

United States Court of Appeals For the First Circuit

No. 11-1675

SAMUEL BARTLEY STEELE

Plaintiff - Appellant

v.

ANTHONY RICIGLIANO; BOSTON RED SOX BASEBALL CLUB LIMITED PARTNERSHIP; BRETT LANGEFELS; JOHN BONGIOVI, individually and, d/b/a Bon Jovi Publishing; JOHN W. HENRY; MAJOR LEAGUE BASEBALL PROPERTIES, INC., a/k/a Major League Baseball Productions; RICHARD SAMBORA, individually and, d/b/a Aggressive Music; TIME WARNER, INC.; TURNER SPORTS INC.; TURNER STUDIOS INC.; VECTOR MANAGEMENT LLC, a/k/a Successor in Interest to Vector Management; WILLIAM FALCON, individually and, d/b/a Pretty Blue Songs; BOB BOWMAN; CRAIG BARRY; DONATO MUSIC SERVICES, INC.; FENWAY SPORTS GROUP, a/k/a FSG, f/k/a New England Sports Enterprises LLC; JACK ROVNER; JAY ROURKE; LAWRENCE LUCCHINO; MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P.; MARK SHIMMEL, individually and, d/b/a Mark Shimmel Music; MIKE DEE; NEW ENGLAND SPORTS ENTERPRISES, LLC, f/d/b/a Fenway Sports Group, a/k/a FSG; SAM KENNEDY; THOMAS C. WERNER; TURNER BROADCASTING SYSTEM, INC.

Defendants – Appellees

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

BRIEF OF APPELLANT SAMUEL BARTLEY STEELE

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

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	5
REASONS WHY ORAL ARGUMENT SHOULD BE HEARD	8
JURISDICTIONAL STATEMENT	9
STATEMENT OF ISSUES PRESENTED FOR REVIEW	10
STATEMENT OF THE CASE.....	11
a. Nature of the Case	11
b. Course of Proceedings.....	11
c. Disposition Below.....	12
STATEMENT OF FACTS	13
a. PRELIMINARY STATEMENT ON NOMENCLATURE	13
b. INTRODUCTION	14
c. THE PARTIES	17
i. Appellant/Plaintiff Steele	17
ii. Appellees/Appellees.....	18
iii. Defendant/Appellee MLBAM.....	18
iv. Defendant/Appellee FSG.....	20
d. THE STEELE SONG SOUND RECORDING	22
i. 2004: The Red Sox Access to the Steele Song	23
ii. 2004-2006: Appellees' Alleged Access and Copying of the Steele Song.....	24
e. MLBAM RELEASES THE INFRINGING AUDIOVISUAL	25
f. STEELE I: THE DISTRICT COURT OVERLOOKS STEELE'S CLAIM OF INFRINGING REPRODUCTION	26
i. Steele I Alleged Infringing Reproduction of the Steele Song	27
ii. Defendants Argue Only Steele's Registered Work at Issue	28

- iii. Defendants Argue Substantial Similarity Dispositive Issue; that “Access and Copying” Should be Excluded From Steele I.....29
- iv. The District Court “Agree[s] With Defendants’ Reasoning” that Substantial Similarity Dispositive; “Access and Copying” Should be Excluded From Steele I.....30
- v. The District Court’s Adoption of “Defendants’ Reasoning” Prevented Steele From Pursuing his Infringing Reproduction Claim.....31
- g. STEELE I: DEFENDANTS’ FRAUD ON THE COURT32
- h. STEELE III: INFRINGEMENT OF STEELE’S 2009 SOUND RECORDING COPYRIGHT IN THE STEELE SONG34
- i. STEELE III: DEFENDANTS’ FRAUD ON THE COURT.....34
 - i. Skadden’s Failed “Sting” Against Steele and Hunt.....35
 - ii. Déjà Vu: Skadden Willfully Defaults FSG.....35
- j. THE DISTRICT COURT’S DISMISSAL OF STEELE III39
 - i. Steele Asserted Four Grounds Against Preclusion by Steele I39
 - ii. The District Court Failed to Meaningfully Address Three of Steele’s Four Arguments39
 - iii. The District Court’s Preclusion Analysis.....41
- SUMMARY OF ARGUMENT42
- ARGUMENT45
 - a. INTRODUCTION45
 - b. STANDARDS OF REVIEW46
 - i. De Novo Review Applies to an Allowance of a Motion to Dismiss.....46
 - ii. Abuse of Discretion Review Applies to Application of Judicial Estoppel...46
 - iii. PLEADING STANDARD47
- THE DISTRICT COURT’S THREE ERRORS48
- THE DISTRICT COURT FAILURE TO ACT WHEN PRESENTED WITH CONCLUSIVE EVIDENCE OF FRAUD ON THE COURT48

a.	FRAUD ON THE STEELE I COURT RENDERED ANY PRECLUSIVE EFFECT THEREFROM “MANIFESTLY UNCONSCIONABLE”	50
b.	SKADDEN’S FRAUD ON THE STEELE III COURT REQUIRES REVERSAL	53
i.	Defendants “Duped” the Steele I District Court.....	54
ii.	Elements and Equities of Judicial Estoppel	56
iii.	Steele I Defendants: Reproduction “Irrelevant”	57
iv.	Steele I District Court “Agree[s]:” Reproduction Irrelevant	59
v.	Steele III Defendants: In Retrospect, Reproduction Not Only Relevant – but Actually Adjudicated in Steele I	60
vi.	The District Court Abused its Discretion in Failure to Apply or even Consider Judicial Estoppel.....	62
i.	Failure to Apply Judicial Estoppel “Depriv[ed] [Steele] of Any Tribunal in Which to Bring his Action”	64
	MISAPPLICATION OF CLAIM PRECLUSION.....	66
a.	STEELE III ALLEGES CLAIMS RAISED IN – BUT SPECIFICALLY EXCLUDED FROM - STEELE I.....	66
b.	THE DISTRICT COURT’S APPLICATION OF CLAIM PRECLUSION VITIATED THAT DOCTRINE’S EQUITABLE UNDERPINNINGS BY FAILING TO HOLD DEFENDANTS ACCOUNTABLE FOR THEIR FRAUD ON THE COURT AND MANIPULATIONS WARRANTING APPLICATION OF JUDICIAL ESTOPPEL	70
c.	STEELE I DOES NOT PRECLUDE STEELE III.....	71
	RELIEF REQUESTED	76
	CONCLUSION	76

TABLE OF AUTHORITIES

CASES	PAGES
<u>Agee v. Paramount Communications</u> 59 F.3d 317 (2 nd Cir. 1995)	55-56
<u>Airframe Sys. Inc. v. Raytheon Co.</u> 601 F.3d 9, 14 (1 st Cir. 2010)	68, 69, 71, 72, 73, 74, 75
<u>Alternative System Concepts, Inc. v. Synopsys, Inc.</u> 374 F.3d. 23 (1 st Cir. 2004)	46-47, 57, 60, 62, 63, 70
<u>Ashcroft v. Iqbal</u> 556 U.S. ___, 129 S.Ct. 1937 (2009)	47, 48
<u>Bell Atlantic Corp. v. Twombly</u> 550 U.S. 544 (2007)	47, 48
<u>Hazel-Atlas Glass Co. v. Hartford-Empire Co.</u> 322 U.S. 238 (1944)	50, 53
<u>Indigo America, Inc. v. Big Impressions, LLC</u> 597 F.3d 1 (1 st Cir. 2010) (citation omitted)	47, 52
<u>KPS v. Designs by FMC</u> 318 F.3d 1 (1 st Cir. 203)	54
<u>Lydon v. Boston Sand & Gravel Co.,</u> 175 F.3d 6, 13 (1 st Cir. 1999).	64
<u>Martin v. Applied Cellular Technology</u> 284 F.3d 1 (1 st Cir. 2002)	46

CASES	PAGES
<u>McKinnon v. Kwong Wah Restaurant</u> 83 F.3d 498 (1 st Cir. 1996)	49, 52
<u>New Hampshire v. Maine</u> 532 U.S. 742 (2001)	46, 56, 57, 61, 62, 63-64
<u>Patriot Cinemas v. General Cinemas, Inc.</u> 834 F.2d 208 (1 st Cir. 1987)	56, 62, 63
<u>Steele v. Bongiovi</u> --F.Supp.2d---, 2011 WL 1882276 (D.Mass., May 17, 2011)	40, 49, 51, 52
<u>Steele v. Turner Broadcasting System, Inc.</u> 607 F.Supp.2d 258 (D.Mass. 2009)	27, 28, 31, 59
<u>Steele v. Turner Broadcasting System, Inc.</u> 646 F.Supp.2d 185 (D.Mass. 2009)	27, 55, 56, 59
<u>Steele v. Turner Broadcasting System, Inc.</u> 2009 WL 3448698 (D.Mass. 2009) (unpublished)	27
<u>Steele v. Turner Broadcasting System, Inc.</u> 746 F.Supp.2d 231 (D.Mass. 2010)	19-20
<u>Tri-Cran, Inc., v. Fallon (In re Tri-Cran, Inc.)</u> 98 B.R. 609 (Bankr.D.Mass. 1989)	54
<u>Watterson v. Page</u> 987 F.2d 1 (1 st Cir. 1993)	48

CASES

PAGES

Zocaras v. Castro

465 F.3d 479 (11th Cir. 2006)

53

STATUTES

PAGES

17 U.S.C. §101

9

17 U.S.C. §106

14, 17, 26, 68

17 U.S.C. §106(2)

54, 55

17 U.S.C. §114

9, 11, 17, 26, 28, 34, 65,
68, 72, 75

17 U.S.C. §411(a)

28

28 U.S.C. §1338(a)

9

OTHER AUTHORITIES

PAGES

Fed.R.Civ.P. 8

47

Fed.R.Civ.P. 11

12, 33, 76

Fed.R.Civ.P. 26

31

Fed.R.Civ.P. 26(f)

31

Local Rule 7.1

35

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Appellant Steele has four appeals pending in this Court. Left intact, the District Court's decisions will leave a scar on First Circuit jurisprudence and undermine the faith of counsel, litigants, and, indeed, all citizens in the ability of our courts to fully and fairly redress meritorious claims. Appellant Steele has yet – after nearly three years, as many federal lawsuits, and four appeals – to have his day in court. Steele's opponents executed a shameless, dishonest, and reprehensible scheme spanning all of his cases, committing fraud on the courts of this circuit at a *literally* unprecedented level (no published case even comes close). Steele respectfully submits that this is reason enough for oral argument to be heard and refers this Honorable Court to Steele's story, as told through this and his filings in his three other appeals.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Massachusetts had original jurisdiction over this copyright infringement action pursuant under 28 U.S.C. §1338(a) because it arose under the copyright statute, 17 U.S.C. §101, et seq., including §114.

The First Circuit Court of Appeals has jurisdiction over this appeal based on the District Court's final judgment, dismissing appellant's copyright claim as a matter of law on May 18, 2011 and disposing of all parties' claims. Appellant timely filed a Notice of Appeal on June 13, 2011.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

PRIMARY ISSUE:

Steele presented the Court with undisputed evidence of Appellees' unprecedented fraud on the court and abusive tactics during a prior copyright infringement case brought under a different copyright registration that corrupted the entire proceedings of that case and lead to flawed discovery and procedural orders and, ultimately, a decision spawned from the poison of Appellees' offensive and reprehensible tactics in that case.

The District Court held that, even – taking Steele's facts showing fraud and misconduct as true – this case was claim precluded by the earlier infringement case.

Was the District Court's dismissal of this case as being claim precluded by an earlier fraudulent judgment an error of law, or alternatively, an abuse of discretion?

Was this an error of law? Alternatively, was this an abuse of discretion?

SECONDARY ISSUE:

Steele presented undisputed evidence that Appellees were judicially estopped from claiming an opposite position in this case from the position Appellees had

successfully urged the court in the earlier case to take, resulting in unfairness and the appearance that the court had been “duped” in either the earlier case or this case.

Was this an abuse of discretion?

TERTIARY ISSUE:

Steele presented undisputed evidence of Appellees’ fraud on the court *during the proceedings in this case*. The District Court made no findings or rulings as to fraud.

Was this an error of law?

STATEMENT OF THE CASE

a. Nature of the Case

This is a copyright infringement case pursuant to 17 U.S.C. §114.

b. Course of Proceedings

Steele filed his Complaint on August 25, 2010 alleging infringement of his exclusive rights to reproduce his copyrighted sound recording pursuant to 17 U.S.C. §114. Steele named twenty-six defendants, all of whom moved to dismiss based on various grounds, including claim preclusion, based on the District Court’s dismissal of *Steele v. TBS, et al.*, No. 08-11727-NMG. Steele opposed defendants’ motions based on the equitable doctrines of judicial estoppel, fraud on the court, and because

defendants' assertion of claim preclusion was legally incorrect, would result in grave injustice to Steele, and in any event was born of fraud on the court during the earlier proceeding.

Steele moved to stay this case – *Steele v. Ricigliano*, No. 10-11458-NMG - and consolidate it with his other pending (at the time) and related District Court case, *Steele v. Bongiovi*, No. 10-11218-NMG. Finally, defendants moved for Rule 11 sanctions against Steele and the undersigned counsel.

c. Disposition Below

The District Court denied Steele's motion to stay and consolidate and allowed defendants' motions to dismiss on May 18, 2011. The District Court further allowed defendants' motion for sanctions, describing this case as "at least frivolous, and possibly vexatious," but limiting sanctions to an admonishment to Steele and the undersigned that any similar future filings would result in monetary and other sanctions.

STATEMENT OF FACTS

a. PRELIMINARY STATEMENT ON NOMENCLATURE

This appeal comes to this Court with a history. Steele filed a total of three related cases in U.S. District Court and one in Massachusetts Superior Court. All three District Court cases were dismissed as a matter of law and appealed. Two appeals arising from Steele's original case are pending; accordingly, there are a total of four Steele-related appeals now pending in this Court. The Superior Court case is pending.

The cases, District Court decisions, and subsequent appeals to the First Circuit are identified numerically, with Roman numerals, in chronological order as follows:

"*Steele I*" refers to *Steele v. Turner Broadcasting System, Inc., et al.*, No. 08-11727-NMG, (D. Mass. 2008). The two pending appeals arising from *Steele I*, First Circuit Nos. 09-2571 and 10-2173 are referred to as "*Appeal I*" and "*Appeal II*," respectively.

"*Steele II*" refers to *Steele v. Bongiovi, et al.*, No. 10-11218-NMG (D. Mass. 2010). The appeal arising from *Steele II*, First Circuit No. 11-1674 is referred to as "*Appeal III*."

“*Steele III*” refers to the underlying case in this appeal, *Steele v. Ricigliano, et al.*, No. 10-11458-NMG (D. Mass. 2010). This appeal, First Circuit No. 11-1675, may be referred to, where necessary, as “*Appeal IV*.”

“*Steele IV*” refers to *Steele v. Boston Red Sox Baseball Club Limited Partnership, et al.*, No. 10-3418-E (Suffolk Super. Ct. 2010), (pending).

b. INTRODUCTION

On October 8, 2008 Steele, *pro se*, filed *Steele I*, alleging copyright infringement pursuant to 17 U.S.C. §106 (“Exclusive rights in copyrighted works”). Appeal I Appendix at 24-36 (“Appeal I App—“). Steele alleged infringement of his exclusive rights to reproduce the Steele Song; to create derivatives of the Steele Song; and to synchronize his Song to video. Appeal I Steele Brief at 15, 37, 43-48; Appeal I Steele Reply at 19-20.

Of particular significance to this appeal, Steele repeatedly alleged illegal copying – by reproduction – of the Steele Song repeatedly during *Steele I*. Appeal I App-27, 32, 156, 307-308, 591, 594, 785, 787, 792. Steele further alleged infringing reproduction through defendants’ synchronization of the Steele Song to video. Appeal I App-27-32.

The District Court dismissed *Steele I* on August 19, 2009 based on its limited “substantial similarity” comparison between Steele’s work and the allegedly infringing works. Add-7. Substantial similarity, however, is not an element of any claim of infringing reproduction because reproduction, by definition, means making an identical copy, e.g., “copying and pasting,” as it were. Appeal I Steele Brief at 45-48.

Accordingly, the *Steele I* District Court failed to address – hence failed to adjudicate – *Steele I*’s claim of infringing reproduction. *Id.* The District Court’s analysis as to synchronization rights *also failed to address infringing reproduction*, from which the exclusive right to synchronization to video – based on federal common law - is derived. *Id.*

The District Court’s failure to consider Steele’s claim of infringing reproduction and its flawed analysis of Steele’s claimed infringement of his synchronization right, of which reproduction is an element, were two of the several bases for Steele’s first appeal of *Steele I*, which has been fully briefed. Appeal I Steele Brief at 45-48.

Steele subsequently filed a second appeal arising from *Steele I*, First Circuit No. 10-2173, based on the District Court’s denial of Steele’s Motions for Entry of Default

as to *Steele I* defendants MLB Advanced Media, L.P. (“MLBAM”) and Vector Management. *Appeal II* has also been fully briefed.

In both *Appeal I* and *Appeal II* Steele set forth numerous undisputed facts of defendants’ misconduct and fraud on the court during *Steele I*. *Appeal I* Steele Brief at 18-19; *Appeal I* Steele Reply at 8-19; *Appeal II* Steele Brief at 19-34; 73-74; *Appeal II* Steele Reply at 3-6; 7-14; 16-33.

Steele’s Complaint here alleges defendant misconduct during *Steele I* constituting fraud on the court, App-51. Steele additionally addressed fraud on the *Steele I* court and its impact on this case - *Steele III* - in the following *Steele III* filings: Opposition to the Moving Defendants’ Motion to Dismiss and for Other Relief (September 20, 2010), App-204-206; Opposition to Defendants’ Motions to Dismiss the Verified Complaint (November 19, 2010), App-355-357; Opposition to Defendants’ Motion to Dismiss the Verified Complaint (April 9, 2011), App-486-487.

Plaintiff’s August 25, 2010 Verified Complaint and Jury Demand in the underlying case to this appeal, i.e., *Steele III*, alleged infringing reproduction in

violation of 17 U.S.C. §114 (“Scope of exclusive rights in sound recordings”) as compared with *Steele I*’s claim of infringement pursuant to §106. App-22.

Finally, Steele’s Opposition to Defendants’ Motions to Dismiss the Verified Complaint (April 9, 2011), brought to the District Court’s attention facts indicating fraud on the court was occurring *presently*, during the *Steele III* proceedings. App-478-487.

c. THE PARTIES

i. Appellant/Plaintiff Steele

Plaintiff and Appellant Samuel Bartley Steele, also known as Bart Steele (“Steele”), is a professional musician and music producer. App-23-24. Steele does business as Bart Steele Publishing and Steele Recordz, both of which are unincorporated sole proprietorships wholly owned by Steele and located at 80 Park Street, Chelsea, Massachusetts, 02150. App-23-24.

Steele d/b/a Steele Recordz is the registered owner of the Sound Recording (“SR”) copyright to the Steele Song. App-24. 17 U.S.C. §114. Steele’s SR copyright was registered on November 23, 2009. App-69

ii. Appellees/Appellees

The twenty-six defendant-appellees are persons and/or entities each of whom were involved in the creation, production, editing, and/or marketing of the audiovisual commercial advertisement created in 2007 to promote Major League Baseball on the television stations TBS and Fox Sports. App-24-28; 45, 47-48 50-52.

iii. Defendant/Appellee MLBAM

MLBAM is the claimed copyright owner of the infringing commercial audiovisual advertisement at issue in *Steele I* (the “Infringing Audiovisual”). App-37.

MLBAM corporate status is not clear, as demonstrated to this Court by MLBAM’s three conflicting Corporate Disclosure Statements filed in *Appeal II* - the second at the behest of the Court, the third responding to Steele’s notice of errors in the second.¹ App-474-475. In District Court, MLBAM filed two Corporate Disclosure Statements stating that it “has no parent corporation,” on November 5, 2010 and March 28, 2011. App-276, 470-471.

By contrast, in *Steele I*, Major League Baseball Properties, Inc.’s (“MLB Properties”) Opposition to Steele’s Motion for Entry of Default as to MLBAM, stated

¹ Steele does not concede the accuracy of MLBAM’s third corporate disclosure.

that MLBAM was owned by MLB Media Holdings, L.P. and MLB Advanced Media, Inc.² App-474-475. MLBAM and its owners do not own – and are not owned by – Appellee MLB Properties; MLBAM is a legally discrete entity from MLB Properties. Appeal II App-261-262.

MLBAM defaulted in *Steele I. Steele v. Turner Broadcasting System, Inc.*, 746 F.Supp.2d 231, 236 (D.Mass., September 27, 2010).

The *pro se* Steele did not discover MLBAM’s default until retaining counsel – which was after judgment entered in *Steele I.* Appeal I App-26.

MLB Properties evaded service the same day MLBAM was served. Appeal II Brief at 22. Nonetheless, Skadden voluntarily appeared for MLB Properties, claiming – falsely it turns out – that MLB Properties had been “misidentified” as MLBAM in Steele’s Complaint. *Id.*

Steele moved for entry of default as to MLBAM in *Steele I*, which the Court denied as “futile” because judgment had already entered against Steele. *TBS*, 746 F.Supp.2d at 238. The District Court noted the peculiarity of MLB Properties’

² MLB Properties acted as MLBAM’s proxy in opposing Steele’s motion for entry of default, as described in Appeal II Steele Brief at 21-24; Appeal II Steele Reply at 25-26, 34-35.

defense against entry of MLBAM's default despite being a "discrete entity," as well as their failure to deny that MLBAM failed to appear. *Id.* at 236 ("Indeed, it is worth noting that MLB [Properties] filed the opposition to Steele's motion to default MLBAM and yet claims that MLBAM is a separate legal entity... MLB [Properties] does not deny that MLBAM failed to appear... MLBAM did technically default, although it remains unclear why MLB [Properties] (figuratively) picked up its banner.").

The District Court "forewarned" Steele filed not to file any similar such motions. *Id.* at 239. ("Plaintiff and his counsel are, however, forewarned that any further motion practice in this regard will be looked upon askance.").

iv. Defendant/Appellee FSG

The corporate status of defendant/appellee Fenway Sports Group a/k/a FSG f/k/a New England Sports Enterprises, LLC ("FSG") is also unclear. FSG filed *three* different – and conflicting – corporate disclosure statements. App-483. In Superior Court, FSG filed three similarly conflicting corporate disclosure statements while, as in this case, concealing its default.³

³ Steele IV Steele Motion for Sanctions at 7-8, 16-20 (Docket Entry 59).

FSG was served on October 15, 2010. App-266-267; App-481. Skadden filed what appeared at first blush to be a timely appearance for FSG, but was actually for an entity not listed in Steele's Complaint - but which, confusingly, included "Fenway Sports Group" in its name.⁴ App-270-271. Skadden offered no explanation for this entity's appearance. *Id.*

Steele – in correspondence to Skadden – questioned the appearance of this entity (and numerous other irregularities,) and, threatened default as to FSG if Skadden failed to forthrightly and honestly appear for that defendant. App-490-508.⁵

Skadden acquiesced and filed its appearance and motion to dismiss on behalf of FSG on March 25, 2011, over four months late, during which time FSG was in default. App-457; 481.

⁴ Defendant New England Sports Enterprises, LLC f/d/b/a Fenway Sports Group f/a/k/a FSG ("NESE") has filed two notices of appearance, two corporate disclosure statements, and two motions to dismiss. App-479-480. In Superior Court, NESE defaulted; subsequently, defendants filed an emergency motion to effectively stay NESE's appearance pending dispositive motions. Steele IV Steele Opposition to Emergency Motion for Stay at 6, Exhibit 1 (Docket Entry 64). *Id.* at 7-10. The motion is briefed and scheduled for argument.

⁵ FSG's default was concealed by NESE's false appearance, and Skadden's willfully inaccurate motion to dismiss and attached exhibit, "Chart of Defendants." App-493-494.

d. THE STEELE SONG SOUND RECORDING

In September 2004, during the Boston Red Sox (“Red Sox”) run-up to their first World Series championship in 86 years, Steele composed, wrote, recorded, and published a 2:38:90-long Red Sox-centric country-rock and baseball-themed musical work entitled “Man I Really Love This Team” (“Steele Song”). App-11-13, 18-20.

The Steele Song became extremely popular as the Red Sox advanced in the playoffs: it was played on Boston Sports Radio 850 AM, Steele performed it live on local Boston television stations, and sing-alongs were held at the Cask ‘n Flagon sports bar (among others) outside Fenway Park. App-12.

During the fall of 2004 Steele gave out thousands of CDs containing the Steele Song to fans and Red Sox officials at Fenway Park. App-13. Steele sent CDs of the Steele Song with lyric sheets to several Red Sox players and personnel App-13.

The digital nature of the sound recording of the Steele Song - it was recorded, mixed, and mastered in the digital domain using a Digital Audio Workstation (music production software and computer) – made reproduction, transmission, and/or other unauthorized copying of the sound recording very simple; all that was needed was a computer and access to Steele’s sound recording. App-29.

i. 2004: The Red Sox Access to the Steele Song

In October 2004, Irene Barr, a music agent acting on Steele's behalf, spoke with Jay Rourke, an employee of the Red Sox, about the Red Sox using the Steele Song as part of a baseball promotion. App-31. On October 20, 2004, Mr. Rourke informed Ms. Barr that the Red Sox were very interested in the Steele Song and he asked Ms. Barr to send the Steele Song to him, which she did that day by e-mail (with the Steele Song sound recording attached as a digital audio file). App-31. The Red Sox have admitted, in court papers, receipt of the Steele Song from Ms. Barr's e-mail of October 20, 2004. App-31; Appeal I App-424 (¶ 20).⁶ The Red Sox circulated the Steele Song amongst its management personnel and forwarded it to key executives,

⁶ "The Defendants admit that on October 20, 2004 a person using the email address ecmp2000@comcast.net sent an electronic mail message with a Windows Media Audio file attachment entitled "01 Man I Really Love This Team.wma" to the electronic mail address jrourke@redsox.com." Appeal I App-424.

including Appellees Dee and Kennedy holding dual roles with Appellees FSG and the Red Sox.⁷ App-48-49

ii. 2004-2006: Appellees' Alleged Access and Copying of the Steele Song

From October 2004 through June 2006, Steele sent numerous hard copy letters (enclosing CDs of the Steele Song as well as paper lyric sheets) and e-mails (with digital copies of the Steele Song attached and/or links to a website from which the Steele Song could be played) to the Red Sox, MLBAM, and MLB Properties, suggesting recipients could use the Steele Song or Steele's derivative "I Love This Town" to promote Major League Baseball across the country. App-32.

While Appellee Boston Red Sox explicitly admit access – via Irene Barr's e-mail to Jay Rourke - to Steele's Song, Appellees MLBAM and MLB Properties have never denied receiving Steele's letters or digital audio versions of the Steele Song. App-33.

Furthermore, MLBAM's access is *admitted* via the Red Sox, since MLBAM owns and

⁷ FSG is headquartered at 82 Brookline Ave., Boston, across from Fenway Park. App-25. FSG and the Red Sox share common ownership. App-25-26. At pertinent times, concurrently: Dee was president of FSG and chief operating officer of the Red Sox, App-26; and Kennedy was vice president of sales for FSG and the Red Sox, App-27. FSG runs business operations for the Red Sox and Fenway Park, among others, and is known publicly as the Red Sox's "sister company." App-48-50; Steele IV Steele Motion for Sanctions at 5-7.

manages “redsox.com,” i.e., the website through which Jay Rourke accessed Steele’s Song. Appeal II Steele Brief at 19.

e. MLBAM RELEASES THE INFRINGING AUDIOVISUAL

On August 27, 2007, MLBAM released the Infringing Audiovisual: a 2:38:90-long Red Sox-centric country-rock and baseball-themed work entitled “I Love This Town,” with Appellees Bongiovi and Sambora performing the soundtrack, on MLBAM’s website, www.mlb.com. App-18-20.

The Infringing Audiovisual was part of a nationwide marketing plan to advertise that the TBS-owned television network “TBS” was broadcasting part of the playoffs that year. App-19.

The Infringing Audiovisual contains numerous audio and visual congruities with the Steele Song in addition to identical length at 2:38:90, for example, at the exact moment Steele sings “Yawkey Way,” the Infringing Audiovisual features an image of the Yawkey Way street sign. App-35-36. Appeal I Steele Brief at 24-27.

The Infringing Audiovisual displays, in its final seconds, MLBAM’s copyright notice, “© 2007 MLB Advanced Media.” App-51, 570; Appeal I Steele Brief at 20.

The Infringing Audiovisual may be viewed by clicking (or Ctrl-clicking) on the following link:

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.

App-48.

f. STEELE I: THE DISTRICT COURT OVERLOOKS STEELE'S CLAIM OF INFRINGING REPRODUCTION

Steele I alleged use of the Steele Song as a “temp track” during the creation of the Infringing Audiovisual in violation of Steele’s 2006 Performing Arts (“PA”) copyright registration pursuant to 17 U.S.C. §106. App-29. Appeal I Steele Brief at 20-22, 24-28; and Appeal I App-27-32, 145-147, 151-163.

Steele remained *pro se* throughout the District Court proceedings, obtaining counsel after entry of judgment. Appeal I App-22.

At no point before, during, or since the *Steele I* proceedings has any *Steele I* defendant - or any Appellee here - disputed that Steele’s Song was illegally reproduced and used as a temp track for the Infringing Audiovisual. App-55; Appeal I Steele Reply at 24, n.14, 31, 33-35; Appeal II Steele Reply at 11, n.4.

The District Court allowed several defendants' motions to dismiss for failure to state a claim on April 3, 2009. *Steele v. Turner Broadcasting System, Inc.*, 607 F.Supp.2d 258, 263-265 (D.Mass., April 3, 2009).

On August 19, 2009 the District Court allowed the defendants' summary judgment motions, "finding no substantial similarity between the Steele Song and that of the defendants." Add-2; *TBS*, 646 F.Supp.2d at 193-194. On October 13, 2009 the District Court denied Steele's motion for reconsideration. Add-2; *Steele v. Turner Broadcasting System, Inc.*, 2009 WL 3448698, at *1 (D.Mass., October 13, 2009) (unpublished). On November 6, 2009 Steele's counsel filed his appearance and Notice of Appeal of *Steele I* to this Court, which appeal remains pending. Appeal I App-822-823.

i. Steele I Alleged Infringing Reproduction of the Steele Song

Appellees characterization of Steele's argument - that "defendants in *Steele I* in effect duped [the District Court] into not addressing... digital copying of the Steele Song," App-263, is basically correct. Appellees' argument that the District Court "did not address the issue because no such claim had been asserted, although it could have been," on the other hand, App-263, is incorrect.

Steele specifically alleged illegal copying – by reproduction – of the Steele Song during *Steele I*.⁸ *Steele I* Appeal App-27, 32, 156, 307-308, 591, 594, 785, 787, 792; Appeal I Steele Brief at 15, 37, 43-48; Appeal I Steele Reply at 19-20. For example: “[T]emp tracking constitutes unlawful *reproduction*.” Appeal I App-591 (emphasis supplied).

Steele further alleged infringing reproduction through defendants’ synchronization of the Steele Song to video. Appeal I App-27-78, 31-32. To the extent Steele’s arguments turned to substantial similarity, it was because the District Court *ordered* the parties to do so when it excluded “access and copying” from discovery or consideration at summary judgment. *TBS*, 607 F.Supp.2d at 265.

ii. Defendants Argue Only Steele’s Registered Work at Issue

Defendants, at the March 31, 2009 hearing, the only hearing held in *Steele I* - or any of Steele’s cases, for that matter – argued that Steele could only pursue infringement claims based on works that Steele had registered at the time. Appeal I App-395 (Steele “may only assert claims based on his registered work... the song...

⁸ Steele’s sound recording copyright under 17 U.S.C. §114, was not at issue in *Steele I* because it was not registered with the copyright office at the time. See 17 U.S.C. §411(a).

called “Man I Really Love This Team.”). Defendants’ later reiterated their position in their motion for summary judgment that only registered works could “be considered in evaluating plaintiff’s claims.” Appeal I App-457 (citing the Court’s April 3, 2009 Order).

iii. Defendants Argue Substantial Similarity Dispositive Issue; that “Access and Copying” Should be Excluded From Steele I

The *Steele I* defendants, beginning with their first filing, on December 8, 2008, repeatedly argued that access and copying were irrelevant, asserting a defense based solely on lack of “substantial similarity” between the Steele Song and the Bon Jovi Song and Infringing Audiovisual. App-55; 195-196; Add-7; Appeal I App-41-42, 44, 46-48.

Defendants specifically argued that “access and copying” were irrelevant if the works were not “substantially similar;” that “access and copying need not be addressed for there to be a complete disposition of the matter,” that “access and copying are not before the court,” and that even if “copying is assumed for purposes” of their December 8, 2008 motions to dismiss, Steele’s Complaint failed to state a claim. App-195-196.

Defendants additionally argued that substantial similarity could be determined without any discovery, at the motion to dismiss stage. App-396 (“your Honor has before him everything that he needs to make the judgment that there’s [no substantial similarity]”). Defendants acknowledged the lack of precedent for their position but nonetheless argued that the First Circuit “has never remotely suggested that merely by incanting substantial similarity somehow there’s a different rule than normally applies on a motion to dismiss... Your Honor has in front of you everything that is necessary for this lay listener, ordinary listener, test.”⁹ Appeal I App-398.

iv. The District Court “Agree[s] With Defendants’ Reasoning” that Substantial Similarity Dispositive; “Access and Copying” Should be Excluded From Steele I

The *Steele I* District Court “agreed with defendants’ reasoning” that “access and copying need not be addressed for there to be a complete disposition of the matter,” both as to discovery and at summary judgment. Add-7. The District Court ordered that Steele and the remaining defendants conduct “discovery” limited to (1) the issue of “substantial similarity” and (2) an exchange of expert reports on that issue, after which it would consider the remaining defendants’ motions for summary judgment

⁹ At this same hearing, Appellee Sloan characterized MLBAM’s Infringing Audiovisual as, “what we’ll call the Turner promo.” Appeal I App-395.

solely on the issue “substantial similarity.” *TBS*, 607 F.Supp.2d at 264-265; App-55, 196; Add-7.

The District Court’s discovery order made clear that access and copying were forbidden issues for both discovery and summary judgment argument. App-196.

The District Court also failed to enforce any Rule 26 required disclosures or the parties’ own proposed discovery plan at any point, despite the parties’ Rule 26(f) conference and filing of the joint discovery plan. *Id.* at 387.

v. The District Court’s Adoption of “Defendants’ Reasoning” Prevented Steele From Pursuing his Infringing Reproduction Claim

The District Court’s order limiting discovery and the sole dispositive issue at summary judgment to “substantial similarity,” as well as its failure to enforce Rule 26’s require disclosures, prevented Steele from engaging discovery or arguing issues relating to access and copying. Add-7; Appeal I Steele Brief at 41-42, 44, 46-48.

In *Appeal I*, Steele described the negative impact of the defendant-proposed and District Court adopted “reasoning” excluding consideration of “access and copying:” “Steele did not get a fair hearing – or any hearing – on [his infringing reproduction] claim.” Appeal I Steele Brief at 46.

g. STEELE I: DEFENDANTS' FRAUD ON THE COURT

Defendants' actions constituting fraud on the court during *Steele I* and its appeal are well-documented in Steele's Opening and Reply Briefs filed in *Appeal I* and *Appeal II*. Appeal I Steele Brief at 18-19; Appeal I Steele Reply at 8-19; Appeal II Steele Brief at 19-34; 73-74; Appeal II Steele Reply at 3-6; 7-14; 16-33.

Here, Steele's opposition to defendants' motion to dismiss *Steele III* argued that defendants' fraud on the court in *Steele I* undermined any preclusive effect *on this case*. App-204-209; 355-357. Steele referred the District Court to Steele's motions for entry of default in *Steele I* and Steele's Motion for Sanctions filed in *this Court* (which *defendants* made part of the record in *Steele III*) for the specific undisputed and unrefuted actions constituting fraud on the *Steele I* court. App-204-205; 165; 168-187.

Defendants' fraudulent actions in *Steele I*, outlined in Exhibit A to the *Steele III* Defendants' Notice of Recent Activity Providing Supplemental Grounds to Oppose Plaintiff's Request for a Belated Extension of Time – Steele's Motion for Sanctions filed with the First Circuit in *Steele I* – include the following:

- (1) Intentional spoliation and false filing, under oath, of the Infringing Audiovisual, App-175;
- (2) Failure to remediate the records of the District Court and First Circuit Court of Appeals by filing a true and correct copy of the Infringing Audiovisual. App-176;
- (3) Intentional misrepresentations of fact and law, App-176-178;
- (4) Orchestrating the willful default of MLBAM, 178-179;
- (5) Concealing MLBAM's default by falsely appearing for MLB Properties as MLBAM's illegal proxy, App-178-179;
- (6) Orchestrating the willful default of Vector Management, App-179;
- (7) Concealing Vector Management's default by falsely appearing for "Vector 2 LLC" as Vector Management's illegal proxy, App-179;
- (8) Filing retaliatory and bad faith Rule 11 motions, App-179-183;

Defendants and Skadden have failed to dispute any facts of the above fraudulent actions, despite numerous opportunities to do so in Superior Court, District Court, and the First Circuit Court of Appeals.

h. STEELE III: INFRINGEMENT OF STEELE'S 2009 SOUND RECORDING COPYRIGHT IN THE STEELE SONG

On August 25, 2010 Steele filed *Steele III*. App-22. Steele alleged infringement of his 2009-registered SR copyright in his Steele Song, by digitally reproducing the Steele Song sound recording without Steele's permission in violation of 17 U.S.C. §114 during pre-production and production of the Infringing Audiovisual. App-50, 52-54; 55-64.

Steele's Complaint further alleged facts that, during *Steele I*, Appellee MLBAM (1) willfully defaulted; (2) had MLB Properties file a false appearance to conceal MLBAM's willful default; (3) labeled the Infringing Audiovisual "the Turner Promo," despite MLBAM's claimed ownership thereof, in order to further conceal itself; (4) filed false evidence in the form of the Altered Audiovisual. App-51 (citing to Appeal I).

i. STEELE III: DEFENDANTS' FRAUD ON THE COURT

Appellees engaged in fraudulent acts and misconduct during the District Court proceedings underlying this appeal as well.

i. Skadden's Failed "Sting" Against Steele and Hunt

During *Steele III*, Skadden attempted to "set up" Steele and his undersigned counsel through a scheme initiated under false pretenses of a Local Rule 7.1 conference. App-184-187, 211-215. Specifically, Skadden initiated a dialogue with the undersigned ostensibly relating to negotiating a stay of *Steele III*, but was instead a pretext for an attempt to contrive a record that Skadden could argue showed bad faith on the part of Steele and the undersigned. App-211-215. The undersigned discovered the ruse and confronted Skadden with it. App-211-215. Skadden failed to deny their scheme. App-187.

Steele addressed this issue in his Motion for Sanctions filed with this Court in *Appeal I*, on September 15, 2010. App-168, at 184-187.

ii. Déjà Vu: Skadden Willfully Defaults FSG

Steele's Complaint alleged crucial role of FSG as the conduit between the Boston Red Sox – with acknowledged access to the Steele Song - and MLBAM, the claimed copyright owner and producer of the Infringing Audiovisual. App-50.

FSG was served on October 15, 2010. App-266-267; App-481. Skadden filed what appeared at first blush to be a timely appearance for FSG, but was actually for an

entity not listed in Steele's Complaint - but which, confusingly, included "Fenway Sports Group" in its name. App-481-483. Skadden did not claim misnomer or mistake, nor explain the basis for this entity's appearance. App-481.

Steele – in an exchange of correspondence with Skadden – questioned the appearance of this entity (and numerous other irregularities, App-492-494) and, threatened default as to FSG if Skadden failed to forthrightly and honestly appear for that defendant. App-494-495.

Skadden acquiesced – or seemed to - and filed its appearance and motion to dismiss on behalf of FSG on March 25, 2011, over four months late during which time FSG was in default. App-453-457, 488. Accordingly, FSG was in default for over four months. App-481. Steele remains unconvinced that FSG – as named and served – ever appeared in this case.

Another defendant/appellee, New England Sports Enterprises, LLC f/d/b/a Fenway Sports Group f/a/k/a FSG ("NESE"), had timely appeared and moved to dismiss, but under a different name: New England Sports Enterprises, LLC d/b/a Fenway Sports Group. App-270; App-481-486. Steele informed FSG's counsel, Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates ("Skadden"), in writing, that

its appearance for NESE – with no explanation for its unilateral name change – was not *also* an appearance for the separately named, sued, and served entity FSG. App-481-482.

Steele further *directly accused* Skadden of impropriety in its attempt to have NESE appear for – and conceal the willful default of – FSG, recalling Skadden’s nearly identical scheme in *Steele I* when Skadden concealed the willful defaults of two defendants through the false appearances of two similar-sounding but unserved entities. App-482. Steele allowed Skadden one week to correct its filings as to FSG and NESE.¹⁰

Four days later, on March 25, 2011 Skadden filed what seemed to be its appearance and motion to dismiss on behalf of FSG, which otherwise would have remained concealed from Steele in default. App-482. Skadden also filed at that time FSG’s second corporate disclosure statement and NESE’s second corporate disclosure statement. App-451-456.

¹⁰ Skadden also filed multiple – and conflicting – corporate disclosure statements, notices of appearance, and motions to dismiss ostensibly on behalf of NESE and/or FSG. App-479-486.

However, Skadden's March 25, 2011 filings were again "inaccurate, confusing, and deceptive," as Steele noted in a March 28, 2011 letter to Skadden. App-482. Among other things, Steele noted that FSG's own press release of March 22, 2011 directly contradicted FSG's and NESE's corporate disclosure statements and appearances. App-482-484.

Skadden responded to Steele's March 28, 2011 letter by filing FSG's *third* corporate disclosure statement. App-483. Once again, however, FSG misrepresented itself to the District Court in its third corporate disclosure statement. App-483-484.

Significantly, at *no point* did Skadden, in response to Steele's letters outlining fairly outrageous misconduct and fraud on the court, *deny or dispute Steele's accusations*. App-483.

Steele addressed FSG's – and Skadden's – confusing, conflicting, and deceptive filings in his April 9, 2011 Opposition to FSG's Motion to Dismiss, Docket Entry #73. App-478. Steele argued that FSG's actions constituted misconduct insofar as FSG had attempted to willfully default and conceal its default by having NESE – under a new name – appear as its illegal proxy. App-480.

Steele maintained that FSG's and Skadden's conduct required denial of FSG's motion to dismiss – *at a minimum* – if not the imposition of sanctions against FSG and/or Skadden for FSG's willful default and NESE's false appearance. App-480.

j. THE DISTRICT COURT'S DISMISSAL OF STEELE III

On May 18, 2011, the District Court allowed defendants' motions to dismiss *Steele III*. Add-5-9. The District Court held that *Steele III* was claim precluded by *Steele I*. Add-5-7.

i. Steele Asserted Four Grounds Against Preclusion by Steele I

Steele's opposition to defendants' motions to dismiss presented four arguments against application of claim preclusion: (1) fraud on the *Steele I* court undermining its preclusive effect; (2) fraud on the *Steele III* court; (3) judicial estoppel; and (4) mutually exclusive facts, claims, and issues in *Steele I* and *Steele III*. App-192-209; App-478-487.

ii. The District Court Failed to Meaningfully Address Three of Steele's Four Arguments

The District Court found *Steele I* precluded *Steele III*. Add-5-7. The District Court failed to address the majority of Steele's arguments, however.

Specifically, the District Court did not address Steele's judicial estoppel argument. Add-5-7.

As to Steele's fraud on the court arguments, the District Court was aware of Steele's claims: "Steele also makes *numerous allegations* of misconduct by the defendants and their attorneys." Add-8, App-570. The District Court acknowledged Steele's arguments "that the defendants committed fraud on the Court in Steele I," *Id.*, and that, in *Steele III*, "defendants' counsel attempted to remove defendant Fenway Sports Group, formerly known as New England Sports Enterprises LLC [] from this action by willfully defaulting and concealing FSG's willful default." Add-8, App-570.

The District Court, however, failed to conduct any *analysis* of Steele's fraud on the *Steele I* court argument – that such fraud undermines preclusive effect – other than to cross-reference its opinion in *Steele II*, which itself did not address fraud on the court as undermining preclusion. *Bongiovi*, 2011 WL 1882276, at 3.

As to Steele's fourth argument – that Skadden committed fraud on the court *in this case* – the District Court "decline[d] to consider [FSG's] alleged default" because it was dismissing the case on preclusion grounds; because Steele did not file a motion

for entry of default (notwithstanding its earlier explicit warning – that it would “look askance” - against such filings); and FSG had since appeared and moved to dismiss (though only after being “caught out” and threatened with entry of default). Add-8-9, App-570-571.

iii. The District Court’s Preclusion Analysis

The District Court reasoned that Steele “could have alleged copyright infringement based on unauthorized copying” in *Steele I*, “because such activities would have been in violation of his musical composition copyright.”¹¹ Add-6.

Steele argued that *Steele I* did not address unauthorized copying – i.e., reproduction – because defendants “successfully framed – and thereby limited – the issue before the [*Steele I*] Court as “substantial similarity.” App-193.

The District Court agreed with Steele on this point, attributing its *Steele I* exclusion of all “access and copying” issues and its limitation of the dispositive issue to substantial similarity to its adoption of “defendants’ reasoning,” Add-7 (“The Court

¹¹ The District Court prefaces this point with “as the defendants point out.” Add-6. However, Steele also “pointed this out” in his argument that *Steele I* did allege “unauthorized copying” but was improperly excluded from consideration. App-200.

agreed with the defendants' reasoning [*in Steele I*] and dismissed the case due to a lack of substantial similarity"). Add-7.

The District Court applied claim preclusion, finding that "Steele has provided no compelling reason for his failure to [allege copyright infringement based on unauthorized copying]" during *Steele I*. Add-6.

As noted, Steele, did allege "copyright infringement based on unauthorized copying" during *Steele I*. Appeal I App-27, 32, 156, 307-308, 591, 594, 785, 787, 792; Appeal I Steele Brief at 15, 37, 43-48; Appeal I Steele Reply at 19-20

SUMMARY OF ARGUMENT

The District Court's decision in *Steele III* was based entirely on the sanctity of its decision in *Steele I*. Add-5-7. *Steele I*, as Steele has shown this Court in his prior appeals, was corrupted in its entirety by defendants' fraud on the court. Appeal I Steele Brief at 18-19; Appeal I Steele Reply at 8-19; Appeal II Steele Brief at 19-34; 73-74; Appeal II Steele Reply at 3-6; 7-14; 16-33. Defendants' fraud on the court in *Steele I* is now the primary basis for reversal of *Steele I*, as Steele has made clear in his briefing of *Appeal I* and *Appeal II*.

The *Steele III* District Court had the full record of the *Steele I* defendants' fraud on the court before it but nonetheless *failed to make any findings or rulings as to fraud on the Steele I court*, or address Steele's arguments arising therefrom. Add-8 (deferring the District Court's analysis of "fraud on the court" to its decision in *Steele II*, which did not analyze fraud on the court).

Accordingly, this Court's determination of *Appeals I* and *II* – and the issue of defendants' fraud on the *Steele I* court – will impact, if not determine this appeal, given the *Steele III* District Court's reliance *en toto* on the soundness of its ruling in *Steele I*.

Defendants' continued their ways during *Steele III*, committing fraud on the court *during* the *Steele III* District Court proceedings. *Supra.* (i),(ii). Defendants' fraud on the court *in this case* provides additional grounds for reversal, including sanctions against Skadden.

In summary, after Steele

- (1) litigated *Steele I* to judgment in fraud-tainted proceedings;
- (2) appealed that judgment, in part based on defendants' fraud on the court;

(3) discovered that two *Steele I* defendants had willfully defaulted - which Skadden concealed with false appearances - and moved for entry of their defaults;

(4) had those motions denied in an opinion that failed to address Steele's undisputed claims of fraud on the *Steele I* court;

(5) appealed the District Court's denial of Steele's Motions for Entry of Default (*Appeal II*);

(6) filed *Steele III*, which alleged fraud on the *Steele I* court, during the pendency of the two *Steele I* appeals;

(7) presented undisputed evidence of *additional* fraud on the court during *Steele III*;

(8) had his *Steele III* claim dismissed by the District Court based on preclusion by *Steele I*, in a decision that failed to address Skadden's fraud in both *Steele I* and *Steele III*; and,

(9) filed the instant appeal of that dismissal, the overarching and determinative issue in this appeal, indeed in *all* of Steele's appeals, is defendants' fraud on the court. Appellees' fraud in *Steele I* not only impacted – but continued in - *Steele III*, and

requires reversal of *Steele III* as well as reversal of *all Steele I*-related dispositive District Court rulings.

Finally, the District Court's failure to address Steele's judicial estoppel argument and its failure to properly balance the equitable and policy considerations behind claim preclusion provide independent grounds for reversal.

ARGUMENT

a. INTRODUCTION

The District Court's Memorandum and Order ("*Steele III Decision*") failed to consider Steele's argument that (1) Skadden's fraud on the court in *Steele I* undermined any preclusive effect thereof, Add-8; (2) Skadden committed additional fraud on the court in *Steele III*, App-478-487; (3) defendants were judicially estopped from now holding the position that infringing reproduction was relevant in – indeed was adjudicated during - *Steele I*, in direct contradiction to their earlier position *during Steele I*, which the District Court adopted, that infringing reproduction was "irrelevant" in *Steele I*, App-192-197; and, (4) *Steele III* alleged only facts and claims that the District Court *ordered excluded* from consideration in *Steele I*, despite Steele's attempts to have those claims heard during *Steele I*. App-197-204.

b. STANDARDS OF REVIEW

i. De Novo Review Applies to an Allowance of a Motion to Dismiss

Appellate review of a District Court's allowance of a motion to dismiss is *de novo*. *Alternative System Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 29 (1st Cir. 2004) (citation omitted); *Martin v. Applied Cellular Technology*, 284 F.3d 1, 5-6 (1st Cir. 2002).

ii. Abuse of Discretion Review Applies to Application of Judicial Estoppel

Judicial estoppel is an equitable doctrine invoked by a court at its discretion. *Alternative Systems Concepts*, 374 F.3d. at 30-32 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). Accordingly, the First Circuit has determined that “the abuse of discretion standard seems a natural fit.” *Id.* at 31. In addition to equitable considerations, judicial estoppel – “[d]etermining whether a litigant is playing fast and loose with the courts” - also “has a subjective element,” making the trial court “better positioned” to decide the issue. *Id.* (citations omitted).

Under this standard, this Court will not disturb a discretionary decision unless it “plainly appears that the court committed a clear error of judgment in the

conclusion it reached upon a weighing of the proper factors.” *Id.*, at 32 (citations omitted).

Where the district court leaves a paucity of findings, this Court’s review is *de novo*. *Indigo America, Inc. v. Big Impressions, LLC*, 597 F.3d 1, 3 (1st Cir. 2010) (citation omitted).

c. PLEADING STANDARD

A complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009), (citing Fed.R.Civ.P. 8(a)(2)). As the Supreme Court held in *Twombly*, Rule 8 does not require “detailed factual allegations,” but does “demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S.Ct. at 1949, quoting *Twombly*, 550 U.S. at 570. The “plausibility standard” is not a “probability requirement,” but requires pleading of facts that are more than “merely consistent with” a defendants liability, else it “stops short of the line between

possibility and plausibility of the ‘entitlement to relief.’” *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557).

Determining the plausibility of a claim for relief is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

On a motion to dismiss, doubt resolves in the plaintiff’s favor. *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (“a court must take the allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiffs”).

THE DISTRICT COURT’S THREE ERRORS

The District Court’s decision dismissing *Steele III* misapplied, or failed to apply, three discrete – but here overlapping – equitable judicial doctrines designed to maintain the integrity of the courts and protect litigants from opponents’ unfair tactics: (1) fraud on the court; (2) judicial estoppel; and (3) claim preclusion.

THE DISTRICT COURT FAILURE TO ACT WHEN PRESENTED WITH CONCLUSIVE EVIDENCE OF FRAUD ON THE COURT

The District Court was presented with numerous undisputed, well-documented, and damning facts showing Skadden committed fraud on the court – *the*

same District Court – both in the past, during *Steele I*, and in the present, during *Steele III*. App-51, 204-206, 486-487.

While Skadden’s well-concealed fraud in *Steele I* was not discovered until after judgment, the *Steele III* District Court was made aware at once of both Skadden’s earlier – successfully concealed (to a point) – fraud in *Steele I* and Skadden’s fraud on the court occurring in “real-time,” in *Steele III*, as the court considered defendants’ *motions to dismiss*. App-204-206, 481-487.

Armed with this information and Steele’s repeated cries for help, the District Court did *nothing* to protect itself, the integrity of the judiciary, or Steele. Add-8; *Bongiovi*, 2011 WL 1882276, at 3.

Steele respectfully submits that the District Court’s abstention in the face of hard facts indicating fraud occurring before its eyes was an abuse of discretion, if not a dereliction of its duties as a member of the federal judiciary. See *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 503 (1st Cir. 1996) (abuse of discretion “occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them”) (citation omitted).

a. FRAUD ON THE STEELE I COURT RENDERED ANY PRECLUSIVE EFFECT THEREFROM “MANIFESTLY UNCONSCIONABLE”

Defendants committed fraud on the Court in *Steele I*. Accordingly, enforcement thereof is "manifestly unconscionable" and Defendants may not now "tak[e] any benefit whatever from it." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-45 (1944).

The District Court failed to address Steele's arguments that fraud on the court undermined any preclusive arising from *Steele I*. Add-8-9; App-204-209.

The District Court specifically stated: “[Steele] contends that the defendants committed fraud on the Court in Steele I by removing the MLB Advanced Media, L.P. (“MLBAM”) copyright notice from the [Infringing Audiovisual] it (sic) filed with the Court. That allegation is the subject of *Steele II* and, therefore, will not be addressed here.”¹² Add-8.

Nor was it addressed in *Steele II*, however.

To the contrary, *Steele II*'s analysis, assuming the plausible facts of Steele's complaint, *assumed* fraud on the court *during Steele I* yet found it irrelevant *to Steele I*:

¹² The District Court's decisions dismissing both *Steele II and III* were issued the same day, May 18, 2011. Appeal III App-7; App-20.

“[e]ven if defendants did make the alleged alterations with the requisite intent to conceal copyright infringement [during *Steele I*],” Steele “was not injured by the alleged acts.” *Bongiovi*, 2011 WL 1882276, at *3.

Moreover, Steele’s allegations of fraud on the *Steele I* court were not limited to defendants’ removal of the MLBAM copyright notice in *Steele I*. App-204-209; 355-357. Steele raised the entire litany of (known) fraudulent acts during and since *Steele I*, which had “been briefed in detail in Steele’s motions, memoranda, and replies” relating to Steele’s Motions for Default filed with and considered by the same District Court. App-204-205.

Appellees’ own “Notice of Recent Activity,” *Steele III* docket entry #9, informed the District Court of the extent of defendants’ fraud on the court. App-165-166. Exhibit A to defendants’ submission was Steele’s Motion for Sanctions filed with *this* Court in *Steele I’s* first *Appeal*, which outlined defendants’ numerous and *still undisputed* fraudulent acts and misconduct during and after *Steele I*, including *defendants’ fraud on this Court* as Appellees in the *Steele I Appeal*. App-168-188; 205.

The District Court failed to address defendants’ numerous undisputed acts of fraud on the court, other than cross-referencing its decision in *Steele II* – of which

fraud on the court was ostensibly “the subject,” - which, in turn, failed to address any fraud on the court, regardless of scope. Add-8; *Bongiovi*, 2011 WL 1882276, at *3.

Accordingly, the District Court *did not address* Steele’s allegations of fraud on the court; not in its *Steele III* decision, nor in its cross-referenced *Steele II* decision. *Id.*; Add-8. The District Court’s failure in this regard is Steele’s primary assertion of error in this appeal. The District Court’s abstention from the fraud on the court issue in *Steele III* was a legal error and abuse of discretion. *Indigo America, Inc., LLC*, 597 F.3d at 3 (citation omitted); *McKinnon*, 83 F.3d at 503 (citation omitted).

Additionally, Appellees here, during the District Court proceedings, continued to engage in serious misconduct and fraud on the court. Specifically, (1) FSG willfully and improperly defaulted, concealed by (2) NESE’s false appearance, (3) Skadden’s bad faith motion to dismiss, and (4) FSG’s multiple conflicting corporate disclosure statements. App-478-484.

Therefore, as with the currently pending *Steele I* appeals, fraud on the court is now the primary issue before this Court in this appeal.

b. SKADDEN'S FRAUD ON THE STEELE III COURT REQUIRES REVERSAL

Skadden's strategy in *Steele III* – at least the covert aspects – mirror those it employed in *Steele I*. In *Steele I*, two defendants intentionally defaulted while Skadden filed false appearances to conceal the defaults. Appeal II Brief at 19-28. Here – in *Steele III* – at least one defendant – FSG – intentionally defaulted while Skadden filed a false appearance to conceal its default. App-481-482.

Such conduct – the underlying facts of which Skadden has not, and cannot dispute because they *come from Skadden's own filings* – constitutes fraud on the *Steele III* court. *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.”).

Fraud on the court taints the entire proceedings. *Hazel-Atlas Glass*, 322 U.S. at 245-247.

Fraud on the court is an affront to the court's integrity and Steele need not show injury; the injury is to the court and requires reversal of this case in its entirety.

Id.

At a bare minimum, FSG should not be permitted to benefit from Skadden's fraud on the court on its behalf and both Skadden and FSG should be sanctioned. *Tri-Cran, Inc., v. Fallon (In re Tri-Cran, Inc.)*, 98 B.R. 609, 616 (Bankr.D.Mass. 1989) ("Where a judgment is obtained by fraud perpetrated by an attorney acting as an officer of the court, the judgment may be attacked for fraud on the court."). Sanctions should include reversal and entry of default as to FSG. *KPS v. Designs by FMC*, 318 F.3d 1, 13 (1st Cir. 203) (entry of default provides the Court with "a useful remedy when a litigant is confronted by an obstructionist adversary").

i. Defendants "Duped" the Steele I District Court

Steele I alleged infringing reproduction of the Steele Song in violation of his registered PA copyright pursuant to §17 U.S.C. §106 (2). Appeal I App-27, 32, 156, 307-308, 591, 594, 785, 787, 792; Appeal I Reply at 22-25. Steele further alleged infringing reproduction through defendants' synchronization of the Steele Song to video. Appeal I App-27-32.

Defendants, however, successfully misled - "duped" – in their words, App-263, the District Court into creating an incorrect legal framework that excluded Steele's

allegations of “infringing reproduction” through illegal copying from consideration.

Appeal I Reply at 22-25.

The District Court fully adopted - “agreed with” - defendants’ legally flawed basis for dismissing *Steele I*. Add-7.

The extent of defendants’ misdirection of the District Court as to the scope of Steele’s claims in *Steele I* is painfully clear in the District Court’s legally untenable analysis of Steele’s claim of violation of his synchronization rights – which is but an extension of Steele’s exclusive right to reproduce his work pursuant to §106(2). *Agee v. Paramount Communications*, 59 F.3d 317, 320-322 (2nd Cir. 1995). The District Court held – despite Steele’s unchallenged evidence of 96% synchronization, App-39 – that because “intervals of time are not original expression protectable under federal copyright law...no reasonable juror could conclude that the TBS Promo violates plaintiff’s synch rights.” *TBS*, 646 F.Supp.2d at 193. The District Court’s analysis of “intervals of time” as “original expression” stands contrary to *all* case law on Synchronization rights, as well as §106(2) from which those rights emanate. *Id.*

In reality, analysis of synchronization rights violations *necessarily* require determination of access and copying. *See Agee*, 59 F.3d at 320-322. The District

Court, following its own improper exclusion of access and copying from discovery or consideration – despite those elements being mandatory in any synchronization rights analysis – faced a “Catch-22” of its own making: how to analyze – and dismiss – Steele’s claimed violation of his synchronization rights without addressing access and copying. *Id.*; *TBS*, 646 F.Supp.2d at 193.

The District Court’s – frankly bizarre - holding that “synch rights are an additional right...to use [a protected work] in timed-relation with an audiovisual work... [a]lthough ... intervals of time are not original expression protectable under federal copyright law,” was the result of the District Court’s own order improperly limiting the issue to “substantial similarity” *at the behest of defendants*, who knew *exactly* what they were doing. *TBS*, 646 F.Supp.2d at 193; App-55; 195-196; Add-7; Appeal I App-41-42, 44, 46-48.

ii. Elements and Equities of Judicial Estoppel

Judicial estoppel is an equitable doctrine applied to prevent the “improper use of judicial machinery.” *New Hampshire*, 532 U.S. at 742. It is a longstanding principle, recognized by the First Circuit, as noted by this Court in *Patriot Cinemas v. General Cinemas, Inc.*, 834 F.2d 208, 212 (1st Cir. 1987).

Judicial estoppel applies where a “party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled.’” *New Hampshire*, 532 U.S. at 750 (citation omitted).

The First Circuit’s view is that, generally, judicial estoppel “prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant in a prior proceeding or in an earlier phase of the same legal proceeding.” *Alternative Systems Concepts*, 374 F.3d at 32-33 (citations omitted).

The First Circuit has two conditions that must be satisfied to apply the doctrine: (1) the estopping and estopped positions “must be directly inconsistent, that is, mutually exclusive;” and (2) the “responsible party must have succeeded in persuading a court to accept its prior position.” *Id.*

iii. Steele I Defendants: Reproduction “Irrelevant”

During *Steele I*, defendants consistently and repeatedly argued that (1) access and copying were irrelevant to Steele’s claims and (2) substantial similarity was the *only* dispositive issue, beginning with their very first appearance:

- “Applying these [legal] standards to the case at bar – *regardless of whether copying is assumed for the purposes of this motion* – the Complaint fails to state a cognizable copyright claim...” Appeal I App-51.
- “*Neither access nor copying...* can salvage a copyright infringement claim if the works at issue are not substantially similar.” *Id.* at 179, n.8.
- “Defendants... have assumed access solely for the purpose of their pending motion to dismiss. Should this lawsuit not be dismissed, the factual contentions concerning Defendants’ purported “access” to the Steele Song, as well as actual copying, will be vigorously disputed.” *Id.* at 440, n.3.
- “In [the instant case], Plaintiffs have alleged copying of portions of a musical composition, *not digital sampling of portions of sound recordings.*” *Id.* at 440, n.4
- “As the Court noted, there can be no copyright infringement in the absence of a showing of substantial similarity, and thus other *issues such as access and copying need not be addressed* for there to be a complete disposition of the matter.” *Id.* at 457.
- “[The issues of access and copying] *are not before the Court.*” *Id.* at 738, n.3.

iv. Steele I District Court “Agree[s]:”¹³ Reproduction Irrelevant

The District Court limited the scope of *Steele I* to the issue of substantial similarity. *TBS, 607 F.Supp.2d at 265*. The Court's April 3, 2009 Order was very clear, emphasizing that access and copying were forbidden territory. *Id.* As expected, in its final judgment on August 19, 2009, the Court analyzed Steele's infringement claims in terms of substantial similarity with no mention of access or factual copying. *TBS, 646 F.Supp.2d at 190-194*.

By its terms - and consistent with the Court's rulings at the March 31, 2009 hearing and following April 3, 2009 Order - the District Court's dismissal of *Steele I* did not constitute an adjudication of any issue apart from substantial similarity, i.e., "access and copying" (i.e., infringement by exact reproduction) *was not adjudicated*. *Id.*; *TBS, 607 F.Supp.2d at 265*; Appeal I App-394, 414.

The *Steele I* defendants filed false evidence, misrepresented both law and fact, and concealed willful defaults with false appearances, while presenting the Court with its unequivocal “position” from its first filing to its last e – however legally incorrect - that substantial similarity was the “dispositive issue” and infringing reproduction need

¹³ Add-7.

not be addressed. App-55; 195-196; Add-7; Appeal I App-41-42, 44, 46-48. The District Court immediately “bought” defendants’ misplaced legal framework. *See Alternative Systems*, 374 F.3d at 34 (“[t]here is no question but that the district court bought what [the estopped party] was selling the first time around”).

As Skadden was no doubt aware – and as Steele has argued to this Court already, Appeal II Reply at 31-32, Steele, *pro se*, was unable to refute – was not even aware of the nature of - this purely legal (and legally erroneous) argument.

v. Steele III Defendants: In Retrospect, Reproduction Not Only Relevant – but Actually Adjudicated in Steele I

Appellees’ arguments to the District Court on claim preclusion grounds *assumed* the prior adjudication - in *Steele I* - of *access and reproduction*. App-121-122, 125-128. *Steele I* did not, however, adjudicate access, reproduction, or *anything other than substantial similarity*. Add-7.

More to the point, however, defendants’ mantra-like position in *Steele I* – no doubt seeking to avoid having to respond to any meaningful discovery - that access and factual copying were irrelevant, is "clearly inconsistent" with Appellees’ later position in *Steele III* that *Steele I adjudicated* access and factual copying.

Appellees' preclusion argument – adopted by the District Court - was "clearly inconsistent" with defendants' position in *Steele I*. See *New Hampshire*, 532 U.S. at 750-751. (New Hampshire estopped from asserting terms defining maritime boundary inconsistent with terms to which it had previously agreed).

The *Steele I* defendants' arguments that *Steele I* could be decided as a matter of law based exclusively on a substantial similarity analysis – which the *Steele I* District Court adopted – resulted in dismissal of *Steele I*. Add-7.

Defendants/appellees argued in *Steele III*, however, that *Steele I's* narrow scope – substantial similarity – arose not from their insistence that it was the determinative issue, App-430-431, 433, but because Steele “could have, but didn't” allege infringing reproduction. *Id.* The record plainly refutes their expedient change of positions. Appeal I App-27, 32, 51, 156, 179, n.8, 307-308, 440, n.3, n.4, 457, 591, 594, 738, n.3, 785, 787, 792; Appeal I Reply at 22-25. Nonetheless, the District Court apparently - it did not specifically address Steele's judicial estoppel argument - saw no contradiction. Add-6-8.

vi. The District Court Abused its Discretion in Failure to Apply or even Consider Judicial Estoppel

The District Court's failure to estop appellees resulted in the exact – and inequitable – situation the doctrine of judicial estoppel was meant to avoid: Appellees "derive[d] an unfair advantage" and "impose[d] an unfair detriment" on Steele because they were not estopped. *New Hampshire*, 532 U.S. at 750-751.

Here, as in *Alternative Systems*, the facts "paint[] a convincing picture of a litigant who took one position, used that position to its advantage at the motion to dismiss [and summary judgment] stage, and later attempted to switch horses midstream to revive a previously abandoned (and flatly inconsistent) claim." *Alternative Systems*, 374 F.3d at 34-35.

Once defendants succeeded in *Steele I* – both as to convincing the District Court to ignore Steele's claim of infringing reproduction and at summary judgment – they adopted the "flatly inconsistent" position" in *Steele III* that reproduction was not only at issue, but actually adjudicated in *Steele I*. See *Alternative Systems*, 374 F.3d at 35. Defendants effectively "carr[ied] out a game of bait and switch" in *Steele III, Id.*, "simply because [their] interests ha[d] changed." See *Patriot Cinemas*, 834 F.2d at

212. The District Court's preclusion ruling, accordingly, "sanction[ed] what amounts to a sneak attack." *See Alternative Systems*, 374 F.3d at 34.

Where, as here, Appellees have played "fast and loose with the courts," using "intentional self-contradiction... as a means of obtaining unfair advantage in a forum provided for suitors seeking justice," judicial estoppel "should be employed." *Patriot Cinemas* 834 F.2d at 212.

Appellees' position in *Steele I* "virtually assured" that access and copying – reproduction – would not be addressed in *Steele I*. *See Id.*

Defendants may not first assert a position in one case - conceding facts to narrow issues and obtain a favorable judgment - then, in another case, argue the exact opposite position to shield themselves from their prior position, i.e., that the prior favorable judgment *was* based on the facts they successfully removed from consideration in the first case. *New Hampshire*, 532 U.S. at 749.

Judicial estoppel is particularly appropriate where, as here, Defendants' "interests have changed" between *Steele I* and *Steele III* and their inconsistent position is "to the prejudice of the party who has acquiesced in the position formerly taken by him." *See Id.* Moreover, "[Defendants] succeeded in persuading [this] court to

accept [Defendants'] earlier position, so that judicial acceptance of [Defendants'] inconsistent position in [Steele III] would create ‘the perception that either the first or the second court was misled.’” *Id.* at 750.

Having succeeded in persuading the *Steele I* District Court to adopt defendants’ “reasoning,” obtaining dismissal of *Steele I* on that “reasoning,” appellees now – in order to argue preclusion *Steele III* - disclaim their earlier and successfully argued “reasoning” that the issues of “access and copying” were properly excluded from *Steele I*. App-261; Add-7. Appellees argue that in *Steele* was “free to (but did not) allege” digital copying in *Steele I*. App-261-262. Appellees concede that such digital copying “would have infringed Steele’s copyright on his musical composition.” App-262.

i. Failure to Apply Judicial Estoppel “Depriv[ed] [Steele] of Any Tribunal in Which to Bring his Action”¹⁴

Where a litigant argues in one forum that an opponent has an “exclusive remedy” in that forum, but later, in another forum makes “precisely the opposite argument,” i.e., that the opponent’s “exclusive remedy” is in the second forum, judicial estoppel applies. *Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 13 (1st Cir. 1999).

¹⁴ *Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 13 (1st Cir. 1999).

As Steele has maintained since his first appeal, he has yet to “have his day in court” as to his infringing reproduction claim. Steele, *pro se*, claimed infringing reproduction in *Steele I*, but was ignored by the District Court, which adopted Skadden’s hard-pressed legal framework of a substantial similarity-only determination. Steele appealed that ruling and, to avoid limitations issues as to infringing reproduction, filed *Steele III* – but only *at the last possible moment*. Moreover, Steele moved to stay *Steele III* pending this Court’s determination of his appeal asserting error in the District Court’s adoption of Skadden’s narrow legal analysis.

In sum, Steele filed *Steele III* precisely *because* the District Court failed to address reproduction in *Steele I* and because his appeal on this issue remained pending as the possible limitations period approached. Any other course of action risked Steele losing the right to have his infringing reproduction claim – properly raised in *Steele I*, appealed to this Court, and raised *again in Steele III* – adjudicated at all.

If this Court reversed *Steele I* prior to the expiration of the limitations period, Steele *would not have filed Steele III*. Rather, Steele would have moved to amend his complaint on remand to add his *Steele III* count of infringing reproduction pursuant to 17 U.S.C. §114. Allowing preclusion here would take Steele’s reproduction claim

from him without adjudication of any kind in any forum, based on an erroneous decision, steeped in fraud, where that claim was ignored.

Respectfully, this is not a legal precedent the First Circuit should establish.

Finally, Steele submits these policy considerations – designed to protect the courts as well as the litigants – should be enforced even more vigorously where, as here, plaintiff was *pro se* and where the District Court, as well as Steele, were victims of a sophisticated law firm’s *successful* (so far) scheme of fraud on the court.

MISAPPLICATION OF CLAIM PRECLUSION

a. STEELE III ALLEGES CLAIMS RAISED IN – BUT SPECIFICALLY EXCLUDED FROM - STEELE I

The *Steele III* decision reasoned that preclusion applied because “Steele could have alleged copyright infringement [in *Steele I*] based on unauthorized *copying*... Steele has provided no compelling reason for his failure to do so.” *Steele III* Decision at 6 (emphasis supplied).

The District Court’s finding simply defies the facts on record, as Steele explicitly raised the issue of actual copying, or reproduction:

(1) “Bart can show that...defendants could easily change Bart’s song into the

Bon Jovi ad by simply *copying* and dragging or cutting and pasting parts of

the music [into their unauthorized derivative].” *Steele I* Complaint at ¶ 29 (Docket No. 1).

- (2) “Bart’s saga shows [that]...ASCAP and the Copyright Office...turn[ed] a blind eye to the very wrongs they are supposed to guard against: *copying*, changing and using songs without the permission of the author.” *Id.* at ¶ 29.
- (3) “[C]urrent law...do[es] not address the issue of temp tracking, and the current ease of *copying* and altering copyrighted musical works.” *Steele I* Amended Complaint and Opposition to Motion to Dismiss at ¶ 8 (Docket No. 42) (emphasis supplied to all).

The District Court’s failure to consider Steele’s categorical claim of “copying” *during Steele I* was the exact reason for Steele’s filing of *Steele III*, i.e., to have his claim of “copying” – ignored by the Court in *Steele I* – finally heard.

The Court’s circular reasoning – that because Steele “could have” raised “copying” in *Steele I* (when, in fact, he did raise it), he is now barred from raising it in *Steele III* (which Steele filed *specifically because* it was ignored in *Steele I*) – is simply inexplicable. Steele even used the District Court’s own language, i.e., “copying,” in his futile attempts to have the issue heard in *Steele I*.

The District Court held that Steele's claims here were claim precluded by its decision dismissing *Steele I*. Add-5. The District Court found that Steele's claims met the three *Airframe* requirements for claim preclusion: "(1) the earlier suit resulted in a final judgment on the merits, (2) the causes of action asserted in the earlier and later suits are sufficiently identical or related, and (3) the parties in the two suits are sufficiently identical or closely related." Add-5 (citing *Airframe Sys. Inc. v. Raytheon Co.*, 601 F.3d 9, 14 (1st Cir. 2010)).

Steele does not question that *Steele I* resulted in a final judgment on the merits, the appeal of which remains pending. *Steele I Appeal*. Steele further agrees that *some* of the defendants in the two suits were "closely related" or "sufficiently identical." Add-5 (citing *Airframe* 601 F.3d at 14). Certain defendants in *Steele III*, however, were unrelated to the *Steele I* parties specifically because of the differences between the *Steele I* claim of infringement pursuant to 17 U.S.C. § 106 and the *Steele III* claim of infringement arising under 17 U.S.C. § 114.

Specifically, certain of the *Steele III* defendants were alleged to have engaged in reproduction of the Steele Song – infringing Steele's rights pursuant to 17 U.S.C. §114 and his SR copyright registrations – but *not* infringement by other means, i.e.,

derivation and synchronization. Nonetheless, any analysis of distinctions between the parties is inextricably linked to the second *Airframe* factor, whether the causes of action in *Steele I* and *Steele III* are “sufficiently identical or related.” Add-5 (citing *Airframe* 601 F.3d at 14).

The District Court applied claim preclusion – an equitable doctrine – without weighing the intervening and intersecting equitable doctrines of fraud on the court and judicial estoppel. Steele forcefully argued that the equitable considerations arising from defendants’ past and current fraud on the court as well as their playing “fast and loose” with the courts, which warranted application of judicial estoppel, far outweighed any equitable or policy concerns in favor of claim preclusion. The District Court additionally ignored claim preclusion’s independent policy considerations that strongly favored Steele.

b. THE DISTRICT COURT'S APPLICATION OF CLAIM PRECLUSION VITIATED THAT DOCTRINE'S EQUITABLE UNDERPINNINGS BY FAILING TO HOLD DEFENDANTS ACCOUNTABLE FOR THEIR FRAUD ON THE COURT AND MANIPULATIONS WARRANTING APPLICATION OF JUDICIAL ESTOPPEL

The District Court's decision involved – and this Court's ruling will likely involve – the intersection of three equitable judicial doctrines: (1) fraud on the court; (2) judicial estoppel; and (3) res judicata (claim preclusion).

Appellees/defendants (1) committed fraud on the court during *Steele I*, part of which involved substantive legal misrepresentations convincing the District Court to adopt defendants' substantial similarity-only analysis and ignore as "irrelevant" Steele's claim of infringing reproduction, 2) "succeeded in persuading" the District Court to adopt defendants' position, *Alternative Systems*, 374 F.3d at 33, resulting in the District Court's order that the only issue for all purposes – discovery and summary judgment – was substantial similarity; later, their interests having changed from winning *Steele I* to precluding *Steele III*, defendants adopted the *false* and "directly inconsistent" position, *Alternative Systems*, 374 F.3d at 33, that substantial similarity was the sole issue in *Steele I* not because of their arguments *for that position*, but because Steele could have, but did not, claim infringing reproduction in *Steele I*; (3)

thereby successfully convincing the District Court that *Steele III* was claim-precluded by *Steele I*.

c. STEELE I DOES NOT PRECLUDE STEELE III

The exact facts (1) *alleged by Steele in his complaints*, (2) *conceded for argument by defendants*, (3) *barred from discovery or argument* by this District Court's Order of April 3, 2009, and (4) *not part of the Court's August 19, 2009 Summary Judgment Order in Steele I* are the *only* facts at issue in *Steele III*. The District Court's judgment in *Steele I*, therefore, should not - given its limited scope - have precluded *Steele III*, which alleged *only* facts and claims *specifically excluded* from the final judgment in *Steele I*.

The doctrine of claim preclusion bars relitigation of claims that were or could have been made in an earlier suit. *Airframe Systems, Inc. v. Raytheon Co.*, 601 F.3d 9, 14 (1st Cir. 2010) (“plaintiff had every opportunity to fully litigate its various claims against the full range of defendants in an earlier suit and made the strategic choice not to do so”).

Steele III is based *entirely* on those elements alleged by Steele *yet not determined* by *Steele I*: Order: access and factual copying, i.e., infringing reproduction. The

entire "nucleus of operative facts" in *Steele III* - access and factual copying - implicates facts and issues intentionally and specifically neither litigated nor adjudicated in *Steele I*, at the urging of the *Steele I* defendants, no less. Accordingly *Steele III* would *in no way* overlap, duplicate, or relitigate issues of fact or matters of law litigated or adjudicated in *Steele I*. See *Airframe* 601 F.3d at 14.

Steele III alleges infringement by exact reproduction of Steele's sound recording - shown by access and factual copying - pursuant to 17 U.S.C. § 114:

200. Each defendant named herein directly infringed Steele's exclusive rights in the Steele Team Song sound recording by reproducing the Steele Team Song sound recording without Steele's permission by sending, forwarding, or otherwise transmitting by e-mail or internet, or by copying or downloading by digital means, or otherwise illegally copying, the Steele Team Song sound recording before and during the pre-production and production of the MLB Audiovisual.

See *Steele III* Complaint, ¶ 200.

The First Circuit's "transactional approach" defines claims as arising from "all or any part of the transaction, or series of connected transactions, out of which the action arose." See *Airframe*, 601 F.3d at 15. The cause of action, or common nucleus of operative facts, is determined by the (1) facts' relation in time, space, origin or motivation, (2) whether they are convenient as a trial unit, and (3) whether such treatment conforms to parties' expectations. *Id.*

Here, the operative facts of reproduction - Steele III - as compared to the operative facts of substantial similarity - Steele I - are not related in time or space.

Airframe, 601 F.3d at 14.

The temporal facts relevant to Steele III's illegal reproduction range from in October 2004 with Defendant Red Sox's admitted receipt of Steele's sound recording up through August 2007 with the completion of the MLB Audiovisual. The infringing reproductions occurred during that nearly three-year period in which the pre-production and production of the MLB Audiovisual took place. Steele III Complaint, ¶200.

Facts relating to substantial similarity in Steele I, on the other hand, do not occur until the facts relating to reproduction are over, i.e., August, 2007, after preproduction and production of the MLB Audiovisual, with which the Steele Song was compared in Steele I, as part of the Court's substantial similarity analysis.

As to geography of facts, Steele III's claim of infringing reproduction began in Boston and likely spread to Atlanta, Nashville, and New York, at a minimum. Steele

III Complaint.¹⁵ Conversely, location was irrelevant in determining substantial similarity in Steele I.

Defendants' reliance on Airframe is misplaced. Plaintiff in Airframe failed to state a claim, failed to amend his complaint, and withheld his claim as a “calculated tactical decision” in order to “mere[ly] shift...evidence offered to support a ground held unproved in a prior action.” See Airframe, 601 F.3d at 16. Steele withheld nothing: Steele I alleged reproduction, as well as illegal derivation and violation of his synch rights in defendants' creation of the MLB Audiovisual. See Steele Complaint of October 8, 2008 (Docket No. 1) at ¶¶ 16, 29, 32; Steele's Opposition to Motion to Dismiss of January 30, 2009 at ¶¶ 1, 2, 6, 8, 11, 13, 16, 18, 20; Steele's Opposition to Summary Judgment of July 17, 2009 (Docket No. 101) at 3, 5-6.

Nor has Steele's underlying theory for Steele I or Steele III varied. As this Court noted in Steele I: “Steele contends the [the MLB Audiovisual] was unlawfully derived from his work through a method called “temp tracking”... the use of a song as

¹⁵ Defendant Red Sox admitted receipt in Boston; Turner Studios, which edited the MLB Audiovisual, is in Atlanta, as is Turner Sports; MLBAM is located in New York.

a template to create an audiovisual work which, in turn, is used to create a final soundtrack.” Memorandum & Order of August 19, 2009 (Docket No. 104) at 3.

More to the point, unlike in Airframe, the facts of “access” and “actual copying” (i.e., creation of the MLB Audiovisual and Bon Jovi audio works) were neither “vigorously disputed” nor “held unproved in [Steele I].” See Airframe, 601 F.3d at 16. Claim preclusion protects parties against gamesmanship and claim-splitting, spares judicial resources, and promotes consistency in the courts. See Id. at 14. These protections apply to Steele as well as Defendants. Steele III's claim of unlawful digital reproduction of his sound recording should not be precluded by this Court's ruling on plagiarism and synchronization of his composition Steele I.

Finally, given the mutually exclusive facts and issues of Steele I and Steele III, and with the policy behind claim preclusion in mind, Steele III will not relitigate previously determined claims, the Court will not expend unnecessary judicial resources determining facts and issues left unresolved from Steele I, and because the Steele III cause of action arises solely from Steele's exclusive right to reproduce his sound recording, pursuant to 17 U.S.C. §114, this Court runs no risk of rendering inconsistent decisions.

RELIEF REQUESTED

Steele requests a mandate reversing the District Court's dismissal of this case and Rule 11 admonition of Steele and the undersigned, and remanding the case to the District Court for further proceedings.

Steele further requests that, upon remand, a Master be appointed to oversee discovery and otherwise oversee the case and assist the District Court. Steele makes this request based upon his experience to date litigating against Skadden, whose nefarious tactics have not relented and certainly are likely to continue on remand.

CONCLUSION

WHEREFORE, Steele respectfully requests that this Honorable Court reverse the District Court's Order dismissing this case and provide the above-described relief sought by Steele.

/s/Christopher A.D. Hunt
Christopher A.D. Hunt
MA BBO# 634808
Court of Appeals Bar #61166
THE HUNT LAW FIRM LLC
10 Heron Lane
Hopedale, MA 01747
(508) 966-7300
cadhunt@earthlink.net

CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that on August 11, 2011, I caused this Brief of Appellant Samuel Bartley Steele, filed through the ECF system, to be served electronically by the Notice of Docket Activity upon the ECF filers listed below. On August 8, 201, copies of the appendix were sent to the clerk of the First Circuit Court of Appeals and to counsel for appellees, Christopher G. Clark, at the address listed below.

Clifford M. Sloan
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005
csloan@skadden.com

Kenneth A. Plevan
Skadden, Arps, Slate, Meagher & Flom LLP
One Beacon Street
31st Floor
Boston, MA 02108
kplevan@skadden.com

Scott D. Brown
Skadden, Arps, Slate, Meagher & Flom LLP
One Beacon Street
31st Floor
Boston, MA 02108
sbrown@skadden.com

Christopher G. Clark
Skadden, Arps, Slate, Meagher & Flom LLP
One Beacon Street
31st Floor
Boston, MA 02108
cclark@skadden.com

Matthew J. Matule
Skadden, Arps, Slate, Meagher & Flom LLP
One Beacon Street
31st Floor
Boston, MA 02108
sbrown@skadden.com

Dated: August 11, 2011

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

United States Court of Appeals For the First Circuit

No. 11-1675

SAMUEL BARTLEY STEELE

Plaintiff - Appellant

v.

ANTHONY RICIGLIANO; BOSTON RED SOX BASEBALL CLUB LIMITED PARTNERSHIP; BRETT LANGEFELS; JOHN BONGIOVI, individually and, d/b/a Bon Jovi Publishing; JOHN W. HENRY; MAJOR LEAGUE BASEBALL PROPERTIES, INC., a/k/a Major League Baseball Productions; RICHARD SAMBORA, individually and, d/b/a Aggressive Music; TIME WARNER, INC.; TURNER SPORTS INC.; TURNER STUDIOS INC.; VECTOR MANAGEMENT LLC, a/k/a Successor in Interest to Vector Management; WILLIAM FALCON, individually and, d/b/a Pretty Blue Songs; BOB BOWMAN; CRAIG BARRY; DONATO MUSIC SERVICES, INC.; FENWAY SPORTS GROUP, a/k/a FSG, f/k/a New England Sports Enterprises LLC; JACK ROVNER; JAY ROURKE; LAWRENCE LUCCHINO; MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P.; MARK SHIMMEL, individually and, d/b/a Mark Shimmel Music; MIKE DEE; NEW ENGLAND SPORTS ENTERPRISES, LLC, f/d/b/a Fenway Sports Group, a/k/a FSG; SAM KENNEDY; THOMAS C. WERNER; TURNER BROADCASTING SYSTEM, INC.

Defendants – Appellees

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

ADDENDUM TO BRIEF OF APPELLANT SAMUEL BARTLEY STEELE

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

TABLE OF CONTENTS

DISTRICT COURT MEMORANDUM & ORDER OF MAY 18, 2011.....	1
--	---

United States District Court
District of Massachusetts

<hr/>)
SAMUEL BARTLEY STEELE,)
Plaintiff,)
)
v.)
	Civil Action No.)
	10-11458-NMG)
ANTHONY RICIGLIANO, BOB BOWMAN,)
BOSTON RED SOX BASEBALL CLUB)
LIMITED PARTNERSHIP, BRETT)
LANGEFELS, CRAIG BARRY, DONATO)
MUSIC SERVICES, INC., FENWAY)
SPORTS GROUP a/k/a FSG f/k/a New)
England Sports Enterprises LLC,)
JACK ROVNER, JAY ROURKE, JOHN)
BONGIOVI, individually and d/b/a)
Bon Jovi Publishing, JOHN W.)
HENRY, LAWRENCE LUCCHINO, MAJOR)
LEAGUE BASEBALL ADVANCED MEDIA,)
L.P., MAJOR LEAGUE BASEBALL)
PROPERTIES, INC., a/k/a and/or)
d/b/a Major League Baseball)
Productions, MARK SHIMMEL,)
individually and d/b/a Mark)
Shimmel Music, MIKE DEE, NEW)
ENGLAND SPORTS ENTERPRISES LLC)
f/d/b/a Fenway Sports Group)
f/a/k/a FSG, RICHARD SAMBORA,)
individually and d/b/a Aggressive)
Music, SAM KENNEDY, THOMAS C.)
WERNER, TIME WARNER, INC., TURNER)
BROADCASTING SYSTEM, INC., TURNER)
SPORTS INC., TURNER STUDIOS, INC.,)
VECTOR MANAGEMENT LLC, f/k/a)
and/or a/k/a and/or successor in)
interest to Vector Management,)
WILLIAM FALCON, individually and)
d/b/a Pretty Blue Songs,)
Defendants.)
<hr/>)

MEMORANDUM & ORDER

GORTON, J.

Plaintiff Samuel Bartley Steele ("Steele") brings this case against numerous defendants for copyright infringement. He claims that a song he wrote about the Boston Red Sox ("the Steele Song") was unlawfully copied and used to create a promotion for post-season baseball telecasts ("the TBS Promo"). This is the third such lawsuit brought by Steele and will be referred to as "Steele III". In this case, Steele alleges that the named defendants infringed his copyright of the Steele Song sound recording, in violation of 17 U.S.C. § 114, by reproducing and using the Steele Song sound recording prior to and during production of the TBS Promo.

I. Factual Background

Plaintiff originally brought claims for copyright infringement against many of the same defendants. Steele v. Turner Broad. Sys., Inc. et al, Civ. A. No. 08-11727-NMG ("Steele I"). In August, 2009, this Court granted summary judgment to the defendants in that case finding no substantial similarity between the Steele Song and that of the defendants. Steele v. Turner Broad. Sys., Inc., 646 F. Supp. 2d 185 (D. Mass. 2009). Thereafter, the Court denied Steele's motion for reconsideration. Steele v. Turner Broad. Sys., Inc., Civ. A. No. 08-11727-NMG, 2009 WL 3448698 (D. Mass. Oct 13, 2009). Steele appealed this

Court's orders to the United States Court of Appeals for the First Circuit and that appeal remains pending. Steele also has another case pending in this Session (Steele v. Bongiovi, et al., Civ. A. No. 10-11218-NMG) ("Steele II") and a case pending in the Massachusetts Superior Court Department (Steele v. Boston Red Sox Baseball Club L.P., No. 10-3418E) ("Steele IV").

On September 1, 2010, defendants Turner Broadcasting System, Inc. ("TBS") and Boston Red Sox Baseball Club Limited Partnership ("the Red Sox") filed a motion 1) to dismiss Steele's lawsuit pursuant to Fed. R. Civ. P. 12(b)(6) on claim preclusion grounds and 2) to award the moving defendants attorney's fees and costs. Alternatively, the defendants request that the Court enter a stay of the case pending resolution of the related cases and that the Court enjoin Steele from a) making additional motions in Steele I and this case and b) filing new lawsuits related to the "Steele Song" without first obtaining this Court's prior approval.

After that motion to dismiss was filed, the remaining defendants filed similar motions to dismiss and adopted in support thereof the arguments made by TBS and the Red Sox. In their motion, Anthony Ricigliano, Donato Music Services, Inc., Brett Langefels and Craig Barry also move to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). On January 3, 2011, Steele filed a motion to stay the action and to consolidate it with Steele II which the defendants oppose.

II. Plaintiff's Motion to Stay

Steele moves to consolidate this action with Steele II and to stay both proceedings until the First Circuit issues a decision with respect to the Steele I appeals. Although the defendants' suggest the alternative of a stay in their motions to dismiss, they oppose Steele's motion to stay on the grounds that Steele filed the motion to stay in order to avoid dismissal and sanctions.

Deciding whether to stay proceedings involves balancing the interests of the parties and the Court. Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936). "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward." Id. at 255. The Court finds that Steele has not set forth any convincing grounds for staying this action. The fact that Steele I is currently on appeal in the First Circuit does not undermine its validity or preclusive effect. See, e.g., In re Belmont Realty Corp., 11 F.3d 1092, 1095-96, 1099 (1st Cir. 1993). Unless that decision is reversed by the First Circuit, it is a valid and binding determination and the Court may dismiss this case as claim precluded by its decision in Steele I. See id.; Solis-Alarcon v. Abreu-Lara, 722 F. Supp. 2d 157, 161 (D.P.R. 2010) (finding that the possibility that a prior judgment adverse to the plaintiff might be reversed on appeal did not justify staying a subsequent related action).

III. Motions to Dismiss

Defendants argue that the doctrine of res judicata, or claim preclusion, bars Steele's claims in this case. The doctrine of res judicata provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."

Allen v. McCurry, 449 U.S. 90, 94 (1980). Accordingly, res judicata applies if

(1) the earlier suit resulted in a final judgment on the merits, (2) the causes of action asserted in the earlier and later suits are sufficiently identical or related, and (3) the parties in the two suits are sufficiently identical or closely related.

Airframe Sys., Inc. v. Raytheon Co., 601 F.3d 9, 14 (1st Cir. 2010).

The Court finds that Steele's claims in this case are claim precluded by Steele I. First, this Court's grant of summary judgment in favor of the defendants in August, 2009 in Steele I was certainly a final judgment on the merits. See Caballero-Rivera v. Chase Manhattan Bank, N.A., 276 F.3d 85, 87 (1st Cir. 2002). With respect to the second requirement, Steele argues that this case is distinct from Steele I because it arises from his sound recording copyright, whereas the claims in Steele I arose out of his performing arts copyright. Nevertheless, the claims in this case are based on the same "nucleus of operative facts" as the claims in Steele I: the defendants' alleged

infringement of Steele's copyright in the Steele Song. See Airframe Sys., Inc., 601 F.3d at 15 (holding that the plaintiff's earlier claims of infringement by possession and its later claims of infringement by use of its source code arose from the same nucleus of operative facts and, therefore, the later claims were barred by res judicata). Thus, the Court finds that the copyright infringement claims Steele brings in this case are sufficiently related to his claims in Steele I.

Moreover, there is no reason why the new defendants and new claims could not have been included in Steele I. Steele argues that he could not have brought the current claims because, at the time Steele I was filed, he had not yet registered his sound recording with the United States Copyright Office. Steele does not, however, explain why he delayed the registration of his sound recording copyright. More importantly, as the defendants point out, Steele could have alleged copyright infringement based on unauthorized copying because such activities would have been in violation of his musical composition copyright which was registered at the time Steele I was filed. Steele has provided no compelling reason for his failure to do so and, as such, the Court finds that he should be precluded from raising such claims in a separate lawsuit. See Airframe Sys., Inc., 601 F.3d at 14-15, 18 (holding that it was fair to apply claim preclusion because the plaintiff did not show good cause for failing to

bring its claims in the earlier lawsuit).

Steele argues that the issues in this case are factual copying and access any response to which the defendants waived when they limited the scope of Steele I to an analysis of "substantial similarity." Steele refers to the defendants' memoranda in Steele I, in which they pointed out that

there can be no copyright infringement in the absence of a showing of substantial similarity, and thus other issues such as access and copying need not be addressed for there to be a complete disposition of the matter.

The Court agreed with the defendants' reasoning and dismissed the case due to a lack of substantial similarity between the Steele Song and the defendants' creative works. See Steele I, 646 F. Supp. 2d at 190-93. Indeed, the claims brought here are distinct from those brought in Steele I and may require analysis of some issues not addressed in Steele I. The doctrine of claim preclusion, however, bars litigation of claims that could have been brought in the prior lawsuit, not just claims that were actually articulated. Airframe Sys., Inc., 601 F.3d at 14. Although all of the issues raised here may not have been litigated in Steele I, they could have been and, therefore, Steele's claims are barred by res judicata. As such, the defendants' motion to dismiss will be allowed.

The third criteria for the enforcement of the doctrine of res judicata is also clearly satisfied here. Claim preclusion applies so long as a new defendant is "closely related to a

defendant from the original action". Id. at 17 (internal quotation omitted). Eight defendants were named in both Steele I and Steele III. Steele alleges that the new defendants added in Steele III are directors, managers, employees or affiliates of or acting in concert with the defendants named in Steele I. The Court finds that those affiliations constitute sufficiently close relationships to warrant the application of claim preclusion. See In re El San Juan Hotel Corp., 841 F.2d 6, 10-11 (1st Cir. 1988) (holding that the new defendant, an alleged co-perpetrator of the harms litigated in the first lawsuit, could invoke the doctrine of res judicata because it had a sufficiently close relationship to the original defendant).

Steele also makes numerous allegations of misconduct by the defendants and their attorneys. First, he contends that the defendants committed fraud on the Court in Steele I by removing the MLB Advanced Media, L.P. ("MLBAM") copyright notice from the TBS Promo it filed with the Court. That allegation is the subject of Steele II and, therefore, will not be addressed here. Second, Steele asserts that defendants' counsel attempted to remove defendant Fenway Sports Group, formerly known as New England Sports Enterprises LLC ("FSG") from this action by willfully defaulting and concealing FSG's willful default. Because 1) the Court will dismiss this action on claim preclusion grounds, 2) Steele has not filed a motion for a default judgment

and 3) FSG has responded to this action by moving to dismiss it, the Court declines to consider the alleged default.

IV. Defendants' Motion for Sanctions

Defendants request attorney's fees and costs related to their motion to dismiss pursuant to Fed. R. Civ. P. 11 , 28 U.S.C. § 1927 and 17 U.S.C. §§ 505 and 1203(b) (5). They also ask that the Court enjoin Steele from making additional motions or filing new lawsuits related to the Steele Song, without the Court's approval.

The First Circuit has stated that Fed. R. Civ. P. 11 prohibits filings made with any improper purpose, the offering of frivolous' arguments, and the assertion of factual allegations without evidentiary support or the likely prospect of such support.

Roger Edwards, LLC v. Fiddes & Son Ltd., 437 F.3d 140, 142 (1st Cir. 2006) (internal quotations omitted). Rule 11 sanctions are intended to "protect parties and the Court from wasteful, frivolous, and harassing lawsuits." Jones v. Social Sec. Admin., Civ. A. No. 03-12436, 2004 WL 2915290, at *3 (D. Mass. Dec. 14, 2004).

Similarly, 28 U.S.C. § 1927 provides that

Any attorney . . . 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 reasonably incurred because of such conduct.

Finally, under the United States Copyright Act, 17 U.S.C. §§ 505 and 1203(b) (5), the Court has the discretion to award costs and

reasonable attorney's fees to the prevailing party if it finds that the litigation was, inter alia, frivolous or undertaken in bad faith. See Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 n.19 (1994).

As explained above, Steele's claims in this action are clearly precluded by this Court's holding in Steele I and appear to be an attempt to circumvent that holding. Thus, this lawsuit is at least frivolous, and possibly vexatious, and it would be reasonable for the Court to conclude that sanctions are warranted. See Hughes v. McMemon, 379 F. Supp. 2d 75, 81 (D. Mass. 2005). Moreover, Steele has filed two additional actions arising from the same nucleus of operative facts, one in federal court (Steele II) and one in the Massachusetts Superior Court (Steele IV).

Despite the fact that sanctions are warranted here and that Steele's proliferating lawsuits against essentially the same group of defendants border on harassment, the Court will limit its sanctions to an admonition this time. Steele is forewarned, however, that any future filing of frivolous or vexatious cases in this Court will result in the imposition of sanctions, including an order enjoining him from filing further proceedings in this Court arising from the same nucleus of operative facts. Although the defendants are entitled to an award of the costs and fees that they have incurred in responding to this action, the

Court will abate any such award unless plaintiff hereafter persists in filing frivolous or superfluous pleadings.

ORDER

In accordance with the foregoing,

- 1) plaintiff's motion to stay and consolidate (Docket No. 59) is **DENIED**;
- 2) defendants' motions to dismiss (Docket Nos. 7, 37, 38, 47 and 68) are **ALLOWED**;
- 3) defendants' motions for sanctions (Docket Nos. 7, 37, 38, 47 and 68) are held in abeyance during the pendency of the appeal of the Court's decisions in Steele v. Turner Broad. Sys., Inc., Civ. A. No. 08-11727-NMG, and unless and until plaintiff files any further frivolous pleadings, in which event the Court will impose monetary sanctions and/or an order enjoining plaintiff from filing further proceedings in this Court.

So ordered.

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

Dated May 18, 2011