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

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JEFFREY VERNON MERKEY  
Plaintiff,

**PLAINTIFF JEFFREY VERNON  
MERKEY'S RESPONSE TO  
PETROFSKY'S OBJECTIONS  
TO WELLS ORDER**

vs.

Case No: 2:05-cv-521 DAK

Honorable Dale A. Kimball  
Honorable Magistrate Warner

AL PETROFSKY a.k.a. SCOFACFS.OR, et. al.

Defendant.

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The following response is submitted to the Court regarding the objections of Petrofsky

to the order and recommendations of Judge Warner.

### **STATEMENT OF FACTS**

1. On June 22, 2005 a verified petition was filed with the US District Court. Contained within the petition was a statement that the Novell Settlement Agreement was "filed under seal". The agreement was subsequently attached as Exhibit 2 to the complaint.
2. The Clerk of the Court accepted the filing, placed whiteout over the words "filed under seal", then directed Plaintiff to obtain a sealing order from Judge Kimball to place the exhibit under seal. The Petition clearly stated the exhibit was to be "filed under seal". The Local rules clearly state that sealed exhibits should contain a cover sheet and be filed under seal. The Local rules, and specifically local rule DUCivR5-2 states:

**(d) Procedure for Filing Documents Under Seal. Documents ordered sealed by the court or otherwise required to be sealed by statute must be placed unfolded in an envelope with a copy of the cover page of the document affixed to the outside of the envelope. The pleading caption on the cover page must include a notation that the document is being filed under court seal. The sealed document, together with a judge's copy prepared in the same manner, must be filed with the clerk. No document may be**

designated by any party as *Filed under Seal* or *Confidential* unless:

- (1) it is accompanied by a court order sealing the document;
- (2) it is being filed in a case that the court has ordered sealed; or
- (3) it contains material that is the subject of a protective order entered by the court.
- (4)(e) Access to Sealed Cases and Documents. Unless otherwise ordered by the court, the clerk will provide access to cases and documents under court seal only on court order. Unless otherwise ordered by the court, the clerk will make no copies of sealed case files or documents.
- (f) 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.

Although the document was not in an envelope, it did contain a cover sheet and the Petition clearly stated the document was to be "Filed under Seal". The materials in the Court's File amply demonstrated Plaintiff intended and attempted to place the exhibit under seal. The Local rules also state the clerk of the Court may not COPY sealed materials, and this includes copying them onto the electronic docket of the Court, which was clearly done unintentionally, and in error.

3. Due to a filing error on the part of both the Plaintiff and the Clerk of the Court, the exhibit was scanned onto the electronic docket IN ERROR, and placed on the docket for a short period of time. Subsequently, Al Petrofsky of SCOFACRS.ORG posted the exhibit to SCOFACRS.ORG, Groklaw.com, and LWN.NET. The following day,

the Court issued an order sealing the exhibit. The exhibit was available for a short period of time.

4. Petrofsky was notified by Judge Kimball's law clerk in an email exchange that the document was confidential and sealed. Over the next several months, Petrofsky engaged in an email exchange with Novell, Plaintiff, and others and was notified by all the parties the document was confidential. Despite this, Petrofsky continued to disregard the wishes of the parties and has been distributing the document for over a year on the internet. Petrofsky has admitted to these actions in his declaration and objections.
  
5. In September and October of 1998, Elisabeth Blattner, Attorney for Novell was notified by Plaintiff that Novell employees were actively breaching the agreement by sending emails to customers, clients, and business associates of Plaintiff making claims Plaintiff "is in possession of stolen Novell source codes," "is a liar thief and saboteur", "engaging in business with plaintiff will subject anyone to legal action from Novell" and other tortious tactics intended to interfere with Plaintiff's business relationships and interests, all of which violate the Novell settlement agreement. In response, Novell sent an internal announcement to Novell employees instructing them to cease any such activities. Novell subsequently stated a position to Plaintiff

they did not consider their employees statements "official announcements" from the company in their unofficial capacities, even though these employees sent such emails from Novell email systems and addresses. To correct the harm caused by their employees, Elisabeth Blattner negotiated a subsequent agreement that granted to Plaintiff the right to disclose A). That the causes of action were dismissed for the sexual harassment and trade secret litigation and that B) the language relative to the mutual general release could be disclosed on a need to know basis to those individuals who had concerns about the broad scope of the release from all obligations granted under the settlement agreement in order to explain the boundaries of Novell's claims over Plaintiff, which based upon the language were confined solely to an injunction prohibiting possession of Novell's source code. The specific language released Plaintiff from any and all trade secret claims for intangible information not specifically addressed in the permanent injunction, releasing Plaintiff from any and all confidentiality obligations regarding Novell's trade secrets, and contained a covenant not to sue, granting to Plaintiff to the right use all intangible knowledge and a patent cross license, since the parties agreed to a mutual general release of "all past present and future obligations, whether known or known and all causes of action" with the exception of the narrow language pertaining to NetWare

and Wolf Mountain Source Code created by Plaintiff at Novell..

6. This modification to the agreement was not filed with the Court, however, the specific language was cited in the petition as Plaintiff had obtained the right to disclose the nature of the release from Novell to alleviate the confusion created by the awkward language in the final resolution of the case. The agreement came from Novell in the form of a letter agreement from Elisabeth Blattner, Attorney for Novell of Parsons, Behle, and Latimer.
7. I was ordered by Judge Alba in late 2005 to serve Petrofsky with A) a copy of the complaint, and B) a summons.
8. I attempted to mail the summons to Petrofsky following the issuance of the Court's order and he refused service. I subsequently hired a process server and had Petrofsky served in person. Due to Petrofsky's attempts to evade service, and even with additional fees for "expedited service" upon Petrofsky, it took the process server over a week to "catch" him at home and affect service.
9. Subsequent to service, Petrofsky continued to distribute the agreement on the internet, and he evidenced he intends to do so, despite any order from this Court.
10. At no time have I distributed any materials related to the Novell Settlement Agreement on the internet or distributed the settlement agreement outside of the

terms agreed to by Novell and the parties. The only disclosures made have been authorized by the terms of the agreement or addendum's to the agreements made between the parties which related to A) the nature of the claims settled and B) the terms of the mutual general release language.

### **ARGUMENT**

This case was reopened by Judge Kimball following Petrofsky continuing to distribute the settlement agreement on the internet, post libel to Wikipedia and SCOFACST.ORG, and send harassing postings to Novell and the other parties to the Novell action.

The Court also directed that Petrofsky be served with a copy of the Complaint after the case was reopened for enforcement of the Courts order. Petrofsky's objections are not well taken or have a sound basis as he was served with a complaint relative to a standing order issued by the Court on June 23, 2005.

Petrofsky has been served with a summons and a verified complaint BY ORDER OF THE COURT, and whether he agrees or not, he is subject to the Court's jurisdiction.

His arguments he is not subject to the Court's authority are also not well taken or have a sound basis in established case law.

His statements regarding my obligations under the settlement agreement are in error, partly based upon his lack of knowledge of addendum's to the agreement, which are not public, and his unfamiliarity with the law. Petrofsky makes claims he addressed the issues with Novell prior to re-distributing the agreement, however, he fails to address the rights of the remaining parties to the agreement, namely, Plaintiff, Mr. Major and Mr. Angus, and his actions are in total disregard for the rights of the other parties.

#### **REQUEST FOR EVIDENTIARY HEARING**

I am hesitant to file the addendum's to the Novell Settlement agreement with the Court as exhibits under seal, as Mr. Petrofsky has amply demonstrated he will simply post them to the internet and distribute them as a litigant in this matter since he will be allowed to obtain copies of the materials in the matter. I propose the Court consider an evidentiary hearing to call Elisabeth Blattner of Parsons, Behle, and Latimer as a witness with a Subpoena Deus Tecum to present testimony regarding the Novell matter, the agreements, and the addendums to the agreements. In such a case, the Court can examine Novell's attorneys directly on the matter with the possibility of Mr. Petrofsky obscounding with yet another confidential document and posting it to the internet, should the Court feel it needs to consider this matter in greater depth.



**SANCTIONS SHOULD BE IMPOSED AND PETROFSKY CITED FOR PERJURY IN**

**ADDITION TO DEFAULT JUDGMENT AND AWARD OF DAMAGES**

In Section 2 of Petrofsky's declaration, he states "I did not distribute the Novell Settlement agreement ..." after stating on his objections he in fact has been distributing the materials. He also states in section 4.4.2 of his objections should the Court order him to remove the materials from SCOFACST.ORG, he will repost them "2 minutes thereafter". These statements and admissions evidence a cavalier attitude towards the Court and clear intent to disobey the Court's orders.

**CONCLUSION**

Mr. Petrofsky is simply another symptom of the irresponsible and cavalier attitude evidenced by the Linux Community and movement regarding misuse of confidential information, trade secrets, and other materials. Both he and his associates involved in Linux have amply demonstrated a complete disregard to the rights of Plaintiff in this matter and other matters before the Court relative to misuse of confidential information. He and his associates are "thumbing their noses" at this Court, its authority, and all in total disregard for the rights of Plaintiff or anyone else who stands in the path of their

objectives. I have been subjected to vicious libel, harassment, invasion of privacy, and other tortious acts. The Court needs to make an example of this conduct. Mr. Petrofsky has exhausted the Court's patience and the patience of the parties and has been shown an enormous amount of latitude to simply remove the confidential materials and allow this matter to close. Instead he has thumbed his nose at the Court, run roughshod over the rights of the parties in this matter, and evidenced callous and cavalier attitudes towards this Court. The Court should impose the most severe sanctions allowed under law.

Perhaps this will help the internet community behave more responsibly and remind all of us of the disease that came from the Linux movement.

Respectfully Submitted,

DATED this 27 day of July, 2005.



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JEFFREY VERNON MERKEY, Plaintiff

CERIFICATE OF SERVICE/MAILING

I certify that a true and correct copy of REPOSE TO PETROFSKY'S OBJECTION in the styled action of 2:05CV521DAK filed in the US District Court, District of Utah, Central

Division was mailed to all Parties or delivered by hand or Faxed to:

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7/27/06  
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JEFFREY VERNON MERKEY Plaintiff