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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

DENNIS MONTGOMERY and the  
MONTGOMERY FAMILY TRUST,

Plaintiffs,

v.

ETREPPID TECHNOLOGIES, LLC;  
WARREN TREPP; and the UNITED  
STATES DEPARTMENT OF DEFENSE,

Defendants.

AND ALL RELATED MATTERS.

3:06-CV-00056-PMP-VPC  
**BASE FILE**

3:06-CV-00145-PMP-VPC

ORDER

Since receiving assignment of these now consolidated civil cases on February 23, 2007, and a related Search Warrant case, 3:06-cv-0263-PMP-VPC, the Court has issued numerous orders to resolve a host of outstanding motions. Among the most challenging have been the motions filed by each party asserting various claims of privilege to protect alleged military and state secrets, trade secrets, and attorney client communications. Common law, constitutional, and statutory privileges exist for sound policy reasons. The Court has endeavored to address carefully each of the claims of privilege advanced to insure that the parties' legitimate interests are protected yet balanced with the equally legitimate interests of the public in access to Court proceedings.

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1           Currently the parties are engaged in long delayed briefing of Motions for  
2 Protective Orders brought on behalf of Defendants Department of Defense (“DoD”) and  
3 eTrepid. The Court will resolve those motions upon completion of briefing. A more  
4 immediate issue has arisen, however, with regard to the DoD’s claim of military and state  
5 secrets privilege related to the Search Warrant case.

6           On March 19, 2007, the Court entered an Order in the Search Warrant case (3:06-  
7 cv-0263-PMP-VPC) affirming the ruling of Magistrate Judge Valerie Cooke which had  
8 granted Montgomery’s Motion for the Return of Seized Property and to Unseal Search  
9 Warrant Affidavits. As the Search Warrant proceedings were related to these consolidated  
10 civil actions, the Court also filed a copy of the Search Warrant Order in this case (Doc.  
11 #125). In part, the Court’s Order in the Search Warrant case directed the FBI to return  
12 property seized from Montgomery as a result of the Search Warrant executed on March 1  
13 and March 3, 2006. To reconcile the claims of state secrets and trade secrets asserted  
14 respectively by DoD and eTrepid, the Court’s Order further established a protocol for the  
15 review of the previously sealed Search Warrant file in case, 3:06-cv-0263-PMP-VPC,  
16 which provided as follows:

17           IT IS FURTHER ORDERED that all filings made in this action with  
18 the exception of the declaration of Dennis Montgomery (#115) filed on  
19 February 28, 2007, shall be unsealed unless for good cause shown the  
20 Court determines that assertion of state secrets, trade secrets, or other  
21 privilege is found to be meritorious and requires the continued sealing  
22 of a particular filing, declaration or exhibit in this case. In this regard,  
23 counsel for the parties in the related civil actions shall have twenty-one  
24 days from the date of this order within which to review the sealed case  
25 file in this case and to file with the Court any objection to the unsealing  
26 of any portion thereof. To assist in the review of the sealed search  
warrant case file, counsel for Montgomery, eTrepid, and the United  
States shall immediately contact Chief Deputy Clerk of Court, Cynthia  
Jensen, at (702) 464-5477, who will provide limited access to the  
sealed case file through the Court's electronic case filing system.

25           The goal of the foregoing Order was to establish a procedure which would insure  
26 the unsealing of the related Search Warrant proceedings while at the same time protecting

1 legitimate claims of privilege asserted by the parties to the related actions. The protocol  
2 outlined by the Court was especially necessary due to the pendency of a Motion for  
3 Protective Order (Doc. #83) filed September 25, 2006, on behalf of Defendant DoD which  
4 asserted a claim of military and state secrets privilege. That Motion was supported by the  
5 unclassified declaration of John D. Negroponte, formerly director of National Intelligence  
6 of the United States, and a classified declaration reviewed by the Court in camera on March  
7 15, 2007.

8           On March 21, 2007, Defendant DoD filed an Emergency Motion for  
9 Reconsideration (Doc. #133) requesting the Court to modify the case file review protocol  
10 outlined above. Defendant DoD requested the Court permit DoD to review the Search  
11 Warrant case file to insure that it did not contain classified information or other material  
12 subject to a viable claim of military or state secrets privilege before making the file  
13 available to the Montgomery and eTreppid parties for review.

14           At a hearing conducted March 23, 2007, the Court granted DoD's Motion in part  
15 and directed that Defendant DoD conduct a review of the Search Warrant case file materials  
16 the following week thereby permitting an in camera review with the Court on March 30,  
17 2007, of any materials as to which Defendant DoD asserted a claim of privilege.

18           Defendant DoD conducted the review of the Search Warrant case file as directed  
19 on March 28 and 29, 2007. On Friday, March 30, 2007, representatives of Defendant DoD  
20 met with the Court in camera to review claims of military and state secrets privilege in  
21 accord with the unclassified Negroponte Declaration and the classified declaration  
22 previously reviewed by the Court. As a result of that review, the Court has determined that  
23 DoD's assertions of the military and state secrets privilege are valid with regard to a limited  
24 number of items contained within the Search Warrant case file. The Court therefore has  
25 directed that the pages of documents contained within the Search Warrant case file which  
26 contain classified information shall be redacted to remove references to such classified

1 material. The original and unredacted copy of each such page shall be retained under seal  
2 by a Court security officer and shall be subject to further review by this Court and any  
3 appropriate appellate court. The redacted pages shall be returned to the Search Warrant  
4 case file whereupon they will be available for the previously contemplated review by the  
5 Montgomery and eTreppid parties to determine whether additional claims of trade secrets or  
6 other privileges apply. Thereafter, the redacted Search Warrant case file will be unsealed in  
7 accordance with this Court's Order of March 19, 2007.

8 The Court's review of the Search Warrant case file and the determination that  
9 limited classified information was contained therein requires that the Court augment the  
10 time schedule for review set forth in the Court's Order of March 19, 2007, as amended at  
11 the hearing conducted March 23, 2007.

12 IT IS THEREFORE ORDERED as follows:

- 13 1. Defendant Department of Defense shall not later than  
14 Friday, April 6, 2007, complete the process of redacting  
15 classified information from the Search Warrant case file and  
16 shall substitute appropriately redacted pages.
- 17 2. Commencing Monday, April 9, 2007, the Clerk of Court  
18 shall make available to the Montgomery and eTreppid parties  
19 the electronic case file in the Search Warrant case,  
20 3:06-cv-0263-PMP-VPC, and the related transcripts and exhibits  
21 for their further review. The Montgomery and eTreppid parties  
22 thereafter shall have to and including Friday, April 20, 2007, within  
23 which to complete their review **AND** to file with the Court any  
24 objections to the unsealing of any portion thereof. To assist in  
25 the review of the sealed Search Warrant case file, counsel for the  
26 Montgomery and eTreppid parties shall contact Chief Deputy

1 Clerk of Court Cynthia Jensen, at (702) 464-5477, who will  
2 provide access to the sealed case file through the Court's  
3 electronic case filing system.

- 4 3. Upon resolution of any further objections by the parties  
5 filed not later than April 20, 2007, the redacted Search Warrant  
6 case file, 3:06-cv-0263-PMP-VPC, will be unsealed in accord  
7 with this Court's Order of March 19, 2007.  
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9 From the in camera review of the Search Warrant case file conducted by the  
10 Court on March 30, 2007, it has become apparent that the parties to the Search Warrant  
11 case, both Montgomery and the United States, have not guarded against the disclosure of  
12 classified information as carefully as they should. To the extent Montgomery or any other  
13 party to these proceedings possess classified information it is incumbent upon them strictly  
14 to avoid disclosure of such information in any filing with the Court be it an unsealed, sealed  
15 or in camera submission. This is not an onerous requirement. Any party to this litigation  
16 who thinks it is necessary to raise a classified matter with the Court can do so with a proper  
17 filing of a Motion to Permit the Disclosure of Classified Information to the Court. In doing  
18 so, however, the party making the motion must be careful not to disclose the classified  
19 content of the very information they seek to bring to the Court's attention unless and until  
20 the Court has given them specific permission to do so.

21 The process for doing so is well illustrated by the Motion for Protective Order  
22 (Doc. #83) filed on behalf of Defendant DoD on September 25, 2006. That motion was  
23 supported by the September 19, 2006, unclassified Declaration of John D. Negroponte,  
24 which identified a classified declaration which Defendant DoD made available to the Court  
25 for its in camera review as directed by the Court. All parties to this action should employ a  
26 similar procedure before filing or submitting any classified materials in these cases.

1           The United States of America is a party to each of these cases. Unfortunately,  
2 because many executive branch entities which comprise the United States are involved, as  
3 well as an equally diverse aggregation of government counsel, it is imperative that the  
4 various components of the United States which make up the parties involved in these  
5 related cases exert greater effort to communicate and cooperate amongst themselves prior to  
6 making filings with the Court which are later determined to have been improvident. To  
7 date, the United States has failed to do so. The result has been the inadvertent release of  
8 classified information which could have been avoided had the various representatives of  
9 the United States in these cases taken the care and the time necessary to communicate more  
10 effectively. As stated at the hearing conducted on March 23, 2007, regarding Defendant  
11 DoD's Emergency Motion for Reconsideration (Doc. #143), the Court, as well as every other  
12 party to these related cases and the public is entitled to have the United States as a party  
13 speak with "one voice" at least insofar as it relates to representations as to what is or is not  
14 subject to a claim of the military and state secrets privilege.

15           To assist the parties, their counsel, and ultimately the Court from being put in the  
16 position of trying to put the "genie back in the bottle" when it comes to addressing  
17 inadvertent disclosures of classified information, the Court has determined that it is  
18 appropriate to declare a thirty (30) day hiatus in the filing of motions by the parties to these  
19 related cases to enable them to meet and confer and to address more thoughtfully their  
20 collective understanding as to what may be filed with the Court without improperly  
21 disclosing classified or other privileged information. This hiatus shall not apply to any  
22 filings which the Court previously has ordered or which otherwise are required by any  
23 Federal Rules of Civil or Appellate Procedure.

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1           Accordingly, IT IS FURTHER ORDERED that the parties shall not file any  
2 further Motions or other papers with the Court for thirty (30) days from the date of this  
3 Order without leave of the Court through Magistrate Judge Cooke or the undersigned  
4 except for any filings this Court previously has ordered the parties to file or otherwise are  
5 required by the Federal Rules of Civil or Appellate Procedure.

6           IT IS FURTHER ORDERED that the parties shall meet and confer within the  
7 next thirty (30) days to gain a collective understanding of what material is subject to the  
8 various assertions of privilege in these related proceedings, and in particular to address the  
9 matter of avoiding future disclosures of classified information.

10           IT IS FURTHER ORDERED that Counsel for Defendant DoD shall forthwith  
11 consult with Government counsel appearing in related proceedings to insure that all  
12 representing the United States understand their obligations with respect to the protection of  
13 material subject to a claim of military and state secrets privilege.

14 Dated: April 2, 2007.

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17 PHILIP M. PRO  
18 United States District Judge  
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