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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](http://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 possess [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 its 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 its 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 its 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 Deo [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,  
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by hand delivery;  
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