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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ETREPPID TECHNOLOGIES, LLC, a)
Nevada Limited Liability Company,)
Plaintiff,)

CV-N 06-0145 (BES)(VPC)

vs.)

DENNIS MONTGOMERY,)
THE MONTGOMERY FAMILY TRUST,)
DENNIS MONTGOMERY and BRENDA)
MONTGOMERY as Trustees of The)
Montgomery Family Trust, and)
DOES 1-20)

Defendants.)

RESPONSE OF THE
UNITED STATES DEPARTMENT
OF DEFENSE TO PLAINTIFF'S
MOTION TO SEVER AND
REMAND

DENNIS MONTGOMERY, and)
MONTGOMERY FAMILY TRUST, a)
California Trust,)

Counterclaimants and Third-Party Plaintiffs,)

vs.)

ETREPPID TECHNOLOGIES, INC., a)
California Corporation,)
WARREN TREPP,)
DEPARTMENT OF DEFENSE of the)
UNITED STATES OF AMERICA,)
DOES 1-10,)

Counterdefendants and Third-Party Defendants)

1 The plaintiff in this removed case, eTreppid Technologies, LLC (eTreppid), seeks to
2 sever the claims of the defendants and third-party plaintiffs, Dennis Montgomery and the
3 Montgomery Family Trust (Montgomery), against the United States Department of Defense
4 (DoD) and to remand the case to State Court. eTreppid does not have standing to argue that
5 claims against an agency of the United States should be dismissed. Further, inasmuch as DoD, a
6 third-party defendant, has not yet filed a response to Montgomery's counterclaim, eTreppid's
7 motion is premature. For these reasons, the Court should not grant eTreppid's motion.

8 **Background**

9 eTreppid filed a complaint in the State Court of Nevada, asserting a claim of entitlement
10 to protect and recover trade secrets from Montgomery, a former employee, officer, and director
11 of the company. On February 17, 2006, Montgomery filed a counter-complaint. The counter-
12 complaint asserted that Montgomery's defense of the action would require him to discuss the
13 nature of the work he had been performing on behalf of DoD while associated with eTreppid.
14 Naming DoD as a counter-defendant, Montgomery claimed that in order to defend against
15 eTreppid's claims of trade secret misappropriation, Montgomery "will be obligated to disclose
16 the nature of the technology, the type of work he has performed on the government contracts
17 using his technology versus that of eTreppid, and the capabilities of his technology . . . in
18 performing work for certain government agencies." Counter-complaint, ¶ 24. Asserting that
19 disclosures of information relating to the work performed on government contracts would violate
20 his "secrecy contract," *id.*, Montgomery included a claim against DoD, seeking a declaration, in
21 essence, that the disclosure of the information he believes is necessary to his defense will not
22 constitute a violation of "the contract between Montgomery and the United States to maintain []
23 secrets, and/or a declaration of immunity for Montgomery from the United States." *Id.* ¶ 26.

24 On March 20, 2006, the United States removed this action to federal district court. DoD
25 recently requested an extension of time until June 23, 2006 to respond to the counter-complaint.
26 In its second request for an extension, filed on May 5, 2006, the government noted that the
27 claims against the United States Department of Defense seek a declaratory judgment that
28

1 Montgomery may disclose classified information implicating vital national security concerns.
2 Unopposed Motion for Extension of Time for United States Department of Defense to File a
3 Responsive Pleading and to Align Responsive Pleading Deadlines (Second EOT Motion) at 2.
4 The motion further stated that the same claim has been articulated in another case pending in this
5 Court, *Dennis Montgomery, et al. v. Etreppid Technologies, LLC, et al.*, No. 3:06-cv-00056-
6 BES-VPC. *Id.* Because of the similarity of the claims against the government in the two cases,
7 DoD “will file a similar response to the complaints in both cases as well as similar motions for
8 protective orders, the latter of which will outline the necessity of protecting certain governmental
9 information and the measures necessary to ensure that certain information that is harmful to the
10 national security interests will not be disclosed, either inadvertently or otherwise.” *Id.* The
11 Second EOT Motion further identified the government’s need for “adequate time to coordinate
12 its interest in protecting national security information that may be at issue and to determine what
13 steps it must take in defending against the counterclaims of defendants, including potentially
14 asserting the military and state secrets privilege. Because the government continues to assess
15 the risks involved in these two cases and is working to determine the precise steps that will be
16 necessary to protect the information at issue in both cases, the United States requests that the
17 deadlines in the two cases be aligned and that responsive pleadings will be filed by the
18 government in both cases no later than June 23, 2006.” *Id.* at 2-3

19 **Argument**

20 **1. eTreppid Does Not Have Standing to Raise Claims on Behalf of DoD**

21 In its motion to sever and remand, eTreppid argues that the claims against DoD, as
22 articulated in Montgomery’s counter-complaint, should be dismissed for failure to state a claim
23 under Federal Rule of Civil Procedure 12(b)(6). Motion to Sever and Remand at 3. The United
24 States, however, having already been named a party to this litigation, is in the best position to
25 determine how to protect its own interests. *See Smith v. Organization of Foster Families for*
26 *Equality & Reform*, 431 U.S. 816, 842 (U.S. 1977) (“Ordinarily. . . a party would not have
27 standing to assert the rights of another, himself a party in the litigation; the third party himself
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1 can decide how best to protect his interests). Further, because the interests of the government
2 here involve whether information that may be classified may be intertwined with the private
3 parties' trade secrets and copyright infringement claims, only the United States can determine
4 the means by which its interests should be protected. As stated in the Second EOT Motion, the
5 government is in the process of assessing its interest in protecting national security information
6 that may be at issue and the measures necessary to defend against Montgomery's counterclaims,
7 including potentially asserting the military and state secrets privilege. Because the analysis of
8 whether disclosure of information in this case could damage national security interests is a
9 quintessential government function, only DoD can assert arguments about the extent to which
10 Montgomery claims against the government should be dismissed.

11 **2. eTreppid's Motion is Premature**

12 As noted above, DoD has requested additional time to file a response in this case, as well
13 as in a related case involving the same parties and similar claims. The additional time is
14 necessary in order for the government to determine the extent to which classified national
15 security information may be intertwined with the claims and defenses of eTreppid and
16 Montgomery. Second EOT Motion at 2. Once an assessment has been made about whether
17 such information may be involved in this case, the government will determine the scope of the
18 information that must be protected. At that point, the government will be in a position to outline
19 for the Court and the parties the measures necessary to ensure that information that may be
20 harmful to the national security interests will not be disclosed. *Id.*

21 By no later than June 23, 2006, the government will prepare and file a response to the
22 counter-complaint and simultaneously move for an appropriate protective order regarding any
23 classified information that may be at issue. Until the time that such papers are filed on the
24 government's behalf, it would be premature for the Court to either sever Montgomery's claims
25 against DoD or to remand this action to State Court. If in fact the claims and defenses of
26 eTreppid and Montgomery will entail the resort to information that is classified for national
27 security reasons, then the government must be involved in determining the means by which such
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1 information should be protected. Therefore, it would not be appropriate to sever Montgomery's
2 claims against the United States, at least not at this juncture. Similarly, to the extent that
3 classified, governmental information may be related to the claims and defenses of the private
4 parties, this case should not be removed to State Court. The assessment of whether classified
5 information is involved and the effect that determination would have on the claims and defenses
6 of the private parties should be considered in the first instance by this Court, not the State Court.
7 For these reasons, eTreppid's motion to sever and remand should not be granted.

8 **Conclusion**

9 For the foregoing reasons, the Court should not grant eTreppid's motion to sever
10 Montgomery's claims against DoD or, in the alternative, to dismiss those claims and remand this
11 case to State Court.

12 DATED: May 8, 2006

13 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee in the office of the United States Department of Justice, Civil Division in Washington DC and I am of such age and discretion as to be competent to serve papers. On May 8, 2006, I served a copies of the RESPONSE OF THE UNITED STATES DEPARTMENT OF DEFENSE TO PLAINTIFF'S MOTION TO SEVER OR REMAND by placing said copies in postpaid envelopes addressed to the persons named below at the places and addresses stated below and by depositing said envelopes and contents in the United States mail at the United States Department of Justice, 20 Massachusetts Aveune, Washington D. C. 20001.

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