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12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE DISTRICT COURT OF NEVADA**

14 DENNIS MONTGOMERY, an individual; and  
MONTGOMERY FAMILY TRUST, a California  
15 Trust,

16 Plaintiff,

17 vs.

18 ETREPPID TECHNOLOGIES, L.L.C., a Nevada  
Limited Liability Company; WARREN TREPP, an  
19 individual; DEPARTMENT OF DEFENSE of the  
UNITED STATES OF AMERICA, and  
20 DOES 1 through 10,

21 Defendants.

22 \_\_\_\_\_/  
AND RELATED CASE(S)  
23 \_\_\_\_\_/

Case No. 3:06-CV-00056-PMP-VPC  
**Base File**

3:06-CV-00145-PMP-VPC

ETREPPID TECHNOLOGIES, L.L.C.'S  
MOTION TO REALIGN THE PARTIES

24 **ETREPPID TECHNOLOGIES, L.L.C.'S MOTION TO REALIGN THE PARTIES**

25 Plaintiff eTrepid Technologies, L.L.C., by and through its undersigned counsel of  
26 record, Hale Lane Peek Dennison and Howard, hereby submits its Motion to Realign the Parties.

27 This Motion is supported by the following points and authorities.  
28

1 **I. Introduction.**

2 This consolidated action originally consisted of two separate lawsuits. The *first* lawsuit  
3 was filed by eTreppid Technologies, L.L.C. (“eTreppid”) (3:06-CV-00145-PMP-VPC) (the “145  
4 Matter”). The *second* lawsuit was filed by Dennis Montgomery (3:06-CV-00056-PMP-VPC)  
5 (the “56 Matter”). Accordingly, eTreppid is the proper Plaintiff in this action because it was the  
6 first to file suit. When the actions were consolidated, however, the *second* lawsuit, the 56  
7 Matter, was designated as the “base file” suit which is currently reflected in the case caption.  
8 Accordingly, all pleadings filed in the consolidated action are currently being filed under the 56  
9 Matter filed by Dennis Montgomery as Plaintiff in that matter. It is eTreppid, however, that  
10 initiated the original action (the 145 Matter) and it is eTreppid, therefore, that should be  
11 designated as the Plaintiff in the consolidated matter. Accordingly, eTreppid requests that this  
12 Court realign the 145 Matter to be the “Base File” in the consolidated action, that eTreppid be  
13 considered the proper Plaintiff in the consolidated action, and that the caption in the consolidated  
14 action be altered to reflect this change. For all of the foregoing reasons, eTreppid respectfully  
15 requests that its Motion to Realign the Parties be granted.

16 **II. Procedural Background.**

17 This consolidated action arises out of a dispute as to the ownership of certain intellectual  
18 property rights relating to software used for video compression, object tracking, pattern  
19 recognition, and anomaly detection. eTreppid Technologies, L.L.C. (“eTreppid”) *first* initiated  
20 this litigation on January 19, 2006, by filing a Complaint and a Motion for a Preliminary  
21 Injunction in the Second Judicial District Court for the State of Nevada. On January 25, 2006,  
22 Montgomery filed a Notice of Removal, claiming that diversity jurisdiction existed. On January  
23 27, 2006, eTreppid filed an Ex Parte Motion for Summary Remand. On that same date,  
24 Montgomery filed an answer and counterclaim alleging claims for copyright infringement,  
25 declaratory relief, and an accounting. On January 31, 2006, the United States District Court  
26 ordered the case remanded to State Court. On February 8, 2007, following a lengthy evidentiary  
27 hearing, the motion was granted and a preliminary injunction entered.

28 After Judge Perry signed and entered the Order granting the Plaintiffs’ Preliminary

1 Injunction, Dennis Montgomery, Brenda Montgomery, and the Montgomery Family Trust  
2 (collectively “Montgomery”), filed an amended Answer and Counterclaim on February 17, 2006  
3 to allege a third-party claim for declaratory relief against the United States Department of  
4 Defense (the “United States”). On March 20, 2006, the United States filed its notice of removal  
5 pursuant to 28 U.S.C. §1442. Upon removal, eTreppid’s action subsequently became the 145  
6 Matter.

7 In the meantime, on January 31, 2006, Montgomery initiated the 56 Matter in the U.S.  
8 District Court for the District of Nevada alleging causes of action for, *inter alia*, copyright  
9 infringement. The factual allegations and legal claims set forth in this complaint are essentially  
10 similar to those set forth in the January 27, 2006 Answer and Counterclaim Montgomery filed in  
11 the state court action. Montgomery filed a First Amended Complaint in the 56 Matter on  
12 February 21, 2006.

13 The 145 Matter and the 56 Matter were subsequently consolidated into the present  
14 proceedings. On March 15, 2007, this Court entered an Order of consolidation which provides  
15 that the “base file” for this matter shall be designated: “3:06-CV-0056-PMP-VPC” (the 56  
16 Matter). *See* Order dated March 15, 2007. The foregoing Order also provides that “[a]ll future  
17 filing shall be filed in said case.” *See id.* Accordingly, all filings in this consolidated matter are  
18 currently being filed under the 56 Matter, which was initiated by Montgomery *after* the 145  
19 Matter was initiated by eTreppid.

### 20 **III. Legal Argument.**

21 It is well-established that “[t]he courts, not the parties, are responsible for aligning the  
22 parties according to their interests in the litigation.” *Continental Airlines, Inc. v. Goodyear Tire*  
23 *& Rubber Co.*, 819 F.2d 1519, 1523 (9<sup>th</sup> Cir. 1987). Indeed, the “trial court has broad discretion  
24 in deciding the realignment of parties and order of proof.” *L-3 Communications Corp. v. OSI*  
25 *Systems, Inc.*, 418 F.Supp.2d 380, 383 (S.D.N.Y. 2005) (citations omitted). In a consolidated  
26 action, the “first case filed” should be the “lead case” rather than any actions that are  
27 subsequently filed. *Alaska Airlines v. United States*, 399 F.Supp. 906, 909 (N.D. Cal. 1975). In  
28 fact, “where both parties bear the burden of proof on distinct counts of their causes of action, the

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1 court has good grounds for allowing the ‘actual plaintiff, the party that filed the lawsuit, to  
2 proceed first.’” *L-3 Communications*, 418 F.Supp. at 383. (holding that the *original* plaintiff in  
3 the action was entitled to proceed first at trial because plaintiff initiated the action *first*), *see also*  
4 *Anheuser-Busch, Inc. v. John Labatt, Ltd.* 89 F.3d 1339, 1344 (8<sup>th</sup> Cir. 1996) (holding that where  
5 each side bore the burden of proof on separate causes of action, “The District Court  
6 understandably chose to allow the actual plaintiff, the party that filed the lawsuit, to proceed  
7 first.”) This is true in light of the fact that “[w]hen a state court action is removed to federal  
8 court, the removal is treated as if the original action has been commenced in federal court.”  
9 *Schnabel v. Lui*, 302 F.3d 1023, 1037 (9<sup>th</sup> Cir. 2002).

10 It is well within this Court’s discretion to realign the parties in this case. *See Continental*  
11 *Airlines, Inc.*, 819 F.2d at 1523. In realigning the parties, the Court should primarily consider  
12 who filed their lawsuit *first*. *See, e.g. Alaska Airlines*, 399 F.Supp. at 909, *Anheuser-Busch*, 89  
13 F.3d 1339. Here, this Court should realign the parties because eTreppid was the first to file its  
14 complaint. Indeed, eTreppid first initiated this litigation by filing its complaint in state court on  
15 January 19, 2006. eTreppid’s state court action was removed to federal court on March 20,  
16 2006, thereby becoming the 145 Matter. For jurisdictional purposes, however, the 145 Matter  
17 must be treated as if it were originally commenced in federal court. *See Schnabel*, 302 F.3d at  
18 1037. It was not until January 31, 2006 that Montgomery initiated the 56 Matter. Therefore,  
19 Montgomery’s suit was initiated only *after* eTreppid’s suit was initiated.

20 Accordingly, eTreppid respectfully submits that this court should exercise its discretion  
21 to realign the parties so that eTreppid, which was the first to file a complaint in these  
22 consolidated matters and which bears the burden of proving its affirmative claims for relief, will  
23 appear as the plaintiff in this matter and will present its case first at trial.

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**IV. Conclusion.**

For all of the foregoing reasons, eTrepid respectfully requests that its Motion to Realign the Parties be granted.

Dated: December 10, 2007.

/s/  
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Cross-Defendant Warren Trepp*

**PROOF OF SERVICE**

I, Cynthia L. Kelb, declare:

I am employed in the **City of Reno, County of Washoe, State of Nevada**, by the law offices of Hale Lane Peek Dennison and Howard. My business address is: **5441 Kietzke Lane, Second Floor, Reno, Nevada 89511**. I am over the age of 18 years and not a party to this action.

On December 10, 2007, I caused the foregoing **ETREPPID TECHNOLOGIES, L.L.C.'S MOTION TO REALIGN THE PARTIES** to be:

X filed electronically with the U.S. District Court and therefore the court's computer system has electronically delivered a copy of the foregoing document to the following person(s) at the following e-mail addresses:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on December 10, 2007.

\_\_\_\_\_  
/s/  
Cynthia L. Kelb

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