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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 IN RE:

10 SEARCH OF THE RESIDENCE)
LOCATED AT 12720 BUCKTHORNE) 3:06-cv-0263-PMP-VPC
11 LANE, RENO, NEVADA, etc.)
_____)

12 DENNIS MONTGOMERY, et al.,)
13)
Plaintiffs,) 3:06-CV-0056-PMP-VPC
14)

15 vs.)

15 ETREPPID TECHNOLOGIES, LLC, et al.,) UNITED STATES' POST-HEARING
16) BRIEF RE SEPTEMBER 5, 2008,
Defendants.) EVIDENTIARY HEARING
17 _____)

18 Comes now the United States and, as directed by the court, submits the following post-
19 hearing brief regarding the September 5, 2008, evidentiary hearing. The focus of the September
20 5 evidentiary hearing, requested by the Montgomery Parties, was the seizure of certain materials
21 by the FBI from Mr. Montgomery's residence and storage unit facility, the subsequent return of
22 such materials to Mr. Montgomery, and the FBI's custody and review of such materials during
23 the intervening time period.

24 Montgomery Parties filed their motion (#527) for an evidentiary hearing on April 7, 2008.
25 In that motion, Montgomery Parties requested an evidentiary hearing to enquire into three areas;
26 specifically, (1) to identify the items seized by FBI on March 1 and 3, 2006, (2) to explain the

1 alleged “disparity” between the inventories of seized items and the inventories of returned items,
2 and (3) to establish the chain of custody for items seized. See Motion (#527), p.2, lines 2-7. The
3 factual basis for the motion included the argument by counsel as follows:

4 Inexplicably, the search inventory and the return inventory, which should be
5 mirror images of each other, do not match. The reason may be innocent - such
6 as an omission made in the heat of the search. More ominously, the disparity
7 may suggest that evidence was tampered with after the search, with materials
8 deliberately planted to provide Trepp with evidence to support his civil claims
9 against Montgomery. Or it may be that materials were not properly
10 maintained, allowing the seized evidence to be co-mingled with other
11 evidence not seized from Montgomery pursuant to flawed warrants.

12 See Motion (#527), p. 3, lines 12-18.

13 In addition to the arguments and statements made by counsel for Montgomery Parties in
14 the motion (#527), Dennis Montgomery filed a sworn declaration (#466-2) stating, among other
15 things, the following:

16 1. A certain (but unspecified) “device” which Montgomery needs to restore his work to a
17 readable format “was seized and never returned to [Montgomery] by the FBI. The FBI’s
18 mishandling of this data and in some cases destruction of the data make it difficult [for
19 Montgomery] to gather information...” See #466-2, ¶ 8.

20 2. “...the FBI destroyed that organization [of Montgomery’s work product] on February
21 28, 2006, and March 3, 2006, when they ravaged through the containers of [Montgomery’s] work
22 product...” See #466-2, ¶ 9.

23 3. “They [FBI] damaged, and in some cases destroyed [Montgomery’s] property as they
24 conducted their search and seizure...” See #466-2, ¶ 9.

25 4. “...the FBI has taken some of [Montgomery’s] ‘intellectual property’ and to this day
26 has never returned it. This can be shown by discrepancies between the FBI inventory seizure list
and the FBI return lists.” See #466-2, ¶ 10.

1 By minute order (#700) entered June 17, 2008, this court granted the Montgomery
2 Parties' motion for evidentiary hearing. See Order (#700), p.4. By order (#760) entered July 17,
3 2008, the court scheduled the evidentiary hearing for September 5, 2008, described the limited
4 focus of the hearing, and noted that the hearing would be conducted simultaneously in the so-
5 called "civil action" (3:06-cv-056) as well as in the so-called "search warrant proceeding" (3:06-
6 cv-263).

7 Despite specific requests and multiple opportunities to do so, Montgomery Parties have
8 never identified or explained what "disparities" exist between that which was seized by FBI and
9 that which was returned to Mr. Montgomery. Likewise, Montgomery Parties have never
10 identified which seized items were allegedly "destroyed" or "damaged" or "never returned."

11 Responsive to the non-specific allegations made by the Montgomery Parties, the United
12 States presented the testimony of three witnesses: 1) FBI Special Agent Gerald DeVore, 2) FBI
13 Special Agent Mark Thomas, and 3) FBI Supervisory Special Agent Michael West. No other
14 witnesses were called to testify. Additionally, the United States submitted exhibits A-H,
15 inclusive, which were admitted into evidence. Although the September 5 hearing was conducted
16 at Mr. Montgomery's request, he did not testify and he did not present testimony of any person to
17 substantiate, clarify, or support his counsel's non-specific allegations or his own non-specific
18 sworn statements described above. Mr. Montgomery was not present at any time during the
19 September 5 evidentiary hearing.

20 The testimony admitted at the hearing, together with the admitted exhibits, conclusively
21 and unambiguously established the following:

22 1. All items and materials seized from Mr. Montgomery's residence (Buckthorn Lane
23 residence) by the FBI were returned by FBI to Mr. Montgomery and/or his counsel on March 29
24 or April 6, 2007. No such items or materials were retained by FBI. Nothing seized from Mr.
25 Montgomery's residence was damaged or destroyed while in FBI custody. No materials or data

1 seized from Mr. Montgomery's residence were co-mingled or tainted with materials or data
2 obtained from any other source while in FBI custody. Other than federal law enforcement
3 officers exercising legitimate law enforcement duties, no person had access to any materials or
4 data seized from Mr. Montgomery's residence while such materials or data were in FBI custody.
5 No system or method of organization concerning any such seized materials or data was destroyed
6 or altered by the FBI.

7 2. All items and materials seized from Mr. Montgomery's storage unit facility, including
8 storage unit #140, by the FBI were returned by FBI to Mr. Montgomery and/or his counsel on
9 March 29, 2007. No such items or materials were retained by FBI. Nothing seized from Mr.
10 Montgomery's storage unit facility was damaged or destroyed while in FBI custody. No
11 materials or data seized from Mr. Montgomery's storage unit facility were co-mingled or tainted
12 with materials or data obtained from any other source while in FBI custody. Other than federal
13 law enforcement officers exercising legitimate law enforcement duties, no person had access to
14 any materials or data seized from Mr. Montgomery's storage unit facility while such materials or
15 data were in FBI custody. No system or method of organization concerning any such seized
16 materials or data was destroyed or altered by the FBI.

17 3. Montgomery Parties' exhibit 42, at page 2, reflects the apparent seizure of thirty-two
18 3.5" disks from Mr. Montgomery's storage unit facility. The FBI did not, in fact, seize thirty-two
19 3.5" disks from Mr. Montgomery's storage unit facility or from anywhere else. This error in the
20 inventory (exhibit 42) was corrected by FBI when it filed its return on the search warrant
21 (government's exhibit B). At the time of the search of Mr. Montgomery's storage unit facility,
22 the supervising agent (FBI Supervisory Special Agent West) made the specific and conscious
23 decision to not seize the thirty-two 3.5" disks because he had no investigative interest in any data
24 which might be contained on such disks. No evidence was presented to rebut or contradict Agent
25 West's testimony regarding the 3.5" disks. Mr. Montgomery has never contended that the FBI

1 seized the 3.5" disks reflected in exhibit 42 and has never contended that FBI failed to return
2 such disks to him.

3 4. There is no evidentiary support for Mr. Montgomery's sworn statement that materials,
4 devices, property, or data seized by FBI were "destroyed" or "damaged" or "never returned."
5 Mr. Montgomery's sworn statement (#466-2) is false.

6 5. There is no evidentiary support for Mr. Montgomery's sworn statement that FBI
7 destroyed the organization of Montgomery's work product. Mr. Montgomery's sworn statement
8 (#466-2) is false.

9 6. There is no evidentiary support for Mr. Montgomery's sworn statement that FBI
10 ravaged through the containers of Mr. Montgomery's work product. Mr. Montgomery's sworn
11 statement (#466-2) is false.

12 7. There are no disparities, irregularities, or anomalies concerning the FBI's management
13 or return of materials or data seized from Mr. Montgomery's residence.

14 8. There are no disparities, irregularities, or anomalies concerning the FBI's management
15 or return of materials or data seized from Mr. Montgomery's storage unit facility.

16 It is the United States' view that the motion (#527) for evidentiary hearing and the
17 Montgomery declaration (#466-2) were submitted for an illegitimate and fraudulent purpose;
18 namely, to advance Montgomery Parties' improper litigation and discovery strategies in this civil
19 proceeding by falsely alleging FBI malfeasance including collusion between the FBI and various
20 eTreppid Parties. The evidentiary presentation has exposed the falsity of those allegations.

21 The United States has a keen interest in an evidentiary record in these proceedings which
22 unambiguously confirms the legitimacy and integrity of FBI's practices and processes regarding
23 the seizure of materials and data from Mr. Montgomery's residence and storage unit facility, the
24 care of such materials and data while in FBI custody, and the return of such materials and data to
25 Mr. Montgomery. It is the the United States' view that, at considerable expense of time and

1 resources, such an evidentiary record has been made in these proceedings and the United States
2 urges this court to enter its findings and conclusions consistent with that evidentiary record. The
3 United States defers to the court for consideration of any appropriate sanctions against the
4 Montgomery Parties and/or their counsel on account of Mr. Montgomery's submission of a false
5 declaration and related litigation abuses.

6 Respectfully submitted,

7 GREGORY A. BROWER
8 United States Attorney

9 /s/ Greg Addington
10 GREG ADDINGTON
11 Assistant United States Attorney
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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing UNITED STATES' POST-HEARING BRIEF RE SEPTEMBER 5, 2008, EVIDENTIARY HEARING was made through the Court's electronic notification system or, as appropriate, by sending same through first class mail from Reno, Nevada, to the addressees below on September 22, 2008.

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