

No. 10-2173

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

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

v.

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

TURNER BROADCASTING SYSTEM, INC.; TIME WARNER, INC.; JON BONGIOVI, individually and d/b/a Bon Jovi Publishing; RICHARD SAMBORA, individually and d/b/a Aggressive Music; WILLIAM FALCONE, individually and d/b/a Pretty Blue Songs; FOX BROADCASTING COMPANY; MAJOR LEAGUE BASEBALL PROPERTIES, INC.; MLB PRODUCTIONS, A & E; A & E/AETV; BON JOVI; AEG LIVE, LLC; MARK SHIMMEL MUSIC; AGGRESSIVE MUSIC, a/k/a Sony ATV Tunes; BON JOVI PUBLISHING; UNIVERSAL MUSIC PUBLISHING GROUP; UNIVERSAL POLYGRAM INTERNATIONAL PUBLISHING, INC.; PRETTY BLUE SONGS; SONY ATV TUNES; KOBALT MUSIC PUBLISHING AMERICA, INC.; BOSTON RED SOX; THE AMERICAN SOCIETY OF COMPOSERS; FOX TELEVISION STATIONS, INC.; ISLAND RECORDS, a/k/a Island Def Jam Records; THE BIGGER PICTURE CINEMA CO.
Defendants

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

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

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I. INTRODUCTION

A. Appellees' Fraud and Misconduct is Established

Appellees' Brief fails to refute their numerous, specific, and well-documented instances of fraud on the court and gross misconduct as detailed in Steele's Opening Brief. Appellees have, by omission, conceded the underlying facts of their fraud and misconduct and, by doing so, have made their fraud and misconduct the overriding issue in this appeal.

Appellees' attempts to deflect these issues are found on pages 4 and 23-25 of their Brief. Appellees fail to meaningfully dispute *a single fact* of the dozens presented in Steele's Opening Brief, in Steele's motion papers subject to this appeal, or in Steele's first appeal, No. 09-2571.¹

Appellees, in fact, explicitly acknowledge their failure, stating they will "not attempt to exhaustively address" Steele's facts demonstrating Appellees' fraud and misconduct, other than to say they "do not concede" them. Appellees' Brief at 24. In

¹ The sum of Appellees' defense of their actions is the following: (1) the record "contains no evidence" of Appellee misconduct (Appellee Brief at 4); (2) Steele's claims of fraud on the court are "irrelevant" (Appellee Brief at 23-24); (3) Appellees will not attempt to "exhaustively address" fraud and misconduct (Id. at 24); and (4) Appellees "do not concede the accuracy of Steele's... facts and evidence" as to their fraud and misconduct. Id. at 24.

reality, Appellees fail to “address” anything, exhaustively or otherwise, instead merely copying and pasting the district court’s conclusory language into their Brief. *Id.* at 24-25.

Steele’s appeal, by definition, directly challenges the district court’s decision. Accordingly, Appellees offer nothing to refute Steele’s facts and arguments or defend the district court’s decision, instead insisting on absolute “deference” to the district court’s decision. *Id.* at 1, 4, 13, 15, n.7, 25-26.

Steele's first appeal, his motions for default, and this appeal have each confronted Appellees with detailed evidence of fraud and misconduct; Appellees in each instance failed to rebut the evidence. In addition, Steele's Motion for Sanctions in his first appeal (denied without prejudice to raise the relief sought in this appeal) and correspondence with Appellees’ counsel also addressed Appellees' conduct. Steele Motion for Sanctions, No. 09-2571, at 7-10, 12-19. Appellees in each instance failed to rebut Steele's assertions and underlying facts. *Id.* at 11-15. For example, Appellees’ opposition to Steele’s Motion for Sanctions *did not defend* their altered audiovisual, but instead cried foul on Steele for belaboring the issue. Appellees’ Reply to Steele Motion for Sanctions, No. 09-2571, at 4.

If Steele's damning accusations - backed by hundreds of pages of evidence

(much of it Appellees' arguments, evidence, and statements) - were incorrect, one would expect a meticulous refutation of each one of Steele's claims. Appellees' silence on these grave issues is telling.

One example is particularly telling: during the district court proceedings, Steele, *pro se*, asked Appellees' counsel for the "FINAL 1" version of the infringing audiovisual – the altered version was titled "FINAL 2;" Steele was ignored. App-516. Months later, now represented by the undersigned counsel, Steele again raised this issue in writing, *Id.*, and was rebuffed by Appellees' counsel, who stated they had been "under no obligation" to respond to Steele's request. App-555. Steele again requested the "FINAL 1" version of the infringing work and was, again, ignored. App-563.

As a whole, Appellees' Brief fails to set forth *any* facts, explanations, or substantive argument rebutting their numerous - and, in several cases, ongoing – instances of (1) filing false evidence, (2) filing false appearances, and (3) making false material representations in both the district court and this Court.

Finally, Appellees – apparently forgetting their audience – declare that fraud on the First Circuit and its lower courts is "irrelevant" to this appeal. Appellees' Brief at 23, 25. Steele respectfully suggests that this Court – not Appellees – will determine whether fraud on the court is relevant in this appeal. See Hazel-Atlas Glass Co. v.

Hartford-Empire Co., 322 U.S. 238, 246 (1944).

Ultimately, Appellees – given numerous opportunities over the past two years in the district court and First Circuit – simply have nothing to say in their defense.

B. Appellees’ Circular Arguments Relying on the District Court’s Flawed Reasoning Fail to Defend that Reasoning

Appellees’ Brief – reportage rather than argument - fulsomely quotes the district court’s September 27, 2010 Decision. Appellees’ argument is, in effect: the district court’s decision was correct because the district court’s decision was correct. See, e.g., Appellees’ Brief at 21 (stating, after quoting from the district court’s decision: “[t]his reasoning presents yet another basis upon which to affirm” the district court).²

As a whole, Appellees’ Brief is little more than a series of quotations of and citations to the district court’s decision. See, e.g., Appellee Brief at 22 (on one page Appellees write: (1) “the District Court correctly recognized...”, (2) “[a]s the District Court recognized...”, (3) “[t]he District Court correctly reasoned...”, (4) “[t]he District Court also recognized...”).

This being an *appeal* of that decision, simply repeating the district court’s language – without more - fails to refute Steele’s arguments for *reversal* of that

² Appellees also inexplicably quote Steele’s Opening Brief at length without disputing any underlying facts from the quotes.

decision.

II. APPELLEES' FRAUD AND MISCONDUCT, CONCLUSIVELY ESTABLISHED, IS THE ASCENDANT ISSUE IN THIS APPEAL

Steele's first appeal (No. 09-2571) was based on the district court's summary judgment decision and raised the issue of Appellees' false evidence (the altered audiovisual) and misrepresentations. Steele's Reply Brief revealed Appellees' failure to refute those issues in their Brief.

Steele, formerly *pro se*, retained counsel who, upon close examination of the file, discovered that Appellees MLBAM and Vector had defaulted while their counsel, Skadden, Arps, Slate, Meagher & Flom ("Skadden") filed false "proxy" appearances for two entirely different unserved entities - Vector 2 and MLBP - on their behalf. Steele Opening Brief at 21-22, 26-27. The false appearances were filed the same day, December 8, 2008, that Skadden first filed the altered audiovisual, as well as a motion to dismiss that made several material misrepresentations.³ *Id.* at 22-23, 26, 29; Steele Opening Brief, No. 09-2571, at 41-43.

Steele moved for entry of default pursuant to Rule 55(a) based on MLBAM

³ Over two years of ongoing litigation and investigation later, it is now plain that these filings were part of Appellees' larger effort to (1) win by any means possible - proper or improper, including fraud on the Court - and (2) surreptitiously and illegally remove MLBAM and Vector from the district court proceedings.

and Vector's de-facto failure to appear or defend. App-150, 595. However, Steele also argued that Appellees' defaults were willful, citing to the detailed and undisputed record evidence of Appellees' well-coordinated plan to extricate MLBAM and Vector by extrajudicial means. App-443-452, 893-900, 903-905. Steele argued Appellees and their counsel had committed fraud on the court and other sanctionable party and attorney misconduct, which were independent bases to enter their defaults. App-446-452, 888-889.

Accordingly, Steele's motions for default put the issues of fraud on the court and other misconduct squarely before the district court. The oppositions – Vector made its first appearance to oppose Steele's motion on its own behalf while MLBAM, on the other hand, still yet to appear, opposed Steele's motion by having its proxy, MLBP, file an opposition - failed to dispute Steele's factual allegations as to fraud and misconduct. App-258-259, 785-786, 790.

The district court nonetheless denied Steele's motions for entry of default, finding, without citation to any facts in the record or any mention of the altered audiovisual, no fraud or misconduct. App-990. Steele's appeal of that order - this appeal, in other words - is now before this Court.

Accordingly, this appeal brings the issue of current Appellees MLBAM and

Vector's false appearances, false evidence, and willful defaults before this Court.

Further, this appeal supplements the issues of false evidence and misrepresentations Steele raised in his first appeal (09-2571) *as to all then-Appellees*. Steele Opening Brief, No. 09-2571, at 18-19, 38-43. In addition, this appeal also raises a number of additional misrepresentations to the courts (discovered after Steele's first appeal) made by Appellees in *both appeals*. See, e.g., App-243-250, Steele Opening Brief at 53-54.

Therefore, Appellees *in both appeals* were monolithic in their actions and representations through Skadden. They *all* benefited – obtaining judgment – from Skadden's orchestrations, including MLBAM and Vector's defaults and accompanying misrepresentations and misconduct. Accordingly, Appellees in Appeal No. 09-2571 and here share responsibility for the fraudulent judgment obtained below.

At this juncture, therefore, the Court is faced with "far more than an injury to a single litigant:" fraud on the court is "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Hazel-Atlas Glass, 322 U.S. at 246 (circuit courts have inherent power to address false evidence on appellate review).

As in Hazel-Atlas Glass, here there is undisputed evidence of "a deliberately planned and carefully executed scheme to defraud" the district court *and this Court*.

Id. at 245. What remains to be seen is whether Appellees' scheme has succeeded.

III. THE QUESTION BEFORE THIS COURT IS THE PROPER REMEDY, INCLUDING THE NATURE AND SCOPE OF EFFECTIVE SANCTIONS

The facts establishing Appellees' sanctionable conduct speak for themselves and provide self-evident and conclusive proof of Appellees' fraud upon the district court and First Circuit, compounded by additional gross and unethical misconduct.

Consequently, the First Circuit's ruling will address not only Appellees' calculated, sustained, and far-reaching affront to the integrity of its courts, but how to deter future such endeavors. This Court must effectively address two key issues: (1) how to redress the wrongs inflicted upon Steele and the Courts by Appellees' conduct here and (2) how to "send a message, loud and clear" to deter future litigants and counsel from perpetrating similar schemes in the First Circuit. Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1122 (1st Cir. 1989).

Deterrence is no easy proposition. Here, a large, high-powered and respected (or even feared) law firm representing a large group of wealthy corporate and individual clients faced an individual plaintiff - Steele - who was both indigent and, despite mighty efforts to retain counsel, *pro se* until after judgment entered. App-244, 246-248.

Further, considering the totality of the circumstances, it is reasonable to assume that Appellees are guilty of infringing Steele's work. In fact, no other scenario makes sense in light of then-defendants' no-holds - or rules -- barred defense of the case and given the ease with which defendants, if wrongly accused, could have quickly ended this case.⁴

Consider a future similar case where, as here, large and wealthy corporate and individual defendants stand to lose a great deal, both in monetary terms and in reputation, if they lose the case - or even have to litigate it *fairly* - because factual discovery (which Steele was denied) could be nearly as costly, in terms of business and good will, as a judgment. A cost-benefit analysis would indicate that any benefits of settling or litigating within the rules are outweighed by the benefits of quickly and decisively ending the case by any means possible - legal or otherwise - particularly because they face little risk of being "called out" by either their *pro se* opponent or the district court.

⁴ Defendants could have explained how their works came to be and, if necessary, easily offered to show Steele their digital files proving him wrong, as Steele explained in his Opening Brief of his first appeal (09-2571) at 79-82. Instead, they chose litigation but have never denied using Steele's work as a temp-track. See, e.g., Steele Reply Brief, No. 09-2571 at 24, n.14. Moreover, Steele offered to settle very early on with little more than a meeting and a handshake. App-36, 573, 645-646.

Specifically, the district court is likely to give - reasonably - the side with the well-respected attorneys the benefit of the doubt as to any legal issues and, consequently, to related factual issues. The district court further will - again, reasonably - presume counsel's compliance with ethical rules and, absent obvious mischief, will not dissect defendants' evidence, filings, or representations for well-hidden irregularities. The *pro se* litigant on the other side, without legal training, will remain - through no fault of his or her own - oblivious.

Executing such a scheme - subtly and quietly, and with a friendly countenance to the other side - is, for the clients, a low-risk high-yield business proposition; an easy business decision for those willing to break the law. For sophisticated counsel - at least those willing to ignore their ethical responsibilities - it is not difficult to implement.

Indeed, Appellees' design here was unraveled only after Appellees' success at summary judgment and only because Steele retained counsel in time to pursue his appeal. It was thereafter - in preparing for Steele's first appeal - when counsel began to notice irregularities in the record, the altered audiovisual being the most obvious. Uncovering the full extent (if it has been uncovered) of Appellees' fraud and misconduct, however, was a painstakingly slow process because the docket - on its face

- did not indicate obvious fraud, the underlying facts of which had been well-concealed. App-1-30. Steele Opening Brief at 45-46.

The undersigned carefully took additional steps to confirm what appeared to be, upon close examination of the district court record and other sources, including, e-mails and correspondence between Steele and Skadden, evidence of fraud and misconduct. These steps included raising - cautiously at first - the issue in Steele's first appeal, direct and repeated requests to Appellees' counsel for information or explanation (to no avail), and, eventually, filing the motions for default, leading to this appeal. See, e.g., Steele Reply in Support of Sanctions, No. 09-2571, at 4, n.8.

Counsel's investigation, followed by Steele's post-judgment and post-appeal motions for default and a second appeal are not, of course, part of typical appellate procedure. But this is not, one hopes, a typical case.

Accordingly, other than trusting in the good faith of opposing parties and counsel - as Steele did - there is little to deter future defendants and counsel who find themselves in a similar position and are similarly willing to break the rules for their bottom line. Monetary sanctions alone, for example - unless large enough to realistically impact that bottom line - are unlikely to deter such future scheming because the risk of getting caught remains low.

Here, from a purely business perspective - and Appellees are, after all, businesses (their counsel, on the other hand, are held to a higher standard than the "bottom line") - the risks of proceeding likely *were* considered and, with the advice of counsel, deemed small enough to proceed.

In order to "send a message" to those who might entertain the idea of similar intrigue, the severest of sanctions are not only warranted, but required. See Aoude, above, 892 F.2d 1115, 1122. Steele's Opening Brief, at 75-79, requests the appropriate relief, including a mandate for entry of judgment in Steele's favor and the imposition of sanctions against Appellees and their counsel.

IV. THIS COURT'S REVIEW IS DE NOVO: THERE IS NO "DISCRETION" TO ALLOW FRAUD; IN ADDITION, THE PAUCITY OF FINDINGS AS TO FRAUD REQUIRES FULL APPELLATE REVIEW OF RECORD

This Court has the power and duty to maintain the integrity of court proceedings in the First Circuit. See Hazel-Atlas Glass, 322 U.S. at 246. Steele respectfully submits that the scope of this Court's review of the district court's ruling as to whether fraud against the court has occurred is *de novo* because it necessarily invokes not just review of the lower court's decision, but this Court's own inherent authority to maintain the integrity of its courts, which "transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power

to police itself.” See Chambers v. Nasco, Inc., 501 U.S. 32, 46.

Appellees offer no defense or explanation for their actions, but merely re-state the district court's unsupported conclusion of "no evidence of bad faith." Appellees' Brief at 24-25. Given the district court's "paucity of findings" as to fraud and bad faith - offering no explanation, analysis, or citation to facts – this Court should conduct its own review of the "KPS factors," in particular (1) whether their defaults were willful, (2) the nature of Appellees' explanations for their defaults, and (3) the good faith of the parties. Indigo v. Big Impressions, LLC, 597 F.3d 1, 3-4 (1st Cir. 2010). See also KPS & Assoc., Inc. v. Designs by FMC, Inc., 318 F.3d 1, 12 (1st Cir. 2003).

Moreover, because of the broad scope of Appellees' fraud and its pervasive effect on the proceedings below, this Court's review should include the two additional factors of (1) prejudice to Steele and (2) Appellees' claimed meritorious defense.

As to prejudice, the record is replete with the blows Steele took due to Appellees' willful defaults and, indeed, their entire fraudulent scheme. Regardless, in the face of fraud prejudice is presumed. Aguiar-Carrasquillo v. Agosto-Alicea, 445 F.3d 19, 28 (1st Cir. 2006).

As to meritorious defense, the district court's findings as to futility based on

preclusion was based exclusively on Appellees' fraudulently obtained judgment. As to futility based on Steele stating a claim in his complaints, the district court applied the misnomer doctrine inconsistently and, further, Steele's identification of Appellees in his amended complaint came directly from the misrepresentations made in Appellees' false appearances. Id

V. APPELLEES' UNDISPUTED FRAUDULENT AND BAD FAITH ACTS⁵

A. Appellees Filed False Material Evidence Under Penalty of Perjury: The Altered Version of the Infringing Audiovisual Work

On December 8, 2008, Appellees filed a version of the infringing work that was materially different from the actual infringing work in several substantive respects, including: (1) different start time (which offset the otherwise clear temporal parallels between Steele's musical cues and the infringing audiovisual's lyric and visual cues when both works are played concurrently); (2) different length (which not only altered protectable elements of linear dimension and 'fade' ending, but also improperly concealed that the actual work and Steele's work were *identical* in length,

⁵ Appellees deny, in conclusory fashion, misconduct, but have failed to dispute or contradict the *facts* of their misconduct.

strong evidence of duplication and use as a temp-track)⁶; (3) removal of the copyright notice *of the infringing work's copyright owner* MLBAM (which served not only to conceal MLBAM, but altered the work's ending) ; (4) altering the work's ending by removing soundtrack elements and showing the TBS logo, rather than the MLBAM copyright notice on the last frame (which bolstered Appellees' misrepresentations to the court that it was TBS's work rather than MLBAM's). App-443, Steele Opening Brief at 23, 29-30.

Appellees filed this false evidence on two additional occasions in the district court and once in this Court, each accompanied by attorney Scott D. Brown's false Declaration under *penalty of perjury* that it was a "true and correct" copy of the infringing work. Steele Opening Brief at 29-30.

Decisively, Appellees recently admitted unequivocally that they filed a different *version* (not a "true and correct" *copy*) of the infringing work in the district court. *Id.* Appellees, therefore, have been withholding the truth – and the unaltered evidence – the entire time. Appellees have yet to correct the record and have ignored Steele's written requests for a legitimate copy of the infringing audiovisual, allowing the

⁶ The Steele Song and MLB Audiovisual are both exactly 2:38:90-long from start to 'fade' ending. Steele's Opening Brief, No. 09-2571, at 24.

obvious – and strong – inference that doing so would weaken their case. Goldie v. Cox, 130 F.2d 695, 719 (8th Cir. 1942).

B. Appellees' False Appearances

1. MLBAM

Steele's target defendant, MLBAM - the copyright owner of the infringing work - was properly served. App-152-153, App-985. However, instead of appearing and defending as required, MLBAM had Skadden file a false appearance for MLBP, "a separate legal entity," which had evaded service three weeks earlier (on the same day MLBAM was successfully served with its own separate summons), and which had no interest in the infringing work and had not been served, on MLBAM's behalf. App-151-152, 262, 440-441, 984-985; Steele Opening Brief at 22-24. To conceal the false appearance, MLBP's Notice of Appearance misrepresented that Steele had "misidentified" MLBP as MLBAM. App-43, 45, 446, 567; Steele Opening Brief at 15, 44.

The false appearance for MLBP was filed on December 8, 2008, concurrent with Appellees' filing of the false evidence discussed above. App-567.

In the district court, MLBAM claimed it had "no notice" of Steele's intent to sue it until June 18, 2010, despite the U.S. Marshal's Process Receipt showing that

MLBAM's office manager received and signed for the summons addressed to MLBAM (as MLB.com) at MLBAM's headquarters on November 17, 2008. App-53-54, 265.

Moreover, MLBAM had notice enough to arrange for an unserved proxy - MLBP - to appear in its stead on December 8, 2008, belying MLBAM's supposed unawareness that it was being sued until June 18, 2010. App-265. Yet even now, *in this appeal*, MLBAM continues to deny it was served, in spite of undisputed evidence to the contrary and the district court's finding of service and default based on that evidence in its otherwise favorable opinion to MLBAM. Appellees' Brief, 29-30.

It is axiomatic that a properly served defendant – and here the primary defendant - may not, on its own accord, and without notice to, and/or assent of, plaintiff, and leave of court, simply remove itself from a lawsuit. This is true whether the defendant defaults openly and obviously or – as here - defaults clandestinely by having a proxy file an appearance misrepresenting itself as the defendant.

Skadden's appearance on behalf of MLBP - under the false pretense that it *was* the “misidentified” MLBAM - provided the facade that enabled MLBAM to withdraw unnoticed. *See Zocaras v. Castro* 465 F.3d 479, 484 (11th Cir. 2006) (deliberate appearance under false name, without 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”).

2. Vector Management

Also on December 8, 2008, Vector - Bon Jovi's management company at the time - employed an identical methodology to remove itself from the case *sub rosa*. App-596-598; Steele Opening Brief at 26-28. Specifically, Vector was properly served - on December 8, 2008, in fact - but on that day had an unserved previously unknown entity "Vector 2 LLC" falsely appear in its stead. *Id.*

Once challenged by Steele's motion for default, Vector initially denied its existence as a "legal entity," arguing it could not legally have defaulted (or, by definition, be served) App-899, 918. Vector, however, knew that the docket contained a process receipt from a U.S. Marshal, showing that the Vector summons addressed to "Vector Management c/o Jack Rovner" was signed for by Vector's General Manager, Joel Hoffman, at Vector's headquarters, on December 8, 2008. App-67, 596-597, 983-984.

So, Vector hedged, offering the improbable explanation that "the question of what entity the U.S. Marshals served" when Vector's General Manager, Joel Hoffman, was handed and signed for the summons, was "inherently ambiguous." App-898-

900.

Vector later shifted its story – now no longer disputing service – and claimed that its substitution of Vector 2 was proper, but offered two contradictory and equally improbable explanations. App-784-787, 897-898, 918. Steele Opening Brief at 65-69. Both, however, inexplicably presumed that Vector – not Steele - had the right to unilaterally and secretively determine who Steele actually "intended" to sue. *Id.* One of Vector's versions claimed Steele "intended" to sue the manager of the *man* Bongiovi; Vector's other version claimed Steele "intended" to sue the *band* Bon Jovi. *Id.*

A side note worth mentioning: Vector further tried to muddy the waters with ham-fisted naming games in its opposition to Steele's motion for entry of default, at one point deploying *sixteen* name variations for *three* parties in the span of two pages. App-894-897, 784-785.

Ultimately, of course, Steele – not Vector – determines Steele's "intentions." Nonetheless, Vector continues to maintain that it – not Steele – decides whom Steele intended to sue. App-784-787. Appellee Brief at 32-33.

More to the point, both explanations are whole-cloth fabrications because Vector was unquestionably Bon Jovi's very public manager at all pertinent times –

that is, according to Vector and Mr. Bongiovi. App-599. Vector's counsel, on the other hand actually asserted that "Vector Management neither has nor had any connection with Bon Jovi." App-784, 897. That statement – to the court - is plainly and inexcusably false.

Further putting the lie to Vector's justifications for Vector 2's appearance are the facts that: (1) Steele already sued Mr. Bongiovi (and bandmate Richard Sambora) directly – but neither of their "personal managers," (2) the infringing work's soundtrack was performed by the band Bon Jovi, as Steele referenced throughout his pleadings, (3) that all public records and statements – including those of Mr. Bongiovi and Vector themselves - state that Vector managed the band, not the man, App-598-599, 613-615, and that (4) Steele had never heard of Vector 2 prior to their appearance. Steele Opening Brief at 26. App-893-896.

Once caught out on their contradictory stories, Vector held fast to their right to divine Steele's "intentions," but had to choose only one explanation on appeal. Appellees' Brief at 8, 32. So they did – but without explaining their prior conflicting stories. Id. at 7-9, 32-33. Vector's lack of candor with this Court in its attempted explanation – KPS element number four, the nature of the explanation – tilts the balance further in Steele's favor. KPS, 318 F.3d at 12.

On appeal, Vector attempts yet another explanation: that it was, in “good faith,” helping Steele avoid a limitations issue when it had Vector 2 falsely appear. Appellees' Brief at 32-33. At this point, any argument that Vector’s default was born of their benevolence towards Steele simply cannot be taken seriously.

Vector – clearly the proper defendant and, as the parent, directing Vector 2 – has been in control all along: in determining what Vector 2 ostensibly “believed” (since Vector 2 – never served – could only have learned of the case from Vector), in having Vector 2 appear, and now in offering another untenable explanation to this Court as to why Vector 2 appeared. App-784-787, 897-898, 918. Appellees’ Reply Brief at 8, 32-33.

Offering still more contradiction, Vector argues lack of due process – notice and opportunity to be heard - if default is entered. Appellee’s Brief at 20-21. Yet it was necessarily Steele’s clear *notice* to Vector - which Vector, in its version necessarily relayed to Vector 2 - that prompted Vector 2’s substitute appearance for Vector.

Vector had, therefore, *full opportunity to be heard* and, in fact, *was heard* - by having Vector 2 appear in its stead. *Id.* at 32-33, App-784-787, 918.

In short, Vector had full and fair notice of Steele’s claims and took steps – fraudulent ones, to be sure – to defend itself. Vector’s own opposition to Steele’s

motion for entry of default fatally undermines its due process claim: “The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance,” App-788, quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Vector not only had enough information and time to appear, but enough to arrange for Vector 2’s false appearance. Appellee’s Brief at 8, 32-22. App-784-787, 918.

In reality, if Steele did not state a claim as to *Vector* it was only because *Vector 2* was neither Bon Jovi’s management company nor the party Steele “intended” to sue – and did, in fact sue and serve. App-596-600, 895-897; Steele Opening Brief at 67-68.

Additionally, Appellees’ claimed “typographical error” in appearing for “Vector 2 LLC” (significantly, no such company exists) rather than “Vector *Two* LLC,” though seemingly a minor point, fairly screams “fraud” when examined carefully. App-43-44, 596-600. First, Appellees’ counsel misspelled their client’s name in *each and every* document filed – including its corporate disclosure statement – without any steps to correct the error until called-out by Steele. App-596-600.

Second, Skadden, in its hundreds of pages of filings has made only a small handful of such errors, none of which relate to a party’s name or other proper noun; replacing three letters with one number of *their own client’s name* is wildly inconsistent

with Skadden’s otherwise meticulous – if sometimes fraudulent – approach to nomenclature.

Finally: are we to believe that all this time – in fact, Skadden continues to “mistype” its client’s name even now – Vector Two LLC did not notice their attorneys’ gross “typographical” error? And never requested that Skadden use its correct name in Court-filed papers?

Vector’s vacillations and lack of candor in its attempted explanations for its default – and its inability to keep its stories consistent – have determinatively shown that its default was willful.

C. Appellees Willfully Defaulted For Illegal Purposes

That MLBAM and Vector defaulted willfully – as opposed to unintentionally – cannot, in light of the above, be seriously questioned. One fact alone – which is not disputed – conclusively demonstrates willfulness: Both Appellees took *affirmative steps* to arrange for *unserved* entities to appear and defend on their behalf, explicitly stating in their appearances that MLBAM and Vector – the defaulting parties – were “misidentified” in Steele’s Complaint. App-43-46.

Appellees’ steps in this regard – based on Appellees’ own version of the facts – necessarily required MLBAM and Vector to have received service of process; to have

analyzed the summons and complaint; to have made their own deliberate determination as to whom Steele intended to sue; and to have forwarded the complaint and summonses to MLBP and Vector 2 with instructions for them to appear. App-53, 67, 265, 784-787, 918. Appellees' Brief at 32-33.

MLBP and Vector 2 did not appear out of thin air. Their appearances make clear that they necessarily communicated (or colluded) with MLBAM and Vector prior to voluntarily appearing for MLBAM and Vector. *Id.* Steele Opening Brief at 22-24, 43-45, 48-50.

Accordingly, willfulness is a given. Appellees' evolving and contradicting attempts to deny and/or explain their defaults not only "fail to demonstrate a lack of willfulness," leaving Appellees with "*no* explanation," but actually underscore their willfulness and, indeed, continued intransigence. KPS, 318 F.3d at 14.

However, mere willfulness does not adequately describe Appellees' defaults here. Appellees did not default merely in the "hope[] that [Steele] would...go away," See McKinnon v. Kwong Wah, 83 F.3d 498, 503-504 (1st Cir. 1996), or otherwise just stick their heads in the sand and hope for the best; they arranged for false appearances to conceal their defaults in furtherance of their overall conspiracy to *secretly and illegally* remove themselves from the litigation. Steele Opening Brief at 22-

24, 43-45, 48-50.

D. Appellees' Two Years of Continuous Fraud on First Circuit Courts

Accordingly, what follows is a partial list of Appellees' un-refuted acts that constitute fraud on the court, individually and as part of their overall strategy to illegally remove themselves from this case and improperly misdirect the district court towards its precipitous judgment against Steele.

Appellees MLBAM and Vector (individually or together):

1. Filed false and materially altered evidence – the altered version of the infringing audiovisual – on three separate occasions in the district court and once and this Court. Steele Opening Brief at 29;
 - a) Appellees deleted, among other things, Appellee MLBAM's copyright notice from the infringing work. Id. at 30;
 - b) The altered audiovisual consequently ended showing the logo of TBS (another defendant and current Appellee in 09-2571), rather than Appellee MLBAM's copyright notice. Steele Motion for Sanctions, No. 09-2571, at 8;
2. Falsely represented to the court, under penalties of perjury, that the altered audiovisual was a "true and correct" copy. Steele Opening

Brief at 29.

3. Appellees have since conceded that their submission was neither “true and correct” nor a “copy” of the infringing work. Steele Opening Brief at 29-30.

4. Misrepresented the infringing audiovisual as the “Turner Promo” and “TBS Promo,” which was reinforced by Appellees’ alteration deleting MLBAM’s copyright notice from the final frame, which now displays the TBS logo instead. Steele Motion for Sanctions, No. 09-2571, at 8. App-443-444. Steele Opening Brief, No. 09-2571, at 40.

5. Filed MLBP's false appearance to conceal the willful default of the infringing work's copyright owner, MLBAM. App-43-46.

6. Filed Vector 2's false appearance to conceal Vector's willful default. Id.

7. Falsely stated that Steele had "misidentified" Vector 2 as the properly sued, named, and served Vector (whose default then went unnoticed). App-43-46.

a) Steele had never heard of Vector 2 until their appearance and Appellees have yet to provide any evidence contradicting the

very public record showing that Vector was the proper party (including Vector and Mr. Bongiovi's own public statements, both *before* and after suit was filed. App-598-599, Steele Opening Brief at 27.

8. Falsely stated that Steele had "misidentified" MLBP as the properly named, sued, and served MLBAM (whose default then went unnoticed). App-43-46;

a) MLBAM - the copyright owner of the infringing work - was Steele's obvious target, which he made clear in his pleadings. Steele Opening Brief at 59;

b) MLBAM disappeared - concurrent with MLBP's appearance on MLBAM's behalf and Appellees' filing of the altered audiovisual (without MLBAM's copyright notice). *Id.* at 23-24.

9. Had their illegal proxies file bad faith Rule 11 motions against Steele while MLBAM and Vector hid under cover of default (the motions were peremptorily denied prior to the filing of Steele's oppositions). *Id.* at 30-32.

10. Falsely state that they had “promptly and unambiguously disclosed to Steele” the “precise legal entities” that appeared. Appellees’ Brief at 33.

11. Falsely represented to the district court that Steele had not assented to Appellees’ filing a reply brief at summary judgment. App-482-483.

12. Repeatedly misrepresented fact and law in characterizing Bon Jovi’s musical contribution to the MLB Audiovisual as a Bon Jovi “song” rather than an MLBAM soundtrack. Steele Opening Brief, 09-2571, at 41-42.

13. Falsely asserted that the infringing audiovisual soundtrack makes “not a single reference to baseball.” *Id.* at 42-43.

14. Represented that MLBAM has “no parent corporation” in MLBAM’s corporate disclosure *in this appeal*, after representing to the district court that MLBAM was “owned by” two companies – including one corporation. App-280.

15. Assert, disingenuously, that this Court could “affirm the district court” by finding that MLBP, not MLBAM, was served. Appellees’

Brief at 29-30.

a) Appellees illogically – and dishonestly – claim such a finding supports *affirmance* of the district court, but fail to include that such a finding would *directly contradict* the district court’s explicit finding that MLBAM – *not MLBP* - was served. App-985;

b) The undisputed record demonstrates that MLBP *evaded* service on the same day MLBAM’s office manager *accepted* service at MLBAM’s headquarters. Steele Opening Brief at 21, App-151-153, 196, 199, 985.

16. Falsely maintain, in this appeal, that they – MLBAM and Vector - rather than Steele, are entitled to determine what “entities” Steele’s intended to sue, despite Steele’s post-judgment statements, including two sworn affidavits, and presentation of facts to the contrary. Appellee Brief at 32-33; App-244, 621-623, 626-627 .

E. Unethical Treatment of Opponent

Appellees' treatment of Steele and his counsel over the past two years has been dishonest, abusive, and highly unethical.

Appellees' false statements to Steele are ubiquitous in the record, but examples can be found in Steele's June 18, 2010 Affidavit (App-243) and Steele's September 15, 2009 Affidavit (App-251). See also Steele letter to Plevan, App-549.

Appellees requested sanctions, in bad faith, in each of their oppositions to Steele's motions for default. App.-266, 299-302; App-791, 903-905. Appellees further moved for Rule 11 sanctions against Steele in bad faith, unable or unwilling to even explain - during Rule 11's "safe harbor" period - *any sanctionable conduct* by Steele. App-908-919. Steele Reply to Opposition to Motion for Sanctions, No. 09-2571, at 4.

Finally, Appellees' counsel negotiated with the undersigned in bad faith and under false pretenses, in a failed effort to contrive a record painting Steele (and the undersigned) in a negative light. Steele Opening Brief at 32-33.

VI. APPELLEES' FAILURE TO CORRECT THE RECORD CONSTITUTES ONGOING SANCTIONABLE INTRANSIGENCE

Appellees have yet to correct the records of the district court and this Court by filing an *unaltered copy* of the infringing audiovisual – even after acknowledging their failure to do so originally. Steele Opening Brief at 29-30. Appellees have similarly failed to correct attorney Scott Brown's Declaration stating the altered audiovisual was a "true and correct" copy.

There are numerous additional *material* misstatements of fact - which Steele has raised in his briefs in both appeals - and which Appellees have yet to correct. See e.g., Steele Motion for Sanctions, No. 09-2571, at 8-10.

VII. APPELLEES' CIRCULAR REASONING AS TO FUTILITY CANNOT SAVE THEM

A. Preclusion

The district court found that entry of Appellees' defaults would be futile because Steele's claims would be barred by issue preclusion. App-989.

However, what the district court failed to consider – and what Appellees ignore in their Brief - is that Appellees' defaults were not only willful, but part of a larger scheme to defraud the court system, which, unfortunately, has thus far been successful insofar as the judgment against Steele remains. Steele Opening Brief at 72-75.

That judgment was obtained by fraud on the court, including Appellees willful defaults. Such judgments may not be given preclusive effect. See George P. Reintjes Co., Inc., v. Riley Stoker Corp., 71 F.3d 44, 47 (1st Cir. 1995).

Appellees' essential claim is that the ill-gotten fruit of their fraudulent acts – judgment – precludes the Court from acting to redress their fraud, which thereby shields Appellees from any repercussions for their fraud. Respectfully, Steele submits

that such a proposition is offensive to justice and cannot stand.

B. Steele's Complaints

The district court similarly found that entry of Appellees' defaults would be futile because Steele's complaints failed to state claims as to Appellees. App-988.

1. MLBAM and Misnomer

Appellees offer nothing in defense of Skadden's misrepresentations that sowed the confusion as to the identity and names of "Major League Baseball" and "MLB." Steele Opening Brief at 53-63. Appellees' Brief at 32-33.

Appellees intentionally omitted any definition of "MLB" as a particular Major League Baseball "entity" because to do so, at least honestly, would have been to reveal MLBAM – and its default. Steele Opening Brief at 53-54. Instead, Appellees put forth MLBP to assume - and reduce, if not eliminate – liability because MLBP neither owned nor created, and thereby would not provide an evidentiary trail leading back to, the infringing audiovisual, its owner, *and the primary infringing party*, MLBAM.

MLBAM – in the words of its CEO, "stealthy by design" (Id. at 20) – thereby remained "safely" hidden in default. Steele Opening Brief at 58-59.

Fomented by Appellees' misrepresentations, omissions, and substitution - and blinded by Appellees as to MLBAM's presence (or very existence) - the district court

attributed all “MLB” references to MLBAM’s “straw-man,” MLBP. Steele Opening Brief at 58-63. While the district court’s misattribution may have been understandable at the time (given Appellees’ then-unknown shell and naming games), it was no less erroneous and harmful to Steele. Indeed, that the district court’s error was unwitting and caused by Appellees’ fraud renders its error *more harmful* – and reversible – and additionally provides grounds for sanctions. To affirm would reward not only fraud, but the successful concealment of fraud for a determinate period of time, i.e., until judgment.

Finally, Appellees are silent as to the district court’s legal error in applying the misnomer doctrine to Steele’s summonses and service but not his complaints, App-987.

In total, Appellees do not challenge that Steele placed MLBAM on notice and stated a claim against it, placing the weight of KPS factors 1, 3, 4, and 5 – willfulness, meritorious defense, explanation, and good faith, respectively – decisively in Steele’s favor. KPS, 318 F.3d at 14.

2. Appellees’ Misrepresentations of Themselves Directly Caused any Failure in Steele’s Complaints

What the district court failed to consider – and what Appellees again ignore – is that Steele’s amended complaint adopted the names for Appellees offered by the

false appearances of their proxies, MLBP and Vector 2. App-73. What Steele did not and could not know was that there was no “misidentification” at all. Rather than correcting Steele’s nomenclature, Appellees inserted *entirely different entities* in order to conceal their defaults. App-43-46.

Appellees intentionally misdirected Steele with MLBP and Vector 2’s false appearances at the outset and now act as if Steele’s adoption of their names in his amended complaint occurred in a vacuum.⁷

So, once again, Appellees seek to use the poison fruit of their own malfeasance – Steele’s adoption of what they falsely stated was their correct identifications – to claim Steele failed to provide sufficient facts to support his claims. Appellees’ Brief at 26-28.

Appellees point out – correctly – that there was “confusion” caused by the parties’ names, Appellee Brief at 32. However, it was *Appellees*, not Steele, who caused the confusion – intentionally so – by claiming to clarify their names in their

⁷ Appellees’ “dead letter” argument fails both legally and factually: first, the district court *did* cite authority for its decision to read Steele’s complaints together. App-87. Second, Appellees ignore the cited authority – Connectu LLC v. Zuckerberg, 522 F.3d 82, 91 (1st Cir. 2008) – which held that an amended complaint “normally” supersedes the earlier complaint. Use of “normally” allows for exceptions, such as the district court’s exception for the *pro se* Steele.

appearances, when in fact introducing *two entirely different entities*. Steele Opening Brief at 22, 26-27.

The very fact that this appeal references *four entities*, rather than the two Steele sued and served, puts the lie to any claim of misidentification, good faith, or innocent confusion.

Appellees' post-facto justifications and explanations cannot change the fact that they misrepresented themselves to the Court and to Steele when they "appeared" in the form of MLBP and Vector 2.

VIII. CONCLUSION

WHEREFORE, Plaintiffs Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz respectfully request that this Honorable Court direct the district court to enter judgment in Steele's favor, order the imposition of sanctions against Appellees and their counsel, and provide other relief as requested in Steele's Opening Brief at 75-78.

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CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that on January 27, 2011, I caused this Reply Brief of Appellants Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz, filed through the ECF system, to be served electronically by the Notice of Docket Activity upon the ECF filers listed below.

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