entry 109), copy attached.
- pp. In the same July 24, 2009 conversation with Attorney Clark, I asked for similar consent to file a sur-reply. He thanked me for my consent, but stated he did not have authority to give consent to my reciprocal request and promised to check with his clients and get back to me.

- qq. Attorney Clark never got back to me. Instead, five days later, on July 29, 2009, Skadden filed a motion for leave to file a reply, falsely claiming that I had not given consent for them to file their reply.
- rr. The next morning I called district court deputy clerk Nicewicz and left a voicemail stating that MLB "was being dishonest" in their motion for leave, and to please inform the judge that I had, in fact, consented.
- ss. My attached affidavit relates additional details about these events, including how my reliance on Attorney Clark's statements resulted in a fatal delay to the filing of my sur-reply because I was still waiting to hear from him when the Court allowed MLB's summary judgment motion on August 19, 2009, three weeks before the scheduled hearing date of September 10, 2009. I had assumed, reasonably, I believe, that I had those three weeks to finish my sur-reply and obtain MLB's consent or file a motion for leave to file my sur-reply.

Signed under the pains and penalties of perjury this 18 of June, 2010:



Samuel Bartley Steele

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**FILED
IN CLERKS OFFICE**

2009 SEP 15 P 1:21

**U.S. DISTRICT COURT
DISTRICT OF MASS.**

**SAMUEL BARTLEY STEELE,)
BART STEELE PUBLISHING)
STEELE RECORDZ,)
Plaintiffs)
v.)
)
TURNER BROADCAST SYSTEM,)
et al,)
)
Defendants.)
_____)**

Case No. 08-11727-NMG

**AFFIDAVIT OF
SAMUEL BARTLEY STEELE**

I, Samuel Bartley Steele, swear that the following statement is true to the best of my knowledge under the penalty of perjury:

1) In early July 2009, after the defense had filed their Motion for Summary Judgment, but before I had filed my Opposition to that Motion, defendants' attorney Chris Clark of Skadden, Arps called me and asked me if I was willing to agree to change the date set for hearing his clients' Motion for Summary Judgment. The Court had set that hearing for August 12, 2009. Attorney Clark wanted my agreement to move the hearing to July or possibly early September. I said that I would probably be busy on tour in September and would gladly agree to any of dates in July that they had proposed, however I was not sure about extending the hearing until September because of scheduling and the fact that I wanted the case to move forward. After that discussion, I reluctantly agreed to file a joint motion asking the Court reset the hearing, and suggesting several alternative dates in July (and some in September).

2) While I was still waiting to learn the outcome of that joint motion to reset the hearing date, I continued to work on my Opposition to defendants' Motion for Summary Judgment. I filed that Opposition on July 17, 2009, the date set by the Court in its April 3 Order. At 1:37pm on Friday, July 24, 2009, I received a friendly phone call from defense attorney Chris Clark in which I was asked for consent to file a Reply brief to my Opposition. I politely said "yes" and did give him my consent and said both sides had been very courteous up to this point, so why stop now?

3) In that same July 24 phone conversation, I politely asked Clark for consent to file a sur-reply brief. Clark thanked me for my courtesy in allowing him to file a reply. He told me that he could not give consent himself to my filing a sur-reply, but would let me know in the next week or two once he had contacted all the defendants. He has yet to call me back.

4) On July 29, 2009, five days after this phone conversation with Clark, defendants filed a Motion for Leave to File Reply claiming I did not give my consent to their filing a reply brief. This was clearly a blatant misrepresentation by defense attorneys to mislead this Court, intended to portray me as unreasonable and uncooperative in the critical weeks before the Court's judgment.

5) The next morning, at approximately 10am, July 30, 2009, I called Deputy Clerk Nicewicz and left him a voicemail saying that the defense was being dishonest (and to please tell the Judge) because I did in fact consent and I had a question as to procedure going forward.

6) Despite defendant's untrue statements in their reply, I waited to hear back from defendants about their consent to my sur-reply. Because I was waiting to hear from them, I was not sure whether I should file a sur-reply, or a motion for leave to file a sur-reply. Defendants' attorneys had been of some assistance on procedure in the past, and I believed it was best to attempt to cooperate with defendants' attorneys on procedural issues. I now see that this belief was misplaced, as those attorneys have twisted my words and actions against me.

7) I felt blindsided by the Court's August 19 ruling, which came well before the re-scheduled hearing date of September 10, 2009. When I received notice of the August 19 ruling, I was still waiting on the defenses' consent to my filing of a sur-reply, and still believing that I could eventually tell the Court about the defenses' misrepresentations at the hearing on that motion which was pushed back a month (against my wishes), to September 10.

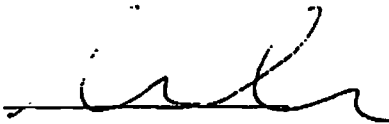
8) I cannot and do not blame this Court for its ruling. The defense, by untruthfully portraying me as an unreasonable Pro Se plaintiff, purposely misled the Court by claiming I did not extend a standard professional legal courtesy like 'consent' to file a motion (which defendants would do whether I consented or not). So I can certainly understand the Court's frustration with me. But the defendants' assertions were intentionally dishonest: I immediately gave consent to their reply, and even agreed to move the hearing date back a month, even though it was not at all convenient for me. The defense never gave reciprocal consent to my sur-reply. Instead, they hung me out to dry and abused the goodwill I had extended to them. Their underhanded scheming and disrespect for me and the Court should not go unnoticed.

9) The defense has misled the Courts in many other ways. Examples: their contradictory statements regarding access to my song, references to baseball in their works (addressed in previous motion) and their repeated attempts to distance Bon Jovi from baseball. I had a polite conversation with Clark in June in which both sides assessed the strengths and weaknesses of their case. In that June conversation, I asked Clark if he knew that MLBAM (Major League Baseball Advanced Media, the copyright owner of the MLB/TBS promo) and FSG (Fenway Sports Group, the Red Sox's non-baseball operations) run the websites of and directly profit from (as well as sell online advertising for) all 30 MLB teams, NASCAR, MLS, Madonna, U2, Bon Jovi and many others. Mr. Clark shockingly said he did not know about this relationship. This is publicly available information. In an article dated May 2007, Sports Business Journal states "MLBAM can even take on other clients...and even rock acts like Jon Bon Jovi". I jokingly advised Mr. Clark that he should know the clients he's representing a little better. Yet defendants continue to claim that Bon Jovi has nothing to do with baseball, despite their intimate business relations. Then a month after this conversation, the defendants filed their Reply, which states (at p.2) that defendants do NOT concede access to my song anymore. This clearly

contradicts statements made in the Answer filed by the Red Sox in April.

10. The defendants have demonstrated a pattern of deception and contradiction in an attempt to mislead the Court, and have shown contempt for me, a Pro Se Plaintiff, and the Court in their dishonest procedural maneuvers and misrepresentations.

Respectfully submitted,



Samuel Bartley Steele (Pro Se)

Dated 9/15/09

EXHIBIT 2

PLEASE NOTE THIS IS PART OF EXHIBIT 7
TO STEELE'S REPLY NOT EXHIBIT 2 THERETO

Dear Scott,

This letter responds to your letter dated May 19, 2009, and the many telephone calls made to me and Kevin McCullough regarding my case. Those letters and phone messages have grown increasingly threatening and insistent that I am under some obligation to comply with the deadlines imposed by your discovery requests/demands. Because I believe that Skadden, Arps is attempting to intimidate me by deliberately misconstruing Judge Gorton's April 3, 2009 Memorandum & Order ("the Order") as well as Judge Gorton's statements at the March 31 hearing, I am writing this letter to make my position clear. I am still a Pro Se plaintiff and I am consulting with several attorneys (just as Judge Gorton advised me to do) and until I decide who shall represent me, please direct all communications regarding this case directly to me.

In short, I believe that your discovery demands are premature and go beyond what is allowed by the Order. I am gathering the affidavits permitted by Judge Gorton, and we are still within the time he allowed me to do that.

The Order and Judge Gorton's statements at the hearing leading up to that order made it very clear that I was granted 60 days to obtain evidence regarding the issue of substantial similarity. The Order states that I "may offer, by affidavit, expert analysis of [my] work or the infringing work as deemed necessary and the Court will consider such analysis in making the substantial similarity determination. Any affidavit or other evidence presented to the Court must be in compliance with Fed. R. Civ. P. 56."

The relevant part of Rule 56 of the Federal Rules of Civil Procedure is very clear. My reading of this rule, in connection with the Order as well as Judge Gorton's statements at the March 31 hearing is that:

1. I have until May 31, 2009 to obtain affidavits, including expert analysis affidavits, regarding the issue of substantial similarity.
2. The Court may permit those affidavits to be supplemented or opposed by depositions, answers to interrogatories, etc. such as you have served on me. To date, the Court has not permitted that. Nevertheless, I will respond to your First Set of Interrogatories just as soon as I have compiled the information requested.

After reviewing your recent court filings, I am convinced that they are simply another attempt to intimidate and harass me because they go over issues already decided by the Order. They even appear to ask the Court to dismiss a defendant I have voluntarily released on April 1, 2009--The Bigger Picture Cinema Company.

Lastly, Mr. Plevan's May 19, 2009 letter insisting that I have "defaulted" on my obligations appears to contain a typographical error. Mr Plevan demands that I respond to your discovery requests by "Friday May 19 2009." The deadline Judge Gorton set out in the Order falls on a Sunday--May 31, 2009. I can only conclude that this is a typographical error and that Mr. Plevan meant to insist that I comply with the Sunday May 31, 2009 deadline stated in the Order, by completing my discovery by Friday May 29, 2009. I intend to comply with the Order.

Sincerely,

Bart Steele
Pro Se Plaintiff

EXHIBIT 8

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
FOUR TIMES SQUARE
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SYDNEY
TOKYO
TORONTO
VIENNA

July 1, 2010

BY EMAIL, FAX AND FEDEX

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

RE: Steele v. Turner Broadcasting Systems, Inc.,
Civil Action No. 08-11727 (D. Mass.) (NMG);
Appeal Pending, No. 09-2571 (1st Cir.)

Dear Mr. Hunt:

I am writing to respond to your letter of June 28, 2010, addressed to my colleague, Clifford M. Sloan, but copied to me, among others (the "Letter"). In the Letter, you raise a number of very serious allegations against me and my colleagues, against Skadden, Arps, Slate, Meagher & Flom LLP, and against the defendants in this proceeding.

We have carefully reviewed your allegations and believe each is groundless, whether viewed individually or collectively. Moreover, we believe that neither you (Mr. Hunt) nor your client (Mr. Steele) has a good faith basis for believing in the veracity of the allegations made in the Letter, but rather are asserting them either (a) under the mistaken apprehension that somehow the filing of meritless

Christopher A.D. Hunt, Esq.
July 1, 2010
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motions in the District Court will have an impact on your clients' appeal pending in the First Circuit, or (b) for the purpose of harassment. In this connection, please be advised that if you follow through with your stated intent to file a Rule 11 motion on the grounds articulated in the Letter, each of the persons and entities against which any such motion is directed will seek sanctions against you and your client.¹

In response to your invitation to point out mistakes contained in the Letter, because so many of the assertions in the Letter are factually and legally groundless, we believe that no purpose would be served by providing a point-by-point refutation. We have, however, addressed a few of your more serious misstatements below.

1. **The Alleged "Concealing" of MLB Advanced Media, L.P.**

The Letter's allegations that Skadden sought to "improperly conceal MLBAM's role in creating the MLB Audiovisual and, if possible, to conceal MLBAM's very existence from Steele and the District Court" are unsupported (and, indeed, unsupportable). In the District Court, you have already filed a factually and legally baseless motion seeking a default judgment against non-party MLB Advanced Media, L.P. Rather than repeating herein the multiple, independently sufficient arguments demonstrating that that motion is without any merit, please refer

¹ Rule 11(c)(2) states that "[i]f warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion." In this connection, we invite your attention to the fact that many of the matters complained of in the Letter (e.g., Steele's "requests" and "questions" and alleged

Christopher A.D. Hunt, Esq.
July 1, 2010
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to the opposition papers filed yesterday by defendant Major League Baseball Properties, Inc.

In addition, we are at a loss to understand how you could believe that having had another defendant in this lawsuit, with approximately 20 defendants already, could have impacted the outcome of the lawsuit in the District Court. Two of plaintiffs' claims (for alleged violations of the Lanham Act and M.G.L. ch. 93A) were dismissed as legally insufficient, (i.e. on the face of Mr. Steele's pleadings) and the dismissal of the third (copyright infringement) on summary judgment was based on a comparison of publicly available works (Mr. Steele's copyrighted work and the Turner Promo), without regard to the identify of any or all defendants. Thus, the identity and number of the multiple defendants was of no consequence to the outcome of the District Court proceedings (and remains of no consequence today). The decisions were made as a matter of law.

2. The So-Called "Altered" Video

In the Letter, you allege that a Rule 11 violation has been committed on the basis of your assertion that the Turner Promo was altered to remove a copyright notice. (Letter at 8.) You have provided no evidence of any such alteration, nor do you or plaintiffs have a good faith basis for asserting that any document, including a version of the Turner Promo, was "false" or otherwise "altered" by this firm or by any defendant.

misconduct towards "counsel") are not properly the subject of Rule 11, which concerns "pleadings, written motions, and other paper" presented to the Court.

Christopher A.D. Hunt, Esq.
July 1, 2010
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Moreover, as with your "concealment" claim, we do not understand how the addition of a copyright notice at the end of the Turner Promo could have impacted the outcome of the lawsuit in the District Court in any way. The presence or absence of such a notice had (and has) nothing whatsoever to do with the adjudication of plaintiffs' copyright infringement claims, as it has nothing to do with an analysis of substantial similarity as a legal matter.

3. Steele's "Requests" and "Questions"

You make reference to Steele having made a "request" of, or posed a "question" to, Skadden attorneys on various issues. (E.g. Letter at 6, 9.) Counsel for defendants were under no obligation to respond to such requests or questions raised by Mr. Steele. As Judge Gorton himself admonished Mr. Steele at the hearing on defendants' motion to dismiss, "you're going to be required to abide by rules of procedure that are sometimes arcane and hard to understand, but, nevertheless, you will be required to abide by them." March 31, 2009 Transcript at 6. See also Eagle Eye Fishing Corp. v. U.S. Dep't of Commerce, 20 F.3d 503, 506 (1st Cir. 1994) (proceeding pro se "is not a license not to comply with relevant rules of procedural and substantive law") (internal citations omitted).

4. Alleged Misstatement of Legal Principles

Skadden did not "knowingly misrepresent copyright law." Moreover, Mr. Steele had ample opportunity in his many pages of legal briefs in the District Court to state the law correctly and you had ample opportunity to identify and correct the alleged misstatements in your two briefs in the First Circuit. This

Christopher A.D. Hunt, Esq.
July 1, 2010
Page 5

allegation is certainly not a basis for a Rule 11 motion. Moreover, your argument that Skadden acted improperly by having "expressly adopted the District Court's . . . application of" the synchronization "issue" is certainly a novel (if baseless) argument. Siding on appeal with the District Court's articulation of a legal issue is certainly not sanctionable conduct.

5. Alleged Misconduct Towards "Counsel"

You accuse Skadden of "threatening and abusive tactics" directed at "Attorney McCullough." (Letter at 12.) As neither you nor Mr. Steele apparently dispute, Mr. Steele on May 11, 2009 referred us to Kevin McCullough, an attorney in Salem, Massachusetts. Given the ethical requirements, we immediately ceased communicating with Mr. Steele and contacted Mr. McCullough. The first "abusive" tactic was allegedly that I insisted that Mr. McCullough decide whether he was, in fact, Mr. Steele's attorney, and if the answer was yes, that he file a notice of appearance. (He never did.) That is not "abuse," but rather a perfectly proper request that an attorney timely comply with applicable procedure to move the matter along expeditiously within the schedule set by the District Court.

Next, you claim it was allegedly "abusive" that I advised Mr. McCullough that Mr. Steele was in default on his discovery responses. That was not "abusive," it was entirely correct. A Rule 34 Request, a Rule 33 Request, and a Notice of Deposition had been served on Mr. Steele on April 6, 2009. As you know, the Federal Rules of Civil Procedure require that the Rule 33 and Rule 34 Requests be responded to within 30 days of service, i.e. by May 6, 2009.

Christopher A.D. Hunt, Esq.
July 1, 2010
Page 6

Mr. Steele apparently incorrectly concluded that Judge Gorton had extended those deadlines, and given Mr. Steele's 60 days in which to respond, but no such extension was ever granted. Rather, at the hearing on March 31, 2009, the Court had simply opined that there should be a 60-day period in which all discovery had to be concluded. See March 31, 2009 Transcript at 13. That Mr. Steele may have misunderstood the Court's comments is not a surprise, but that certainly does not support an allegation of "abusive" tactics because defendants asserted a position based on advising an attorney of the time-periods set forth in the Federal Rules of Civil Procedure. Mr. McCullough, moreover, being an attorney, certainly did not have to accept our interpretation of the status of discovery, but was free to make his own assessment.

* * *

In sum, as noted, we see no merit to any issue raised in your letter of June 28, 2010, and will seek the imposition of sanctions if a Rule 11 motion is made.

Sincerely,



Kenneth A. Plevan

cc: Clifford M. Sloan, Esq.
Scott D. Brown, Esq.
Christopher G. Clark, Esq.
Amy B. Auth, Esq.
David A. Buins, Esq.
Daniel J. Cloherty, Esq.
Michael Mellis, Esq.

EXHIBIT 9

THE HUNT LAW FIRM LLC

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

VIA E- MAIL AND FACSIMILE

July 3, 2010

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

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

Re: **Notice of Intent to File Rule 11 Motion for Sanctions**
Steele v. Turner Broadcasting System, Inc., et al., No: 08-11727

Dear Attorneys Plevan and Sloan:

This will reply to your letter of July 1, 2010. I have reviewed your letter carefully and discussed it with my client. I am, indeed, making "very serious allegations," which makes your inability or unwillingness to meaningfully explain your misconduct all the more inexplicable.¹

Your conclusory assertion that my client and I have no "good faith basis for believing in the veracity" of the very specific and detailed contentions in my June 28, 2010 letter and Steele Affidavits attached thereto ("Letter"), rings hollow without reference to contrary facts. Further, imputing improper motive or bad faith and threatening a groundless retaliatory Rule 11 motion merely underscores the points made in my Letter. The idea that my client - *pro se* - or I, a solo practitioner, by

¹ I address your specific purported "responses" in detail, below.

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seeking clarification of apparent misconduct, is "harassing" Skadden Arps is not credible.

I am under no obligation to confer with you informally prior to serving a Rule 11 motion. I sent the Letter in good faith and out of an abundance of caution in order to make certain that my understanding of your conduct was well-founded and to afford you ample opportunity to show otherwise.

Your claim that there are "so many" mistakes that "no purpose would be served by providing a point-by-point refutation" has it exactly backwards. I went to great lengths to provide you with the necessary detail and supporting facts so that you could make intelligent and equally detailed responses. You cannot, however, simply brush-off inconvenient facts. A less-detailed Letter would likely have provoked a complaint that the lack of specifics makes it impossible for you to meaningfully respond.

Your attempt to address "a few of" the Letter's purported "more serious misstatements" prompts the question: since you believe I have made more than "a few" such "serious misstatements," what possible purpose is served by not addressing all of them, particularly where they involve "very serious allegations" against you and your colleagues?

Once again, I ask that you provide me with any additional information - supported by the record or other factual evidence - that meaningfully addresses the strong evidence of misconduct presented in my Letter.

As to the few points you do address, I respond as follows:

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1. Concealing MLBAM

Here, other than your conclusory assertion that my allegations are "unsupportable," you refer me to your Opposition to Steele's Motion for Default ("Opposition"). The Opposition, however, provides no facts disputing proper service on MLBAM or their failure to appear. The Opposition also does not address numerous other facts relating to MLBAM's role (or non-role) in this case.

Further, as you know from our appeal papers - and as also detailed in my Letter - our allegations as to MLBAM have nothing to do with "having had another defendant in the lawsuit," or the "identity and number of the multiple defendants." Your response is a non sequitur. If you are at a "loss to understand" our allegations as to MLBAM, I am equally at a loss as to how to make them any clearer.

2. The Altered Audiovisual

The undisputed evidence that the MLB Audiovisual was altered is explained in great detail in our appellate papers, your (once again) conclusory denial notwithstanding. Your supposed inability to "understand" how deletion of the copyright notice of an audiovisual work, where that work is at issue in a copyright case, is not credible.

First, I again refer you to my appeal papers, Letter, and the factual record to help you understand how deleting the copyright notice was part of a larger scheme to conceal MLBAM.

Second, as also explained in my appeal papers and letter, it was not just the MLBAM copyright notice that was deleted, but the concurrent section of the soundtrack. It is – or should be – self-evident that deletion of the “end” of the true

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MLB Audiovisual bears directly on Steele's claim of infringement by that very same work, including on the issue of substantial similarity.²

Third, as you undoubtedly know, alteration of material evidence, regardless of its affect on the proceedings, is almost always improper and very often sanctionable misconduct.³

3. Steele's Requests

You resort to a strictly procedural defense, given the increasingly clear (and damaging) implications of acknowledging the underlying substantive reality. Specifically, your failure to acknowledge – much less provide – the “FINAL 1” draft of the MLB Audiovisual upon Steele’s request strongly suggests (1) that the “FINAL 1” and/or other earlier drafts not only exist, but undermine your defense, and (2) that the “FINAL 2” version you submitted to both the District Court and Court of Appeals was altered to conceal MLBAM by removing “© 2009 MLBAM” notice and to attempt to make it appear dissimilar to both the true MLB Audiovisual and Steele’s Song. If true – and I have seen no evidence to the contrary – this was clearly disingenuous, to put it mildly, and intended to mislead the Court.

² We agree that, in the true MLB Audiovisual, the MLBAM copyright notice appears at the "end" of the audiovisual and not "after" it, as you previously asserted in your appellee brief.

³ Interestingly, you argue that we have no "good faith basis" for claiming that the MLB audiovisual was altered by "[your] firm or by any defendant." I don't recall specifically claiming that Skadden Arps did the altering. In addition, since you have taken the position that MLBAM is not a "defendant" and have not responded to my query as to whether Skadden Arps represents MLBAM, one might reasonably infer that MLBAM – as neither a “defendant” or Skadden, Arps - was responsible for altering the MLB audiovisual, which, of course, is consistent with our concealment theory.

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Further, your shift in attitude when litigating against the *pro se* Steele in District Court, from relative (and informal) cooperation to abrupt defensiveness when faced with this particular request for “FINAL 1” indicates Steele had noticed something you preferred not be noticed, especially by the Court. That you avoided Steele’s very clear and specific request for “FINAL 1” and continue, to this day, to deflect the alteration and prior draft issues with curt references to the rules and Judge Gorton’s admonishment, only serves to highlight the veracity of Steele’s theories relating to alteration of the MLB Audiovisual and concealment of MLBAM.

Nonetheless, I repeat Steele’s request here and now, informally, for the “FINAL 1” version of the MLB Audiovisual. Given that informal disclosure always serves the salutary purposes of clarifying the issues, avoiding unnecessary litigation, or otherwise expediting the litigation, I also request any other evidence that you believe disproves our claims or theories. For example, you might provide a sworn affidavit of Brett Langefels or even allow me to informally question him, off the record (with his counsel present, of course).⁴

4. Misstatements of Law

Incredibly, Skadden, Arps blames the *pro se* Steele for failing to correct its own misstatements of law. Nonetheless, I have, as you suggest, addressed your legal misrepresentations in my appeals papers, which will soon be addressed by the First Circuit.

Otherwise, you fail to address any specifics other than a small part of my section on synchronization rights, but nonetheless miss the point: the District Court’s incorrect application of synch rights law resulted from your efforts to intentionally complicate an otherwise very simple legal issue.

⁴ Of course, you could have offered such evidence months ago.

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5. Other Misconduct

Your letter ignores the vast majority of instances of misconduct, focusing instead on selected communications you had with Attorney McCullough, which, examined in a vacuum and framed as you have, attempt to appear reasonable.

Facts do not, however, exist in vacuums, nor do interpersonal communications. Steele's Affidavits tell a sordid – and undisputed – tale of misrepresentations and improper tactics. Your inability to explain your misconduct with any substance does not present a very convincing defense of your actions – e.g., your repeated misrepresentations of the summary judgment deadline to Steele, telling Attorney McCullough, falsely, that Steele had retained him (which Steele explicitly had informed you was not the case), and blatantly misrepresenting to the Court that Steele had not given consent for you to file a reply in connection with your summary judgment motion.⁵

In closing, I further repeat my request that you advise me whether your firm has represented MLBAM at any time during the pendency of this case. I will also assume that you have been, and will continue to, comply with all rules pertaining to the preservation of evidence, including digital evidence.

⁵ That your aggressive behavior towards Steele eased somewhat following his May 22, 2009 letter to you (which specifically addressed your misconduct and to which you did not reply) implies at least some knowledge on your part of the overall inappropriateness of your tactics.

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I look forward to any further responses you may have. In the meantime, I have decided to hold my Rule 11 motion in abeyance. Failing receipt of any persuasive – and fact-based – responses from you, however, I maintain the right to serve the Motion at any time.

Very truly yours,



Christopher A.D. Hunt

cc: Scott Brown, Esq. (via e-mail only)
Matthew J. Matule, Esq. (via e-mail only)
Christopher G. Clark, Esq. (via e-mail only)
Amy B. Auth, Esq. (via e-mail only)
David A. Bunis, Esq. (via e-mail only)
Daniel J. Cloherty, Esq. (via e-mail only)
Michael Mellis, Esq., MLBAM, (via e-mail only)

EXHIBIT 10

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

----- X
 SAMUEL BARTLEY STEELE :
 and BART STEELE PUBLISHING, :
 :
 Plaintiffs, : Civil Action
 v. : No. 08-11727-NMG

TURNER BROADCASTING SYSTEM, INC., :
 TIME WARNER CORPORATION, :
 JON BONGIOVI, RICHARD SAMBORA, : **ORAL ARGUMENT REQUESTED**
 WILLIAM FALCONE, THE AMERICAN :
 SOCIETY OF COMPOSERS, AUTHORS :
 AND PUBLISHERS, FOX TELEVISION :
 NETWORKS, MAJOR LEAGUE :
 BASEBALL/MLB PRODUCTIONS, :
 A&E/AETV, BON JOVI, AEG LIVE, :
 MARK SHIMMEL MUSIC, VECTOR :
 MANAGEMENT, ISLAND :
 RECORDS/ISLAND DEF JAM RECORDS, :
 AGGRESSIVE MUSIC/SONY ATV TUNES, :
 BON JOVI PUBLISHING, UNIVERSAL :
 MUSIC PUBLISHING GROUP, UNIVERSAL :
 POLYGRAM, PRETTY BLUE SONGS and :
 THE BIGGER PICTURE CINEMA CO., :
 Defendants. :
 ----- X

THE MOVING DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants (i) Time Warner Inc. (misidentified in the Complaint as "Time Warner Corporation"), (ii) John Bongiovi (misidentified in the Complaint as "Jon Bongiovi"), (iii) Richard Sambora, (iv) William Falcone, (v) Major League Baseball Properties, Inc. (misidentified in the Complaint as "Major League Baseball/MLB Productions"), (vi) A&E Television Networks (misidentified in the Complaint as "A&E/AETV"), (vii) Bon Jovi (which is a United States Federal trademark, not a legal entity), (viii) AEG Live LLC (misidentified in the Complaint as "AEG Live"), (ix) Vector

2 LLC (misidentified in the Complaint as "Vector Management"), (x) Aggressive Music (a d/b/a of Defendant Richard Sambora), (xi) Bon Jovi Publishing (a d/b/a of Defendant John Bongiovi), and (xii) Pretty Blue Songs (a d/b/a of Defendant William Falcone) (collectively the "Moving Defendants") hereby move for an order dismissing the Complaint with prejudice.

The grounds for this motion are set forth in the accompanying memorandum of law.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(D), the Moving Defendants respectfully request oral argument on this motion.

LOCAL RULE 7.1 CERTIFICATION

I, Scott D. Brown, hereby certify that on December 8, 2008 I conferred with the Plaintiff in a good faith effort to resolve or narrow the issues herein but could not obtain his agreement to the specific relief requested in this motion.

Dated: December 8, 2008

/s/ Scott D. Brown
Scott D. Brown

Dated: December 8, 2008
Boston, Massachusetts

Respectfully submitted,

Of Counsel:

Kenneth A. Plevan
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

/s/ Matthew J. Matule
Matthew J. Matule (BBO #632075)
Scott D. Brown (BBO #662965)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Beacon Street
Boston, Massachusetts 02108
(617) 573-4800
mmatule@skadden.com

Clifford M. Sloan
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Counsel for Defendants
Time Warner Inc., John Bongiovi, Richard
Sambora, William Falcone, Major League
Baseball Properties, Inc., A&E Television
Networks, Bon Jovi, AEG Live LLC, Vector 2
LLC, Aggressive Music, Bon Jovi Publishing,
and Pretty Blue Songs

CERTIFICATE OF SERVICE

I, Matthew J. Matule, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on December 8, 2008.

Dated: December 8, 2008

/s/ Matthew J. Matule
Matthew J. Matule

EXHIBIT 11

D



ASCAP

Robert Cheatham
Repertory Services
Repertory Department
rchatham@ascap.com

March 25, 2008

John F. Bongiovi
% Gudvi, Sussman & Oppenheim
1222 16th Ave. South
Third Floor
Nashville, TN 37212

Sony/ATV Tunes LLC
c/o Aggressive Music
Attn: Amy Cranford
8 Music Square West
Nashville, TN 37203

Richard S. Sambora
% Gelfand, Rennert & Feldman
360 Hamilton Ave.
Ste 100
White Plains, NY 10601

Email: garrett.nakasuji@umusic.com, bartsteele@comcast.net

RE: "I Love This Town" (Title Code: 392590937) Entitled Parties:

Samuel Bartley Steele, John Bongiovi, Richard Sambora, Universal Polygram, Sony/ATV Tunes, Aggressive Music and Bart Steele Publishing

Dear Members:

ASCAP has received multiple claims for the composition referenced above. These claims, when compared, hold discrepant information. For easy reference, the detail of each claim is attached.

Please submit any substantiating documentation supporting your claim. It will expedite the process if any correspondence regarding this work is sent to my attention. If at the end of thirty (30) days no correspondence has been received, ASCAP will continue to reflect the information currently listed on our records as noted in the column that includes ASCAP Title Code 392590937.

Contact me if you have any questions.

Kind regards,

Robert Cheatham

Enclosure

EF

Bart Steele
Bart Steele Publishing
80 Park Street
Chelsea, Massachusetts 02150
www.myspace.com/chelseacitycouncil
Telephone: 508-737-5235
April 20, 2008

FILED
RECEIVED
2008 OCT -8 P 1:07
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIA U.S. Mail and Email: rcheatham@ascap.com

Robert Cheatham
ASCAP Repertory Services
Repertory Department
One Lincoln Plaza
New York, New York 10023

Re: "I Love This Town"

Dear Mr. Cheatham,

This letter responds to your letter dated March 25, 2008. In that letter, you request that I submit any substantiating documentation supporting my claim regarding "I Love This Town." As you know, the essence of my claim is that the Bon Jovi song is an unauthorized derivative version of my original song, "Man I Really Love This Team/Town," which I wrote in 2004. As you also know, I have been submitting information and documentation to ASCAP about this matter for several months. Therefore, I simply refer you to our previous correspondence and highlight the following information and documentation previously submitted:

1. MP3 file/audio of my original 2004 song and lyrics
2. My revised 2006 lyrics
3. Link to the MLB promo video, with the Bon Jovi music soundtrack
4. MLB promo video, with my song substituted for the Bon Jovi soundtrack
5. Lyrics to the Bon Jovi derivative version promo ad (excluding the one verse that they probably did write that is only on the studio album version)
- 6.

(I have included all five of these again on a cd-r for your convenience)

If you need any further information, please let me know. Thank you for your continuing attention to this matter.

Sincerely,

Bart Steele

handed to ASCAP rep Pat Hen
Meitzler-John April 10, 2008

Dear Bon Jovi,

at ASCAP Expo in LA

2008 OCT -8 P 1:05

This is my final attempt to contact you re: "I Love This Town".

TBS and/or MLB simply doubled my chorus and inserted their ad messages in between them; I have tried to contact you through Jack Rovner & Mark Shimmel, but this has proved unsuccessful.

This was my baseball song originally about the Red Sox!!! (as many people in Boston have already figured out).

IF you want to talk this out artist to artist, my cell # is (508)-737-5

Sincerely, Bart Steele



H

Bart Steele Publishing
80 Park St.
Chelsea, Ma.
02150

2008 OCT -8 P 1:07

September 29, 2008

Louise Sams
Executive Vice President and General Counsel
TBS (Turner Broadcasting Systems), Inc.
One CNN Center
Atlanta, Georgia 30303

Re: CEASE AND DESIST DEMAND RE: "I LOVE THIS TOWN" BASEBALL PROMO

Dear Ms. Sims,

As I'm sure you already know, I am the author of the work entitled "Man I Really Love This Team" and my derivative work "Man I Really Love This Town." Copyrighted in June 2006, I also registered the song with ASCAP under both titles as Writer and Publisher. Bon Jovi's advertisement for TBS/MLB, "I Love This Town" is clearly infringing my copyright.

I can prove that TBS had access to this song through MLB. In a phone conversation with Mark Shimmel (musical consultant for TBS), I demanded to know how Bon Jovi got a copy or version of my song. Mr. Shimmel told me, "Talk to Turner!"

As you also probably know, I brought my musicology and 'temp-track' evidence to ASCAP in January 2008. After seeing this evidence, they sent out a discrepancy letter to the 3 people listed as songwriters in their records --Jon Bon Jovi, Richie Sambora, and William Falcone--in March. ASCAP also told me that I'd be "pretty depressed to know how much this type of thing happens (in the music/advertising business)". In response to this problem, ASCAP launched their "ASCAP's Bill Of Rights" this spring in an effort to prevent this practice and any further copyright infringement of songwriters. Last week, they also brought the Songwriter's Bill of Rights to Washington D.C. to bring attention to this matter to Congress itself. I have had correspondence with Congressman Bill Delahunt (D.-Mass.) about this (his daughter is a very good friend and classmate from high school).

TBS has clearly been involved in the production, performance, recording, publishing and/or distribution of an unauthorized use of my copyrighted work. As you neither asked for nor received my permission for synchronization rights, to make derivative works, or any other use of my copyrighted work, you have infringed my rights under 17 U.S.C. Section 101 et seq. Accordingly, you could be liable for statutory damages as set forth in section 504(c)(2) therein, as well as attorney's fees. I demand that you immediately cease the use and distribution of the "I Love This Town" baseball promo and all other infringing works derived from my song, and all copies, including electronic copies, and that you deliver to me all unused, undistributed copies of

the same, or destroy such copies immediately, and that you desist from this or any other infringement of my rights in the future. If I have not received an affirmative response from you within 48 hours of this letter, I shall take further action against you.

TBS's widespread use of the infringing baseball promo makes it liable to me for enormous damages. If Bon Jovi is an innocent infringer, the minimum infringement of \$200 per cd is close to \$1 Billion, as they have sold nearly 4 million cd's to date. The only reason I mention this to you is because ASCAP members told me they believed Bon Jovi has an indemnification letter from you. If, however, the infringement is wilful, the penalty is \$100,000 per cd sold. This is almost \$400 Billion. I believe the intent will be very easy to prove. In the press, TBS refers to this advertisement as "adding to our property," and states that Bon Jovi was "delivering our message" about TBS being the new home of the playoffs.

You should also be aware that TBS may be liable for criminal penalties under copyright law. I have already let both AMP and the FBI know about this case.

I am currently in touch with many members of the local, national and international media who have expressed interest in exposing this epidemic of 'temp tracking.' If I do not receive a positive response from you within 48 hours, I will cooperate with the media requests to interview me, and pursue further action against you.

Sincerely,

Bart Steele
Bart Steele Publishing
bartsteele@comcast.net
508-737-5235

EXHIBIT 12

Pursuant to Federal Rules of Civil Procedure 26(f) and Local Rule 16.1(D), I, the Pro Se plaintiff, am required to look at the evidence of both sides and cost of discovery and subsequent trial and I am required to make a settlement offer to all defendants in this case. As ADR or a settlement will most likely be rejected by the defendants, I look forward to a jury trial as soon as Judge Gorton would allow and will be seeking actual damages and profits. I believe that I can easily prove that my song was used in the development of the MLB/TBS audio visual as well as the subsequent derivative version released on the Bon Jovi CD *Lost Highway*, released before the MLB/TBS audio visual ad for the obvious deceptive reasons mentioned in my complaint. As I have been very reasonable from the start, all I am asking for is public acknowledgment, credit and an apology from the defendants as well as a percentage of royalties for 'the work' entitled "I Love This Town", either the original MLB/TBS audio visual and/or the derivative CD version. As this doesn't seem like an option at this point, here is another proposal:

I am willing to negotiate settlements with any of the parties individually, or a global settlement with all defendants. If a global settlement is to be reached with the conditions listed below, I would require a payment of \$3.3 million dollars. In exchange, I would agree to the following:

A) I would permanently release all of the defendants in this case, as well as any possible infringers not yet included in this case (whether they are wilful or innocent). I would also instruct ASCAP to release my claim as well as "unfreeze" royalties for 'the work'.

B) I would relinquish my past/present/future copyright ownership, royalties and payments made for the creation, exploitation and public performances of the many MLB/TBS 'owned' audio visuals as well as the Bon Jovi *Lost Highway* CD version.

Based upon synch/master/mechanical/public performance/statutory payments owed to me for all the separate infringements of my work including tour/CD/DVD/digital revenue/advertising revenue etc., and past/present/future publishing and copyright control, this amount is more than reasonable. Just to put it in perspective, synchronization fees alone for the use of popular songs in large commercial ad campaigns fetch a minimum \$500,000 per year and up to \$3 million depending on the song. Other obvious factors noted in pricing a song are the length and size of the ad campaign.

C) I would also be obligated under this agreement to refrain from accepting movie and/or book deals offered to me and/or speaking to the media about this case. I am willing to negotiate accepting less than the stated amount as long as it includes any of the following:

- 1) % of past/present/future royalties
- 2) % of copyright/publisher ownership of the MLB audiovisual and/or Bon Jovi CD version
- 3) % of advertising/cable subscription profits due to promo (decided by a 3rd party arbitrator)
- 4) % of MLB's profits nationally & internationally from use of the promo advertisement (decided by a 3rd party arbitrator)
- 5) any song writing/co-writing/producing/publishing/record deal
- 6) public acknowledgment and/or apology
- 7) donation to Chelsea Green Space & a Bon Jovi appearance at our summer concert fundraiser

Sincerely,

Samuel Bartley Steele

Date: March 17, 2009

EXHIBIT 13



UNITED STATES COURTS FOR THE FIRST CIRCUIT
OFFICE OF THE SETTLEMENT COUNSEL
JOHN JOSEPH MOAKLEY UNITED STATES COURTHOUSE
1 COURTHOUSE WAY - SUITE 3440
BOSTON, MA 02210
MAIN 617-748-9339 FAX 617-748-4393

HON. PATRICK J. KING
SETTLEMENT COUNSEL

JANE WALLACE
EXECUTIVE ASSISTANT

December 1, 2009

By Email Only

To: Christopher A.D. Hunt, Esq.	cadhunt@earthlink.net
Scott D. Brown, Esq.	scott.brown@skadden.com
Christopher G. Clark, Esq.	christopher.clark@skadden.com
Matthew J. Matule, Esq.	mmatule@skadden.com
Kenneth A. Plevan, Esq.	kplevan@skadden.com
Clifford M. Sloan, Esq.	cliff.sloan@skadden.com
Amy B. Auth, Esq.	aauth@dwycollora.com
David A. Bunis, Esq.	dbunis@dwycollora.com
Daniel J. Cloherty, Esq.	dcloherty@dwycollora.com

Re: Appeal No. 09-2571 Steele vs. Turner Broadcasting

NOTICE OF MANDATORY PRE-ARGUMENT SETTLEMENT CONFERENCE

A Civil Appeals Management Program (CAMP) Pre-Argument Settlement Conference, pursuant to the provisions of Rule 33 of the Local Rules of the Court of Appeals, has been scheduled as follows:

DATE: Thursday, January 14, 2010 at 2:00 p.m.
LOCATION: John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 3440
Boston, Massachusetts 02210
PHONE: (617) 748-9339 **FAX:** (617) 748-4393

In advance of the conference and by Wednesday, December 30, 2009, please provide the following materials (materials may be transmitted electronically to Honorable_Patrick_King@ca1.uscourts.gov):

If the appeal is from a dispositive motion, e.g. summary judgment or motion to dismiss, please provide the (1) District Court Memorandum and Order; and (2) the briefs of each party in support of or opposing the motion.

If the appeal is from a judge or jury trial, please provide the (1) Final Order of the District Court; (2) the Jury Verdict; and (2) any relevant briefs.

THIS NOTICE DOES NOT AFFECT ANY APPROACHING OR OTHERWISE SCHEDULED DEADLINES. ANY SUCH DEADLINES CAN BE MODIFIED ONLY BY TIMELY MOTION FILED WITH THE CLERK AND GRANTED BY THE COURT.

NOTICE of CAMP Pre-Argument Settlement Conference
Page 2

Counsel are expected to seek, and to accommodate opposing parties who seek, an extension of time with respect to any approaching deadlines for filing briefs or similar events until after the Settlement Conference has taken place.

This is a MANDATORY conference and will be conducted by the Court's Settlement Counsel. An attempt has been made to schedule the Settlement Conference prior to the investment of significant time and expense by any party in prosecuting or responding to the appeal, such as the purchase of trial transcript or preparation of briefs.

If the date or time of the Settlement Conference creates scheduling conflicts for any counsel or party, please discuss with all other counsel and present at least three alternative dates to me as soon as possible. Please take into consideration that Justice King's schedule is Tuesday, Wednesday, and Thursday.

The purpose of the Settlement Conference and intent of the Settlement Counsel is to facilitate the resolution of the case on terms acceptable to all parties. In order to accomplish that result, the following commitments are expected of counsel and the parties.

1. Unless attendance by a party or party representative is **excused with the express, prior approval** of the Settlement Counsel, all persons necessary to make a decision to resolve this matter shall be personally present at the conference without limitation on their authority to negotiate and commit to terms that, in their discretion, may be acceptable.¹
2. To clarify the level of authority that MUST be present at the Settlement Conference, in addition to the attorneys appearing on behalf of the parties, the appellant shall be represented by an individual with the authority to dismiss the claim for no consideration whatsoever. Similarly, the appellee shall be represented by an individual with the authority to pay or otherwise satisfy the claim (or the claimant's final settlement demand) in full. The same level of authority must be present with respect to any counterclaims or cross-claims that have been asserted.
3. All parties and counsel shall participate in the Settlement Conference process in good faith and with the intention to attempt to settle on a basis all parties can live with.

¹Any insurance company, either as a party or non-party, which has not offered policy limits shall be present through a representative with authority and discretion to settle up to policy limits. If the insured party has any exposure outside of policy limits or has any control or influence on the amount paid within policy limits, then both the insured party and the insurance representative must attend.

Where a party is a governmental unit that must approve any settlement in a subsequent deliberative session, then a member of the deliberative body and/or the governmental unit's executive director, or a person expressly designated by him, shall attend the Settlement Conference.

NOTICE of CAMP Pre-Argument Settlement Conference

Page 3

4. All parties and their attorneys shall attend the Settlement Conference, in its entirety, until a settlement is reached, or a recess or an impasse is declared by the Settlement Counsel. The conference may last as long as three hours, and longer if progress toward resolution continues to be made.
5. All parties who participate in the Settlement Conference and/or discussions, must keep confidential all information and communications.

Counsel are requested to review the names of the direct recipients of this Notice, which are listed at the end of the Notice. If there are other parties involved in this appeal whose counsel are not listed, then it is the responsibility of any party who has filed a Notice of Appeal (or Notice of Cross-Appeal) to provide a copy of this Notice to those parties by and through their counsel of record and to notify the Settlement Counsel's office of the involvement of such parties. If you as counsel are no longer actively involved in this case, please forward this notice immediately to any other attorney who to your knowledge may be actively involved.

Please send notice to all other counsel involved in the appeal, advising of the identities of the persons who will be attending the Settlement Conference with counsel. Copy of this communication shall be sent to the office of the Settlement Counsel.

The pertinent documents may be emailed or sent to:

Attention: **Honorable Patrick J. King, Settlement Counsel**
Office of the Settlement Counsel
John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 3440
Boston, Massachusetts 02210
Phone: **(617) 748-9339** Fax: **(617) 748-4393**
Email: **Honorable_Patrick_King@ca1.uscourts.gov**

Sincerely,
Jane Wallace
Jane Wallace on behalf of
Patrick J. King, Settlement Counsel

EXHIBIT 14

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

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FAX: (202) 393-5760
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December 18, 2009

BY HAND DELIVERY

Honorable Patrick J. King
Settlement Counsel
United States Court of Appeals for the First Circuit
John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 3440
Boston, Massachusetts 02110

Re: Steele v. Turner Broadcasting System, Inc., Appeal No. 09-2571

Dear Justice King:

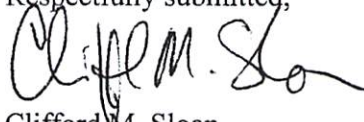
I write on behalf of appellees Turner Broadcasting System, Inc., Time Warner Inc., John Bongiovi (individually and d/b/a Bon Jovi Publishing), Richard Sambora, William Falcone (individually and d/b/a Pretty Blue Songs), Major League Baseball Properties, Inc., A&E Television Networks, AEG Live LLC, Mark Shimmel d/b/a Mark Shimmel Music and Boston Red Sox Baseball Club Limited Partnership (collectively "Appellees") to respectfully request a waiver of the Civil Appeals Management Program Pre-Argument Settlement Conference, which is currently scheduled for January 14, 2010 at 2:00 p.m.

The Appellees are requesting a waiver of the settlement conference because they believe settlement discussions would be futile and unproductive. The Appellees prevailed on all claims in the District Court. In two comprehensive and well-reasoned opinions, the District Court granted the Appellees' motion to dismiss and motion for summary judgment based on a straightforward application of settled Supreme Court and First Circuit authority. Under these circumstances, there is no possibility of settlement prior to a decision by the First Circuit unless the appellants withdraw this appeal for no consideration.

Honorable Patrick J. King
December 18, 2009
Page 2

In the alternative, in the event that the Appellees' request for a waiver of the settlement conference is denied, the Appellees respectfully request that they be excused from having a representative from each of the more than ten Appellees (many of which are out-of-state) present at the settlement conference. Representatives with full authority to settle this matter will be available by telephone, as necessary, throughout the settlement conference.

Respectfully submitted,



Clifford M. Sloan
Counsel for Appellees
Turner Broadcasting System, Inc.,
Time Warner Inc., John Bongiovi
(individually and d/b/a Bon Jovi
Publishing), Richard Sambora,
William Falcone (individually and d/b/a
Pretty Blue Songs), Major League
Baseball Properties, Inc., A&E
Television Networks, AEG Live LLC,
Mark Shimmel d/b/a Mark Shimmel
Music and Boston Red Sox Baseball
Club Limited Partnership

cc: Christopher A.D. Hunt, Esq. (via electronic mail)
Daniel J. Cloherty, Esq. (via electronic mail)
Amy B. Auth, Esq. (via electronic mail)

EXHIBIT 15

THE HUNT LAW FIRM LLC

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

VIA E-MAIL

December 18, 2009

Honorable Patrick J. King
Settlement Counsel
United States Court of Appeals for the First Circuit
John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 3440
Boston, Massachusetts 02110

**Re: Notice of Mandatory Pre-Argument Settlement Conference – January 14, 2010
Steele v. Turner Broadcasting System, Inc., et al., Appeal No. 09-2571**

Dear Justice King:

I represent plaintiffs/appellants Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz (“Steele”) in the above-referenced appeal and write in response to certain defendants/appellees’ (“defendants”) request for a waiver of the Mandatory Pre-Argument Settlement Conference before your Honor, scheduled for January 14, 2010. A copy of defendants’ December 18, 2009 letter is attached.

Steele does not agree to a waiver of the settlement conference. Further, defendants’ reasons for requesting a waiver of the settlement conference indicate a striking disregard – disdain, even - for the salutary purpose of the settlement conference: “All parties and counsel shall participate in the Settlement Conference process in good faith and with the intention to attempt to settle on a basis all parties can live with.” See December 1, 2009 Notice of Mandatory Pre-Argument Settlement Conference.

Specifically, defendants write that “settlement discussions would be futile and unproductive. The [defendants] prevailed on all claims in the District Court.”¹ It goes without saying (or it should) that the First Circuit is well aware that one party prevailed in the District Court and another

¹ Defendants, of course, self-servingly characterize the District Court’s opinions as “well-reasoned” and “based on a straightforward application of settled Supreme Court and First Circuit authority.” In point of fact, the District Court case – and the current appeal - was one of first impression.

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party appealed – otherwise the parties would not be before the First Circuit. It is equally obvious that the First Circuit has deemed it worthwhile to order settlement conferences in certain cases before it – that is to say, appeals - which, by definition, are cases in which one side prevailed in the District Court. By defendants’ logic, the First Circuit has no place ordering any settlement conferences. But it does and it has.

More importantly, defendants write that “there is no possibility of settlement prior to a decision by the First Circuit unless the appellants withdraw this appeal for no consideration.” It is difficult, to put it mildly, to harmonize this statement with the good faith participation requirements laid out by the Notice of Mandatory Pre-Argument Settlement Conference. If defendants’ counsel mean what they say – that “there is no possibility of settlement prior to a decision by the First Circuit unless the appellants withdraw this appeal for no consideration” then defendants have made the preemptive decision to not “participate in the Settlement Conference process in good faith.”

Defendants’ stated intent is all the more galling considering that their counsel – Skadden Arps – faced a *pro se* and indigent Steele in the District Court, never missing an opportunity to take advantage of Steele’s status and, worse in the current context, defendants never once agreed to settlement discussions with Steele, despite numerous requests. Accordingly, defendants’ assertion that settlement talks would be “futile and counterproductive” is speculation, at best, since defendants have never engaged in good faith settlement talks with Steele.²

To address what is likely the real purpose of defendants’ letter: Steele does not agree to the “alternative” request that defendants be excused from the settlement conference and be available only by phone. This is nothing more than a reiteration of defendants’ intention to not “participate... in good faith.” Anyone who has ever litigated and/or mediated or negotiated a case knows that appearing by phone (especially with 10 defendants/callers) significantly diminishes the chances of a successful case resolution.

Finally, to be absolutely clear: Steele requests nothing more than has already been ordered, including that “[a]ny insurance company... which has not offered policy limits shall be present” at the settlement conference. See December 1, 2009 Notice of Mandatory Pre-Argument Settlement Conference (emphasis supplied).

² Further, Local Rule 33(b)(1) states that settlement is but one of several issues to be considered at the Pre-Argument Conference, including “the simplification of the issues and any other matters which the Settlement Counsel determines may aid in the handling or the disposition of the proceeding.” See F.R.A.P. 1st Cir. L.R. 33(b)(1).

THE HUNT LAW FIRM LLC

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Thank you for your consideration.

Respectfully submitted,



Christopher A.D. Hunt
Counsel for Samuel Bartley Steele,
Bart Steele Publishing, Steele Recordz

cc: Samuel Bartley Steele
Clifford M. Sloan, Esq. (via electronic mail)
Christopher Clark, Esq. (via electronic mail)
Daniel J. Cloherty, Esq. (via electronic mail)
Amy B. Auth, Esq. (via electronic mail)

EXHIBIT 16

Christopher Hunt

From: Christopher Hunt [cadhunt@earthlink.net]
Sent: Friday, January 08, 2010 12:52 PM
To: 'Jane_Wallace@ca1.uscourts.gov'; 'scott.brown@skadden.com';
'christopher.clark@skadden.com'; 'mmatule@skadden.com'; 'kplevan@skadden.com';
'cliff.sloan@skadden.com'; 'aauth@dwycollora.com'; 'dbunis@dwycollora.com';
'dcloherty@dwycollora.com'
Cc: 'bartsteele@comcast.net'
Subject: RE: 09-2571 Steele vs. Turner Broadcasting

Ms. Wallace:

Thank you for your consideration and for the notice.

Regards,

Chris

Christopher A.D. Hunt
The Hunt Law Firm LLC
10 Heron Lane
Hopedale, MA 01747
(508) 966-7300
cadhunt@earthlink.net

From: Jane_Wallace@ca1.uscourts.gov [mailto:Jane_Wallace@ca1.uscourts.gov]
Sent: Friday, January 08, 2010 12:05 PM
To: cadhunt@earthlink.net; scott.brown@skadden.com; christopher.clark@skadden.com; mmatule@skadden.com;
kplevan@skadden.com; cliff.sloan@skadden.com; aauth@dwycollora.com; dbunis@dwycollora.com;
dcloherty@dwycollora.com
Subject: 09-2571 Steele vs. Turner Broadcasting
Importance: High

Counsel,

Judge King has granted your request to waive the settlement program requirement in the subject case. No further action will be taken by this office.

Thank you,
Jane Wallace Knutsen

Office of the Settlement Counsel
Main Office # (617) 748-9339
Direct # (617) 748-4517 fax # (617) 748-4393
Jane_Wallace@ca1.uscourts.gov