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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ETREPPID TECHNOLOGIES, LLC, a)
Nevada Limited Liability Company,)
)
Plaintiff,)
vs.)
)
DENNIS MONTGOMERY,)
MONTGOMERY FAMILY TRUST,)
et al.,)
)
Defendants.)

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

DENNIS MONTGOMERY,)
MONTGOMERY FAMILY TRUST,)
et al.,)
)
Counterclaimants and Third-Party)
Plaintiffs,)
)
vs.)
)
ETREPPID TECHNOLOGIES, INC.,)
WARREN TREPP,)
U.S. DEPARTMENT OF DEFENSE,)
DOES 1-10,)
)
Counterdefendants and Third-Party)
Defendants.)

**NOTICE OF MOTION AND MOTION TO DISMISS
BY THE UNITED STATES DEPARTMENT OF DEFENSE**

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: Please take notice that,
2 pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6), counter-defendant the United States
3 Department of Defense (DoD) hereby submits its motion to dismiss. The motion is based on this
4 notice of motion and motion and the following memorandum of points and authorities.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**
6 **IN SUPPORT OF MOTION TO DISMISS**

7 The sole claim of the defendant and counter-claimant Dennis Montgomery, et al.
8 (Montgomery) against the United States Department of Defense (DoD) relates to whether
9 Montgomery can be relieved of obligations under a non-disclosure agreement in order to
10 adequately raise claims and defenses in connection with litigation relating to allegations that
11 copyrights have been infringed and trade secrets violated. Montgomery's only basis for asserting
12 a claim before this Court is the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* Because
13 that statute does not create an independent cause of action, the Court lacks jurisdiction and the
14 claim against DoD must be dismissed. In addition, Montgomery's claim is without merit
15 because the court lacks authority to require that an Executive Branch agency divulge classified
16 information.

17 **FACTUAL BACKGROUND**

18 Plaintiff and counter-defendant eTreppid Technologies, Inc., *et al.* (eTreppid), filed a
19 complaint in the State Court of Nevada, asserting a claim of entitlement to protect and recover
20 trade secrets from Montgomery, a former employee, officer, and director of the company. On
21 February 17, 2006, Montgomery filed an answer and counter-complaint. Montgomery claimed
22 that he is an inventor and software developer who developed software for which he was granted
23 copyrights in 1982. Counter-complaint ¶ 8. Montgomery asserted that, after the registration of
24 the copyrights, he developed derivative works based on the copyrighted technology. *Id.* ¶ 9. In
25 September 1998, Montgomery and counter-defendant Warren Trepp formed eTreppid. *Id.* ¶ 10.
26 Pursuant to an agreement entered into between Montgomery and Trepp, Montgomery alleged he
27 contributed certain technology in exchange for a 50 percent interest in eTreppid. *Id.*
28

1 The dispute between Montgomery and eTreppid stems from the issue of the extent to
2 which Montgomery retained the sole interest in the derivative works based on the copyrighted
3 technology. Counter-complaint ¶¶ 11-14. Montgomery alleged that, in 2003, eTreppid “began
4 sublicensing the Derivative Works to various entities, including the United States government
5 and collecting licensing fees for the sublicenses,” without having a license to take such action.
6 *Id.* ¶¶ 16-18. Further, Montgomery claimed that, to the extent eTreppid had “an oral nonexclusive
7 license to exploit the Derivative Works,” such oral license was terminated in January 2006. *Id.*
8 ¶¶ 17-18. Montgomery asserted that eTreppid not only has failed to account for any profits
9 associated with its “unlicensed exploitation” of the derivative works, but also may have
10 destroyed part of the derivative works’ “source code.” *Id.* ¶¶ 19-20.

11 In connection with his claim against DoD, Montgomery claimed that he signed a “secrecy
12 oath” which “prevents him from discussing, disclosing or even identifying the subject matter of
13 his work for the United States on penalty of criminal prosecution . . .” Counter-complaint ¶ 21.
14 Montgomery signed the Classified Information Nondisclosure Agreement (Nondisclosure
15 Agreement), which was executed with the Defense Security Service, an agency within the DoD,
16 on September 16, 2003. Exhibit 1. Pursuant to the terms of the Nondisclosure Agreement,
17 Montgomery *inter alia*: (1) accepted certain obligations in exchange for being granted access to
18 classified information (para. 1); (2) agreed never to divulge classified information to anyone
19 unless authorized under the terms of the agreement and to comply with all laws prohibiting the
20 unauthorized disclosure of classified information (para. 3); (3) stated he had been advised that
21 the unauthorized disclosure of classified information could violate certain criminal statutes (para.
22 4); (4) stated he understood that the United States government may seek any remedy available to
23 it to enforce the terms of the agreement, including but not limited to seeking a court order to
24 prohibit the unauthorized disclosure of classified information (para. 6); (5) stated he understood
25 that the classified information to which he would have or obtain access to was and would remain
26 the property and under the control of the United States government (para. 7); and (6) agreed that
27 the conditions and obligations imposed upon him under the agreement apply unless and until he
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1 is relieved of such obligations in writing by an authorized representative of the United States
2 government (para. 8). *Id.*

3 In addition, the counter-complaint asserted that Montgomery's defense of the action
4 would require him to discuss the nature of the work he had been performing on behalf of DoD
5 while associated with eTreppid. Counter-complaint ¶ 24. Naming DoD as a counter-defendant,
6 Montgomery claimed that in order to defend against eTreppid's claims of trade secret
7 misappropriation, Montgomery "will be obligated to disclose the nature of the technology, the
8 type of work he has performed on the government contracts using his technology versus that of
9 eTreppid, and the capabilities of his technology . . . in performing work for certain government
10 agencies." *Id.* Asserting that disclosures of information relating to the work performed on
11 government contracts would violate his "secrecy contract," *id.*, Montgomery sought a declaration
12 that the disclosure of the information he believed is necessary to his defense will not constitute a
13 violation of "the contract between Montgomery and the United States to maintain [] secrets,
14 and/or a declaration of immunity for Montgomery from the United States." *Id.* ¶ 26. On March
15 20, 2006, the United States removed this action to federal district court.

16 ARGUMENT

17 THE COURT LACKS JURISDICTION OVER MONTGOMERY'S CLAIM

18 It is axiomatic that the United States cannot be sued absent a waiver of sovereign
19 immunity. FDIC v. Meyer, 510 U.S. 471, 475 (1994). Such waivers are strictly construed in
20 favor of the sovereign. Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999);
21 Lane v. Pena, 518 U.S. 187, 192 (1996). In addition, plaintiffs suing the government must show
22 not only a waiver of sovereign immunity, but also a grant of subject matter jurisdiction. VS
23 Limited Partnership v. United States, 235 F.3d 1109, 1112 (8th Cir. 2000); Taylor v. United
24 States, 248 F.3d 736, 737 (8th Cir. 1986).

25 In this case, Montgomery has not identified any statute that waives sovereign immunity
26 and, thus, serves as the basis for his claim against DoD, except for the Declaratory Judgment Act.
27 This Act, however, does not provide the Court with jurisdiction. Indeed, the Declaratory
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Judgment Act does not create an independent cause of action. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950). A court may only enter a declaratory judgment in favor of a party who has a substantive claim of right to such relief. *Id.* Accord Akins v. Penobscot Nation, 130 F.2d 482, 490 n.9 (1st Cir. 1997); In re Joint E. & S. Dist. Asbestos Litigation, 14 F.3d 726, 731 (2d Cir. 1993); Earnest v. Lowentritt, 690 F.2d 1198, 1203 (5th Cir. 1982). Nor does the Act effect a waiver of sovereign immunity. *See* Muirhead v. Mecham, 427 F.3d 14, 18 (1st Cir. 2005). Inasmuch as the Declaratory Judgment Act does not provide a basis for a cause of action herein, Montgomery's claims against DoD must be dismissed.

Montgomery's claims against DoD also are defective because, as he has acknowledged, he is bound by the terms of the Nondisclosure Agreement he executed with DoD. Under its terms, Montgomery agreed not to make any unauthorized disclosures of classified information. Exhibit 1. Montgomery also stated that he understood that the classified information to which he gained access was owned and controlled by the United States government. *Id.* In other words, the agreement prohibits Montgomery from disclosing classified information absent authorization from the United States government. Such authorization has not been obtained and, thus, Montgomery cannot, under the agreement, disclose classified information.

Moreover, as the agreement expressly states, only the United States government—not this Court—can provide Montgomery with the authorization he seeks. The authority “to classify and control access to information bearing on national security” is constitutionally vested in the President as head of the Executive Branch and Commander in Chief. *See* Department of the Navy v. Egan, 484 U.S. 518, 527 (1988). Concomitantly, it is “the responsibility of [the Executive], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether” to disclose classified information. Central Intelligence Agency v. Sims, 471 U.S. 159, 180 (1985). *Accord* Fitzgibbon v. Central Intelligence Agency, 911 F.2d 755, 766 (D.C. Cir. 1990) (impermissible for trial court to “perform[] its own calculus as to whether or not harm to the national security . . . would result from disclosure” of national security information); Guillot v. Garrett, 970 F.2d 1320, 1324 (4th Cir. 1992) (the President has “exclusive

1 constitutional authority over access to national security information"); Dorfmont v. Brown, 913
 2 F.2d 1399, 1405 (9th Cir. 1990) (Kozinski, J., concurring) ("Under the Constitution, the
 3 President has unreviewable discretion over security decisions made pursuant to his powers as
 4 chief executive and Commander-in-Chief."), *cert. denied*, 499 U.S. 905 (1991). Therefore, the
 5 district court lacks authority to rewrite the terms of the Nondisclosure Agreement Montgomery
 6 signed, to substitute its assessment of harm for that of the Executive Branch, and to require the
 7 United States government to permit Montgomery to disclose classified information.

8 **CONCLUSION**

9 For the foregoing reasons, the Department of Defense's motion to dismiss should be
 10 granted.

11 DATED: June 21, 2006

12 Respectfully submitted,

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27 Counsel for Counter-Defendant,
 28 United States Department of Defense

IT IS SO ORDERED

Date: _____, 2006

UNITED STATES DISTRICT JUDGE

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 June 21, 2006, I served copies of the Department of Defense's Notice of Motion and Motion to Dismiss, with the accompanying Memorandum of Points and Authorities, 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 Avenue, Washington D. C. 20001.

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