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**UNITED STATES DISTRICT COURT**

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**DISTRICT OF NEVADA**

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11 DENNIS MONTGOMERY, and the  
MONTGOMERY FAMILY TRUST,

12 Plaintiffs,

13 vs.

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

16 Defendants.

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18

AND RELATED MATTERS.

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3:06-CV-00056-PMP-VPC

**PLAINTIFFS' REPLY TO  
MICHAEL J. FLYNN'S AND  
CARLA A. DIMARE'S MOTION  
TO WITHDRAW AND THE  
UNITED STATES' RESPONSE  
THERE TO; MEMORANDUM OF  
POINTS AND AUTHORITIES**

[Declaration of Deborah A. Klar in support]

Plaintiffs Dennis Montgomery and the Montgomery Family Trust respectfully submit this Reply in response to attorneys Michal J. Flynn's and Carla DiMare's Motion to Withdraw and the United States' response thereto:

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION AND SUMMARY OF REPLY**

4 Plaintiffs Dennis Montgomery and the Montgomery Family Trust do not  
5 oppose the recent request by their current lead counsel of record to withdraw from  
6 this case, and indeed, have already retained the law firm of Limer Yankelevitz  
7 Sunshine & Regenstrief LLP, who are ready, willing and able to substitute into this  
8 matter. Unfortunately, however, as a result of the government's latest tactic, new  
9 counsel is unable to formally substitute into this matter until Mr. Montgomery's  
10 complete client file is turned over to them, causing undue prejudice to the plaintiffs  
11 and both their existing and new counsel. See Declaration of Deborah Klar attached  
12 hereto.

13 Amazingly, the government now apparently claims that not only is Mr.  
14 Montgomery and his present counsel not allowed to provide their files to new  
15 counsel in order to assume the prosecution and defense of these actions, but that  
16 government agents should once again be allowed to "retrieve" and "identify"  
17 documents from counsel's attorney-client privileged files to be destroyed. This is  
18 clearly nothing more than another wrongful attempt by the government to undo  
19 Magistrate Judge Valerie Cooke's November 28, 2006 Order and wrongfully search  
20 and seize Mr. Montgomery's property without basis or probable cause. Furthermore,  
21 this is a wholly improper attempt to invade the attorney-client and work product  
22 privileges and interfere with Mr. Montgomery's ability to obtain adequate  
23 representation. Accordingly, the government's opposition should be disregarded and  
24 current counsel should be allowed to turn over Mr. Montgomery's complete case  
25 files to new counsel immediately.

**II.****SUMMARY OF FACTS**

As this Court is by now well-aware, these consolidated actions involve civil claims for, among other things, breach of contract, breach of fiduciary duty, misappropriation of trade secrets, and related claims between Etreppid Technologies, LLC and its principal, Warren Trepp, and Dennis Montgomery and the Montgomery Family Trust concerning certain computer software technology developed by Mr. Montgomery. Because the actions may involve certain national security issues, the United States of America was named as an indispensable party to this action, and it has since sought to improperly and unconstitutionally obstruct the parties' ability to prosecute and defend these cases.

**A. The Search Warrant Proceedings**

Claiming, among other things, that Mr. Montgomery had in his possession certain "classified" materials concerning national security, in March 2006, the government initiated an action under seal, Case No. 3:06-cv-0263 PMP (VPC), and obtained a search warrant to search and seize various documents, files and property from Mr. Montgomery's home (the "Search Warrant Case"). After withholding Mr. Montgomery's property for nearly nine months, in response to Mr. Montgomery's Motion for Return of Property, the government subsequently conceded that there was no such "classified" information. The Court, Hon. Valerie P. Cooke, accordingly granted Mr. Montgomery's Motion and ordered his property and files returned to him. See Hon. Valerie P. Cooke's November 28, 2006 Order granting Mr. Montgomery's Motion for the Return of Seized Property and to Unseal Search Warrant Affidavits.<sup>1</sup> The Court also ordered the entire case file to be unsealed, with

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<sup>1</sup> The Court specifically stated in this regard: "The evidence before this court compels the conclusion that SA West acted with callous disregard of Montgomery's constitutional rights, which resulted in the improper search of Montgomery's home and storage units, and the improper seizure of his property." November 28, 2006 Order at 31:19-21.

1 the exception of certain limited information. Id. In light of the Court's extensive and  
2 detailed ruling, there is no longer any purpose served by the Search Warrant Case,  
3 and that action should now be dismissed or closed.

4 **B. The Unsealing Orders**

5 Following the issuance of Judge Cooke's Order, in response to the  
6 government's objections, the Court entered a series of orders setting forth a protocol  
7 for the review and redaction of the Search Warrant Case files by the government  
8 prior to release of the information to the parties and their counsel. The Court  
9 thereafter entered an order governing the filing and disclosure to the Court of any  
10 purported "classified" material. See April 2, 2007 Order. At no time did the Court  
11 issue any order requiring any information to be viewed by "attorneys' eyes only" or  
12 preventing counsel from communicating any information in their possession with  
13 their clients.

14 **C. The Civil Proceedings**

15 There are presently three civil actions pending between the parties, but no  
16 discovery has yet been conducted in any of the cases as a result of the foregoing  
17 proceedings. Indeed, it is clear that no discovery will be conducted without  
18 strenuous objection by the government, and it is questionable whether any discovery  
19 *can* be conducted in these cases in light of the positions taken by the government.

20 Plaintiffs' lead counsel has now moved to withdraw, and none of the parties  
21 object to such withdrawal; however, the government once again seeks to improperly  
22 seize control of plaintiffs' property, thereby preventing the plaintiffs from  
23 prosecuting this action. There is simply no support for the government's position --  
24 none is cited --and its request should be denied so that the parties may proceed with  
25 the prosecutions of these actions, including discovery, forthwith.

1 **III.**

2 **ARGUMENT**

3 **A. There is No Basis for the Government's Request.**

4 The government provides no legal or factual basis in its Opposition for its  
5 unreasonable and intrusive request to hinder Mr. Montgomery's attorney-client  
6 relationship and invade the attorney-client privilege. The government has already  
7 conceded that there were no "classified" materials in Mr. Montgomery's possession  
8 in relation to the Search Warrant Case. See Hon. Valerie P. Cooke's November 28,  
9 2006 Order. Furthermore, the Court previously provided the government with a  
10 protocol for the redaction and sealing of purportedly states secret information from  
11 the Court's file in the Search Warrant Case before making it available to plaintiffs'  
12 counsel. See April 2, 2007 Order. To the extent that the Court has issued any orders  
13 limiting or prohibiting disclosure of any classified information by the parties and  
14 their counsel, new counsel will be governed by those orders, as well. Therefore,  
15 there is simply no basis for the government's recent request.

16 The government's current position cannot be reconciled with its earlier  
17 admission that Mr. Montgomery does not have classified information in his files.  
18 Nor has the government identified any specific information in either Mr.  
19 Montgomery's or his counsel's possession which is prohibited from disclosure to  
20 new counsel. The government should not be allowed to engage in a fishing  
21 expedition at the expense of the attorney-client relationship and privilege, and its  
22 unreasonable conditions should be rejected.

23 **B. Plaintiffs Would Be Highly Prejudiced if the Court Allows a**  
24 **Violation of Counsel's Ethical Obligations.**

25 As current counsel's Motion to Withdraw makes clear, plaintiffs cannot  
26 continue to be represented by attorneys Michael Flynn and Carla DiMare. Thus,  
27 unless plaintiffs are allowed to substitute new counsel into these actions, they will be  
28 unfairly left without representation. Although new counsel is ready, willing, and

1 able to substitute into this matter, they cannot competently do so without immediate  
2 access to plaintiffs' complete case files. It is axiomatic that to exercise requisite  
3 diligence and skill, an attorney must review and have knowledge of the case upon  
4 which he advocates See State Bar v. Slocum, 101 Nev. 967 (1985) (an attorney fails  
5 to exercise requisite diligence when he handles a legal matter without adequate  
6 preparation given the circumstances). It is further axiomatic that a client has a right  
7 to see his own client files, to know of their substance and to communicate with his  
8 attorney as to their contents. See Nev. Rules of Prof. Conduct, Rule 1.4.<sup>2</sup> The  
9 government's latest request is an attempt to prevent the plaintiffs and their counsel  
10 from doing just that.

11 Under both Nevada Rules of Professional Conduct and California Rules of  
12 Professional Conduct, upon termination of the attorney-client relationship, the  
13 attorney must return the client's files to his client. Nev. Rules of Prof. Conduct, Rule  
14 1.16(d); Cal. Rules of Prof. Conduct, Rule 3-700.<sup>3</sup> The ethical rules adopted by the  
15 Nevada State Bar and the California State Bar promote open dialogue between a  
16 client and his attorney and the freedom for a client to change counsel should a  
17 working relationship deteriorate. See In re Kaufman, 93 Nev. 452 (1977); Isrin v.  
18 Superior Court of Los Angeles County, 63 Cal.2d 153 (1965); see also Attorney-  
19 Client Privilege in California, 10 Stan. L. Rev. 297 (1958). The government has not  
20 and cannot provide any legitimate basis to prevent or excuse current counsel from  
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23 <sup>2</sup> Cal. Rule of Prof. Conduct 3-500 similarly provides: a member shall keep a client  
24 reasonably informed about significant developments relating to the employment or  
25 representation, including promptly complying with reasonable requests for  
information and copies of significant documents when necessary to keep the client so  
informed.

26 <sup>3</sup> Both Mr. Flynn and Ms. DiMare are residents of California. Ms. DiMare is a  
27 California attorney. Although Mr. Flynn is apparently not licensed to practice in  
28 California, he maintains an office in California and most, if not all, communications  
between Mr. Flynn and plaintiffs took place within the State of California.

1 complying with their ethical obligations. The government’s request is highly  
2 improper, unduly prejudicial and should be rejected.

3 **IV.**

4 **CONCLUSION**

5 For all the foregoing reasons, plaintiffs respectfully request that the Court  
6 reject the improper conditions requested by the government, and allow plaintiffs’  
7 current counsel to immediately turn over all files to new counsel so that they may  
8 properly substitute into this matter. Furthermore, attorneys Michael Flynn and Carla  
9 DiMare should be ordered to comply with their ethical obligations, maintain client  
10 confidences, and not file or disclose any information which may be adverse to their  
11 client or a violation of the attorney-client privilege.

12 Dated: July 26, 2007

LOGAR & PULVER

14 By: \_\_\_\_\_/s/

15 Ronald Logar  
16 Eric Pulver  
17 Attorneys for Plaintiffs Dennis  
18 Montgomery and the Montgomery  
19 Family Trust  
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