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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**  
**CENTRAL DIVISION**

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**JEFFREY VERNON MERKEY,**

Plaintiff,

v.

**BRUCE PERENS, et al.,**

Defendants.

**ORDER MODIFYING  
REPORT & RECOMMENDATION**

**Case No. 2:05cv521DAK**

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This case was assigned to United States District Court Judge Dale A. Kimball, who then referred it to United States Magistrate Judge Paul Warner under 28 U.S.C. § 636(b)(1)(B). Plaintiff filed a motion for an order to show cause, a motion for default judgment as to Defendant Alan P. Petrofsky, and a motion to amend complaint for damages. On June 30, 2006, Magistrate Judge Warner issued a Report and Recommendation, recommending that: (1) Plaintiff's motions for default judgment be granted; (2) Petrofsky be ordered to remove the Novell Settlement Agreement from scofacts.org and any other websites owned by Petrofsky; and (3) Plaintiff's motion to amend complaint for damages be granted.

The Report and Recommendation notified the parties that any objection to the Report and Recommendation was required to be filed within ten days of receiving it. Petrofsky timely filed an objection to the Report and Recommendation. Petrofsky's objections state that the court lost jurisdiction over Merkey's claims when he filed his notice of dismissal, Merkey should be required to file a new action to assert his claims against Petrofsky for dissemination of the

confidential settlement agreement, he cannot be subject to the court's sealing order because it was directed to the Clerk of Court, and Merkey's own violations of his confidentiality obligations undermine his protests regarding the Settlement Agreement's public availability.

On July 28, 2006, Merkey filed a response to Petrofsky's Objections, and on August 9, 2006, Petrofsky filed a reply in support of his objections. The matter is fully briefed and the court has reviewed the file in this matter *de novo*.

Although Petrofsky asserts that he has responded in good faith to the court and Merkey in this case, he admits that he was personally served with a summons and the second amended complaint on December 8, 2005. Petrofsky did not participate in the case after he was served with the second amended complaint until he filed his objections to Magistrate Judge Warner's Report and Recommendation.

The court's docket indicates that Petrofsky was provided notice of this court's October 27, 2005 Order reopening the case to determine the issue of whether the court's order sealing the confidential settlement agreement (Exhibit 2) applied to third parties. He also received notice of Magistrate Judge Alba's November 28, 2005 Order requiring Merkey to comply with the Federal Rules of Civil Procedure, which specifically responded to Petrofsky's letter to the court that he had not been served properly. And, after he was properly served with the second amended complaint, Petrofsky was served with Merkey's Motion for Default Judgment. Petrofsky did not respond to either the second amended complaint or the motion for default judgment.

Magistrate Judge Warner correctly found Petrofsky in default for failing to respond to the Complaint and failing to respond to Merkey's motion for default judgment. Moreover, the local court rules provide that the failure to respond timely to a motion may result in the court's granting the motion without further notice. DUCivR 7-1(d).

Petrofsky's objection provides no explanation for his failure to respond to the second amended complaint or motion for default. Instead, he attacks the court's jurisdiction to reopen a case. The court does not find Petrofsky's objection with respect to the court's jurisdiction persuasive. The court has jurisdiction to reopen a case, and once a case is reopened a party must participate or risk a finding of default. Petrofsky should have opposed Merkey's motion for default on the grounds he asserts in his objections. Instead, he failed to respond.

The sole issue before the court in this re-opened matter, however, is whether third parties should be prohibited from disseminating the confidential settlement agreement. Although Petrofsky argues that he cannot be prohibited from such dissemination, the court has jurisdiction to determine whether a party to the action can disseminate confidential information that has been filed in connection with the case. This court's October 27, 2005 Order reopening the case made clear that the case was being re-opened for a determination of whether the court's previous order sealing the confidential settlement agreement should apply to third parties. Because of Petrofsky's failure to participate in this litigation since the case was reopened, Magistrate Judge Warner was unable to address the merits of the issue regarding dissemination of the confidential settlement agreement in his Report and Recommendation. In his objections, however, Petrofsky argues that he obtained the confidential document lawfully and Merkey himself has made the document public. Nobody disputes the fact that he obtained a copy of the document while it was publicly available on the court's electronic docket. However, it is also undisputed that the document was erroneously on the court's electronic docket. The court finds that Petrofsky offers no persuasive reason for making the confidential settlement agreement available to the public. The court, therefore, orders Petrofsky to cease dissemination and/or publication of the confidential settlement agreement on scofacts.org and any other website he owns or with which

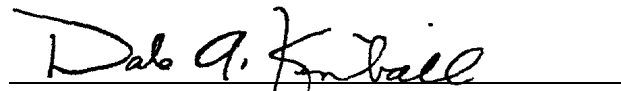
he affiliates.

Because the court recognizes that the issue of whether the sealing order applies to third parties has not been addressed on the merits, it also concludes that Petrofsky should not be liable for any damages that may have resulted from actions prior to the date of this Order. The court concludes that Merkey's motion to amend his complaint for damages is inappropriate and unnecessary. The court reopened the case solely for a determination of whether the court's sealing order should apply to third parties. Although the court concludes that Petrofsky should discontinue his dissemination and/or publication of the confidential settlement agreement, the court does not find that he was bound by the court's previous order. The court has previously indicated that the original order to place the settlement agreement under seal applied only to the Clerk of Court. Therefore, Merkey's request to amend his complaint to seek damages with respect to Petrofsky's prior conduct is denied. The purpose for reopening this case has been addressed and there is no further need for the case to remain open. Therefore, the court closes the case. If Petrofsky violates this court's order with respect to publication and dissemination of the confidential settlement agreement, Merkey must file a new, separate action for the resulting damages.

Accordingly, the court modifies Magistrate Judge Warner's Report and Recommendation as discussed above. The clerk of court is directed to close this case, each party to bear his own fees and costs.

DATED this 21<sup>st</sup> day of September, 2006.

BY THE COURT:



DALE A. KIMBALL  
United States District Judge