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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

JEFFREY VERNON MERKEY, **Plaintiff,** **vs.** **BRUCE PERENS, et al.,** **Defendants.**	**PETROFSKY'S OBJECTIONS TO REPORT AND RECOMMENDATION AND ORDER GRANTING MOTION TO AMEND COMPLAINT** **Case No. 2:05-CV-521-DAK** **District Judge Dale A. Kimball** **Magistrate Judge Paul M. Warner**

Pursuant to Rules 72(a) and 72(b) of the Federal Rules of Civil Procedure, Alan P. Petrofsky respectfully submits these consolidated Objections to Magistrate Judge Paul M. Warner's June 30, 2006 Report and Recommendation and Order Granting Motion to Amend Complaint (Docket No. 42).

Contents

1 Introduction / Statement of Issues

This was originally a federal civil rights action against a long list of defendants that did not include me. It was brought in June 2005 by Plaintiff Jeffrey Vernon Merkey, and was apparently based on events that transpired in what another court has described as "his own, separate reality" (*Novell v. Timpanogas Research Group*, 46 USPQ.2d 1197, 1204 (Utah 1998)).

During the first few months of the case, Merkey made several additions and deletions to the list of prospective defendants, but never served any of them. On September 27, 2005, by Merkey's own act of filing a Final Notice of Dismissal, this became a case with no defendants and no complaint. That state of affairs has persisted ever since. Although Merkey, in his most recent memorandum, was still muttering about "conspiring to murder ... threatening to murder ... soliciting others to murder ... murder ... murder ... murder ... Religious Land Use and Institutionalized Persons ...", etc. (Memorandum in Support of Motion for Order to Show Cause, Docket No. 33 at 2-3), the sole issue actually pending is whether a June 22 sealing order, which "was directed at the Clerk of Court and not third parties" (Order Reopening Case, Docket No. 34, at 1), "should also apply to third parties". (Id.)

Magistrate Judge Warner has now recommended that default judgment be entered on a complaint that was long ago dismissed by the complainant, and over which the Court thereby lost all jurisdiction. It has also been recommended that the Court order me to cease distributing a document that I lawfully obtained. Although (1) there is no pending related claim to serve as the basis for any injunction; and (2) no motion has even been made for this relief (Merkey only having moved for enforcement of an earlier order), the Magistrate Judge nevertheless recommends that such an order

simply be entered sua sponte. The District Judge's de novo determination should be to reject both of these recommendations and instead reclose the case. The Magistrate Judge also ordered that the dismissed complaint be amended to incorporate Merkey's absurd specification of more than twenty million dollars ($22,000,150) in damages. To the extent that this order is not moot anyway, it should be found contrary to law and set aside.

I note that the Magistrate Judge's report says that "Plaintiff asserts that ... Petrofsky downloaded and posted [the Novell Settlement Agreement] to a server in Czechoslovakia" (Docket No. 42 at 2). However, Merkey's actual assertion about Czechoslovakia is that when I made a document available worldwide, on the World-Wide Web, I did not take any measures to somehow *prevent* the document from being redistributed by someone in that particular alleged nation: "Petrofsky ... *allowed* it to be mirrored onto a server in Czechoslovakia" (Docket No. 33, stated fact #6, emphasis added). Merkey has previously characterized Czechoslovakia as among those "communist countries" that are "enemies of the United States" (see Merkey's email that he attached as Ex. 3 to his July 20 memorandum, Docket No. 6, also attached hereto in Ex. A.4 at 47; the Am. Complaint, Docket No. 7, para. 30; and the 2nd Am. Complaint, Docket No. 24, para. 28).

Although I perhaps cannot entirely rule out possibilities such as time-traveling communists, it seems increasingly doubtful that Merkey's repeated representations to the Court about latter-day Czechoslovakians were all "formed after an inquiry reasonable under the circumstances" (Fed. R. Civ. P. Rule 11(b)) (please also see Rule 11(c)(1)(B)).

2 History of the Case

To understand the peculiar current status of this case, one must review the bizarre story so far:

2.1 Prologue: The End of the Republic

1. On December 31, 1992, the Česká a Slovenská Federativní Republika, also known as Czechoslovakia, "cease[d] to exist".[1]

2.2 A Nut's Case Is Born, Then Dies

2. On June 21, 2005, Merkey commenced this action by filing his original frivolous complaint (Docket No. 1). This complaint did not name me as a defendant. The second exhibit was a document entitled "Confidential Settlement Agreement", which had been executed in 1998 by Merkey, Novell, Inc., and three other parties. On multiple occasions, Merkey has stated a belief that the public's lack of knowledge of the terms of that agreement has been detrimental to him (see Docket No. 33 at 8; Docket No. 1 at 30). Merkey claims that he intended, nevertheless, for the exhibit to have been sealed at the time of filing (Docket No. 33 at 4-5). Regardless of what his true intent was (and whether or not he

[1] "Uplynutím dne 31. prosince 1992 zaniká Ceská a Slovenská Federativní Republika." Art. 1, para. 1, of Constitutional Act 542/1992 of the Česká a Slovenská Federativní Republika (also known, at various times, as the Czech and Slovak Federal Republic, the Czechoslovak Socialist Republic, or simply Czechoslovakia), enacted on November 25, 1992 and published in volume 110 of *Sbírka Zákonü* (Collection of Acts) at pages 3253-3254, which are reproduced in Ex. A.2 at 39. An English translation of that paragraph, from an official representative of the late republic, can be found in the letter dated December 10, 1992 from His Excellency Mr. Eduard Kukan, Czechoslovakian Ambassador Extraordinary and Plenipotentiary, addressed to the Secretary-General of the United Nations. U.N. document A/47/774, Ex. A.3 at 42.

My declaration in support of these objections is attached hereto as Appendix A, and throughout these objections, exhibits to the declaration will be denoted as "Ex. A.__".

is even capable of knowing what his true intent was), the fact is that the exhibit was not filed under seal.

3. On June 22, the clerk entered the unsealed complaint and its unsealed exhibits as item 1 on the docket, and copies of them became available to any member of the public who paid the applicable copying fee. I then obtained a copy of the complaint and its exhibits from the `ecf.utd.uscourts.gov` website. I next placed them on the `scofacts.org` website, from which anyone with internet access could obtain copies of the documents for no charge.

4. Later on June 22, the Court entered an order (Docket No. 2, hereafter referred to as the "Sealing Order") sealing the second exhibit to the complaint and directing the Clerk of Court to remove the exhibit from the public docket. The Clerk did as ordered (see Docket No. 3). Merkey then sent me an email, titled "Criminal contempt", stating "I have notified the Court you are distributing copies [of the Settlement Agreement] in violation of Judge Kimballs [sic] order" (Ex. A.4 at 45).

5. On June 23, just in case there had been an egregious scrivener's error, I sent an email to Judge Kimball's law clerk Susie Hindley pointing out that the order, as it had been written and entered, was directed solely at the Clerk of Court and not at me (Ex. A.4 at 45). Unsurprisingly, no correction to the order ensued.

6. Later on June 23, as a courtesy to the Settlement Agreement's non-Merkey parties, I removed the agreement from my website, and I informed Novell and Merkey that I had done so (Ex. A.4 at 48). For the next four months, I did not distribute the agreement through any website, nor by any other means, with

the sole exception that I attached a copy of it to a letter that I wrote to Novell on September 16 (see Declaration, Ex. A at 31 and Ex. A.8 at 77).

7. On July 20, Merkey filed an amended complaint (Docket No. 7), which named me as a defendant. This was 29 days after I had lawfully obtained the Settlement Agreement while acting as a non-party with no special access to case records. After exactly one mention of me, in the list of parties (para. 30), the complaint noticably fails to assert anything connecting me in any way to any of the seven causes of action.

8. Also on July 20, Merkey filed his "EX-PARTE MOTION TO CONDUCT EXPEDITED DISCOVERY" (Docket No. 8), which named "AL PETROFSKY" as a defendant and claimed that "the defendants are evading service in this matter" (Id. at 1). The supporting memorandum revealed that I had "conspired with individuals in communist countries", specifically, "Checkoslovakia [sic]" (Ex. 3 to Docket No. 6).

9. On August 9, I filed an opposition brief (Docket No. 10) in which I discussed that:

   (a) there was no basis whatsoever for the contention that I was evading service;

   (b) addresses for me and most of the other defendants were readily available from public records;

   (c) Merkey has a history of wholesale and malicious untruthfulness in his representations to courts: "He deliberately describes his own, separate reality" (*Novell*, 46 USPQ.2d at 1204); and

(d) Communist Czechoslovakia, in the reality that the rest of us share, has not existed for more than a decade.[2]

10. On August 17, the Court held a hearing on Merkey's discovery motion. Merkey made the only appearance at the hearing. He stated "Your Honor, Mr. Petrofsky, Mr. Causey they will be served today. / THE COURT: All right. / MR. MERKEY: By waiver. If they reject the waiver I'll send it out to the sheriff" (Hearing transcript at 13:2-6, Ex. A.7 at 72). Although one would guess that "served today ... [b]y waiver" meant that he would send a waiver request that day, he did not send anything to me until more than a week later.

11. On August 23, Merkey filed a second amended complaint (Docket No. 24). Like the previous complaint, the only mention of me was in the list of parties (Id. at para. 28), with no assertions connecting me to any of the causes of action. Despite my name and address having been publicly listed for the `scofacts.org` domain since its registration more than one year earlier, and despite my having explicitly disclosed my address on my August 9 brief, and despite Magistrate Judge Alba having explicitly pointed out to Merkey the week before that "you have an address on the material he sent you" (transcript at 6:21, Ex. A.7 at 65) the second amended complaint states that my address "is believed to be within the State of California, but is unknown at the present time" (Docket No. 24 at

[2]I also pointed out the alarming fact that the United States, in an action in which it was represented by then–U.S. Attorney Paul M. Warner and Assistant U.S. Attorney Veda Travis, had recently called Merkey as a witness and then argued for the continued detention of a defendant, based partially on the assumption that Merkey's testimony reflects reality. (Hearing on June 28, 2005 in *U.S. v. Mooney et al.*, 2:05-cr-410-TS-SA). That was one week after Merkey had filed his complaint making wide-ranging and fanciful assertions of murderousness and terrorism by a disparate group of conspirators against him. I notice that despite having the valuable testimony of Merkey at its disposal, the Utah U.S. attorney's office has not recently been able to secure the convictions of any Communist Czechoslovakians.

para. 28).

12. On August 25, Merkey sent me an envelope by certified mail, which I received on August 30. It contained four items:

    (a) a "NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE FOR SUMMONS";

    (b) a blank "WAIVER OF SERVICE OF SUMMONS" form;

    (c) a copy of the second amended complaint; and

    (d) a document titled "SUMMONS IN A CIVIL CASE", dated August 23 (Ex. A.6 at 57)

    There was no "prepaid means of compliance" (Rule 4(d)(2)(G)), as is required in order for a waiver request to impose any duty on a defendant (see Declaration, Ex. A at 32). The "SUMMONS" stated that I was "HEREBY SUMMONED" by the "United States District Court DISTRICT OF". The two actions it purported to require of me were to serve an answer upon "name and address" and to also file the answer with the clerk of "this Court". None of the names of the ninety-four United States District Courts were written anywhere on the document, nor was the address of any clerk. The only state that even had its abbreviation written anywhere on the document was California.

13. On September 6, I wrote to Merkey informing him that his waiver request was deficient and requesting that "If you actually desire to prosecute this frivolous case (and face the court sanctions and civil liability for doing so), then please send me a stamped and addressed envelope for the waiver's return." (Ex. A.5 at 55). Because the simple task of completing the waiver request would have

obviated the need for a summons, I did not address the ersatz summons in this letter.

14. On September 13, I received an email from Merkey in which he stated "If you fail to send the waiver as required by Rule 4, I will hire a process server and I will have you billed for the process of service. ... If 30 days elapse, I will have you served and sanctioned." (Ex. A.4 at 51)

15. On September 27, Merkey dismissed this action per Rule 41(a)(1)(i), and his still-outstanding Motion to Conduct Expedited Discovery became moot. Despite 98 days having elapsed since the action commenced, Merkey had never filed any Rule 4(l) affidavits reporting that any summonses had been served upon any of the numerous defendants. Merkey's notice of dismissal included the following ravings:

> Sufficient evidence has been obtained relative to the actions of the named defendants to bring criminal actions on [sic] State Court against the remaining defendants for criminal stalking. Plaintiff is now pursuing criminal prosecution in the various states these offenses occurred. ... The State of California, Yahoo, the States of Washington, Oregon, and Florida have all received criminal complaints and are investigating these incidents.
>
> ... These matters are better addressed by Law Enforcement at this point.
>
> As such, I dismiss all defendants ...

(Docket No. 28 at 1-2) Despite this alleged massive mobilization of law enforcement, I have not been contacted by criminal prosecutors or investigators from any state (nor Yahoo).

2.3 Interlude

16. On October 20, 2005, after four months of extending to Novell the courtesy of voluntarily refraining from distributing the Settlement Agreement, I concluded from my correspondence with Novell (Ex. A.8 at 76) that Novell did not find significant value in whatever may have remained of the agreement's confidentiality, and I resumed distributing the agreement. It has been publicly available ever since at pages 20 to 29 of the file at this location:

    `http://scofacts.org/Merkey-Perens-1-2.pdf`

    In the nine months since then, I, like the Court, have not heard a word of complaint from Novell (see Declaration, Ex. A at 32).

17. On October 21, Merkey moved the Court "to Issue and [sic] Order to Show Cause to be served on Alan P. Petrofsky for knowingly, maliciously, and willfully violating the Courts [sic] orders and distributing sealed Court exhibits contrary to orders issued by this Court" (Docket No. 30 at 2). The supporting memorandum (Docket No. 33) included Merkey's standard opening litany of alleged murderousness. There was also no let-up in the allegations of Czechoslovakian involvement.

18. On October 24, Merkey moved "to Re-Open this matter for the purpose of enforcing the Courts [sic] orders sealing the Novell/TRG settlement agreement" (Docket No. 32).

19. On October 25, Merkey filed an affidavit stating that "On August 30, 2005, I served Alan P. Petrofsky with ... a summons issued by the Clerk of the Court" (Docket No. 35, para. 9).

2.4 "Enforcement Proceedings"

20. On October 27, 2005, the Court entered an order stating that:

> "Plaintiff filed a Motion to Reopen this case for enforcement proceedings. Plaintiff ... seeks to have [the case] reopened to enforce the Court's Order sealing the Novell Settlement Agreement. ... the court grants Plaintiff's motion to reopen the case in order to allow the issue regarding whether the [Sealing Order] should also apply to third parties to be determined."

(Docket No. 34)

21. On October 30, I sent a letter to the Clerk of the Court bringing to the Court's attention the fact that I had never been summoned by the District of Utah (Ex. A.9 at 85).

22. On November 28, Chief Magistrate Judge Samuel Alba ordered that Merkey "shall amend the summons sent to Mr. Petrofsky to fully comply with the Federal Rules of Civil Procedure and with the rules of this court" (Docket No. 37 at 2).

23. On December 8, I was personally served a copy of a summons, dated December 5, issued by the "United States District Court DISTRICT OF UTAH" (Ex. A.10 at 87). Attached to the summons was a copy of the Second Amended Complaint, which had been dismissed by Merkey 72 days earlier.

24. On January 23, 2006, Merkey moved for default judgment and to amend his complaint for damages (Docket No. 40).

25. On June 30, 2006, Magistrate Judge Warner entered an order stating that "The court ... incorporates the pleading styled 'Motion to Ammend [sic] Complaint

for Damages' into Plaintiff's Second Amended Complaint" (Docket No. 42 at 3, brackets in original). In the same document, the Magistrate Judge recommended that default judgment be entered against me and that "Petrofsky be ordered to remove the Novell Settlement Agreement from `scofacts.org` and any other websites owned by Petrofsky" (Id.).

3 Summary of Argument

The Court lost jurisdiction over the claims in Merkey's complaint when he filed his notice of dismissal. Thus, the Court should not consider any default judgment on those claims, nor any amendment to those claims, nor any injunction based on those claims.

Any claims Merkey wishes to change his mind about can be addressed in a new action, once he pays another filing fee.

Also, the order amending the complaint is inconsistent with the entry of default judgment, because I have not been served the amended complaint.

As for the existing Sealing Order, it was not directed at me, and thus it cannot apply to me. The recommendation for a new order directing me to remove the Settlement Agreement from websites is apparently a recommendation for an injunction. No motion has been made for this relief, and there is no jurisdictional basis for it.

In any event, Merkey's own violations of his confidentiality obligations undermine his protestations about the Settlement Agreement's public availability.

Lastly, I ask that the Court take note of two issues: (1) it would be helpful if the Court provides explicit direction about the disposition of sealed filings at the time of

the next closing of this case, and (2) I have responded in good faith to Merkey and the Court several times during this litigation.

4 Argument

4.1 Standard of Review and Timeliness of Objections

Rule 72(a) provides that when objections are made to a Magistrate Judge's non-dispositive order,

> The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

(Rule 72(a)).

When objections are made to a Magistrate Judge's Report and Recommendations,

> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

(Rule 72(b))

The docket text for the Report and Recommendations and Order says that objections were due by July 17, 2006. However, the item was served on me by mail sent on July 5 (see Declaration, Ex. A at 32 and Ex. A.1 at 35). Thus, per Rules 5(b)(2)(B) (date of service by mail is date of mailing), 72 (objections due 10 days after service), 6(a) (exclude weekends and holidays for response periods of ten days or less), 6(e) (add three days for response to an item served by mail), and DUCivR 77-1(c) (Pioneer Day), my objections are not due until Tuesday, July 25.

4.2 There is no complaint currently at issue in this case

This case was terminated by Merkey's filing of a notice of dismissal on September 27, 2005 (Docket No. 28). Later that day, the court entered an order (Docket No. 29) consisting of Merkey's notice (including all of its fantastic embellishments) with the addition of the words "SO ORDERED" and the signature of the District Judge. In 2003, the Tenth Circuit held that such a post-dismissal dismissal order is "superfluous, a nullity, and without procedural effect for purposes of appeal or otherwise" (*Janssen v. Harris*, 321 F.3d 998, 1000 (10th Cir. 2003)). That opinion continued:

> The filing of a Rule 41(a)(1)(i) notice itself closes the file. ... There is not even a perfunctory order of court closing the file. Its alpha and omega was the doing of the plaintiff alone. The effect of the filing of a notice of dismissal pursuant to Rule 41(a)(1)(i) is to leave the parties as though no action had been brought. Once the notice of dismissal has been filed, the district court loses jurisdiction over the dismissed claims and may not address the merits of such claims or issue further orders pertaining to them.

(Id. (internal brackets omitted), quoting *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1049 (9th Cir. 2001);)

Merkey's complaint was never reinstated. Thus, there is no complaint that the Magistrate Judge could order be amended, nor is there any complaint on which default judgment could be entered.

The order on October 27 only reopened the case to address an ancillary issue:

> On October 24, 2005, Plaintiff filed a Motion to Reopen this case for enforcement proceedings. Plaintiff voluntarily dismissed this case on September 27, 2005, but seeks to have it reopened to enforce the Court's Order sealing the Novell Settlement Agreement that was attached as Exhibit 2 to Plaintiff's Verified Complaint. Although the court notes that its Order sealing Exhibit 2 was directed at the Clerk of Court and not third parties, the court grants Plaintiff's motion to reopen the case in order to allow the

> issue regarding whether the order should also apply to third parties to be determined.

(Docket no. 34)

This order did not reinstate Merkey's complaint, and there were several good reasons for it not to do so:

1. The Court has "los[t] jurisdiction over the dismissed claims and may not address the merits of such claims or issue further orders pertaining to them" (*Janssen* at 1000).

2. Merkey had not even asked for his complaint to be reinstated. He first moved the Court "to Issue and [sic] Order to Show Cause to be served on Alan P. Petrofsky for knowingly, maliciously, and willfully violating the Courts [sic] orders and distributing sealed Court exhibits contrary to orders issued by this Court" (Docket No. 30 at 2). He then moved "to Re-Open this matter for the purpose of enforcing the Courts [sic] orders sealing the Novell/TRG settlement agreement" (Docket No. 32). Neither of these motions said anything about wishing to reinstate his complaint, nor wishing to pursue any of the causes of action in the complaint.

3. There would be no reason to grant this relief even if the Court had the jurisdiction to do so and Merkey had requested that it do so. The dismissal of Merkey's complaint was without prejudice. If there was some non-imaginary claim in his voluntarily-dismissed complaint that Merkey now wishes to pursue, he is free to: (1) re-assert the claim in a new complaint; and (2) file it with a new filing fee (at the new rate of $350 (120 Stat. 183)); at which point (3) the clerk will open a new case, in which any notice of dismissal of the claim shall "operate[ ] as an adjudication upon the merits" (Rule 41(a)(1)).

4. Allowing voluntary undoing of voluntary dismissals would encourage abusive litigation. The Supreme Court has noted the importance of court fees as "an economic

incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). It is by virtue of paying these fees that a paying plaintiff enjoys a lower susceptibility to having his complaint dismissed as frivolous than does a plaintiff proceeding in forma pauperis (Id.). This purpose would be frustrated if the Court were to allow Merkey to dismiss and reinstate his complaints at his whim, without requiring him to pay a new filing fee each time he swings back into litigious mode.

4.3 The recommendation to enter default judgment is incompatible with the order amending the complaint

The Magistrate Judge has ordered that:

> The court further grants Plaintiff's Motion to Amend Complaint for Damages and thus incorporates the pleading styled 'Motion to Ammend [sic] Complaint for Damages' into Plaintiff's Second Amended Complaint

(Docket No. 42 at 3, brackets in original) The Magistrate Judge simultaneously made the following recommendation for further action:

> it is RECOMMENDED that Plaintiff's Motion for Default Judgment be GRANTED and judgment entered against Petrofsky.

(Id. at 2) No authority is cited for this course of actions.

As explained above, this order amending the complaint should be set aside because the Second Amended Complaint had long ago been dismissed by the plaintiff, and as a result, the Court "los[t] jurisdiction over the dismissed claims and may not address the merits of such claims or issue further orders pertaining to them" (*Janssen* 321 F.3d at 1000).

Nevertheless, if this amendment were allowed to stand, it would be another reason that the recommendation for entry of default judgment should be rejected.

Rule 15(a) makes provision for a court to grant leave to a plaintiff to amend his complaint. Once the plaintiff subsequently files and serves the amended complaint, the defendant must respond within "10 days after service of the amended pleading". If the defendant does not respond in that time, then he is in default.

However, it would be patently unjust for a court to declare that a complaint, which did not specify any amount of damages when it was served, has now been amended to specify millions of dollars in damages, and that default judgment will now be entered, without further ado, on this never-served amended complaint.

Perhaps this order "amend[ing]" the complaint was not intended as a Rule 15(a) amendment to the complaint, but was rather intended as some step in the procedure for determining an appropriate default judgment on a complaint that did not demand any sum certain. However, this intent seems unlikely because the procedure for that is given in Rule 55(b)(2), and what it involves is (1) *first*, obtaining an entry of default pursuant to Rule 55(a); and *then* (2) giving the defendant three days notice of a hearing; and *then* (3) holding the hearing, and *then* (4) entering an appropriate judgment. The procedure does not involve any "amend[ing]" of the complaint, nor any "incorporat[ing]" of motions into the complaint.

> Rule 55 of the Federal Rules of Civil Procedure provides a two-step process for obtaining a default judgment. The first step is to obtain a default. When a party against whom affirmative relief is sought has failed to plead or otherwise defend, a plaintiff may bring that fact to the court's attention, and Rule 55(a) empowers the clerk of the court to enter a default against a party that has not appeared or defended. Having obtained a default, a plaintiff must next seek a judgment by default under Rule 55(b). Rule 55(b)(1) allows the clerk to enter a default judgment if the plaintiff's claim is for a sum certain and the defendant has failed to appear and is not an

> infant or incompetent person. See Fed. R. Civ. P. 55(b)(1). "In all other cases," Rule 55(b)(2) governs, and it requires a party seeking a judgment by default to apply to the court for entry of a default judgment.

(*New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005))

> In all other cases the party entitled to a judgment by default shall apply to the court therefor ... If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application.

(Fed. R. Civ. P. 55(b)(2))

At the time of this order amending the complaint, no entry of default pursuant to Rule 55(a) had been made.

If the second amended complaint has now been superseded by a further amended complaint, then I am not and can not be in default unless and until this further amended complaint is served on me and ten days have passed without any response.

4.4 On determining whether the Sealing Order "should also apply" to me

In response to Merkey's motion "to Re-Open this matter for the purpose of enforcing the Courts [sic] orders sealing the Novell/TRG settlement agreement", the October 27 order stated:

> Although the court notes that its Order sealing Exhibit 2 was directed at the Clerk of Court and not third parties, the court grants Plaintiff's motion to reopen the case in order to allow the issue regarding whether the order should also apply to third parties to be determined.

(Docket no. 34) There is some ambiguity as to whether "should also apply" was

intended to mean "should be construed, as written, to also apply" or "should be supplemented with a new order that also applies".

4.4.1 The Sealing Order cannot be construed to apply to me

The more straightforward reading of the October order is that "should also apply" meant "should be construed, as written, to also apply". That seems to have been Magistrate Judge Alba's interpretation: in the November 28 order, the characterization of the October order leaves out the word "should" and says that the issue is whether the Sealing Order simply "applies ... also to third parties":

> The Court's order reopening this case specified that the case was reopened to allow the Court to address whether the Court's order sealing the Novell Settlement Agreement applies to not only the Clerk of the Court, but also to third parties.

(Docket No. 37 at 1)

This is also the interpretation that is in accord with what Merkey had requested in the motion that the Court said it was granting. Merkey moved to reopen "for the purpose of enforcing the Courts [sic] orders sealing the Novell/TRG settlement agreement", and not for the purpose of entering any new sealing orders. The motion he had filed the day before also plainly claimed that I was violating the existing sealing order, and requested an "Order to Show Cause to be served on Alan P. Petrofsky for knowingly, maliciously, and willfully violating the Courts [sic] orders and distributing sealed Court exhibits contrary to orders issued by this Court" (Docket No. 30 at 2).

The question of whether the Sealing Order should be construed to apply to me is easily decided. As the Court has already found, the order "was directed at the Clerk of Court and not third parties".

Thus the question is whether an order can "apply" to persons at whom it is plainly not "directed". The only tenth circuit decisions I know of that come close to addressing this concept begin with the fact that an order was "directed at" something that was at least closely associated with an alleged violator of the order, and then the decisions seek to determine things such as whether an order "directed at the two organizations w[as] sufficiently specific to put the defendants on notice that they were personally required to comply" (*United States v. Voss*, 82 F.3d 1521, 1528 (10th Cir. 1996)).

I am neither the Clerk of Court nor an employee of the Clerk's office, nor even the Clerk's wife's hairdresser's second cousin. An order directed at the Clerk is not even remotely "sufficiently specific to put [me] on notice that [I] [was] personally required to comply" (Id.).

My failure to find an opinion in this circuit that is directly on point may be attributable to what the first circuit has called "the sheer obviousness of the principle":

> [T]hose who would suffer penalties for disobedience must be aware not merely of an order's existence, but also of the fact that the order is directed at them. This tenet has not been stated frequently. Withal, the relative rarity of articulation testifies more to the sheer obviousness of the principle, *cf.*, *e.g.*, M. de Cervantes, *Don Quixote de la Mancha*, Pt. III, bk. 10 (1615) ("Forewarned, forearmed."), than to doubts about its legitimacy.

(*Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 17 (1st Cir. 1991))

Obviously, I could not have been, and I cannot become, "aware ... of the fact that the order is directed at" me, if the order is, in fact, *not* directed at me. And as the Court noted in October, the "Order sealing Exhibit 2 was directed at the Clerk of Court and not third parties" (Docket no. 34).

If this rather absurd issue is the question that the case was reopened to determine,

then Magistrate Judge Warner's recommendation for an order that I remove the Settlement Agreement from websites should be rejected simply for being outside the scope of what the case was reopened for, and therefore outside the scope of the referral to the Magistrate Judges under Rule 72.

4.4.2 The Sealing Order should not be supplemented with a new order that applies to me

Neither Merkey, nor Novell, Inc., nor the Czechoslovakian Communists, nor any other persons, real or imagined, moved this court to consider entering a new, more expansive version of the Sealing Order.

Nevertheless, Magistrate Judge Warner has recommended that "Petrofsky be ordered to remove the Novell Settlement Agreement from `scofacts.org` and any other websites owned by Petrofsky" (Docket No. 42 at 3). If the recommendation is for an order that I perform the one-time action of removing the information from the website, and the order leaves me free to replace the information two minutes later, then I do not strenuously object.

However, as that would be pointless, I assume that what the Magistrate Judge is recommending is not an order to perform a one-time action, but rather an order permanently enjoining me from distributing the information to the public.

The report articulates no jurisdictional basis for such an injunction. I also cannot find any argument to respond to in the moving papers, because, again, there was no motion for this relief. Merkey only moved for the enforcement of a previous order that I was allegedly violating.

As argued above, there is currently no complaint in this action over which the Court has jurisdiction. Furthermore, even if the Court did have jurisdiction over

Merkey's dismissed complaint, there is nothing connecting this proposed injunction to any of the causes of action in that complaint.

If Merkey, or anyone else, has a meritorious argument that by distributing the agreement I am causing injury by infringing a copyright, breaching a contract, or committing any other tort, then that person's recourse is to (1) write a complaint stating the cause of action, (2) file it and pay the filing fee, and then (3) seek a temporary restraining order or a preliminary or permanent injunction.

In any event, Merkey's alleged desire for confidentiality is at odds with his violations of the agreement's confidentiality provisions, which are detailed below. Also, after nine months of the agreement being continuously available worldwide on the internet, it would seem to be a little late to attempt to preserve its confidentiality with an injunction. It is not clear that any confidentiality remains. Indeed, Novell's silence over the last nine months indicates that Novell, at least, has given up on keeping the agreement confidential (see Declaration, Ex. A at 32).

4.5 Merkey has violated his confidentiality obligations

It was Merkey's own act of filing the Settlement Agreement in the court's public records that led to me obtaining a copy of the document. He claims that this act was unintentional. However, it is undisputed that at the same time he filed the Settlement Agreement, he also filed his Complaint, and he made no attempt to have the Complaint itself sealed. By doing so, he violated the confidentiality he had agreed to preserve.

In the Settlement Agreement, Merkey agreed that:

> 6. ... none of the Trade Secret Defendants [a term defined to include Merkey] ... will publicly discuss or comment upon (a) ..., (b) the parties' motivations and goals in settlement, (c) ..., or (d) the scope of the Permanent Injunction as a measure of the validity of either side's position

in the Trade Secret Litigation.

(Settlement Agreement, Ex. 2 to the Complaint, at 5)

In Merkey's complaint, he publicly makes the following comments upon the parties' motivations and goals in settlement, and upon the scope of the Permanent Injunction as a measure of the validity of Novell's position in the Trade Secret Litigation:

> 93. Novell further stated in the permanent injunction which was a part of the settlement agreement, Merkey was not allowed to posses [sic] 10 year old source code of NetWare or Wolf Mountain or use it in exchange for the right to use all "intangible" knowledge in his possession, whether considered a Novell trade secret or not. Since there was little value in antiquated and unused source code from Netware products which are no longer in use in Novell's relevant markets, Merkey viewed the permanent injunction as moot, since he had not possessed Novell source code unlawfully, and the State Court had issued a specific finding that "no Novell source was used by Merkey" during or following the trade secret litigation.
>
> . . .
>
> 95. This agreement nullified the preliminary injunction and represented a 180 degree shift in Novell's position regarding it's professed concerns over protecting its trade secrets. This was particularly true given the fact Novell was facing at the time a multi-billion dollar Sexual Harassment action in Federal Court and possible criminal indictment of it's executives and Board of Directors for their actions in the trade secret litigation in setting up dozens of Novell employees to commit perjury in State Court in a futile attempt to prove it's merit less [sic] claims.

(Complaint, Docket No. 1, at 29)

Merkey attempts to excuse this by asserting that:

> What references were made to the agreement were done so under privilege and as outlined under the settlement language which allowed the agreement to be used in litigation in State of [sic] Federal Courts in support of Plaintiff's or Novell's claims.

(Memorandum in Support of Motion for Order to Show Cause, Docket No. 33, para. 11)

He is apparently referring to this sentence of the agreement:

> It shall not be a violation of this Settlement Agreement to refer members of the press or public, without further comment, to the public records on file at the state and federal courthouses in these matters.

(Settlement Agreement, Ex. 2 to Complaint, para. 3)

Of course, "these matters" did not include *Merkey v. Perens et al.*, a case that was not even a gleam in a lunatic's eye in 1998. "These matters" did include the case in which the Settlement Agreement was filed, *Novell v. Timpanogas Research Group*, and the agreement provides that the protective order in that case "will remain in full force and effect and will continue to govern the actions of the parties hereto" (Id., para. 2). Anything Merkey may have needed to say to the *Novell* court that was confidential could have been filed with that court, under seal, in accordance with the protective order. If he had had some actual need to reveal some confidential information about the settlement to this court, he could have requested leave to do so under seal.

Merkey's theory appears to be that he was free to express to the public any statement about the settlement he wished, as long as he did so by including the statement in a pleading, filing the pleading in a court somewhere, and then referring people to the filed document. This theory is untenable, but it does perhaps provide an explanation for why he would file a complaint that includes wholly irrelevant material about Novell, and would then dismiss the complaint before serving any of the defendants. There would be no reason to serve defendants if they were just placeholders to facilitate a scheme to circumvent his confidentiality obligations.

4.6 On avoiding the need for future proceedings seeking enforcement of the rule that files be unsealed when a case is closed

According to the local rules, the Settlement Agreement should have long ago become available again to the public directly from the clerk:

> Disposition of Sealed Documents. Unless otherwise ordered by the court, any case file or documents under court seal that have not previously been unsealed by court order will be unsealed at the time of final disposition of the case.

(DUCivR 5-2(f))

When this case was first closed, there had been no order that anything in the file was to remain under seal after the close of the case. However, the docket does not indicate that the Clerk ever complied with DUCivR 5-2(f) by unsealing the Settlement Agreement.

If, at the time of the next closing of this case, the Court has still not ordered that any sealings should persist post-closing, then it may be helpful if the Court explicitly directs the Clerk to unseal all items, in compliance with DUCivR 5-2(f).

4.7 On my good-faith responsiveness to this ludicrous litigation

Magistrate Judge Warner's Report cites my failure to file a responsive pleading to Merkey's complaint.

Let me assure the Court that if Merkey had begun this action in the usual manner, by filing a complaint and serving me with process (*before* dismissing the complaint), then I would have timely responded, as required, in what I understand is the usual manner for responding to completely frivolous complaints: by moving for dismissal

and for Rule 11 sanctions, and considering bringing my own action for Abuse of Process.

Furthermore, if the action had been vetted by, and presented to the court by, a member of the Utah State Bar, then I would engage another member to make my response, rather than attempting to muddle through on my own. However, I do not believe that our legal system has gone so horrendously awry that a person should need to hire an expensive legal expert just to fend off the obviously frivolous vexation of a cretin with no counsel, no case, and no clue.

As things unfolded, it never appeared to me that Merkey had done anything that compelled me to respond. Nevertheless, I proactively wrote to the Court on no fewer than three occasions, namely: (1) my June 2005 email to Judge Kimball's law clerk Susie Hindley in response to Merkey's baseless assertion of "Criminal Contempt" (Ex. A.4 at 45); (2) my August memorandum in response to Merkey's baseless assertion that I was evading service (Docket No. 10); and (3) my October 30 letter to the Clerk of Court (Ex. A.9 at 85) to correct the statements in Merkey's October memorandum and affidavit that I had been served with a summons "issued by the Clerk of the Court".

In addition to sending Merkey copies of those three items, I also sent him the letter on September 6 (Ex. A.5 at 55) in which I explained how he could, at that time, easily cure the deficiency in his service waiver request. I provided a copy of that letter to the Court with my October 30 letter.

In November, Magistrate Judge Alba ordered that Merkey "amend" his summons, despite the facts that (1) no summons had ever been issued from this court, and thus there was no summons to "amend"; and (2) there was no longer any complaint for anyone to be summoned to answer. I found this peculiar, but I understood it to

simply mean that the court believed that issuance and service of a summons would somehow give the Court sufficient personal jurisdiction for deciding the only issue before it: Merkey's post-dismissal motion for a vague Order to Show Cause. I was not particularly concerned by this November order nor by Merkey's vague motion, because I figured that if the Court had actually proceeded to grant the motion and issued some order for me to show cause, then it would probably be much clearer than Merkey's motion (i.e., it would order me to show cause *why* the court should or should not *take some particular action*), and it would be simpler to make a showing at that time.

When Merkey moved in January for the entry of default judgment on a complaint that had long ago been dismissed by Merkey himself (and had even been redundantly dismissed a second time by the Court), I did not think there was any need to respond. In the most recent order, Magistrate Judge Alba had reiterated the limited nature of the reopened proceedings:

> The Court's order reopening this case specified that the case was reopened to allow the Court to address whether the Court's order sealing the Novell Settlement Agreement applies to not only the Clerk of the Court, but also to third parties.

(Docket No. 37 at 1)

I was quite surprised when the next thing I heard from the Court, seven months later, was a recommendation by Magistrate Judge Warner that default judgment be entered against me, along with a new, sua sponte permanent injunction.

I do understand that when a patently frivolous complaint and summons are presented to the clerk along with the filing fee, then the clerk has no choice but to open a case and sign the summons. I also understand that if the summons and complaint are then served on the defendant, then he must respond, and the Court must waste

its resources on adjudicating the matter, no matter how ludicrous. However, I do not quite understand why a court, under no obligation to do so, would *choose* to grant a nutjob's motion to reopen his case for "enforcement proceedings" when there was clearly nothing that needed to be enforced.

5 Conclusion

This case is dead. It was slain by its own mad creator in September 2005, cut down in its youth before any of the defendants were even served. It is long past time for Merkey and the Court to let this case rest in peace. Any legitimate grievance Merkey has can be addressed in a new action, as soon as he files a new complaint and surmounts the Court's recently improved minimal barrier to frivolous litigation: the $350 filing fee.

That $350 fee is the only prior restraint on Merkey filing another complaint, because he is not yet on the District's restricted filer list, and he is free to continue down the path toward joining Holli Lundahl and the other vexatious litigants who have been so honored. Of course, if he files another frivolous complaint that is, as Judge Seymour of the tenth circuit might say, "replete with fanciful, implausible and bizarre factual assertions" (*Lundahl v. Robbins*, No. 03-4219 (CA10/DU, June 8, 2005)[3]), and he actually serves process upon the defendants *before* dismissing the complaint, then among the recourses subsequently available to them will be to bring actions for abuse of process.

[3] `http://www.ca10.uscourts.gov/opinions/03/03-4219.pdf`

For all the foregoing reasons, the Court should (1) set aside the Magistrate Judge's order amending the complaint; (2) reject the Magistrate Judge's recommendation that default judgment be entered; (3) reject the Magistrate Judge's recommendation that I be ordered to remove the Settlement Agreement from websites; and, instead, (4) enter an order directing the Clerk of Court to reclose this case.

Respectfully submitted this 21st day of July, 2006,

Alan P. Petrofsky, pro se

A Declaration of Alan P. Petrofsky

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

JEFFREY VERNON MERKEY, **Plaintiff,** **vs.** **BRUCE PERENS, et al.,** **Defendants.**	**DECLARATION OF ALAN P. PETROFSKY IN SUPPORT OF HIS OBJECTIONS TO REPORT AND RECOMMENDATION AND ORDER GRANTING MOTION TO AMEND COMPLAINT** **Case No. 2:05-CV-521-DAK** **District Judge Dale A. Kimball** **Magistrate Judge Paul M. Warner**

I, Alan P. Petrofsky, declare as follows:

1. I am making this declaration in support of, and attached as an appendix to, my objections to the June 30, 2006 Report and Recommendation and Order in the above-captioned case.

2. From June 23, 2005 to October 20, 2005 I did not distribute the Novell Settlement Agreement (dated August 18, 1998) through any website, nor by any other means, with the sole exception that I attached a copy of it to the letter dated September 16, 2005 that I sent to Jim F. Lundberg of Novell; Jeffrey Vernon Merkey; Pamela Jones of `groklaw.net`; and Michael A. Jacobs, counsel of record for Novell in *SCO Group v. Novell*, Case No. 2:04-cv-00139-DAK.

3. On August 30, 2005, I received from Merkey a document titled "NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE FOR SUMMONS" in an envelope that contained three other items, but no prepaid means for returning a waiver.

4. I have not received any communication from any representative of Novell since the letter from Jim F. Lundberg dated September 23, 2005.

5. On or about July 8, 2006, I received by mail an envelope from the Office of the Clerk of Court containing a copy of the June 30, 2006 Report and Recommendation and Order. Attached hereto as Exhibit A.1 (at page 35) is a copy of the envelope, on which the post office cancellation mark and the postage meter markings are both dated July 5, 2006.

6. I am not now, nor have I ever been, a member of the Communist Party.

7. Attached hereto are true and correct copies of the following documents:

   (a) Exhibit A.2 (at page 37) is a copy of the table of contents and pages 3253-3254 of volume 110 of *Sbírka Zákonů České a Slovenské Federativní Republiky* (Collection of Acts of the Czech and Slovak Federal Republic), dated December 8, 1992, which I retrieved from the website of the Ministerstvo vnitra Ceské republiky (Ministry of the Interior of the Czech Republic) on July 21, 2006, using this URL:

      `http://www.mvcr.cz/sbirka/1992/sb110-92.pdf`

   (b) Exhibit A.3 (at page 41) is a copy of United Nations document A/47/774, "Letter dated 10 December 1992 from the Permanent Representative of Czechoslovakia to the United Nations, addressed to the Secretary-General",

which I retrieved from the United Nations Depository Library at Stanford University.

(c) Exhibit A.4 (at page 44) is a collection, in chronological order, of copies of (1) all 15 email messages that I have ever received from Merkey; (2) the sole email I have ever received from Susie Hindley, Law Clerk to Judge Kimball; and (3) all 3 email messages that I have ever sent to Merkey (including one addressed to both Merkey and Hindley). The message dates range from June 22, 2005 to December 10, 2005.

(d) Exhibit A.5 (at page 55) is a copy of my letter to Merkey dated September 6, 2005.

(e) Exhibit A.6 (at page 57) is a copy of a document titled "SUMMONS IN A CIVIL CASE", dated August 23, 2005, which I received from Merkey on August 30, 2005.

(f) Exhibit A.7 (at page 59) is a copy of the transcipt of the hearing held in this case on August 17, 2005, which I obtained from the court reporter.

(g) Exhibit A.8 (at page 76) is a collection of copies of (1) My letter to Jim F. Lundberg, Associate General Counsel for Novell, Inc. dated September 16, 2005, sans exhibits; (2) the email and letter from Lundberg to me dated September 23, 2005; and (3) my letter to Lundberg dated September 28, 2005.

(h) Exhibit A.9 (at page 85) is a copy of my letter to Markus B. Zimmer, Clerk of the Court, dated October 30, 2005, sans exhibits.

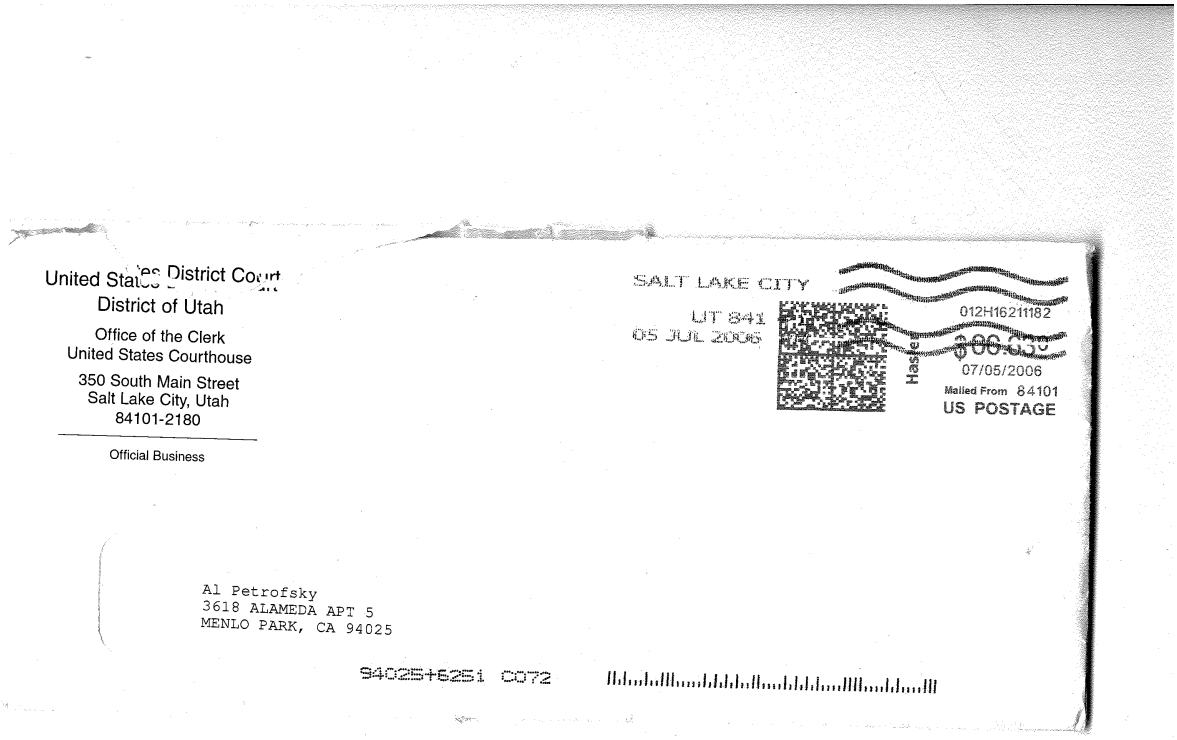
(i) Exhibit A.10 (at page 87) is a copy of the Summons dated December 5, 2005 that I received on December 8, 2005.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of July, 2006,
In the State of California,
County of San Mateo,

Alan P. Petrofsky

A.1 Envelope in which order was served


United States District Court
District of Utah
Office of the Clerk
United States Courthouse
350 South Main Street
Salt Lake City, Utah
84101-2180
Official Business
SALT LAKE CITY
UT 841
05 JUL 2006
012H16211182
07/05/2006
Mailed From 84101
US POSTAGE
Al Petrofsky
3618 ALAMEDA APT 5
MENLO PARK, CA 94025
94025+6251 C072

A.2 Excerpt from Sbírka Zákonů volume 110

Ročník 1992

Sbírka zákonů

ČESKÉ A SLOVENSKÉ FEDERATIVNÍ REPUBLIKY

ČESKÉ REPUBLIKY / SLOVENSKÉ REPUBLIKY

Částka 110 **Rozeslána dne 8. prosince 1992** **Cena Kčs 5,10**

OBSAH:

(4) Zákon Federálního shromáždění může stanovit odchylně od principů podle čl. 3 odst. 1 dělení majetku Federálního fondu tržní regulace v zemědělství.

(5) Majetek Centra kupónové privatizace se rozdělí ke dni zániku České a Slovenské Federativní Republiky mezi Centrum kupónové privatizace České republiky a Centrum kupónové privatizace Slovenské republiky takto:

a) movitý majetek mimo čistý výnos z prodeje kupónů podle územního principu,
b) čistý výnos z prodeje kupónů v poměru dvě celé dvacet devět setin ku jedné.

Podrobnosti dělení majetku Centra kupónové privatizace stanoví dohoda České republiky a Slovenské republiky uzavřená do zániku České a Slovenské Federativní Republiky.

(6) Dělení majetku České a Slovenské Federativní Republiky, k němuž přísluší právo hospodaření Tranzitnímu plynovodu, Československým aeroliniím, Čechofrachtu, bývalým podnikům zahraničního obchodu a jejich afilacím v zahraničí, a dělení dalšího majetku České a Slovenské Federativní Republiky určeného dohodou mezi Českou republikou a Slovenskou republikou, pokud nebude upraveno zvláštními zákony, se provede na základě dohody mezi Českou republikou a Slovenskou republikou.

Čl. 14

Ke dni zániku České a Slovenské Federativní Republiky se zrušuje část pátá (§ 27 až 40) zákona č. 92/1991 Sb., o podmínkách převodu majetku státu na jiné osoby.

Čl. 15

Tento ústavní zákon nabývá účinnosti dnem vyhlášení.

Stráský v. r.
v z. **Benda** v. r.

542

ÚSTAVNÍ ZÁKON
ze dne 25. listopadu 1992
o zániku České a Slovenské Federativní Republiky

Federální shromáždění České a Slovenské Federativní Republiky respektujíc usnesení České národní rady a Národní rady Slovenské republiky usneslo se na tomto ústavním zákoně:

Čl. 1

(1) Uplynutím dne 31. prosince 1992 zaniká Česká a Slovenská Federativní Republika.

(2) Nástupnickými státy České a Slovenské Federativní Republiky jsou Česká republika a Slovenská republika.

Čl. 2

Působnost České a Slovenské Federativní Republiky, která jí byla svěřena ústavními a jinými zákony, přechází na Českou republiku a na Slovenskou republiku dnem 1. ledna 1993.

Čl. 3

(1) Zánikem České a Slovenské Federativní Republiky zanikají státní orgány České a Slovenské Federativní Republiky. Současně zanikají ozbrojené síly a ozbrojené bezpečnostní sbory České a Slovenské Fe-

derativní Republiky a rozpočtové a příspěvkové organizace napojené na státní rozpočet České a Slovenské Federativní Republiky a státní organizace v působnosti České a Slovenské Federativní Republiky, které byly zřízeny zákonem.

(2) Česká republika a Slovenská republika nesmějí po zániku České a Slovenské Federativní Republiky užívat státních symbolů České a Slovenské Federativní Republiky.

Čl. 4

(1) Počínajíc dnem uvedeným v článku 2 náleží zákonodárná moc v České republice zákonodárnému sboru složenému z poslanců zvolených ve volbách v roce 1992 v České republice do Federálního shromáždění České a Slovenské Federativní Republiky[1]) a do České národní rady.[2]) Vnitřní poměry tohoto zákonodárného sboru stanoví v souladu s článkem 7 zákon České republiky.

(2) Počínajíc dnem uvedeným v článku 2 náleží zákonodárná moc ve Slovenské republice zákonodárnému sboru složenému z poslanců zvolených ve volbách v roce 1992 ve Slovenské republice do Federálního shromáždění České a Slovenské Federativní Republiky[1]) a do Slovenské národní rady.[2])[*]) Vnitřní poměry tohoto zákonodárného sboru stanoví v souladu s článkem 7 zákon Slovenské republiky.

(3) Ustanovení zákona o volbách do Federálního shromáždění o uprázdnění mandátu[3]) zůstávají nedotčena.

Čl. 5

Pravomoc příslušející ke dni zániku České a Slovenské Federativní Republiky vládě České a Slovenské Federativní Republiky náleží od 1. ledna 1993 na území České republiky vládě České republiky a na území Slovenské republiky vládě Slovenské republiky, pokud ústavní zákon České republiky nebo ústavní zákon Slovenské republiky nestanoví jinak.

Čl. 6

(1) Pravomoc příslušející ke dni zániku České a Slovenské Federativní Republiky Nejvyššímu soudu České a Slovenské Federativní Republiky náleží od 1. ledna 1993 na území České republiky Nejvyššímu soudu České republiky a na území Slovenské republiky Nejvyššímu soudu Slovenské republiky, nestanoví-li ústavní zákon České republiky nebo ústavní zákon Slovenské republiky jinak.

(2) Pravomoc příslušející ke dni zániku České a Slovenské Federativní Republiky Ústavnímu soudu České a Slovenské Federativní Republiky vykonává od 1. ledna 1993 ve vztahu k orgánům, institucím a občanům na území České republiky Nejvyšší soud České republiky a ve vztahu k orgánům, institucím a občanům na území Slovenské republiky Nejvyšší soud Slovenské republiky, nestanoví-li ústavní zákon České republiky nebo ústavní zákon Slovenské republiky jinak.

Čl. 7

Česká národní rada a Národní rada Slovenské republiky mohou ještě před zánikem České a Slovenské Federativní Republiky s účinností nejdříve od 1. ledna 1993 přijímat ústavní a jiné zákony, jimiž zabezpečí výkon působnosti, která přejde na Českou republiku a Slovenskou republiku podle článku 2.

Čl. 8

(1) Česká republika a Slovenská republika jsou oprávněny ještě před zánikem České a Slovenské Federativní Republiky uzavírat smlouvy o úpravě vzájemných poměrů ve věcech, které náleží do působnosti České a Slovenské Federativní Republiky, s tím, že tyto smlouvy vstoupí v platnost po zániku České a Slovenské Federativní Republiky.

(2) Česká republika a Slovenská republika mohou ještě před zánikem České a Slovenské Federativní Republiky uzavírat mezinárodní smlouvy vůči třetím státům svým jménem s tím, že tyto smlouvy vstoupí v platnost po zániku České a Slovenské Federativní Republiky.

Čl. 9

Tento ústavní zákon nabývá účinnosti dnem vyhlášení.

Stráský v. r.
Kováč v. r.

[1]) Čl. 30 a 31 ústavního zákona č. 143/1968 Sb., o československé federaci.

[2]) Čl. 102 ústavního zákona č. 143/1968 Sb.

[*]) Podle čl. 154 odst. 1 Ústavy Slovenské republiky č. 460/1992 Sb. od 1. října 1992 Národní rada Slovenské republiky.

[3]) § 49 zákona č. 47/1990 Sb., o volbách do Federálního shromáždění, ve znění zákona č. 59/1992 Sb. (úplné znění č. 60/1992 Sb.).

A.3 Letter from Ambassador Kukan

UNITED NATIONS

A

General Assembly

Distr.
GENERAL

A/47/774
10 December 1992

ORIGINAL: ENGLISH

Forty-seventh session
Agenda item 19

ADMISSION OF NEW MEMBERS TO THE UNITED NATIONS

Letter dated 10 December 1992 from the Permanent Representative of Czechoslovakia to the United Nations addressed to the Secretary-General

Upon instruction from my Government, I have the honour to inform you that, on 25 November 1992, the Federal Assembly of the Czech and Slovak Federal Republic passed the Constitutional Law on the dissolution of the Czech and Slovak Federal Republic.

The above-mentioned Constitutional Law provides that:

(a) The Czech and Slovak Federal Republic will cease to exist on 31 December 1992 (art. 1, para. 1);

(b) The successor States of the Czech and Slovak Federal Republic are the Czech Republic and the Slovak Republic (art. 1, para. 2);

(c) The Czech Republic and the Slovak Republic can, even prior to the dissolution of the Czech and Slovak Federal Republic, conclude international treaties with third States on their own behalf, provided that those treaties enter into force after the dissolution of the Czech and Slovak Federal Republic (art. 8, para. 2).

I should like to inform you that the Czech Republic and the Slovak Republic, as the successor States of the Czech and Slovak Federal Republic, which was one of the original Members of the United Nations in 1945, will apply for membership in the United Nations as soon as possible.

92-78753 3802d (E) 101292

101292

/...

I should be grateful if you would have the present letter circulated as an official document of the General Assembly under agenda item 19.

(Signed) Eduard KUKAN
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of the Czech and
Slovak Federal Republic to the United Nations

A.4 All Email Between Merkey, the Court, and Me

Below is all the email that I (Al Petrofsky) have sent to Jeff Merkey or received from him, through 2005-12-10. Also included is a 2005-06-23 email from law clerk Susie Hindley (which is addressed only to me, but is in reply to an email for which I had included Merkey on the CC list).
For more information see http://scofacts.org/merkey.

Technical Notes: In most instances in which an email included the entire text of another email, that has been excised. Also, I believe that the emails appear here in the order that they were sent, even though there are some cases of a Merkey email dated a little earlier than the email that precedes it. For example, his first email titled "Re: Belatedly sealed document in Merkey v. Perens" is a reply to the email that precedes it, and thus could not possibly have been sent before the preceding email, even though this reply is dated June 23 09:41 -0600 (= 15:41 UTC), which is ten minutes before the preceding email's Date, 08:51 -0700 (= 15:51 UTC). It appears that his clock is an hour behind.

```
Date: Wed, 22 Jun 2005 17:01:49 -0600
From: jmerkey <jmerkey@utah-nac.org>
To: al@scofacts.org
Subject: Criminal Contempt
Message-ID: <42B9EDDD.7060302@utah-nac.org>

Hey Al,

You have copies of the Novell settlement agreement posted on your
site.  I have downloaded an forwarded links and hosting information
to Judge Kimball's Clerks.  There is an order sealing these
documents (the complaint is OK).  I have notified the Court you are
distributing copies in violation of Judge Kimballs order.  Go check
PACER.

I advise you to take down the documents immediately.

Jeff
```

```
Date: Thu, 23 Jun 2005 08:51:39 -0700
From: Alan P Petrofsky <al@petrofsky.org>
To: Susie Hindley <Susie_Hindley@utd.uscourts.gov>
CC: Jeff Merkey <jmerkey@utah-nac.org>,
    Jim F Lundberg <jflundberg@novell.com>
Subject: Belatedly sealed document in Merkey v. Perens
Message-Id: <200506231551.IAA15945@radish.petrofsky.org>

Dear Ms. Hindley:

I understand you are the law clerk assigned to Judge Kimball's
odd-numbered cases.  One of those cases is Merkey v. Perens et al.,
2:05-cv-00521-DAK, which was filed late on Tuesday (June 21).
```

The second exhibit to the complaint is a copy of a 1998 settlement agreement between Merkey, Novell, Inc., and some other parties.

I am not a party to the settlement agreement nor to the Merkey v. Perens action. I am, however, in the habit of collecting some documents of interest to people following the litigation efforts of the SCO Group, Inc.. I make such documents publicly available on the scofacts.org internet website. (The SCO Group is also not a party to the Merkey case, but it is connected to the case by, among other things, the plaintiff's allegations on pages 18-22 of the complaint.)

On Wednesday morning, I obtained copies of the Merkey complaint and its exhibits from the court's ECF system. I then placed them at the following locations:

http://scofacts.org/Merkey-Perens-1.pdf (the complaint)
http://scofacts.org/Merkey-Perens-1_1.pdf (exhibits 1 and 2)

I mentioned their locations on two public message systems, and the exhibits have subsequently been downloaded by visitors from over a hundred different internet addresses around the world.

I notice that on Wednesday afternoon, Judge Kimball entered an order that reads:

> Plaintiff filed a Verified Complaint in this matter on June 21, 2005, including a confidential settlement agreement as Exhibit 2 to the Verified Complaint. Plaintiff notified the court that he intended to file this exhibit under seal. However, because it was not filed according to the court's rules regarding sealed documents, the exhibit was scanned into the court's public electronic docket. Pursuant to paragraph 6 of the settlement agreement, the parties agreed that the settlement agreement was confidential. Therefore, the court hereby seals Exhibit 2 of the Verified Complaint in this matter and directs the Clerk of Court to remove the exhibit from the court's electronic docket.

I have received, apparently from Jeff Merkey, an email titled "Criminal Contempt", which states that "I have notified the Court you are distributing copies in violation of Judge Kimballs order". (The full text of the email is below.)

I notice, however, that the order, as written, is directed solely at the Clerk of Court, and not at me.

Please let me know if the court intends to enter an order that would forbid my distribution of this document.

Yours truly,

Alan P. Petrofsky

Date: Thu, 23 Jun 2005 09:41:19 -0600
From: jmerkey <jmerkey@utah-nac.org>

To: Alan P Petrofsky <al@petrofsky.org>
Cc: Susie Hindley <Susie_Hindley@utd.uscourts.gov>,
Jim F Lundberg <jflundberg@novell.com>
Subject: Re: Belatedly sealed document in Merkey v. Perens
In-Reply-To: <200506231551.IAA15945@radish.petrofsky.org>
Message-ID: <42BAD81F.6020807@utah-nac.org>

All,

After leaving Mr. Petrofsky a message last night, he continued to dsitribute these documents and subsequently posted them to a site in the counrty of Checkoslovakia. He and his associates then created links on Groklaw and continued to distribute copies. I have snapshots of the text, comments, and downloads from al and others assisting in violating the courts order. I am preparing an ex-parte motion for TRO against al, groklaw, and his conspirators for an order requiring that they remove this content and asking the court to prohibit these sites from using any court pleadings obtained from PACER for any pending cases until the cases have been adjudicated. These internet sites have conspired with individuals in communist countries and have assisted delberately in the violation of the courts order.

Al is simply a liar, and I will file the evidence next week with the Court detailing his actions and those of his associates.

Sincerely,

Jeff

Date: Thu, 23 Jun 2005 09:45:50 -0600
From: jmerkey <jmerkey@utah-nac.org>
To: jmerkey <jmerkey@utah-nac.org>
Cc: Alan P Petrofsky <al@petrofsky.org>,
Susie Hindley <Susie_Hindley@utd.uscourts.gov>,
Jim F Lundberg <jflundberg@novell.com>
Subject: Re: Belatedly sealed document in Merkey v. Perens
In-Reply-To: <42BAD81F.6020807@utah-nac.org>
Message-ID: <42BAD92E.6040403@utah-nac.org>

These people are roosting like vultures in the trees outside the US Courthouse waiting to pounce on any information for dissemination. These people are not attorneys, parties to the action, or even have any real interest in these cases other than to promote their websites. None of these people involved in these actions, inclduing al, are legitimate reporters or news agencies. It should be clear to the Court and others that their purpose, as stated in the original complaint, is to seize and funnel sensitive information into the hands of enemies of the United States and those acting in concert with them to violate the rights of American Citizens and companies like Novell.

Sincerely,

Jeff

Date: Thu, 23 Jun 2005 11:11:06 -0600
From: Susie_Hindley@utd.uscourts.gov
To: Alan P Petrofsky <al@petrofsky.org>
Subject: Re: Belatedly sealed document in Merkey v. Perens
In-Reply-To: <200506231551.IAA15945@radish.petrofsky.org>
Message-ID: <OF3B904711.3837E7AF-ON87257029.005BE474-87257029.005E969F@usc

Mr Petrofsky:

There is no present motion or case before Judge Kimball regarding the use of or dissemination of Exhibit 2 to the Complaint filed in Merkey v. Perens, 2:05cv521DAK. Procedurally and factually I can't tell you much more than what was contained in the Order issued by Judge Kimball yesterday. Mr. Merkey did not file Exhibit 2 in accordance with the court's procedures and the Exhibit ended up on the court's electronic docket as you are aware. However, the document is confidential and clearly states that it is confidential. Therefore, it has been taken off of the court's electronic docket and is and will remain under seal at the court. The court cannot opine on the legal consequences of what happened or what you are doing unless there is a motion or case before it. Such an opinion would go to the substance of a legal issue, which the court cannot address in an ex parte context.

Susie Inskeep Hindley
Law Clerk to the Honorable Dale A. Kimball
United States District Court, District of Utah
350 South Main Street, #222
Salt Lake City, Utah 84101
(801) 524-6612

Date: Thu, 23 Jun 2005 17:35:22 -0700
From: Alan P Petrofsky <al@petrofsky.org>
To: Jim F Lundberg <jflundberg@novell.com>,
Jeff Merkey <jmerkey@utah-nac.org>
CC: Susie Hindley <Susie_Hindley@utd.uscourts.gov>
Subject: Re: Belatedly sealed document in Merkey v. Perens
In-reply-to: <200506231551.IAA15945@radish.petrofsky.org>
Message-Id: <200506240035.RAA21530@radish.petrofsky.org>

Gentlemen,

In consideration of the apparent desire by Novell, Darren Major, and Larry Angus that the terms of the agreement not become widely known, I have ceased distributing the settlement agreement that was entered into between and among them and Jeffrey Merkey and Timpanogas Research Group on August 18, 1998, and was attached as Exhibit 2 to the Complaint filed on June 21, 2005 in Merkey v. Perens, 2:05-cv-00521 in the District of Utah.

While it was available at http://scofacts.org/Merkey-Perens-1_1.pdf, it was retrieved by visitors from approximately 140 different internet addresses. Obviously, any one of those visitors could possibly redistribute the document to thousands of other readers. The same

goes for all the other people who, as I did, obtained the document directly from the court's website before it was sealed. Like the court, all I can do is cease my own distribution.

Yours truly,

Alan P. Petrofsky

Date: Mon, 25 Jul 2005 10:10:01 -0600
From: "Jeff V. Merkey" <jmerkey@soleranetworks.com>
To: al@scofacts.org
Subject: Posting of Private emails
Message-ID: <42E50ED9.6010005@soleranetworks.com>

Al,

It's a violation of privacy laws to post private emails without the consent of the author. You are only making matters worse by posting this on your site.

http://scofacts.org/Merkey-email.txt

Jeff

Date: Mon, 25 Jul 2005 19:23:40 -0700
From: Alan P Petrofsky <al@petrofsky.org>
To: "Jeff V. Merkey" <jmerkey@soleranetworks.com>
Subject: Re: Posting of Private emails
In-reply-to: <42E50ED9.6010005@soleranetworks.com>
Message-Id: <200507260223.TAA32073@radish.petrofsky.org>

Dear Mr. Merkey:

I do not believe that my publication of the unsolicited emails that you have sent me is in any way illegal or tortious.

Furthermore, please be explicitly advised that I have no interest in engaging in any form of private communication with you, and that I will feel free to share with the public any communications I receive from you.

Yours truly,

Alan P. Petrofsky

Date: Mon, 25 Jul 2005 19:39:49 -0600
From: jmerkey <jmerkey@utah-nac.org>
To: Alan P Petrofsky <al@petrofsky.org>
Subject: Re: Posting of Private emails
In-Reply-To: <200507260223.TAA32073@radish.petrofsky.org>
Message-ID: <42E59465.6040204@utah-nac.org>

The attached communication is priviliged and confidential.

It is a violation of privacy laws to post private emails. You also solicited the emails by distributing sealed documents and responding to me via email.

Jeff

Date: Mon, 25 Jul 2005 19:43:31 -0600
From: jmerkey <jmerkey@utah-nac.org>
To: jmerkey <jmerkey@utah-nac.org>
Cc: Alan P Petrofsky <al@petrofsky.org>
Subject: Re: Posting of Private emails
In-Reply-To: <42E59465.6040204@utah-nac.org>
Message-ID: <42E59543.4020808@utah-nac.org>

This email is privileged and confidential.

See above. You are also engaging in conversion by posting my private emails under this license -- you have no rights from me to do so.

Jeff

Date: Wed, 10 Aug 2005 16:38:21 -0600
From: jmerkey <jmerkey@utah-nac.org>
To: Alan P Petrofsky <al@petrofsky.org>
Subject: So you don't have to wait for it to show up on pacer.
In-Reply-To: <42BAD81F.6020807@utah-nac.org>
Message-ID: <42FA81DD.6020500@utah-nac.org>

Al,

So you don;t have to wait for it to show up and pacer, and so you have the Open Office Template for the lawsuit. Thanks for filing, now I don't have to serve you.

Jeff

[attachment: reply-memo-expedite-1.sxw]

Date: Thu, 11 Aug 2005 14:44:53 -0600
From: jmerkey <jmerkey@utah-nac.org>
To: Alan P Petrofsky <al@petrofsky.org>
Subject: Regular Mail is Fine
In-Reply-To: <42FA81DD.6020500@utah-nac.org>

Message-ID: <42FBB8C5.4020409@utah-nac.org>

Al,

Regarding your pleadings. You don't have to send them certified mail. You can use regular mail unless you are serving someone. I sent you copies of the pleadings priority mail, BTW. You just need to make certain you have filed the cetificate of service with the court, this is the only document that really matters for normal pleadings.

I will be filing a Motion for Summary Judgment against you on September 9, 2005. I can dismiss you out of the Suit if you want to agree to a stipulation, or I can move for Summary Judgment, or we can take it to trial -- up to you. There will be issues in the State Court and you may have to appear there, but a lot of this is still up in the air. You are free to call and conference with me on this case pursuant to Rule 408 (Settlement discussions) at your conveniance, or we can let the Court handle the matter -- either way works for me.

Jeff

Date: Tue, 13 Sep 2005 16:45:13 -0600
From: jmerkey <jmerkey@utah-nac.org>
To: Alan P Petrofsky <al@petrofsky.org>
Subject: Rule 4 Notice of Alternate Service
In-Reply-To: <42FBB8C5.4020409@utah-nac.org>
Message-ID: <43275679.8060508@utah-nac.org>

Dear Mr. Petrofsky,

I received your letter demanding a stamped envelope. I believe one was mailed to you. If you were unable to find it, you may send mye the waiver regular mail, and I will reimburse your .37 stamp for you. You already have my address.

If you fail to send the waiver as required by Rule 4, I will hire a process server and I will have you billed for the process of service. You can also call for my FEDEX account number and send me the waiver via FEDEX and have FEDEX call me directly and I will provide them either a credit card for billing of the postage or my FEDEX account number. If 30 days elapse, I will have you served and sanctioned.

Jeff

Date: Tue, 13 Sep 2005 18:24:53 -0600
From: jmerkey <jmerkey@utah-nac.org>
To: Alan P Petrofsky <al@petrofsky.org>
Cc: jmerkey <jmerkey@utah-nac.org>
Subject: Re: Rule 4 Notice of Alternate Service
In-Reply-To: <43275679.8060508@utah-nac.org>

Message-ID: <43276DD5.4010706@utah-nac.org>

I've been getting a lot of images and strong impressions from you lately and circumstances surrounding you. That's how I knew. I don't always ask to see a lot of the things I do, then just come to me. It's time we talked. Please call me if you get a chance. I think we understand each other a little better know -- at least I understand you a better than I did before.

You have my number. You are not alone in this situation over this lawsuit. Even the person on the other side has a lot of sympathy.

Jeff

Date: Wed, 21 Sep 2005 09:40:54 -0600
From: jmerkey <jmerkey@utah-nac.org>
To: Alan P Petrofsky <al@petrofsky.org>, pj@groklaw.com
Subject: Notice of Dismissal
In-Reply-To: <43275679.8060508@utah-nac.org>
Message-ID: <43317F06.2070001@utah-nac.org>

Dear Al and PJ.

I would recommend that you remove some of the more litigious materials from your sites that would indicate harassment and stalking. I am now pursuing criminal sanctions. I have dismissed both of you from the pending Federal Case.

Sincerely,

Jeff V. Merkey

Date: Fri, 23 Sep 2005 09:38:55 -0600
From: jmerkey <jmerkey@utah-nac.org>
To: jmerkey <jmerkey@utah-nac.org>
Cc: Alan P Petrofsky <al@petrofsky.org>, pj@groklaw.com
Subject: Re: Notice of Dismissal
In-Reply-To: <43317F06.2070001@utah-nac.org>
Message-ID: <4334218F.8080509@utah-nac.org>

Al,

If you want me to file the dismissal, please remove the word "lunatic" from your site and all private emails and recordings.

Thanks

Jeff

Date: Wed, 28 Sep 2005 14:16:58 -0600
From: jmerkey <jmerkey@utah-nac.org>

To: Alan P Petrofsky <al@petrofsky.org>
Subject: Re: Notice of Dismissal
In-Reply-To: <43317F06.2070001@utah-nac.org>
Message-ID: <433AFA3A.5080304@utah-nac.org>

And Al,

I would suggest taking down the content on your site. I doubt you would want me posting a site that states you are sperm guzzling faggot to the whole planet, now would you? BTW, how are those AIDs medications working out for you? How long do you have left?

Jeff

Date: Thu, 29 Sep 2005 14:41:55 -0600
From: jmerkey <jmerkey@utah-nac.org>
To: jmerkey <jmerkey@utah-nac.org>
Cc: Alan P Petrofsky <al@petrofsky.org>, pj@groklaw.com
Subject: Re: Notice of Dismissal
In-Reply-To: <43317F06.2070001@utah-nac.org>
Message-ID: <433C5193.6000103@utah-nac.org>

Al,

You really need to stop banging on the hornets nest down in Provo. Couple of things:

1. Filings in Court are privileged. There's no breach based on those filings. The agreement also allowed for it and this language was placed there by Novell in the event THEY wanted to challenge me based on future events in Court. Filing the agreement under seal and referncingn provisions of the agreement in public filings in a general way is allowed.

2. The Court posted the document on PACER, not me. I filed it with cover sheet, and listed in the complaint as sealed. I also gave it to the clerk. I did not scan it on the internet. Sealed documents get scanned by mistake once in a while, and the Court is well aware of this as is Novell. That's what sealing orders or for -- to make people take them down and not hand them out.

3. A Federal Judge placed that document under seal. You are subject to the order because you know about it, and you have received notice of the action via certified mail.

4. You are the only person making threats to distribute the document and pass it out. What you are really trying to do is rile Novell into coming after me, and this is why you are making the threats. Everyone on the planet can see this. They most probably are not going to. Why? I cannot tell you why because it's none of your business, but they don't want any publicity from this situation nor do they want it busting open publically. There are reasons for this which you are not privy to.

5. Keep going. Once you make them mad, they are nasty characters to contend with. My earlier communications to you were a warning about what these people are capable of doing. You cna mischaracterize them

all you want -- I was trying to help you.

Good luck.

Jeff

Date: Sat, 10 Dec 2005 00:53:01 -0700
From: "Jeff V. Merkey" <jmerkey@wolfmountaingroup.com>
To: al@scofacts.org
Subject: Received Notiication You Were Served
Message-ID: <439A895D.5060007@wolfmountaingroup.com>

Al,

I received confirmation of service this morning. I trust you found the summons correct this time? The bill is $135.00 total.

See you in District Court. You may want to take the emails, settlement, and libel off your site before we get too far into it, a competent attorney will probably advise you to do so in any event. See you in Utah.

You may call and discuss settlement (less the distribution of the settlement agreement, I cannot do anything about that one -- that one's up to the Court).

Jeff

$Id: Merkey-email.html,v 1.2 2005/12/24 07:57:55 al Exp $

A.5 Letter to Merkey dated September 6, 2005

Alan P. Petrofsky
3618 Alameda Apt 5
Menlo Park CA 94025

September 6, 2005

BY CERTIFIED MAIL, ARTICLE NUMBER 7004 0750 0000 9136 9935

Jeffrey Vernon Merkey
1058 E 50 S
Lindon UT 84042

Re: Waiver request for Merkey v. Jones et al.

Dear Mr. Merkey:

I have received your request, dated August 25, 2005, for a waiver of service pursuant to Rule 4(d) of the Federal Rules of Civil Procedure.

Your request did not include the required "prepaid means of compliance" (Rule 4(d)(2)(G)), despite that requirement being clearly noted right on the waiver request form, where it calls for "a stamped and addressed envelope (or other means of cost-free return)".

If you actually desire to prosecute this frivolous case (and face the court sanctions and civil liability for doing so), then please send me a stamped and addressed envelope for the waiver's return.

Yours truly,

Alan P. Petrofsky

A.6 A Document Titled "SUMMONS IN A CIVIL CASE"

AO 440 (Rev. 10/93) Summons in a Civil Action

United States District Court

DISTRICT OF

Jeffrey Vernon Merkey **SUMMONS IN A CIVIL CASE**

V.

CASE NUMBER: 2:05 CV 521-DAK-SA

Alan P. Petrofsky, et al.

TO: (Name and address of defendant)

Alan P. Petrofsky
3618 Alameda Apt 5
Menlow Park, CA 94025

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

MARKUS B. ZIMMER
CLERK

August 23, 2005
DATE

(BY) DEPUTY CLERK

A.7 Transcript of the August 17, 2005 hearing

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)	
	)	
JEFFREY VERNON MERKEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 2:05-CV-521
	)	
PERENS, et al.,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE SAMUEL ALBA

August 17, 2005

Motion for Expedited Discovery

Laura Robinson, CSR, RPR, CP
350 South Main Street
144 U.S. Courthouse
Salt Lake City, Utah 84101-2180
(801)328-4800

Appearances of Counsel:

For the Plaintiff: Jeff V. Merkey
1058 East 50 South
Lindon, Utah 84042

Salt Lake City, Utah, August 17, 2005

* * * * *

THE COURT: All right. Let's go on the record. The matter that is before me on an order of reference. This is in the matter of Merkey versus Yahoo, Scofacts members and a number of individuals.

This is a matter that is assigned to Judge Kimball. It is before me on an order of reference from him.

And this is the time set by the court to hear a motion to conduct expedited discovery on this case.

Who is here for this matter?

MR. MERKEY: I am here, Your Honor, Jeffrey Vernon Merkey.

THE COURT: Okay. Mr. Merkey, let me tell you what I have done in preparation for the hearing here today. And give you some idea of how to proceed, if you wish, and go from there.

I have reviewed your ex-parte motion to conduct discovery along with the exhibits that were appended there to.

Um, I have also reviewed a filing by a Mr. Petrofsky concerning this matter. He also appended an exhibit that I have had an opportunity to review. There is a reply to that opposition that was filed by you and I have reviewed that. That includes a portion of a transcript of the deposition of

Mr. Bradford. I have also had a chance to look at the amended complaint on this case.

MR. MERKEY: Okay.

THE COURT: There was a motion filed by the Electronic Frontier Foundation and American Civil Liberties Union to file an amicus brief. I granted that yesterday allowing them to file their brief.

MR. MERKEY: Okay.

THE COURT: And I have read the position that they have taken relative to this. And that is their brief concerning their opposition to your ex-parte motion.

Those are the materials that I have received. Is there anything more?

MR. MERKEY: Yes, Your Honor. Based upon the brief that was filed by the Electronic Frontier Foundation, they -- if you condense and issue spot their general arguments that they condense, they basically argue based on existing case law that anonymous defendants on the internet or anonymous speakers are entitled to a protection of the court in terms of protecting their identity from invasive discovery.

And they state, through all the references if you wade through it, they feel that there is a sufficient case law to justify that an individual would have to put on an evidentiary hearing and achieve a standard similar to

achieving a preliminary injunction prior to being granted an ex-parte order.

THE COURT: Not necessarily. I mean some of the cases they cited address a preliminary injunction setting and that is how they came up. But that is not necessarily what they're arguing. I mean what they're arguing is, as I understand it, that there are certain standards whenever expedited discovery needs to come out, and there is a test that needs to be met and that is what I need you to address here today because I need to find out, you know, why you need it. You make certain representations that you don't know who these people are, on the one hand. On the other hand, when I read the material, you identify who they are. So you can't have it both ways. You either know who they are or you don't know who they are. All right.

MR. MERKEY: All right. I know who some of them are, Your Honor.

THE COURT: Well, that is the point. If you know who some of them are, then you need to try and explore ways to try to get them served. Now, my clerk also brought to me a document that was just recently filed, I guess it was yesterday, is that correct, that dismissal? Who does that dismiss?

MR. MERKEY: Your Honor, the dismissal dismisses from the case defendants Grendel, Pagansavage.com, John Sage,

Finchhaven.com, Matt Merkey, Brandon Suit and Merkey.net. The only defendants that currently remain active in the litigation are those that -- with the exception of Mr. Petrofsky who has answered the suit is now an active participant.

THE COURT: Now, wait a minute. Let's not go that far, okay, because that is something else that I'm going to address in a minute. Now Mr. Petrofsky filed something in here, but that is not an answer to the complaint. He hasn't been served with a complaint. You cannot assume that by filing the document that that constitutes an answer. It does not.

MR. MERKEY: Your Honor, Mr. --

THE COURT: It does not.

MR. MERKEY: Your Honor, Mr. Petrofsky --

THE COURT: It may place him under the jurisdiction of the court if he tries to file some sort of a motion saying that this court has no jurisdiction. The fact that he entered an appearance for that purpose, all right, it is only for that purpose. But he hasn't been served yet. You haven't -- you have an address on the material that he sent you. You need to serve him.

MR. MERKEY: I'll serve him, Your Honor.

THE COURT: All right. You make some reference in your materials that the fact that he filed that that means

that he is in the lawsuit. That is not the way it works, Mr. Merkey.

MR. MERKEY: Your Honor, Mr. Petrofsky has a copy of the verified petition posted on his web site. He is making public comments on it. He knows about the litigation. I am happy to send him a waiver of service if he'll accept it.

THE COURT: If he doesn't --

MR. MERKEY: If he doesn't, I'll have him served. I'll have him served if he doesn't.

THE COURT: All right.

MR. MERKEY: He had filed a motion opposing. I was waiting to see if he wanted to file an answer. You know I have been served in another matter with Mr. Mooney and I properly approached the court and filed an answer. I have not been served. And the reason I had not been served, Mr. Mooney's attorney was basically using the litigation as a lever to leverage settlement from the state. So I just simply answered the litigation. But there is no question that I'm participating in it now.

And in the case of defendants Causey and Petrofsky, I don't need any expedited discovery on these defendants, Your Honor. I know where they are and who they are and I'll get them served.

In the case of Mrbuttle, I don't need expedited discovery on this defendant either. This defendant is

actually a participant of Mr. Causey and I believe it is the same person. So I'll just simply serve him. Mr. Causey told me if I sent the sheriff to serve him the papers, he wouldn't answer the door. That is fine. They can leave them at the front door after they visit enough times.

In the case of members atul666, and Saltydog -- in the case of SCOX members atul666 and Saltydogmn, I don't know who these individuals are. I don't know where they reside and I don't have an address of service. They're anonymous internet accounts. They post messages on Yahoo. I'm more than happy to go through these exhibits with you, Your Honor, and reflect some of the statements that they have made and some of the language they have --

THE COURT: I reviewed them, Mr. Merkey, and I understand that. What I want to know is what efforts have you made to try and identify who they are, where -- what -- you know, that is what is required for me to even address whether I should give you an opportunity for expedited discovery.

MR. MERKEY: Your Honor --

THE COURT: There has got to be a basis shown to me.

MR. MERKEY: I'll answer.

THE COURT: What efforts you have made.

MR. MERKEY: Okay, Your Honor, I'll answer your question then and I'll actually present exhibits and show

you what efforts I have made. I have filed with the court e-mails that I have sent to Pamela Jones at Groklaw attempting to obtain her address of service. I have other exhibits here that I can enter into the record. I have made not less than three requests to her to return me an address of service of where she can be located. She has not responded to these events. In the case of --

THE COURT: Hang on for a minute. What e-mails are we talking about? Where did you send them? When did you send them? What other efforts have you made as it relates to that, Mr. Merkey?

MR. MERKEY: I was going to answer your first question first, Your Honor. SCOX. If I may go down the list of defendants.

THE COURT: Please.

MR. MERKEY: Okay. In the case of SCOX, I have contacted Yahoo's legal department, their civil subpoena division, and requested information on the identities of these individuals. I have also made requests for the -- for the objectionable content to be taken down off the website. To date, what Yahoo has done is they have removed the financial information from the eBay data base that was stolen by these individuals and taken those postings off the site.

However, in their responses to me, which were

telephonically, they have responded by stating they will not reveal the identity of these individuals or produce any discovery meaning any content or e-mails or postings on their site unless they are served with a subpoena from this court. And they have stated that they feel these individuals have the right to privacy and the right to protect their privacy.

So in the case of Yahoo, their legal department has specifically told me that and asked me to seek discovery on them through civil subpoena process in order to determine their identities.

THE COURT: Was Yahoo served with this motion? This is the ex-parte motion, is that correct?

MR. MERKEY: They were served with the motion, Your Honor. I did fax them a copy and they were made aware of it and the case of Ms. Jones --

(Whereupon, a criminal case was heard.)

THE COURT: Let's go back on the Merkey matter.

Mr. Merkey, here is the test that I'm laboring under, okay.

MR. MERKEY: Okay.

THE COURT: Part of what I had to read and what I read in preparation for the hearing today was the Columbia Insurance Company versus seescandy.com case out of the Northern District of California.

The test that they set forth there is this: One, the plaintiff is required to identify the missing party with sufficient specificity that the court could determine whether the defendant could be sued in federal court. Two, make a good faith effort to communicate with the anonymous defendants and to provide them with notice of the suit, thus assuring them an opportunity to defend their anonymity. And three, demonstrate that he had viable claims against the defendants. That is the test that needs to be applied here and that is what I want you to address for me this morning.

MR. MERKEY: Okay. You don't want me to address the issues of irreparable harm?

THE COURT: Irreparable harm in a context of a preliminary injunction. This is not a preliminary injunction. This is an actual lawsuit, Mr. Merkey, okay? That is a separate test altogether. That is in a different context.

MR. MERKEY: I'm aware of that, Your Honor, but that is one of the tests that was labeled in this legal brief.

THE COURT: Go ahead.

MR. MERKEY: Okay. Going down the list, Your Honor, I have contacted both atul666 and Saltydogmn and, in fact, I have had e-mail dialogues with them negotiating settlement of their claims from the suit. I did not bring those e-mails with me today. If we need to continue the hearing

in order for me to present that evidence to you I will.

THE COURT: That is part of the evidence that needs to be presented. And it needs to be in the form of an affidavit with appended documents, if you get copies of the e-mails, in order for me to make some sort of a decision on this. Absent that, I can't be, you know, laboring in a vacuum.

MR. MERKEY: Well, Your Honor, since you have set the standard on which you will now evaluate this motion, which is very informative and helpful, I would at this point like to move to continue the hearing to assemble the exhibits and then return to the court with those exhibits and with those arguments and make them.

THE COURT: Okay. I'll give you that opportunity, Mr. Merkey.

MR. MERKEY: And I also --

THE COURT: How much time do you need?

MR. MERKEY: One day.

THE COURT: Well, um, unfortunately I'm on criminal duty and you see what happens in this trying to address different things.

MR. MERKEY: As Your Honor knows, I have testified here before.

THE COURT: I understand and that hearing took three hours or however long it took.

MR. MERKEY: I remember it. In the case of most of the defendants, Your Honor, Mr. Petrofsky, Mr. Causey they will be served today.

THE COURT: All right.

MR. MERKEY: By waiver. If they reject the waiver I'll send it out to the sheriff. In the case of --

THE COURT: The ones that concern me are the anonymous ones. And I need the information that relates to those. All right? And the others, you need to express to me by way of affidavit what efforts have been made.

MR. MERKEY: I will.

THE COURT: To try and contact those individuals because, you know, it isn't just a matter of course that these motions are granted, but I need to be acting under some sort of legitimate basis before I can rule one way or the other.

MR. MERKEY: Well --

THE COURT: I'll give you an opportunity to do that.

MR. MERKEY: Your Honor, by way --

THE COURT: Hang on for a second, Mr. Merkey.

MR. MERKEY: Yes, Your Honor.

THE COURT: Look at the calendar for the week of the 29th.

THE CLERK: Okay. Monday afternoon or --

THE COURT: What is Thursday of that week? Actually

the 1st.

THE CLERK: It looks like the morning is open until 11.

THE COURT: Okay. Let's continue this matter until September 1 at 9:00.

MR. MERKEY: Your Honor, I'm going to be out of town on September 1. Can we do it any sooner? You know, if necessary, Your Honor, I'm not sure we need to have a hearing if Your Honor just simply wishes to order that I submit the affidavits with the evidence, Your Honor can simply rule on it without a hearing.

THE COURT: We can do that. Get the affidavits to me by no later than the 23rd of this month. Get them to me and then I can rule on those.

MR. MERKEY: Your Honor, just as a -- just to -- just to inform the court, one of the terminated defendants, Grendel Pagansavage.com actually retained an attorney to negotiate this stipulation which is sealed and confidential. But during the stipulation, I protected the individual's anonymity. I still to this day do not know who this person is. But their attorney represented them and we successfully settled them out of the litigation.

So, you know, the purpose of having protective orders to protect people's confidential information is well established. In terms of protecting the confidentiality and

the anonymity of these people I don't think they have a claim to claim that they be anonymous to Your Honor. I think Your Honor has a right to know who they are. If they're part of the suit they can be shown as that.

And in the event we do need to bring them here, I think there are provisions that we can put in place to protect their anonymity. I have already done so with one of the defendants.

THE COURT: Submit the material to me by Tuesday next, the 23rd, and then I'll review it. I'll make a determination on whether I need any further argument.

MR. MERKEY: And Your Honor, I am -- okay. And if you do, Your Honor, I will be out of town until the 5th of September.

THE COURT: Okay. So we'll keep that in mind. We'll note it and keep it in mind.

MR. MERKEY: Okay. Thank you very much, Your Honor.

THE COURT: Thank you. We'll be in recess on this matter.

MR. MERKEY: Okay.

(Whereupon, the hearing concluded.)

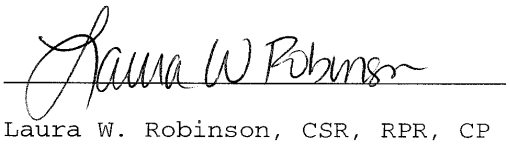
STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

I, Laura W. Robinson, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof I have subscribed my name and affixed my seal this 1st day of September, 2005.



Laura W. Robinson, CSR, RPR, CP
and Notary Public

MY COMMISSION EXPIRES:
December 1, 2008

A.8 Novell Correspondence

Alan P. Petrofsky
3618 Alameda Apt 5
Menlo Park CA 94025

September 16, 2005

BY CERTIFIED MAIL, ARTICLE NUMBER 7005 1160 0004 0082 1054

Jim F. Lundberg
Novell, Inc.
Legal Department
1800 S Novell Pl
Provo UT 84606

Re: Vexation in Novell's name by Jeffrey Vernon Merkey

Dear Mr. Lundberg:

Over the past few months, Jeffrey Vernon Merkey ("Merkey"), a former Chief Scientist at Novell, has been making many statements -- on his website, on internet discussion boards, in email, in voicemail, and in submissions to a federal court -- that could charitably be described as delusional.

Interspersed with his more fanciful lies, he has also made several less-easily disproven statements about activities of the Novell legal department. I write to request Novell's confirmation or denial of these statements.

Additionally, Merkey has been making public statements about a 1998 settlement agreement to which Novell was a party and which was originally confidential. I also seek to learn Novell's current position on the confidentiality of that agreement.

I. BACKGROUND ABOUT MERKEY VS. PERENS ET AL., AND THE 1998 NOVELL ET AL. SETTLEMENT AGREEMENT

On June 21, 2005, Merkey filed, in The United States District Court, District of Utah, a complaint ("the Complaint") captioned Merkey vs. Perens et al., case 2:05-CV-521-DAK. The Complaint makes fascinating accusations of murderousness and terrorism by a variety of defendants. A copy of the Complaint and its exhibits are attached to this letter as Exhibit A. I was added to the list of defendants in an amended complaint filed on July 20, but I have not been served with process.

The second exhibit to the Complaint is a copy of a settlement agreement ("the Agreement") entered into on August 18, 1998, by, between, and among Novell, Inc., Jeffrey V. Merkey, Darren Major, Larry Angus, and Timpanogas Research Group, Inc.. The agreement settles two cases: Novell vs. Timpanogas Research Group et al., 97-0400339 in Utah County; and Merkey vs. Novell, 2:98-cv-311 in the District of Utah.

On June 22, the day after the Complaint was filed, Judge Dale Kimball entered an order, a copy of which is attached to this letter as Exhibit B. Here is the entire text of that order:

> Plaintiff filed a Verified Complaint in this matter on June 21, 2005, including a confidential settlement agreement as Exhibit 2 to the Verified Complaint. Plaintiff notified the court that he intended to file this exhibit under seal. However, because it was not filed according to the court's rules regarding sealed documents, the exhibit was scanned into the court's public electronic docket. Pursuant to paragraph 6 of the settlement agreement, the parties agreed that the settlement agreement was confidential. Therefore, the court hereby seals Exhibit 2 of the Verified Complaint in this matter and directs the Clerk of Court to remove the exhibit from the court's electronic docket.

Earlier that day, I and at least one other person had obtained copies of the Complaint's exhibits from the court's internet docket-access website, http://ecf.utd.uscourts.gov. I had then made the exhibits, including the Agreement, freely available to the public over the internet.

The statements in the Agreement, endorsed by Novell in 1998, indicate that Novell considered the Agreement's confidentiality to be valuable to Novell, at least at that time. Based on those statements, I ceased distributing the Agreement on June 23, as a courtesy to Novell. I informed you of that decision in an email message I sent that day, which can be found on page 4 of the email collection that is attached as Exhibit C to this letter.

In contrast to the confusion about the sealing of one of the Complaint's exhibits, it has always been clear that the Complaint itself is not sealed, and Merkey has never requested that it be sealed. In fact, he has distributed the Complaint directly to the public through his own website, www.merkeylaw.com (see Exhibit D to this letter). The Complaint contains several statements about the Agreement, including the following on page 29:

> 93. Novell further stated in the permanent injunction which was a part of the settlement agreement, Merkey was not allowed to posses [sic] 10 year old source code of NetWare or Wolf Mountain or use it in exchange for the right to use all "intangible" knowledge in his possession, whether considered a Novell trade secret or not. Since there was little value in antiquated and unused source code from Netware products which are no longer in use in Novell's relevant markets, Merkey viewed the permanent injunction as moot, since he had not possessed Novell source code unlawfully, and the State Court had issued a specific finding that "no Novell source was used by Merkey" during or following the trade secret litigation.
>
> 94. The affect [sic] of this language was to in affect [sic] grant to Merkey the unfettered right to use patents, trade secrets, and the sum total of Novell's vast body of intellectual property in any projects he wished and endeavored to create.

> 95. This agreement nullified the preliminary injunction and represented a 180 degree shift in Novell's position regarding it's professed concerns over protecting its trade secrets. This was particularly true given the fact Novell was facing at the time a multi-billion dollar Sexual Harassment action in Federal Court and possible criminal indictment of it's executives and Board of Directors for their actions in the trade secret litigation in setting up dozens of Novell employees to commit perjury in State Court in a futile attempt to prove it's merit less [sic] claims.

These and other statements in the Complaint, and numerous other public statements by Merkey over the past few months, appear to be flagrant breaches of the confidentiality provisions in paragraphs 3 and 6 of the Agreement, and in particular of clauses 6(b) and 6(d). I notice that in paragraph 7 of the Agreement, the parties agreed that such breaches by Merkey would result in liquidated damages of One Hundred Thousand Dollars ($100,000).

II. MERKEY'S CLAIMS TO BE A HARBINGER OF NOVELL'S WRATH

On August 23, 2005, Merkey submitted a sworn affidavit in support of a motion for leave to conduct expedited discovery. A copy of the affidavit and the first of its four exhibits are attached to this letter as Exhibit E. In paragraph 4 on page 2 of the affidavit, Merkey states that Exhibit 1 of the affidavit contains emails he sent to Pamela Jones, one of the defendants. At page 4 of Exhibit 1, in an email dated October 28, 2004, 12:49 pm, Merkey states:

> I am not a jerk or an asshole, but you are creating a huge mess that just may end up back in court with Novell (with you getting hit with Subpoena Deus [sic] Tecum Requests left and right). They just sent me a threat to reopen the litigation because of this stupid article

At page 3 of Exhibit 1 to the affidavit, in an email dated January 25, 2005, Merkey states:

> Novell has authorized me to serve your ISP and associates at OSRM with a Subpeona [sic] AT YOUR COST AND EXPESNE [sic] if you fail to comply with this request and force us to locate you for service.

Attached as Exhibit F is a copy of my letter to Merkey, dated September 6, 2005, regarding his request that I waive service of a summons. On September 9, he sent me a voicemail reply. A copy of that voicemail is on a Compact Disc attached as Exhibit G. For your convenience, I have also attached a transcript of it as Exhibit H. In the voicemail, Merkey states:

> Listen here, you little twerp ...
>
> ... And Novell's coming after you. They met with me yesterday, and you're in a lot of trouble, my friend.

III. REQUESTS FOR CLARIFICATION

If Novell has actually enlisted Merkey to be making these statements on its behalf, then I would appreciate written confirmation of that, and I would also like to humbly suggest that Novell find a different messenger who comes across as a bit less deranged. On the other hand, if Merkey's statements about Novell are fabrications, then I believe a statement to that effect would be helpful to everyone.

In particular, I would appreciate a written response to this letter that states:

1. Whether or not any Novell representatives met with Merkey on September 8, 2005.

2. Whether or not Novell is "coming after" me.

3. Whether or not Novell has "authorized" Merkey to serve any subpoenas.

4. Whether or not Novell has any plans (or is aware of any plans by some Higher Authority) to "hit" anyone with "Subpoena Deus Tecum Requests".

I would also like to know whether or not Novell will be seeking "immediate injunctive relief" to enforce the confidentiality-keeping obligations of the Agreement's other parties. (Pursuant to paragraphs 3 and 6 of the Agreement, Novell is entitled to such relief, in addition to the other remedies provided by the Agreement.) If, by October 17, 2005, I have not received notice that Novell has filed a motion for an injunction against Merkey, then I will conclude that Novell no longer considers the Agreement's confidentiality (to the extent that any confidentiality still exists) to be of value to Novell, and that there is therefore no point in me continuing to omit the Agreement from my website as a courtesy to Novell.

I thank you for your attention to this matter.

Yours truly,

Alan P. Petrofsky

cc: Michael A. Jacobs, Morrison & Foerster LLP,
425 Market Street, San Francisco, California,
by hand delivery;
Pamela Jones, Groklaw.com c/o Domains by Proxy, Inc.,
15111 N Hayden Rd Ste 160 PMB 353, Scottsdale AZ 85260,
by Certified Mail, article number 7005 1160 0004 0082 1061;
Jeffrey Vernon Merkey,
1058 E 50 S, Lindon UT 84042,
by Certified Mail, article number 7005 1160 0004 0082 1078.

Date: Fri, 23 Sep 2005 10:41:16 -0600
From: "Jim Lundberg" <JFLUNDBERG@novell.com>
To: "Alan Petrofsky" <al@petrofsky.org>
Subject: Your Letter of September 16, 2005

Dear Mr. Petrofsky,

I am in receipt of your letter dated September 16, 2005. Unfortunately, I was out of the office traveling on business last week and early this week and just received your letter yesterday. In an effort to provide you with an expedited response, I am sending this to your email address and will also include a copy by U.S. Mail.

In response to your specific questions:

1- To the best of my knowledge, no Novell representative met with Mr. Merkey on September 8, 2005. Although Mr. Merkey has contacted me by phone on several occasions, at no time did we discuss your name.

2- To the best of my knowledge, Novell has never considered "coming after" you.

3- Novell did not "authorize" Mr. Merkey to do anything on Novell's behalf, let alone "serve any subpoena."

4- While Novell is still considering possible recourse for what Novell believes is a breach by Mr. Merkey of the Settlement Agreement, Novell still considers the Settlement Agreement to be highly confidential and strongly disagrees with many of the allegations in Mr. Merkey's Complaint.

Please contact me if you have additional questions concerning the matter.

Sincerely,

Jim F. Lundberg
Associate General Counsel
Ph: 801-861-6906
Fax: 801-861-6893
jflundberg@novell.com
Novell, Inc., the leading provider of Net business solutions
www.novell.com

Novell.

September 23, 2005

VIA EMAIL AND U.S. MAIL

Alan P. Petrofsky
3618 Alameda, Apt. 5
Menlo Park, CA 94025

Dear Mr. Petrofsky,

I am in receipt of your letter dated September 16, 2005. Unfortunately, I was out of the office traveling on business last week and early this week and just received your letter yesterday. In an effort to provide you with an expedited response, I am sending this to your email address and will also include a copy by U.S. Mail.

In response to your specific questions:

1- To the best of my knowledge, no Novell representative met with Mr. Merkey on September 8, 2005. Although Mr. Merkey has contacted me by phone on several occasions, at no time did we discuss your name.

2- To the best of my knowledge, Novell has never considered "coming after" you.

3- Novell did not "authorize" Mr. Merkey to do anything on Novell's behalf, let alone "serve any subpoena."

4- While Novell is still considering possible recourse for what Novell believes is a breach by Mr. Merkey of the Settlement Agreement, Novell still considers the Settlement Agreement to be highly confidential and strongly disagrees with many of the allegations in Mr. Merkey's Complaint.

Please contact me if you have additional questions concerning the matter.

Sincerely,

Jim F. Lundberg
Associate General Counsel
Novell, Inc.
801-861-6906

Alan P. Petrofsky
Al@Petrofsky.org
3618 Alameda Apt 5
Menlo Park CA 94025

September 28, 2005

BY EMAIL AND BY U.S. MAIL

Jim F. Lundberg
JFLundberg@Novell.com
Legal Department, F331
Novell, Inc.
1800 S Novell Pl
Provo UT 84606

Re: Confidentiality of the 1998 Novell/Merkey Settlement Agreement

Dear Mr. Lundberg:

I have received your letter dated September 23, 2005.

Thank you for confirming the falsity of some of the ridiculous statements by Jeffrey Vernon Merkey (hereinafter "Merkey") about Novell's recent activities.

Regarding Merkey's numerous and flagrant breaches of the 1998 Settlement Agreement's confidentiality provisions, I wrote in my September 16 letter that:

> I would also like to know whether or not Novell will be seeking "immediate injunctive relief" to enforce the confidentiality-keeping obligations of the Agreement's other parties. (Pursuant to paragraphs 3 and 6 of the Agreement, Novell is entitled to such relief, in addition to the other remedies provided by the Agreement.) If, by October 17, 2005, I have not received notice that Novell has filed a motion for an injunction against Merkey, then I will conclude that Novell no longer considers the Agreement's confidentiality (to the extent that any confidentiality still exists) to be of value to Novell, and that there is therefore no point in me continuing to omit the Agreement from my website as a courtesy to Novell.

In your response, you wrote:

> While Novell is still considering possible recourse for what Novell believes is a breach by Mr. Merkey of the Settlement Agreement, Novell still considers the Settlement Agreement to be highly confidential and strongly disagrees with many of the allegations in Mr. Merkey's Complaint.

While I appreciate any information you may wish to provide to me about Novell's positions, I feel I had best reiterate that, on this point, I will ultimately be drawing my conclusions about Novell's intent by

looking to Novell's actions in court, rather than to the statements in your letter.

Let me further elaborate:

In June, I made some public statements about the Settlement Agreement. I find some discomfort in the current situation, in which members of the public are not able to verify the accuracy of my statements by simply going to my website and reading the agreement for themselves.

I have, of course, never been under any obligation to try to keep the agreement confidential. Nevertheless, as I wrote to you in my June 23 email, I removed the agreement from the scofacts.org website as a courtesy to the agreement's three extant non-Merkey parties:

> In consideration of the apparent desire by Novell, Darren Major, and Larry Angus that the terms of the agreement not become widely known, I have ceased distributing the settlement agreement that was entered into between and among them and Jeffrey Merkey and Timpanogas Research Group on August 18, 1998

Soon thereafter, I decided, based on their history with Merkey, that I really had no desire to do any favors for Mr. Major or Mr. Angus. Thus, for over three months, I have been keeping the agreement off my website solely as a favor to Novell.

I am willing to continue to do so, if Novell truly believes that there is value in preserving whatever may remain of the agreement's confidentiality. However, if Novell does not believe that there is remaining confidentiality that is valuable enough for Novell to bother availing itself of the mechanisms provided by the agreement for its enforcement, then I am not going to continue troubling myself on Novell's behalf.

If, by October 17, 2005, I have not received notice that Novell has filed a motion for an order enjoining Merkey from making any further breaches of his confidentiality obligations, then I will resume publishing the Settlement Agreement on the scofacts.org website.

Yours truly,

Alan P. Petrofsky

A.9 Letter to the Clerk dated October 30, 2005.

Alan P. Petrofsky
3618 Alameda Apt 5
Menlo Park CA 94025

October 30, 2005

BY CERTIFIED MAIL, ARTICLE NUMBER 7005 1160 0004 0082 1092

Markus B. Zimmer, Clerk
United States District Court, District of Utah
350 S Main St
Salt Lake City UT 84101

Re: Merkey v. Perens et al., 2:05CV521DAK-SA,
and the "United States District Court DISTRICT OF".

Dear Mr. Zimmer:

Enclosed please find a copy of a document dated August 23, 2005. It was included with a "Request For Waiver of Service For Summons" that I received by certified mail, from Jeffrey Vernon Merkey, on August 30.

At the top of the document is written "United States District Court DISTRICT OF". It later states that I am required to perform two actions:

(1) serve an answer upon "name and address";
(2) file the answer with "the Clerk of this Court".

None of the names of the ninety-four United States District Courts are written anywhere on the document, nor is the address of any clerk. The only state that even has its abbreviation written anywhere on the document is California.

This document is clearly not a summons in the form prescribed by Fed. R. Civ. P. Rule 4(a), most notably because it does not "identify the court" that would be doing the summoning. It also does not "state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff".

By this letter, I am not requesting any action or response. I am merely bringing the document to your attention, because I recently learned that Merkey may believe that my receipt of the document constituted service of a summons for a case in your district: Merkey v. Perens et al., 2:05CV521DAK-SA. (In Merkey's last communication to me about process, an email dated September 13, he was still inquiring about his waiver request; and on September 27, he dismissed the action, without ever having filed an affidavit that a summons had been served. However, I have now received a copy of a memorandum dated October 20, in which Merkey claims, for the first time, that a summons was served on August 30.)

I will continue to assume that if the District of Utah should ever wish to summon me, then I will be served with a summons that identifies itself as having been issued by the District of Utah.

Yours truly,

Alan P Petrofsky

Alan P Petrofsky

enclosures: copies of: a document from "United States District Court DISTRICT OF", dated August 23, 2005; my letter to Merkey dated September 6; and an email from Merkey dated September 13.
cc: Jeffrey Vernon Merkey, 1058 E 50 S, Lindon UT 84042,
by Certified Mail, article number 7005 1160 0004 0082 1108.

A.10 Summons Dated December 5, 2005

AO 440 (Rev. 10/93) Summons in a Civil Action

United States District Court

DISTRICT OF UTAH

Jeffrey Vernon Merkey

V.

Bruce Perens, Alan P. Petrofsky, et. al.

SUMMONS IN A CIVIL CASE

CASE NUMBER: 2:05-cv-521 DAK

TO : (Name and address of defendant)

Alan P. Petrofsky
3618 Alameda Apt 5
Menlo Park, CA 94025

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Jeffrey V. Merkey
1058 East 50 South
Lindon, UT 84042

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

MARKUS B. ZIMMER

CLERK

December 5, 2005

DATE

(BY) DEPUTY CLERK

Certificate of Service

I hereby certify that on the 21st day of July, 2006, a true and correct copy of the foregoing document, titled "PETROFSKY'S OBJECTIONS TO REPORT AND RECOMMENDATION AND ORDER GRANTING MOTION TO AMEND COMPLAINT", including all of its attachments, was sent by U.S. Mail, postage prepaid, to the following:

Jeffrey Vernon Merkey
1058 E 50 S
Lindon UT 84042

Alan P Petrofsky

Alan P. Petrofsky