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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

Presently before the Court is eTreppid Technologies, LLC’s (“eTreppid”) Notice of Motion and Motion to File Amended Complaint; Motion for Order Shortening Time; Memorandum of Points and Authorities (3:06-CV-00145-PMP-VPC, Doc. #70) with supporting declaration (3:06-CV-00145-PMP-VPC, Doc. #71), filed on February 27, 2007. Dennis Montgomery and the Montgomery Family Trust (“Montgomery”) filed an Opposition (3:06-CV-00145-PMP-VPC, Doc. #84) and Objection to eTreppid’s supporting declaration (3:06-CV-00145-PMP-VPC, Doc. #85) on March 13, 2007. eTreppid did not file a reply.

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1           These consolidated proceedings concern a dispute between eTreppid  
2 Technologies, LLC/Warren Trepp and Dennis Montgomery/the Montgomery Family Trust  
3 as to who owns certain computer software source code. eTreppid originally brought suit in  
4 Nevada state court asserting various causes of action and seeking a preliminary injunction.  
5 On February 8, 2006, the state court granted eTreppid's motion for a preliminary injunction  
6 and enjoined Montgomery from "destroying, hypothecating, transferring, modifying, and/or  
7 assigning the ETreppid Source Code, from discussing any ETreppid technology, including  
8 anomaly detection and pattern recognition software, with any third-party . . . ." (3:06-  
9 CV00056-PMP-VPC, Doc. #15, Ex. 7 at 3.)

10           In March 2006, based on allegations Montgomery had stolen the disputed source  
11 code from eTreppid, the Federal Bureau of Investigations ("FBI") conducted searches of  
12 Montgomery's home and leased storage spaces and seized certain items, including computer  
13 hard drives. (Order [Doc. #130].) Montgomery thereafter moved the Court for the return of  
14 his property pursuant to Federal Rule of Criminal Procedure 41(g). (See generally, In the  
15 Matter of the Search of: the Residence Located at 12720 Buckthorne Lane, Reno, Nevada,  
16 and Storage Units 136, 140, 141, 142, and 143, Double R Storage, 888 Maestro Drive,  
17 Reno, Nevada, 3:06-CV-0263-PMP-VPC.) Magistrate Judge Valerie P. Cooke ruled the  
18 Government acted in callous disregard of Montgomery's rights. (Order [Doc. #130].)  
19 Upon reviewing the Government's objections to the Magistrate Judge's ruling, the  
20 undersigned affirmed the Magistrate Judge's findings and ordered the FBI to return the  
21 seized property to Montgomery within ten days. (Order [Doc. #125].)

22           eTreppid moves to amend its Complaint to reflect new evidence and facts which  
23 have come to light since eTreppid filed its original Complaint, specifically the search of  
24 Montgomery's home and storage facilities and the recovery of hard drives and other items  
25 eTreppid claims belong to it. eTreppid also moves to amend its Complaint to add a cause of  
26 action for claim and delivery so that if the FBI relinquishes possession of the seized items,

1 the items will be returned to eTreppid, not Montgomery. Montgomery responds by arguing  
2 the Court should deny the motion due to eTreppid's unclean hands and bad faith.  
3 Montgomery argues eTreppid wrongfully is using sealed materials from the search warrant  
4 case which were obtained by the FBI through an unconstitutional search to support the  
5 motion to amend the complaint. Montgomery also questions certain alleged discrepancies  
6 between the lists of hard drives eTreppid provides in its motion to amend and the inventory  
7 the FBI prepared when it conducted the searches.

8           Generally, a plaintiff may amend his or her complaint once "as a matter of course  
9 at any time before a responsive pleading is served . . . ." Fed. R. Civ. P. 15(a). If a  
10 responsive pleading has been filed, "a party may amend the party's pleading only by leave  
11 of court or by written consent of the adverse party; and leave shall be freely given when  
12 justice so requires." Fed. R. Civ. P. 15(a); see also Foman v. Davis, 371 U.S. 178, 182  
13 (1962) ("Rule 15(a) declares that leave to amend 'shall be freely given when justice so  
14 requires'; this mandate is to be heeded."). Courts frequently consider five factors to assess  
15 whether to grant leave to amend: "(1) bad faith, (2) undue delay, (3) prejudice to the  
16 opposing party, (4) futility of amendment[,] and (5) whether plaintiff has previously  
17 amended his complaint." Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990)  
18 (citing Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)).

19           The Court will grant eTreppid's motion to amend. eTreppid has not engaged in  
20 bad faith by violating the Court's Order sealing the search warrant case. eTreppid's motion  
21 to amend relies on the FBI's contact with eTreppid after the FBI searched Montgomery's  
22 home and storage units. According to eTreppid, the FBI gave eTreppid a list of hard drives  
23 seized from the search and asked eTreppid if it could identify any of the items as belonging  
24 to eTreppid. (eTreppid Technologies, LLC's Notice of Mot. & Mot. to File Am. Compl.

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1 [3:06-CV-00145-PMP-VPC, Doc. #70, Ex. B.)<sup>1</sup> eTreppid thus does not rely upon a sealed  
2 filing in the search warrant case to support its motion to amend.

3 Further, the Government's conduct in searching and seizing Montgomery's  
4 property does not necessarily preclude eTreppid's use of the seized materials in a civil  
5 action. The exclusionary rule generally does not apply to civil proceedings between private  
6 litigants. See In re Establishment Inspection of Hern Iron Works, Inc., 881 F.2d 722, 729  
7 (9th Cir. 1989). Although Montgomery contends eTreppid and the Government improperly  
8 colluded to conduct the illegal search, Montgomery offers no evidence to support his  
9 allegations. The record as it currently exists therefore does not warrant denying the motion  
10 to amend. The Court is not making an evidentiary ruling as to the admissibility of any  
11 evidence seized during the searches, however, and the Court does not rule out the  
12 possibility that the seized items may be subject to exclusion. See I.N.S. v. Lopez-Mendoza,  
13 468 U.S. 1032, 1050-51 (1984); Adamson v. C.I.R., 745 F.2d 541, 546 (9th Cir. 1984).  
14 Montgomery's arguments regarding a discrepancy in the FBI's search inventory and the  
15 lists the FBI gave to eTreppid is a matter to explore in discovery, but does not weigh against  
16 granting amendment at this time.

17 Montgomery will not be prejudiced by the amendment because the parties have  
18 not conducted any discovery in this matter. Amendment is not futile, as it adds further  
19 factual allegations regarding events occurring after eTreppid filed the original Complaint  
20 and asserts a new cause of action for claim and delivery of the seized property. However, at  
21 the time eTreppid filed the motion to amend, the Government still possessed the seized  
22 property. That no longer is the case. Accordingly, eTreppid should modify its proposed  
23 amended complaint to reflect Montgomery possesses the seized materials. Finally,  
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25 <sup>1</sup> Montgomery raises several objections to the affidavits of Warren Trepp and Jerry M Snyder.  
26 The Court will overrule the objections for purposes of resolving this motion. The present motion is  
to amend the Complaint, not a motion for summary judgment.

1 eTreppid has not amended its Complaint previously. Given the liberal standard of Rule 15,  
2 the Court will grant eTreppid's motion to amend its Complaint. eTreppid must file the  
3 amended complaint within twenty (20) days of the date of this Order.

4 IT IS THEREFORE ORDERED that eTreppid Technologies, LLC's Notice of  
5 Motion and Motion to File Amended Complaint; Motion for Order Shortening Time;  
6 Memorandum of Points and Authorities (3:06-CV-00145-PMP-VPC, Doc. #70) is hereby  
7 GRANTED.

8 IT IS FURTHER ORDERED that eTreppid Technologies, LLC shall file its  
9 amended complaint within twenty (20) days of the date of this Order.

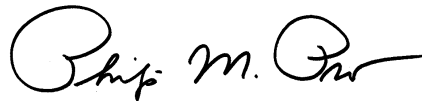
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11 DATED: May 22, 2007.

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PHILIP M. PRO  
United States District Judge

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