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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

DENNIS MONTGOMERY and the	)	
MONTGOMERY FAMILY TRUST	)	3:06-CV-00056-PMP-VPC
	)	<b>BASE FILE</b>
Plaintiffs,	)	
	)	3:06-CV-00145-PMP-VPC
vs.	)	
	)	<b><u>ORDER</u></b>
ETREPPID TECHNOLOGIES, LLC;	)	
WARREN TREPP; and the UNITED	)	
STATES DEPARTMENT OF DEFENSE,	)	
	)	
Defendants.	)	
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AND ALL RELATED MATTERS.	)	
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Michael J. Flynn, Esq., and Carla DiMare, Esq., have served as lead counsel for Plaintiffs Dennis Montgomery and the Montgomery Family Trust since the these consolidated proceedings commenced. They now seek to withdraw as counsel for Plaintiffs pursuant to a motion filed July 9, 2007, (Doc. #204, #205, and #206).

Defendant United States does not oppose Flynn and DiMare's motion to withdraw as counsel, but because the Court has upheld the United States' assertions of the military and state secrets privilege with respect to a variety of pleadings, motions, declarations and other materials filed herein, Defendant United States seek to condition counsel's withdrawal on the following four conditions:

- 1) all counsel (i.e., Michael J. Flynn, Carla DiMare, Ronald J. Logar, and Eric A. Pulver) have complied with their obligations to protect information subject to the military and the state secrets privilege as upheld by the Court in the instant actions;

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1 2) all counsel certify that they have not transmitted any  
2 information covered by the military and state secrets  
3 privilege to new counsel for Dennis Montgomery or to  
4 any other person;

5 3) all counsel have either produced to the United States  
6 or, after consultation with United States Department of  
7 Justice Security and Emergency Planning Staff (SEPS),  
8 certified that they have properly destroyed all information,  
9 either in hard copy or electronic format, in their possession  
10 that is protected by the military and state secrets privilege; and

11 4) the United States either has confirmed that all counsel for  
12 Montgomery have produced such documents to the United  
13 States or determined that counsel for Montgomery's  
14 certification that information protected by the military and  
15 state secrets privilege in any documents in either hard or  
16 electronic format in counsel for Montgomery's possession  
17 has been destroyed is sufficiently detailed.(Doc. #259)

18 Plaintiffs Dennis Montgomery and the Montgomery Family Trust, through local  
19 counsel Ronald Logar, Esq., and Eric Pulver, Esq., who also have represented Plaintiffs in  
20 conjunction with Flynn and DiMare throughout most of this litigation, state in their Reply  
21 (Doc. #213) that they do not oppose Flynn and DiMare's motion to withdraw. Indeed,  
22 Plaintiffs state that they have retained new lead counsel of record, to wit: the law firm of  
23 Liner Yankelevitz Sunshine & Regenstreif, LLP who are prepared to substitute into this  
24 case on Plaintiffs' behalf so long as the Flynn and DiMare turn over Plaintiffs' complete  
25 client file.

26 Flynn and DiMare reply that the four conditions Defendant United States  
proposes are more properly directed to new counsel of record for the Montgomery  
Plaintiffs. Nonetheless, to the extent the conditions Defendant United States proposes are  
directed at them, Flynn and DiMare state that they will comply with their obligations to  
protect information subject to the military state secrets privilege as upheld by this Court in  
its April 2, 2007 Order (Doc. #147), and any subsequent Orders this Court may enter  
pertaining to the United States' claim of and military state secrets privilege. Flynn and  
DiMare further state with respect to proposed condition number two, that they have not to

1 date knowingly turned over to any other person any documents in violation of this Court's  
2 April 2, 2007 Order. Preconditions three and four, however, draw the objection of Flynn  
3 and DiMare as improper and unenforceable.

4 Specifically, Flynn and DiMare state that they cannot agree to provide to the  
5 Defendant United States Department of Justice Security in Emergency Planning Staff any of  
6 Plaintiffs' client files absent an Order of this Court. Flynn and DiMare insist that the  
7 attorney-client privilege permeates Plaintiffs' client files and to surrender them to  
8 Defendant United States for review would violate their attorney client obligations to the  
9 Montgomery Plaintiffs (Doc. #210).

10 Flynn and DiMare object to the argument advanced on Plaintiffs' behalf by local  
11 counsel Logar and Pulver (Doc. #213), that new lead counsel of record cannot substitute into  
12 the case until they obtain Plaintiffs' entire file from Flynn and DiMare. Flynn and DiMare  
13 argue that because they have not yet been "terminated" as counsel for the Montgomery  
14 Plaintiffs and the law firm of Liner Yankelevitz Sunshine & Regenstreif, LLP has not yet  
15 entered an appearance on behalf of the Montgomery Plaintiffs, they are not obligated to turn  
16 any files over to new counsel for the Montgomery Plaintiffs.<sup>1</sup> Additionally, Flynn and  
17 DiMare argue that Nevada Rule of Professional Conduct 1.16(d) affords them a "retaining  
18 lien" over the Montgomery Plaintiffs' client files and that until the Montgomery Plaintiffs  
19 pay any outstanding fees and costs due Flynn and DiMare, withdrawing counsel are not  
20 obligated to surrender the client files to new counsel (Doc. #214, #215 and #216).

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25 <sup>1</sup> On August 1, 2007, the Montgomery Plaintiffs, through local counsel Logar and  
26 Pulver, filed a Notice of Termination of Flynn and DiMare as counsel for Plaintiffs  
(Doc. #227). Additionally, the law firm of Liner Yankelevitz Sunshine & Regenstreif LLP  
recently has entered an appearance on behalf of the Montgomery Plaintiffs.

1 On August 17, 2007, the Court conducted a hearing regarding the Flynn and  
2 DiMare motion to withdraw as counsel for the Montgomery Plaintiffs (Doc. #204 #205, and  
3 #206). Having considering counsel's arguments as well as all supplemental filings made by  
4 the parties since the hearing conducted August 17, 2007, the Court finds that Flynn and  
5 DiMare's motion of to withdraw (Doc. #204, #205 and #206) should be granted subject to  
6 conditions one and two set forth in Defendant United States' Response (Doc. #209) filed July  
7 16, 2007.

8 IT IS SO ORDERED.

9 IT IS FURTHER ORDERED that proposed conditions three and four by  
10 Defendant United States as conditions to the withdrawal of Flynn and DiMare as counsel  
11 for the Montgomery Plaintiffs are rejected.

12 IT IS FURTHER ORDERED that to the extent the Montgomery Plaintiffs seek to  
13 condition the withdrawal of Flynn and DiMare on Flynn and DiMare surrendering their  
14 complete "client file" to new counsel of record for Plaintiffs (Doc. #213), said precondition  
15 is rejected by the Court. In this regard, the record before the Court does not support a  
16 finding that Flynn and DiMare have withdrawn "voluntary" as counsel for Montgomery  
17 Plaintiffs, In the Matter of Kaufman 93 Nev. 452, 567 P.2d 957 (1977), nor does it appear  
18 on the record before the Court that Flynn and DiMare should be compelled to surrender  
19 their files to new counsel of record. Figliuzzi v. Fed. Dist Court. 111 Nev. 338, 890 P.2d  
20 798 (1995).

21  
22 DATED: September 4, 2007.

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25 PHILIP M. PRO  
26 United States District Judge