UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

- x
SAMUEL BARTLEY STEELE, :
BART STEELE PUBLISHING, and
STEELE RECORDZ, :

Plaintiffs, : Civil Action
v. No. 08-11727-NMG
:
TURNER BROADCASTING SYSTEM, INC.,
MAJOR LEAGUE PROPERTIES, INC., :
TIME WARNER, INC., ISLAND DEF JAM
RECORDS, FOX BROADCASTING :
COMPANY, JOHN BONGIOVI,
INDIVIDUALLY AND D/B/A BON JOVI :
PUBLISHING, RICHARD SAMBORA,
INDIVIDUALLY AND D/B/A AGGRESSIVE :
MUSIC, WILLIAM FALCON,
INDIVIDUALLY AND D/B/A PRETTY :
BLUE SONGS, UNIVERSAL-POLYGRAM
INTERNATIONAL PUBLISHING, INC., :
SONY/ATV TUNES LLC, KOBALT MUSIC
GROUP, A&E TELEVISION NETWORKS, :
AEG LIVE LLC, VECTOR 2 LLC, BOSTON
RED SOX, INC., THE BIGGER PICTURE :
CINEMA CO., and MARK SHIMMEL
MUSIC, :

Defendants. :

VECTOR MANAGEMENT LLC'S OPPOSITION TO PLAINTIFFS' RULE 55(a) MOTION FOR ENTRY OF DEFAULT AS TO DEFENDANT VECTOR MANAGEMENT

Vector Management LLC ("Vector") respectfully submits this memorandum of law in opposition to Plaintiffs' Rule 55(a) Motion for Entry of Default as to Defendant Vector Management. (Docket No. 125).

PRELIMINARY STATEMENT AND PROCEDURAL BACKGROUND

Vector respectfully directs the Court's attention to the April 3, 2009 Order (Docket No. 85) (granting in part defendants' motions to dismiss) and the August 19, 2009 Order (Docket No. 104) (granting motion for summary judgment of all claims as to all remaining defendants).

On August 12, 2010, almost two years after this lawsuit was filed and almost one year after this Court entered final judgment closing this case (Docket No. 104), Plaintiffs Samuel Bartley Steele, Bart Steele Publishing, and Steele Records (collectively, "Plaintiffs" or "Steele") filed this motion seeking entry of a default against "Vector Management." (Docket No. 125). Recently, on June 18, 2010, Steele filed a similar motion seeking entry of a default against MLB Advanced Media, LP ("MLBAM"). (Docket No. 118). Thus, the instant motion is now the second such motion that Steele has filed, both of which were filed long after all claims asserted by Steele herein were dismissed as to all defendants on the merits.

When this action originally was filed by Steele against more than twenty (20) defendants, Steele named "Vector Management" in the caption of the Complaint and, in Paragraph 3, simply listed it among "other defendants" with no further mention elsewhere. (Docket No. 1). Although the original Complaint did not identify or otherwise further describe "Vector Management," it was apparent from the allegations set forth therein that Steele was seeking to hold liable the management company that acted as the personal manager to the recording artist Jon Bon Jovi (also known as John Francis Bongiovi, Jr.), whose alleged performance of Steele's work was the foundation upon which Steele based his claims. While there is a management company known as Vector Management, LLC, which manages other recording artists, Vector Management neither has nor had any connection with Bon Jovi. The correct name of the management company that acted as personal manager for Jon Bon Jovi, and which obviously

was the target of Steele's allegations when he named Vector Management, is a company known as Vector Two, LLC ("Vector Two").[1]

Accordingly, counsel appeared for Vector Two LLC – the entity that had the contractual relationship with Bon Jovi – and properly informed Plaintiffs that they had incorrectly named Vector Management as a defendant in the original complaint. (Docket No. 16). Following such appearance, on January 30, 2009, Steele amended the Complaint, removing "Vector Management" from both the caption and the body of his pleadings, and named, instead, the company that managed Bon Jovi – "Vector 2 LLC." (Docket No. 41). Indeed, in Paragraph 18 of the Amended Complaint, Steele simply alleged that "Defendant Vector 2 LLC is a company which performs management services on behalf of John Bongiovi." (Docket No. 41).

On April 3, 2009, this Court held that there was a complete absence of any allegations against Vector Two, and thus dismissed the Complaint as to Vector Two. (Docket No. 85). On August 19, 2009, this Court granted the motion by the remaining defendants for summary judgment on Steele's copyrights claims, ruling that, as a matter of law, the works at issue were not substantially similar. (Docket No. 104). Thereafter, the case was closed.

Now, Steele has come before this Court and asked it to enter a default against Vector Management, an entity that Steele dropped from these proceedings more than eighteen (18) months ago upon the filing of its Amended Complaint. The instant motion must be denied on a number of grounds:

– First and foremost, as discussed below, the Amended Complaint, which removed Vector Management as a party and inserted Vector 2, LLC, the manager of Jon Bon Jovi, as a defendant, superseded as a matter of law the original Complaint, thereby rendering the

[1] Vector acknowledges that "2" was a typographical error, and that the correct name is Vector Two, LLC. That error has no bearing on the issues raised herein or in Steele's motion for default.

Complaint against "Vector Management" a nullity. Hence, as Vector Management was dropped as a party and has not been the object of any pending Complaint since before January 30, 2009, it follows that no default can be entered against it.

– Secondly, and more fundamentally, the entry of a default under these circumstances would violate the Due Process clause of the Fourteenth Amendment of the United States Constitution by denying Vector Management notice and an opportunity to defend. When the Amended Complaint was filed, thereby dropping Vector Management from the case, Vector Management was entitled to conclude, as it correctly did, that there was nothing for it to defend and, hence, it had no reason to file an answer or otherwise participate in this case in which it was no longer a party. To enter a default in this case, when effectively Steele notified Vector Management that it need not interpose a defense, would violate Vector's Due Process rights.

– Thirdly, after several rounds of dispositive motion practice, this Court already has determined that Steele has no claims against any defendant, including any Vector entity, and nothing in Steele's default motion even purports to cure that fatal deficiency.

– Finally, even if this Court had determined that Vector Management technically defaulted – which it has not nor, respectfully, should it – this would be a classic case where the default would be set aside for "good cause."

ARGUMENT

A. As A Matter Of Law, Plaintiffs Withdrew Their Claims Against Vector Management When They Filed The Amended Complaint And There Was, Hence, Nothing For Vector Management To Defend.

After the original Complaint was filed, counsel for Vector 2 LLC quite properly filed an appearance and a corporate disclosure form, pointing out that Vector 2 LLC was the proper name of the defendant against whom Steele apparently intended to sue. Thereafter, in his Amended

Complaint, Steele identified "Vector 2 LLC" as a defendant – there is no reference whatsoever in either the caption or the body of the Amended Complaint to "Vector Management." (Docket No. 41). Later, this Court dismissed Vector Two from the lawsuit, and later dismissed the action against all defendants – without any objection by Steele that he still had any claims pending against Vector Management. (Docket No. 85). Thus, regardless of whether Plaintiffs ever had a basis for asserting claims against Vector Management in the original Complaint (which clearly Plaintiffs did not), as a matter of law Plaintiffs discontinued all such claims upon the filing of the Amended Complaint. See Connectu LLC v. Zuckerberg, 522 F.3d 82, 91 (1st Cir. 2008) (holding that amending a complaint renders the original complaint inoperative). Clearly, a default can only be filed in a pending action. As there has been no pending action against Vector Management since the instant that the Amended Complaint was filed on January 30, 2009, there can be no default.

B. A Default Cannot Enter Against Vector Management Because It Would Violate Its Due Process Rights.

Steele makes no claim to have served Vector Management with a copy of the Amended Complaint or to have otherwise notified Vector Management that it was Steele's intention to pursue claims against it despite the fact that Steele had dropped any mention of Vector Management in both the caption and in the body of the Complaint when he filed the Amended Complaint which he filed. Nor can Steele point to anything in the record, served or not served on Vector Management, in which he purported to be maintaining an action against Vector Management as opposed to Vector Two LLC (which he named and described in the Amended Complaint and as to which he opposed dismissal by this Court).

Thus, to the extent that Steele gave Vector Management notice of anything it was that Steele had dropped Vector Management from the lawsuit, was pursuing claims against Vector

Two LLC instead, and there was nothing for Vector Management to defend against. To enter a default in the face of these undeniable facts would be a violation of the right of Vector Management LLC to Due Process of the law guaranteed by the Fourteenth Amendment.

For almost 100 years, since the United States Supreme Court's decision in Grannis v. Ordean, 234 U.S. 385 (1914), it has been crystal clear that "the fundamental requisite of Due Process is the opportunity to be heard." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), *quoting* Grannis at 394.

> This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest . . . . An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such nature as reasonably to convey the required information [] and it must afford a reasonable time for those interested to make their appearance . . . . [W]hen notice is a person's due, process which is a mere gesture is not due process.

Mullane at 314 (internal citations omitted).

Steele makes no claims to have served Vector Management with a copy of the Amended Complaint, and a review of the Court's docket confirms that. (See Docket). Even if served, Steele's Amended Complaint could not be deemed to constitute notice to Vector Management that it was still the subject of Steele's claims since Vector Management is not mentioned in either the caption or the body of the Amended Complaint. Moreover, it is noteworthy that Steele did not otherwise notify Vector Management that Steele considered the case to be pending against Vector Management, or even say anything about that at any time up to and including the final dismissal of the Amended Complaint, which underscores that the point that at no time did Steele give Vector Management notice "reasonably calculated . . . to apprise [Vector Management of

the continued] pendency of the action and afford [it] an opportunity to present [its] objections." See Mullane at 314.

Entering a default against Vector Management more than eighteen (18) months after it was dropped from this case under the undeniable circumstances presented here would constitute a violation of its basic Due Process rights of notice and an opportunity to defend a case which Vector Management reasonably concluded, by virtue of the Amended Complaint and the subsequent proceedings, had been dropped as against it.

C. Plaintiffs Have Not Alleged Any Substantive Allegations Against Any Vector Entity.

This Court already has held, in granting the motion to dismiss certain "Non-Implicated Defendants," that Steele failed to allege any substantive allegations against any Vector entity in either of his Complaints: "Two of the defendants (Sony and Vector), apart from being identified as such, are not mentioned anywhere in ***either*** Complaint." (Docket No. 85) (emphasis supplied). If the Amended Complaint was dismissed as a matter of law, and it contained slightly more information with respect to Bon Jovi's management company than the original Complaint, it thus follows that the original Complaint would have been dismissed as well, since it did little more than simply list "Vector Management" among a list of "other defendants." (Docket No. 1). Nothing in Steele's prolix motion even purports to cure this fatal deficiency.

D. "Good Cause" Would Exist To Set Aside Any Default.

The Federal Rules of Civil Procedure provide that a court "may set aside an entry of default for good cause . . . ." Fed. R. Civ. P. 55(c). The First Circuit has expressed a strong preference for resolving disputes on the merits, rather than through default judgments. See Coon v. Grenier, 867 F.2d 73, 79 (1st Cir. 1989) (reversing the district court's denial of a motion

to remove default judgment, reasoning that "doubts should be resolved in favor of adjudicating contested claims on the merits").

For these reasons, even if the Court had determined that Vector Management technically defaulted – which it has not – that default would, in any event, have to be set aside for "good cause" and in favor of adjudicating the matter on the merits. Specifically, there would be good cause to set aside any technical default because: 1) Vector 2 filed an appearance and defended the interests of the entity that was Bon Jovi's manager; 2) there was a total absence of substantive allegations concerning any Vector entity in ***either*** Complaint; 3) as a matter of law, the Amended Complaint, which named Vector Two LLC, not Vector Management, superseded the original Complaint; 4) Steele never served Vector Management with the Amended Complaint, nor ever asserted that it intended to continue its case against Vector Management after having filed an Amended Compliant which made no mention of Vector Management; and 5) all claims against the more than twenty (20) defendants in this matter were dismissed on the merits as a matter of law. Accordingly, it would be an exercise in futility to enter a default against Vector Management when good cause would exist to promptly set it aside.

Moreover, Steele's motion for entry of default is futile because a defaulted party is deemed to have admitted only the factual allegations in the operative complaint, not the legal sufficiency of those claims. See Bonilla v. Trebol Motors Corp., 150 F.3d 77, 80 (1st Cir. 1998) ("Generally speaking, a default judgment bars the defaulting party from disputing the facts alleged in the complaint, but it preserves for appeal arguments of law made below as to whether the facts as alleged state a claim.") (emphasis supplied). Here, as this Court already has held that Steele failed to allege sufficient factual allegations in ***either*** Complaint which could support any

claims against either Vector entity, an entry of default deeming those factual allegations admitted would be of no consequence to the legal insufficiency of Steele's Complaints.[2]

E. Plaintiffs' Counsel Should Be Subjected To Financial Sanctions.

Finally, should the court deny the instant motion for a default, Vector respectfully requests that the Court enter a judgment against Plaintiffs' counsel for the attorneys' fees, costs and expenses that it incurred in opposing this motion. Vector hastens to point out that Plaintiffs no longer are acting *pro se*. Accordingly, the understandable latitude that a court would ordinarily give to a *pro se* litigant, as this Court previously has done in this case, no longer should be afforded.

If ever there was an instance of unreasonable and vexatious conduct clearly designed to multiply the proceedings in a court, the instant motion for entry of a default would be a prime example. Congress enacted 28 U.S.C. § 1927 to deter such conduct and to provide the court with a mechanism for removing from litigants who are faced with such conduct the burden of incurring legal fees, costs and expenses for no good reason. The notion that Plaintiffs' counsel would consider it reasonable to seek the entry of a default based upon a superseded and inoperative Complaint that mirrors a substantively dismissed Amended Complaint is so preposterous as to require no further citation except for the words of the statute itself: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees

---

[2] In this Court's Memorandum & Order on the motions to dismiss, the Court confirmed that it was reading the two Complaints together due to Plaintiffs' *pro se* status: "***Even reading the original and amended complaint together***, this Court concludes that some of the Non-Implicated Defendants must be dismissed . . . . Two of the defendants (Sony and Vector), apart from being identified as such, are not mentioned anywhere in ***either*** complaint." (Docket No. 85) (emphasis supplied).

reasonably incurred because of such conduct." 28 U.S.C. § 1927. Accordingly, this Court should sanction Plaintiffs' counsel for bringing the instant motion.

CONCLUSION

For the foregoing reasons, the Court should deny Steele's motion for entry of default against Vector Management.

VECTOR MANAGEMENT LLC
By its attorneys,

/s/ Michael R. Hackett

Jeremy P. Oczek, B.B.O. No.: 647509
Michael R. Hackett, B.B.O. No.: 676693
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
Telephone: 617-526-9723
Fax: 617-526-9899
joczek@proskauer.com
mhackett@proskauer.com

Dated: August 25, 2010

CERTIFICATE OF SERVICE

I, Michael R. Hackett, hereby certify that the foregoing 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 August 25, 2010.

/s/ Michael R. Hackett
Michael R. Hackett