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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SANTA CLARA

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11 EAGLE BROADBAND, INC.,) CASE NO. 1-05-CV-050179
12)
Plaintiff,)
13 vs.) **PLAINTIFF EAGLE BROADBAND,**
DOES 1 through 25, inclusive,) **INC.'S RENEWED OPPOSITION TO**
14) **ALAN P. PETROFSKY'S MEDIA**
Defendants.) **REQUEST TO PHOTOGRAPH,**
15) **RECORD OR BROADCAST**
16)
Date: January 5, 2007
17) Time: 10:00 a.m.
18) Dept.: 2
19) Judge: Hon. William J. Elfving
Complaint filed: October 5, 2005
Trial Date: None Set

20 **I. INTRODUCTION**

21 Despite this Court's previous rejection of Alan P. Petrofsky's attempts to photograph,
22 record, and broadcast various hearings in this case, Mr. Petrofsky has again made such a request
23 in conjunction with Eagle's motion to quash or recall, or in the alternative stay, Defendant
24 Thomas Mould's writ of execution, set for hearing on January 5, 2007. Since Mr. Petrofsky has
25 not taken the hint from the Court's prior rejections of his requests, this Court should not only
26 summarily reject his latest request, but also hold that Mr. Petrofsky is *not* a member of the
27 "media" within the meaning of California Rule of Court ("CRC") 980. Such an order is
28 necessary to deter Mr. Petrofsky from further draining the resources of the Court and Eagle

1 Broadband with any additional frivolous requests.

2 **II. BACKGROUND**

3 Mr. Petrofsky, an individual, is a self-proclaimed “publisher, editor, copyboy, and chief
4 liaison to litigants” who maintains a website, <http://eagle.petrofsky.org>. On this website, Mr.
5 Petrofsky tracks this case and posts various pleadings and letters in the case he has obtained from
6 the court’s website or private parties. As Mr. Petrofsky explains on his website:

7 “No, I am not a party to this case. At least, I don't believe I am,
8 but I suppose it's impossible to say so definitively when most of
9 the parties have only been identified as Does 8 through 25. I can
10 say that I have never used any of the seven pseudonyms named in
the complaint, that I have never had any pecuniary interest in Eagle
Broadband, and that I hadn't even heard of Eagle Broadband until I
read a news report about this case.”

11 It appears that Petrofsky compiled his collection “[f]or the benefit of anyone researching any of
12 the issues involved in this case.”

13 **III. ARGUMENT**

14 **A. Mr. Petrofsky’s Request To Record And Broadcast Proceedings Should Be**
15 **Denied Because He Is Not A Member Of The “Media” Within CRC 980.**

16 As a general rule, California Rule of Court (“CRC”) 980 does *not* permit court
17 proceedings to be photographed, recorded, or broadcast. CRC 980(c) allows for “*media*
18 coverage” of court proceedings “*only on written order of the judge*” (emphasis added). Pursuant
19 to this subdivision of CRC 980, members of the “media” may file a “Request to Photograph,
20 Record, or Broadcast” court proceedings, and the judge assigned to the proceeding (in this case,
21 the Honorable William Elfvig) must rule upon the request.

22 CRC 980 specifically provides a definition of who qualifies as “media” within the
23 provisions of this rule. Thus, CRC 980(b) defines “media” or “media agency” as: “any person or
24 organization engaging in news gathering or reporting and *includes any newspaper, radio or*
25 *television station or network, news service, magazine, trade paper, in-house publication,*
26 *professional journal, or other news-reporting or news-gathering agency.*” (emphasis added).

27 Clearly, this definition does not encompass nor could it encompass a private individual who runs
28 a private website (one among millions of private websites on the world wide web) set up by an

1 individual who happens to have a voyeuristic interest in private litigants' legal affairs. As the
2 language of CRC 980 makes abundantly clear, the term "media" or "media agency" is restricted
3 to professional newsgathering agencies or organizations, and simply certifying oneself as a
4 "liaison to litigants" does not qualify Petrofsky as "media" within CRC 980. Any other
5 interpretation would open up a floodgate of private individuals requesting "media coverage" of
6 court hearings.

7 While Mr. Petrofsky is free to attend and report on this hearing, he is not the member of
8 the "media" and should not be allowed to record the hearings in this case and broadcast them on
9 his website to the whole wide world. His Media Request is therefore improper and should be
10 denied.

11 **B. Eagle's Opposition To Mr. Petrofsky Media Request And Its Privacy Rights**
12 **Should Be Considered.**

13 A decision to allow media coverage under CRC 980 is within the broad discretion of the
14 presiding judge. *See also* Superior Court, County of Santa Clara Rule 3 ("The judge shall retain
15 sole discretion for the approval or denial of any such request"). The rule provides that
16 "[p]hotographing, recording, and broadcasting of courtroom proceedings may be permitted as
17 circumscribed in this rule if executed in a manner that ensures that the fairness and dignity of the
18 proceedings are not adversely affected." CRC 980(e) provides that "[t]he judge in his or her
19 discretion *may permit, refuse, limit, or terminate media coverage*. This rule does not otherwise
20 limit or restrict the right of the media to cover and report court proceedings."

21 CRC 980(e) also enumerates a number of factors that the Court may consider in
22 evaluating whether to grant media's request. The court may consider, *inter alia*, "parties' support
23 of or opposition to the request"; "nature of the case" and "privacy rights of all participants in the
24 proceeding".

25 Here, Eagle, the plaintiff in this case and a private party, opposes this request. Further,
26 this case encompasses sensitive information about Eagle's stock and other financial data and
27 transactions. These and other potentially sensitive issues may come up at the January 5, 2007
28 hearing. Further, Eagle's privacy rights will be affected in that it is a private party, not a

1 government entity, and there is no reason to broadcast to the whole world a hearing on this
2 private matter when Mr. Petrofsky is free to simply attend the hearing and report on it on his
3 website.

4 In this instance, in particular, Mr. Petrofsky has already demonstrated a knack for
5 harming private litigants by posting unauthorized confidential information on his website.
6 Indeed, Mr. Petrofsky previously posted on another one of his websites a highly confidential
7 settlement agreement which was erroneously available on the court's electronic docket. Mr.
8 Petrofsky's unauthorized publication of the settlement agreement caused harm to the litigants
9 and resulted in a slew of additional litigation simply to obtain the removal of the confidential
10 information from Mr. Petrofsky's website. The court in that case issued an order which
11 specifically ordered Petrofsky "to cease dissemination and/or publication of the confidential
12 settlement agreement" on any "website he owns or which he affiliates." This order in the case of
13 *Jeffrey Vernon Merkey v. Bruce Perens* is attached hereto as Exhibit A. This should further
14 guide this Court in the exercise of its discretion to deny Petrofsky's request for media coverage.

15 **IV. CONCLUSION**

16 For all of foregoing reasons, this Court should deny Mr. Petrofsky's improper Media
17 Request to photograph, record, and/or broadcast the hearing on January 5, 2007 and issue an
18 order holding that Mr. Petrofsky is not a member of the "media" within the meaning of
19 California Rule of Court 980 to deter further improper requests from Mr. Petrofsky.

20 DATED: January 2, 2007

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY LLP

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23 By: 
24 JEFFREY RATINOFF
25 Attorneys for Plaintiff
26 EAGLE BROADBAND, INC.
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EXHIBIT A

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

JEFFREY VERNON MERKEY,

Plaintiff,

v.

BRUCE PERENS, et al.,

Defendants.

**ORDER MODIFYING
REPORT & RECOMMENDATION**

Case No. 2:05cv521DAK

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

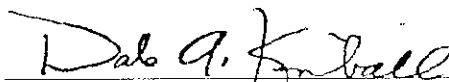
he affiliates.

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 21st day of September, 2006.

BY THE COURT:



DALE A. KIMBALL
United States District Judge

1 **PROOF OF SERVICE**

2 I, Lori Low, am over the age of eighteen years, and not a party to the within action. My
3 business address is Buchanan, Ingersoll & Rooney, 333 Twin Dolphin Drive, Suite 700,
4 Redwood Shores, CA 94065. On January 2, 2007, I served the within document(s):

5 **PLAINTIFF EAGLE BROADBAND, INC.'S RENEWED OPPOSITION TO**
6 **ALAN P. PETROFSKY'S MEDIA REQUEST TO PHOTOGRAPH, RECORD OR**
7 **BROADCAST**

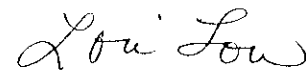
8	by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p m.
9	by placing a true copy of the document(s) listed above in a sealed envelope with postage thereon fully prepaid or provided for, at a station designated for collection and processing of envelopes and packages for mailing with the United States Post Office, addressed as set forth below
10	by causing the document(s) listed above to be hand-delivered to the address(es) set forth below.
11	
12	X by causing the document(s) listed above to be sent via electronic mail to the below listed party(ies).
13	
14	
15	

16 I served said document(s) on the below-listed parties:

17 Shelley K. Mack, Esq
18 Fish & Richardson, P.C.
19 500 Arguello Street, Suite 500
20 Redwood City, CA 94063
21 Phone: (650) 839-5070
22 Fax: (650) 839-5071
23 Email: mack@fr.com

Paul Clifford, Esq
Mark Goldowitz, Esq.
California Anti-SLAPP Project
2903 Sacramento St.
Berkeley, CA 94702
Fax: (510) 486-9708
Email: pc@casp.net
Email: mg@casp.net

24 I declare under penalty of perjury under the laws of the State of California that the
25 foregoing is true and correct. Executed on January 2, 2007, at Redwood Shores, CA.

26 
27 Lori Low
28

1 **PROOF OF SERVICE**

2 I, Lori Low, am over the age of eighteen years, and not a party to the within action. My
3 business address is Buchanan, Ingersoll & Rooney, 333 Twin Dolphin Drive, Suite 700,
4 Redwood Shores, CA 94065. On January 3, 2007, I served the within document(s):

5 **PLAINTIFF EAGLE BROADBAND, INC.'S RENEWED OPPOSITION TO**
6 **ALAN P. PETROFSKY'S MEDIA REQUEST TO PHOTOGRAPH, RECORD OR**
7 **BROADCAST**

8 by transmitting via facsimile the document(s) listed above to the fax number(s) set
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11 postage thereon fully prepaid or provided for, at a station designated for collection and
12 processing of envelopes and packages for mailing with the United States Post Office,
13 addressed as set forth below.

14 by causing the document(s) listed above to be hand-delivered to the address(es) set
15 forth below.

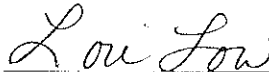
16 by causing the document(s) listed above to be sent via electronic mail to the below
17 listed party(ies).

18 I served said document(s) on the below-listed parties:

19 Shelley K. Mack, Esq.
20 Fish & Richardson, P.C.
21 500 Arguello Street, Suite 500
22 Redwood City, CA 94063
23 Phone: (650) 839-5070
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Mark Goldowitz, Esq.
California Anti-SLAPP Project
2903 Sacramento St.
Berkeley, CA 94702
Fax: (510) 486-9708
Email: pc@casp.net
Email: mg@casp.net

26 I declare under penalty of perjury under the laws of the State of California that the
27 foregoing is true and correct. Executed on January 3, 2007, at Redwood Shores, CA.
28


Lori Low