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SEP 1 2006  
U.S. MAGISTRATE JUDGE  
DISTRICT OF NEVADA  
BY \_\_\_\_\_ DEPU

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA**

13 In the Matter of the Search of: ) CASE NO.: 3:06-CV-0263 (formerly MJ-0023-  
14 12720 BUCKTHORN LANE, RENO, NV ) VPC)  
15 and ) REQUEST TO FILE OVERSIZED POST-HEARING  
16 888 MASTRO DRIVE, RENO, NV, STORAGE ) MEMORANDUM.  
17 UNIT NUMBERS 136, 140, 141, 142, AND 143 )  
18 \_\_\_\_\_ )

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1 Dennis Montgomery, the moveant in his F.R.Crim. P. 41(g) motion, requests permission to file  
 2 an oversized "Post-hearing Memorandum" in support of his motion under 41(g). Mr. Montgomery  
 3 makes this request because the mens rea analysis to show what the government knew and when they  
 4 knew it, and the 'failure to corroborate the charges' analysis were lengthy. Also, a good portion of  
 5 the memorandum includes citations to exhibits, three days of hearing transcripts—pages and lines,  
 6 and state court preliminary injunction hearing transcripts, which significantly beefed up the  
 7 memorandum, but were included in an effort to aid the Court. Mr. Montgomery's counsel did try to  
 8 cut the brief down, but believe the filed memorandum will aid the Court. For example, if citations to  
 9 exhibits or transcripts were relevant in several locations, Mr. Montgomery's counsel repeated those  
 10 citations so the Court would not have to go hunting for prior references or exhibit number. In  
 11 addition, as reflected in the Court's "sealed Minutes of Proceeding," dated August 17, 2006, the  
 12 Court did not limit the pages for the post-hearing memorandum. Also, the post-hearing  
 13 memorandum is not Mr. Montgomery's moving papers or opposition, so he is unsure of whether his  
 14 memorandum actually requires compliance with the thirty page limit. Nevertheless, he makes this  
 15 request in the event he is so limited. A lot is at stake, and he wants to ensure the Court has full  
 16 points and authorities.

17 Accordingly, Mr. Montgomery respectfully requests permission to file his oversized post-  
 18 hearing memorandum.

19 Respectfully submitted,

20 /s/  
 21 \_\_\_\_\_  
 22 Michael J. Flynn, Esq.  
 23 Attorney for Dennis Montgomery

24 September 21, 2006

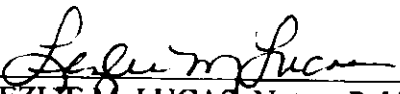
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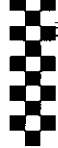
**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of the LAW OFFICE OF LOGAR & PULVER, PC, and that on the 21<sup>st</sup> day of September, 2006, I sent the above document the following ways:

Via: Facsimile 784-5181

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**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEVADA**

11  
 12 In the Matter of the Search of: ) CASE NO.: 3:06-CV-0263 (formerly MJ-0023-  
 13 12720 BUCKTHORN LANE, RENO, NV ) VPC)  
 14 and ) DENNIS MONTGOMERY'S POST-HEARING  
 15 888 MASTRO DRIVE, RENO, NV, STORAGE ) MEMORANDUM IN SUPPORT OF HIS  
 16 UNIT NUMBERS 136, 140, 141, 142, AND 143 ) MOTION FOR THE RETURN OF HIS  
 PROPERTY PURSUANT TO F.R.CRIM.P. 41(g).

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**INTRODUCTION**

1  
 2 This memo is divided into two primary sections. The first section is an analysis of the basic issues  
 3 confronting the Court, mostly without citations or transcript references. It assumes a working knowledge  
 4 of the facts and law in the record, and is designed to give the Court an overall perspective of the facts  
 5 in the context of the very timely and substantial constitutional issues before the Court. The second  
 6 section comprises a legal argument with citations, transcript references and correlations between them.  
 7 It is more like a reference guide requiring some repetition, but no prior knowledge of these proceedings.  
 8 Mr. Montgomery's counsel has chosen this approach because Judge Cooke, who has read and heard the  
 9 entire matter, is intending to prepare a Report and Recommendation to the District Judge.

10  
 11 The memo also addresses Mr. Montgomery's claim of substantial prejudice for those redacted  
 12 or sealed "facts," which the Government still conceals; and concludes that the redactions and sealings  
 13 are presumptively prejudicial, and presumably inaccurate given the Government's pervasively false  
 14 statements in the existing record. The record establishes that the Government misled this Court on every  
 15 material issue in the search affidavit when it applied for the warrants. The redactions must be more of  
 16 the same. Otherwise, the Government would have unveiled the redactions and stopped its charade.  
 17 When challenged, including the very first sentence of the search affidavit regarding West's expertise in  
 18 these alleged "crimes," the statements in the affidavit have proven to be either outright false, materially  
 19 misleading, and/or inaccurate. Those redactions, must, by law, be provided to Montgomery. Obviously,  
 20 Montgomery cannot challenge the specific redactions and sealings. But he asks the Court to review them  
 21 in light of the demonstrable falsity employed by the Government as set forth in this memo; and to rule  
 22 on the issues presented by the disclosed portions of the search affidavit and the testimony of Agent  
 23 West.

24  
 25 Moreover, if the Government is claiming that some vital national security interests are at stake

1 in the redactions and sealed documents, then it *must* either properly assert the state secrets privilege in  
2 conformity with established precedent in all pending litigation, including the civil cases, or turn over the  
3 redactions and concealed documents.

4  
5 The bottom line to Mr. Montgomery's Rule 41 (g) motion is straightforward. *As evidenced in this*  
6 *record*, the Government's material misrepresentations to this Court in the search affidavit are so plainly,  
7 knowingly, and pervasively false, probable cause under the Fourth Amendment standard of  
8 "reasonableness" is absent; and the Government's attempt to fabricate probable cause for the search is  
9 obvious. No other "reasonable" conclusion can be drawn, and no descriptive language other than  
10 "knowingly false" can be applied here. The facts in this record substantially surpass any of the arguably  
11 applicable standards of either "reasonableness under the circumstances," and/or "reckless disregard."

12  
13 Additionally, the Government's improper motive to conduct this raid on behalf of Warren Trepp  
14 in order to seize Montgomery's "source codes," when it never had an inventory of allegedly "stolen  
15 eTreppid Source Code," caused the issuance of facially overbroad and invalid warrants, lacking in the  
16 requisite particularity mandated by the Fourth Amendment. The Government's failure to meet its burden  
17 and to establish either probable cause and/ or facial "particularity" from the evidence it did adduce,  
18 mandates a ruling for Mr. Montgomery on the probable cause and facial invalidity issues contained in  
19 this record. Otherwise, justice will not be served.

20  
21 Finally, the Government's multiple admissions, when the search affidavit was challenged, should  
22 leave the Court with no alternative but to return all seized property forthwith. The Government now  
23 admits that there is no "classified information" involved in this matter whatsoever, let alone information  
24 that has been "unlawfully retained." Thus, as a matter of law, no "classified information crime" exists  
25 and there is no basis to withhold Montgomery's property on this ground.

26  
27 As to the other alleged crime, notwithstanding repeated requests, eTeppid has failed to this day



1 to provide the Government an "inventory" of allegedly "stolen source codes," i.e., "trade  
2 secrets"—something that obviously should have been done before the search. Nor will the required  
3 inventory ever be forthcoming. Both eTreppid and the Government have admitted that only  
4 Montgomery ever had access to, and/or possession of any of the disputed source codes. Thus, neither  
5 eTreppid nor the Government can ever create what it has never had—unless it steals them off  
6 Montgomery's computers. By law, Montgomery is the only true "owner" of any "trade secrets" in any  
7 of the "secret" source code because he is the only person who developed them, owns them, and then  
8 maintained the secrecy of the codes. Obviously, they have never been conveyed, owned or possessed  
9 by eTreppid. These conclusive facts mandate the granting of the Rule 41(g) motion. There was no  
10 probable cause to conduct the search in early March and, given the admissions, there is no probable  
11 cause over *six months* later to retain the seized property. The Court has no alternative but to return the  
12 property forthwith.

## 15 I. ESTABLISHED FACTS AND ANALYSIS

### 16 The "Illusory" Basis for the Illegal Raid—"Classified Information."

17 On March first and third, 2006, the United States Government, acting through the Reno FBI,  
18 under the supervision of the Reno U.S. Attorney's Office, and based on information from an Air Force  
19 Special Agent, raided the home and storage units of Dennis Montgomery. Mr. Montgomery is a pioneer  
20 in the computer industry, and an ingenious inventor and developer of computer software, which he had  
21 created, developed, refined and *copyrighted* over the previous *twenty-eight* years. The agent in charge  
22 of the raid, Agent West, swore in his search affidavit that the *Government* was seeking to seize  
23 "classified information" allegedly in the "unlawful retention" of Montgomery. But the search warrants  
24 never described or even mentioned any "classified information," or even used that term. The search  
25 affidavit, containing vague references to an eTreppid's employee statement about what she thought might  
26  
27

1 be "classified information," was not even attached to the warrants, as required by established precedent  
2 in order to fulfill the "particularity" requirement of the Fourth Amendment. Incredibly, before the raid,  
3 as the search affidavit states, both the Government and eTreppid knew that the alleged "classified  
4 information" specifically comprised "nine" allegedly "Secret" hard drives from Nellis Air Force Base; and,  
5 as the Government was forced to admit in the hearing, the nine hard drives contain nothing but useless  
6 pictures of "palm trees." Thus, the complete absence in the warrants of any particularity regarding any  
7 "classified information" —the very foundation of the alleged "crime" —let alone the specific  
8 identification of useless palm tree photos—failed to give the requisite "notice" to Montgomery of what  
9 "crime" was involved in the search. As a matter of law, the warrants are facially overbroad with respect  
10 to this alleged crime.  
11  
12

### 13 The Great Government "Palm Trees" Raid

14 Not surprisingly, this fatal blunder, (likely arising out of a bad motive given the falsity of the  
15 affidavit), as soon as it was exposed in the Rule 41 (g) motion, forced the Government to voluntarily  
16 unseal part of the affidavit and admit to another fatal blunder—the fact that the "palm trees" hard drives  
17 were not "classified" at all; and that there never was any "classified information" in the "unlawful  
18 retention" of Montgomery. It had to admit these facts because "classified information" is a "sacred cow"  
19 owned by the Government; and governed by a detailed, complex, specific, and highly regulated  
20 Governmental scheme to designate, mark and protect it; and by criminal statutes designed to prosecute  
21 violations thereof. Specifically, the only evidence the Government had pre-raid about the "classified  
22 information" allegedly in Montgomery's "unlawful retention," didn't come from the Government and  
23 wasn't verified by the Government. It was a malicious, unchecked, unverified concoction by Trepp and  
24 his employees about tapes of useless "palm trees." The only conclusion is that these twofold "blunders"  
25 by the Government were not "blunders" at all. As it did in raiding Mr. Montgomery's home for Trepp,  
26  
27

1 the Government deceitfully abdicated to Trepp its responsibility to ascertain its own "classified  
2 information."

### 3 4 The Great "Palm Trees" Raid is a Great Hoax

5 The "classified information" basis to raid Montgomery's home was a hoax against the Court; and  
6 the Government knew it, (regardless of Agent West's thinly protested excuse that he didn't have time to  
7 call Nellis Air Force base), because the Government is charged with knowledge of its own "classified  
8 information." By Executive Order 13292 and comprehensive regulations, encapsulated in the National  
9 Industrial Security Program Operating Manual (the "Manual"), and acting through an "Original  
10 Classification Authority" (an "OCA"), only the Government determines, designates, owns, and  
11 specifically "marks" what it deems to be "classified information"—not eTreppid, not it's employees, and  
12 not Agent West. <sup>1</sup> Clearly, Government employees, agents and officials must be required to determine  
13 what is and is not "classified" from an "OCA"—an authorized government agency—before breaking into  
14 a "citizen's" home on behalf of the Government to seize photos of Government palm trees. The  
15 Government knew that photos of "palm trees" had never been "classified" by Nellis Air Force Base and  
16 there was no crime.

### 17 18 19 The Government as the Principal Is Charged with Knowledge

20 Since the Government, by law, is charged with the duty of "classifying" information, it's agents,  
21 by law, including Agents Haraldsen and West, are charged with knowledge of what is "classified," as  
22 well as the duty to ascertain it. Simple agency law makes the agent responsible for the knowledge of  
23 the principal when the agent is commissioned to perform duties in connection with the precise  
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26  
27 <sup>1</sup>The Manual, Section 4-101 states: "An original classification decision at any level can be made only by a U.S Government official who has been delegated the authority in writing. A determination to originally classify information may be made only when (a) an original classification authority is classifying the information;...." (Emphasis added) (Manual, p. 4-1-1, Exhibit 15).

1 information within the principal's custody and control. Any other analysis on this issue is *not reasonable*  
2 under any objective Fourth Amendment standards. The compelling inference is that the *Government*  
3 conducted the raid for Trepp, not to retrieve "classified information." Otherwise, West, a Government  
4 Agent, would not have simply accepted the vague and baseless accusations of one of Trepp's clerks in  
5 connection with what only the Government could mark as "classified."

7 If West and the Government really believed a "classified information *crime*" had occurred with  
8 respect to "Secret" tapes of useless "palm trees," this Court can reasonably conclude that the Government  
9 would have been exhaustively diligent in determining precisely before the raid how the "palm trees"  
10 constituted "classified information"; and what *threat* to vital national security interests (as the Manual,  
11 Section 4 -101 (c), requires when "classifying" information) was involved. Common sense, the Manual,  
12 and the statutory scheme, and the plethora of cases where the Government determines what is classified  
13 and then aggressively litigates to protect its own information conclusively negates Agent West's feeble  
14 testimony that he failed to call Nellis Air Force base, when he was working with an intra-agency *Air*  
15 *Force Special Agent*, Paul Haraldsen, who was providing him with the factual basis for the alleged  
16 "crime." His excuse is an affront to common sense and an insult to this Court, particularly as the  
17 reviewing Court issuing the warrants. Otherwise, it now places this Court in the untenable position of  
18 finding that uncorroborated Government sources can manufacture any excuse, however absurd, to justify  
19 a false statement by the Government in a search affidavit in connection with information exclusively  
20 under the Government's control and which constitutes the very foundation of the alleged "crime." Only  
21 the Government had the power, the means, the authority, and the responsibility to inform the reviewing  
22 Magistrate - Judge what was "classified" in order to obtain the warrants.

26 Of course, the Government never offered any explanation from Agent Haraldsen about "what  
27 he knew and when he knew it." Nor could a total denial of knowledge by Haraldsen, or a ridiculous

1 excuse like West's, alter the analysis. By any measure of common sense in applying the Fourth  
2 Amendment particularity requirement, where the Government falsifies information that it exclusively  
3 possesses, and where that very information is the basis for the crime, the Government, not just West,  
4 lacked probable cause to believe Montgomery unlawfully retained "classified information."  
5

6 No "Classified Information" Mandates the Immediate Return of All Property—And More.

7 Since there is no "classified information" in the seized items, the motion must be granted and  
8 everything returned forthwith. As a matter of law, the search and seizure violates the Fourth  
9 Amendment and vitiates the warrants regardless of any other alleged basis for the search. The statements  
10 in the affidavit were knowingly false, not only with respect to the "palm trees crime," but also with  
11 respect to the "theft of trade secrets," and the failure to attach the affidavit to the warrants in connection  
12 with both alleged crimes was fatal. This Court was deceived by the Government with respect to both  
13 alleged "crimes" and both raids three days apart—one compounded by the other. First, on February 28,  
14 2006, when it issued the warrant for the search on Montgomery's home on March 1; and then again on  
15 March 3 when it issued the storage unit warrants.  
16  
17

18 The Fourth Amendment Requires "Particularity" Based on Due Process.

19 If the affidavit had been attached to the first warrant, Montgomery and his counsel, who were  
20 present during the search of Mr. Montgomery's home on March 1, 2006, would have known specifically  
21 that the "classified information" sought were tapes or hard drives of "palm trees." Obviously, Mr.  
22 Montgomery knew then that the "palm trees" tapes were not classified, could not be evidence of any  
23 "crime," and were useless, but the warrants didn't even mention "classified information," let alone tapes  
24 of "palm trees" - hence no "particularity" and no notice of items *evidencing crimes* relating to "classified  
25 information." It gets worse. While the search of Mr. Montgomery's home was ongoing on March 1,  
26 2006, his counsel vigorously attempted to find out the basis for the raid. Attorney Flynn made repeated  
27

1 phone calls to AUSA Rachow requesting access to the affidavit; attorney Stillman wrote a letter at the  
2 same time demanding access, (Letter, p. 2, Exhibit 5)<sup>2</sup>; and attorney Pulver, on-site, demanded the  
3 same from Agent West.

4  
5 AUSA Rachow told Mr. Flynn that it wasn't his case, it was AUSA Pugliese's case who was away  
6 that week, and that he didn't know anything about it except that it was to seize "classified information"  
7 from Montgomery. When Mr. Flynn demanded to know what "classified information" was sought and  
8 access to the search affidavit, Mr. Rachow refused and said that AUSA Pugliese would return the  
9 following week. (Flynn Decl., p. 3-4, Exhibit 6). That refusal precluded formal and documented  
10 notification to the Court and to the Government that the "palm trees" tapes were not "classified," and  
11 that the Government needed to, at the very least, call Nellis Air Force Base and verify it. Obviously, if  
12 the Court knew that the March 1 raid was based on false information in the search affidavit - information  
13 exclusively within the control of the Government - it never would have issued multiple warrants *three*  
14 *days later*. As soon as the issue was in question, the barest of judicial inquiry would have elicited from  
15 the Government that it had never bothered to make a phone call in connection with the very essence  
16 of the alleged "crime."  
17  
18

19 Instead, the Government deceitfully concealed all of these facts from Montgomery, and from the  
20 Court, and then used its continued deceptions to obtain the warrants for the storage units on March 3,  
21 2006. The Government simply trampled upon the Fourth Amendment requirement of "particularity."  
22 The compounded Government deceptions mandate the immediate return of all property from the storage  
23 units, regardless of any other considerations.  
24  
25  
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<sup>2</sup> All Exhibits refer to exhibits introduced into evidence at Mr. Montgomery's 41(g) hearing held on June 29, July 31 and August 17, 2006 before the Honorable Valerie Cooke.

### The Real Reason for the Raid.

1                   The real purpose of the raid, also cited by Agent West in his affidavit, is now obvious: the  
2 Government, acting on behalf of Trepp, Mr. Montgomery's former partner—and current adversary in civil  
3 cases pending before this court at *the time of the raid*—sought to seize and/or steal *the* twenty-eight  
4 years of Montgomery's creative work involving some of the most valuable "intellectual property" ever  
5 developed—intellectual property involving *copyrighted* computer "source codes" that have ~~ever~~ been  
6 seen, accessed, possessed, controlled, utilized, or owned by any person other than Montgomery—and  
7 this fact is so obvious, for purposes of this analysis, it is axiomatic. West's affidavit on this critical issue  
8 is a ridiculous collection of false and illogical statements, explicitly contradicted by his  
9 source—Venables; and violates the "trade secret" statutory requirement of owner "secrecy." How can  
10 a putative owner maintain "secrecy" of a "trade secret" he has never possessed, has no means  
11 whatsoever to possess and/or own; and doesn't even know what it is? Only the *real* owner can fulfill  
12 this statutory requirement. The proof is found in logic, common sense, and in the examination of the  
13 falsehoods in the Government's search affidavit. In fact, after extensive research, Montgomery has found  
14 no "theft of trade secret" cases where the defense is "ownership"; and/or "theft of trade secret cases"  
15 between competing owners—more proof that the Government improperly thrust itself into the civil cases  
16 on behalf of Trepp, an alleged owner who doesn't even know what the trade secret is.

17  
18                   If there was a shred of truth to the Government and Trepp's position that eTreppid, not  
19 Montgomery, had *owned, developed, possessed and maintained* "trade secrets" in the disputed codes  
20 for the days, months and/or years before the raid, there never would have been a raid. The Government  
21 fabricated this one big falsity, with Trepp's help, then built upon it with others. For example, this  
22 fabrication required West to present facts to the Court that *both* Venables, eTreppid's security officer, and  
23 Montgomery had access to the specific source codes in dispute at eTreppid, and that periodic copies  
24  
25  
26  
27

1 of these source codes were routinely copied and given to Trepp. West's affidavit explicitly states that  
2 the subject source codes were located on the "Source Code Server," using the "RAID Unit" and "back-up  
3 ISA" on the premises of eTreppid, and that Venables had access to them. According to West, these  
4 disputed source codes that Venables had access to on the Source Code Server related to "data  
5 compression, pattern recognition, change and anomaly detection and other inventions." (Affidavit, 3-4,  
6 Exhibit 2). West testified under oath that Venables told him that he had access to "all" of the source  
7 code at eTreppid, including the disputed code, and that Montgomery began "deleting" it after December  
8 22, 2005 when Venables went on vacation.

9  
10 The Government's representations on these facts in the affidavit, and now, are just falsehoods.  
11 Venables admittedly never had access to the disputed codes, and they were never on the Source Code  
12 Server, or the "RAID Unit" or "back-up ISA." This fact is common sense because obviously Trepp would  
13 have had Venables routinely copy the codes for him and put them in his off-site safe deposit box, as  
14 Venables references in his testimony, particularly before he left for a two week vacation in late December  
15 2005 and Montgomery and Trepp were engaged in open conflict for the prior three months. Venables  
16 swore under oath to his lack of access in the preliminary injunction hearing on February 7, 2006, *three*  
17 *weeks before* West signed the search affidavit. Venables testified in the context of his search for source  
18 code allegedly deleted by Montgomery from the Source Code Server, the RAID Unit, and the ISA, as  
19 follows:  
20  
21

22  
23 **"Q. But since you were never given prior access to the source codes for object tracking, pattern  
24 recognition, and face recognition, you wouldn't know what source codes to look for, would you?"**

25 **A. I don't know if they were ever there. I wouldn't know."**

26 . . . .

27 **"Q. So again, you don't know if they were ever there? Correct? [referring to the presence of the  
referenced source codes on any eTreppid computers or media including the 'Source Code Server']"**



1 **A. Correct.**" (Prelim. Inj. Tr., Vol. 2, p. 163:12-164:5, Exhibit 33).<sup>3</sup>

2 When West was presented with this testimony at the hearing, he testified as follows:

3 **"A. Again, my understanding was that Venables and Montgomery had access to all the source**  
4 **codes. They had administrative profiles which would allow them access to all the folders in the source**  
5 **code server as well as the ISA server.**

6 **I don't know specifically who had access to Montgomery—to what you say is Montgomery's**  
7 **source code." (Emphasis added).**

8 **"Q. Well you just heard what I read from Mr. Venables under oath saying he didn't even know**  
9 **what they were? . . . . .**

10 **"A. He did not tell me that.**

11 **"Q. He told you something different?**

12 **"A. He told me that all of eTreppid's source code was maintained on the source code server**  
13 **and that it was deleted, or I think he termed it the majority of the source code was deleted." (Prelim.**  
14 **Inj. Tr., Vol. 2, p. 165:23-166:7, Exhibit 33).**

15 The fabrication by West in his affidavit that Venables had access to all of the source codes,  
16 including codes for "pattern recognition," "object tracking," etc. then led to the fabrication that  
17 Montgomery had deleted the disputed codes and/or somehow "stolen" them. But common sense tells  
18 us that if Venables never had access to the codes he could never determine if they had been deleted or  
19 stolen, as he testified three weeks before the raid; and if he did have access he would have copied them  
20 for Trepp. On this issue of eTreppid, through Venables, having possession of the disputed source codes,  
21 the Government's affidavit is a fabrication.

22 The truth is that Montgomery never disclosed the source codes to anyone, including eTreppid,  
23 and that the collusion between the Government and Trepp caused them to make false statements to the  
24 Court in order to seize them. Nor is there any evidence that the disputed codes were ever even on  
25 eTreppid premises. Source codes are lines of information readable by a person that trigger "binary" forms  
26 of "executable" code on a computer in order to run a software program. The source codes in dispute

27  

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<sup>3</sup> The preliminary injunction transcript refers to the Feb. 7, 2006, state court preliminary  
injunction hearing in *eTreppid, et al v. Montgomery*, later transferred to U.S.D., Reno, 3:06CV-145.

1 here were never, in fact, on eTreppid premises. The Government in this matter never utilized its  
2 specially trained agents skilled in computer software matters, and trained in Department of Justice  
3 (hereinafter "DOJ") protocols and policies regarding "computer crime" to investigate this case. Indeed,  
4 these specialists were ignored by the local authorities. The Reno FBI and the U.S. Attorney's Office did  
5 not function like independent Government investigators cooperating with DOJ experts, and sworn to  
6 uphold the Constitution. Instead the evidence shows they acted like local, collusive thieves with Trepp,  
7 blindly ignoring the Constitution, the law and DOJ policy, while churning out more falsity than even  
8 Trepp.  
9

10  
11 The Search Affidavit: Theft of Trade Secrets, Source Codes, Patents and Copyrights.

12 Significantly, Montgomery's claimed *copyright* ownership of the source codes, along with the  
13 actual copyright registration numbers, which were involved in implementing the "executables" in certain  
14 Government contracts, (vaguely and ambiguously referenced in the search affidavit), were on file in this  
15 very Court and publicly available to the Government weeks before the search. The record establishes that  
16 these copyrights were never conveyed to eTreppid.  
17

18 Fundamentally, the search affidavit contains no specific and/or "particular" reference to any  
19 specific allegedly "stolen trade secrets" whatsoever. It does make a general reference to "eTreppid source  
20 code" and to a number of patents. By law, the patents cannot be "trade secrets." Under principles of  
21 property law and/or under facts in this matter, the affidavit references to "eTreppid source code" cannot  
22 reasonably, or even remotely, constitute either "eTreppid trade secrets," most certainly not "stolen trade  
23 secrets," and the affidavit references do not supply any means either at the time of the raid, or even with  
24 the facts known today, for the Government to identify and seize any "stolen trade secrets." The term  
25 "eTreppid source code" is meaningless.  
26  
27

The case law and trade secrets statutes, as discussed in Section II, are dispositive on the issue of

1 ownership, in favor of Montgomery. No criminal cases between two alleged owners involving "theft of  
2 trade secrets" were found. The civil cases universally mandate that the "owner" of a "trade secret" must  
3 identify with "particularity" the precise "trade secrets" claimed. The criminal "trade secret" statute, 18  
4 U.S.C. 1832, et seq., relied on by the Government to support probable cause requires that the "owner"  
5 take "reasonable measures to keep such information secret." 18 U.S.C. 1839 (3)(A). Trepp could never  
6 comply with the statutory or case law requirements because he never possessed the disputed source  
7 codes and can never identify them with any "particularity" whatsoever; ipso facto, he is not the "owner."  
8 Prior to the raid, the Government knew these facts relating to ownership of the codes because it  
9 knowingly falsified the only two written documents governing these issues—"The Contribution  
10 Agreement" and "The Operating Agreement"—both of which West quotes at length in his search  
11 affidavit.

12  
13  
14 The only relevant affidavit references to the "theft of trade secrets" contain such knowingly explicit  
15 falsehoods, including deletions from documents patently material to ownership and probable cause; and  
16 alleged "facts" so intentionally misleading, all submitted under oath to this Court, by the Government,  
17 in and of themselves they individually and/or collectively vitiate the warrants. The evidentiary hearing  
18 established that Montgomery had not "stolen" any "trade secrets" and the Government knew it at the time  
19 of the raid. Incredibly, the Government has now admitted that before the raid, it *did not know what*  
20 *"source codes" it was searching for and/or attempting to seize, nor did it have any means whatsoever*  
21 *either at the time of the raid, or currently, to identify any "stolen" source codes of any nature or*  
22 *description.* In fact the Government has admitted that it knew before the raid that it was not even dealing  
23 with "stolen" source codes, but allegedly "deleted" codes from eTreppid computers.

24  
25  
26 Intentional and Knowing Falsehoods: The Contribution Agreement.

27 The Government's search affidavit, collectively put together by West, Haraldsen and Trepp, based

1 the entire raid relating to the "theft of trade secrets" on the premise that Montgomery had conveyed the  
2 disputed codes to eTreppid *in a written document* - "The Contribution Agreement," (the "Agreement").  
3 The Government quoted at length from the specific sentence (the "conveyance sentence"), in the  
4 Agreement, paragraph 1.2.1, relating to Montgomery's conveyance and eTreppid's purchase of specific  
5 "software programs" and "Source Code" in order to establish in the affidavit a written transfer of  
6 ownership and possession of the allegedly stolen trade secrets. As the Court now knows, the  
7 Government intentionally misrepresented to this Court the meaning, the language and the contents of  
8 not only the entire Agreement, but of the "conveyance sentence" itself. The Government extensively  
9 quoted from the broad language of *transfer* of "software programs," "copyrights," "trademarks," "trade  
10 secrets," and specifically "Source Codes" etc. in the "conveyance sentence," then ~~deleted~~ the very next  
11 phrase from the same sentence that explicitly limited the "software" and "Source Code" conveyance to  
12 that "certain Software Compression Engine Development Program contained on CD No. 1." (Emphasis  
13 added).

14  
15  
16  
17 This phrase can only have been *knowingly deleted*. The Agreement, *and this phrase*  
18 (hereinafter the "deleted phrase"), was admittedly in the possession of the Government, including Agent  
19 Haraldsen, Agent West, and its source, Trepp. The only reasonable conclusion to draw is that the  
20 Government knowingly deleted it because it knew that Montgomery, not eTreppid had a lawful claim  
21 of ownership and possession to any and all, copyrights, trade marks, intellectual property, "source  
22 codes," "trade secrets" etc. not "contained on CD No. 1", as the "Contribution Agreement" explicitly  
23 recites. The fact that the Government specifically quoted the phrase immediately prior to the deleted  
24 phrase, which contains a laundry list of references to "copyrights, trade marks etc., all contained in the  
25 same sentence then concluding in the deleted phrase, compels a conclusion of a knowing, intentional  
26 and deceptive deletion. *Themens rea* involved in the deleted phrase speaks volumes about Government  
27

1 deception in this matter.

2           The incredibly false excuse proffered by the Government during the hearing that Haraldsen  
3 sent a copy of the Agreement to West with the “top” cut off, thereby *deleting* paragraph, 1.3 at the top  
4 of page 2 of the Agreement, which immediately followed paragraph 1.2.1, is more evidence of knowing  
5 and intentional deception by the Government. That paragraph recites:

6  
7           ***“Notwithstanding any of the foregoing [referring to the “conveyance sentence”] Contributor is***  
8 ***specifically not contributing, transferring, or conveying to INTREPID under this agreement or***  
9 ***by any other means, nor is INTREPID acquiring from contributor, any other tangible or***  
10 ***intangible assets of contributor not specified herein . . . ”***

11 Clearly both Trepp and Haraldsen had the complete Agreement; and it was on file in this very Court  
12 weeks before the search with complete quotes from these specific paragraphs. The Government’s use  
13 of a “cut off” Agreement is both insulting and disingenuous. The “conveyance sentence” was not “cut  
14 off.” The Court should not sanction such manifest misconduct in a Fourth Amendment analysis *by a*  
15 *Government affiant on the single most material issue in his affidavit—ownership and possession . No*  
16 *other reasonable inference can be drawn from these facts but knowing and intentional falsehoods made*  
17 *under oath by the Government.*

18  
19           The Deleted Phrase From the Operating Agreement.

20           As if such chicanery was not enough, the Government added more deception. In an effort to  
21 show the Court that Montgomery was bound by an “Agreement Not to Compete” preventing him from  
22 disclosing and/or using “trade secrets” after he left eTreppid, (agreements commonly involved in  
23 intellectual property cases), the Government falsified the precise sentence in the search affidavit relating  
24 to that issue in the “Operating Agreement.” The relevant sentence states:

25  
26           **“So long as MONTGOMERY is appointed as a Committee Member and/or as Chief Technology**  
27 **Officer pursuant to this Agreement,** MONTGOMERY and his Affiliates, agree that, during the  
term of this Agreement, none of them shall compete with the LLC, whether for their own account  
and/or for the account of others, individually, jointly with others, or as a part of any other limited

1 liability company, limited partnership, general partnership, joint venture, corporation or other  
2 entity, by: (i) developing, licensing or exploiting in any manner any software programs or other  
3 technology which is competitive with the Technology or the Business of the LLC or providing any  
4 services or supplies which are encompassed within the definition of the "Business" of the LLC set  
5 forth in this agreement" . . . .

6 The Government knowingly deleted the very first phrase, underlined above ("deleted phrase no. 2")  
7 which made the Agreement Not to Compete only valid "[s]o long as Montgomery is appointed as a  
8 **Committee Member an/or as Chief Technology Officer.**" When West signed the affidavit, Montgomery  
9 was neither a Committee Member nor Chief technology Officer. Obviously, he knew it because he  
10 deleted the phrase and did not inform the Court that he had done so. It gets worse.

11 Nor was Montgomery an "employee" as the Government falsely informed the Court. In the  
12 search affidavit, the Government stated that Montgomery assigned various patents in 2000 and 2001  
13 "while an employee at eTreppid." This is false. Even eTreppid treated Montgomery as an "independent  
14 contractor" before December 31, 2002 as proven in the K-1's attached to the Declaration of Greg Gilbert,  
15 attached hereto. Coupled with all of the other fabrications, this Court can only conclude that such  
16 cumulative falsehoods were intentionally designed to deceive the Court into issuing warrants the  
17 Government wasn't entitled to obtain. Incredibly, West admitted at the hearing that he used the assigned  
18 patents to prove Montgomery's alleged status as an "employee," which contain absolutely no reference  
19 whatsoever on this issue, but ignored asking Trepp for W-2's during the critical years 2000 to 2002. And  
20 the parade of deception only gets worse.  
21

#### 22 Montgomery's Security Clearance

23  
24 West testified at the hearing that he knew Montgomery had a "Top Secret " clearance to possess  
25 "classified information" *issued by the Government.* West claimed that he checked with Venables and  
26 some commercial on-line source used by Government contractors to determine if it had been  
27 "suspended." But only the Government can issue "security clearances" (which West admits) and only the

1 Government can “suspend” or “terminate” them after notice, a hearing, and compliance with the due  
2 process requirements found in Executive Order 10865 and Department of Defense Directive 5220.6  
3 (Exhibit 24). Montgomery’s clearance has, by law, never been suspended regardless of Trepp’s  
4 manipulations. Once again, the Government deceitfully abdicated to Trepp it’s responsibility to  
5 determine the status of Montgomery’s clearance, which only *the Government* could suspend. And it gets  
6 worse.  
7

8 No Facility Clearance—No eTreppid Right to Store “Classified Information”

9 West testified that he knew before the raid that eTreppid did not have a “Facility Clearance” to  
10 “store” classified information, and that Montgomery had a Top Secret Clearance to possess it; and that  
11 eTreppid had been unsuccessfully trying to get such a clearance for three years, but that Montgomery had  
12 successfully possessed his clearance for the entire three year period. In his affidavit he recites at length  
13 how Patty Grey provided facts to him establishing probable cause to believe that Montgomery had taken  
14 the “Secret” “nine palm trees” hard drives “stored” in eTreppid’s safe. In order to deal with this thorny  
15 problem in his search affidavit, and convince the Court that “classified information” *properly “stored”* in  
16 *eTreppid’s possession* had been taken by Montgomery, West inserted on page 4 of his affidavit the  
17 following: **“On August 1, 2005, SOCOM amended the Department of Defense (DOD) contract  
18 Security Classification Specification, DD form 254, permitting eTreppid to store Secret Material at the  
19 facility.”**  
20  
21  
22

23 At the hearing, Montgomery challenged the validity of any “Facility Clearance” and the validity  
24 of “Form 254” as recited in the affidavit. So the Government then introduced “Form 254.” Exhibit 34).  
25 But like every other time Montgomery challenged the affidavit, the Government’s evidence was  
26 manufactured. Form 254 was not signed and, in fact, had never been signed. Nor has the Government  
27 ever proffered a signed Form because it doesn’t exist. The reason is that the Manual, Section 2-102 c,

1 (p. 2-1-1, Exhibit 15), mandates that in order to obtain a "Facility Clearance" eTreppid must **"have a**  
2 **reputation for integrity and lawful conduct in its business dealings.** " Given Trepp's unsavory "business"  
3 background, well documented in books, court cases, SEC investigations, (Exhibit 9), FBI investigations  
4 when he was at Drexel and currently in Ohio (Exhibit 8), eTreppid could not obtain a clearance to "store"  
5 classified information. West clearly knew it because he painstakingly attempted to deal with this very  
6 serious problem in his affidavit.  
7

8 But, once again, one falsehood led to another. The affidavit is just patently *false* on each and  
9 every one of these issues: (a) "classified information" was never "stored" at eTreppid; (b) the "palm  
10 trees" hard drives were never "classified" at all; (c) Form 254 never gave eTreppid the clearance to  
11 "store" anything including the "palm trees"; and (d) the "unlawful detention" of useless "palm trees"  
12 never happened. Indeed, a close reading of West's attribution to Patty Grey about the "nine hard drives"  
13 being in the safe, not being in the safe, being moved, being found etc., reveals this purported "crime"  
14 to be just a fabricated charade. The Government deceitfully abdicated its responsibility and obligations  
15 to Trepp.  
16  
17

18 The Court should not sanction such obvious perfidy, particularly by a Government affiant. West  
19 cannot even blame a "citizen informant," let alone one with a polluted background like Trepp, for these  
20 falsehoods. Cumulatively, they were designed to mislead the Court into believing that Montgomery was  
21 an "employee" who had taken "classified information," who had transferred all of his "Technology" to  
22 eTreppid; and who was barred from even possessing eTreppid trade secrets for any of the stated  
23 restrictions, i.e., "developing, licensing or exploiting" etc.; and that "all" of the "Technology" and  
24 "software programs" were owned and possessed by eTreppid; and that Montgomery was prohibited from  
25 using "Any Technology" "in competition" with eTreppid. Each and every one of these Government  
26 representations were and are completely false. - *all contradicted by the deleted phrases, and the admitted*  
27



1 testimony of West and the Government's documents.

2 Basic principles of equity should require this Court to rule that Government falsehoods permeate  
3 these proceedings to such a degree that the Government has "unclean hands" with respect to its claim  
4 of probable cause, or claimed "particularity" in the warrants or affidavit.  
5

6 Pre-Raid Judicial Knowledge and/or Inquiry Into Facts in the Search Affidavit.

7 If the Government had highlighted or referenced the ~~deleted~~ phrases then this Court would have  
8 known what specific property had been conveyed by Montgomery and, therefore, what specific  
9 property—trade secrets—had been allegedly "stolen" by Montgomery, i.e., the very specific "source  
10 code" belonging to eTreppid "contained on CD No. 1." Moreover, if the Government had not deleted  
11 "phrase No. 2," the Court would have known that there were substantial issues as to what, where and  
12 when the disputed software was developed, that Montgomery was not under an "agreement not to  
13 compete"; and that Montgomery claimed ownership to all of his intellectual property not "contained on  
14 CD No. 1," and expressly excluded in the "cut off" paragraph. Alternatively, if the Government was  
15 attempting to obtain a warrant for the source code "contained on CD No. 1," then the claim of "theft"  
16 was legally impossible because those codes had already been patented by Montgomery; and/or on the  
17 face of the affidavit, had allegedly only been "deleted" not stolen; and there was no "particularity" in the  
18 warrants referencing either "CD No. 1," or the source codes on it. Finally on this point, the  
19 Government's own fabrications prevented it from claiming that Montgomery had even stolen "CD No.  
20 1" because it never informed the Court that "CD No. 1" existed. Thus, the Government's own falsehoods  
21 prevented it from providing to the Court the "particularity" required under the Fourth Amendment for that  
22 alleged theft. Once again, one BIG falsehood leading to a multitude of others prevented the  
23 Government from providing the Court a legitimate and complete affidavit for the alleged theft of "CD No  
24 1." And it gets worse.  
25  
26  
27

1 If the Government was trying to support its probable cause and "particularity" requirements with  
2 regard to theft of source codes—theft of trade secrets—other than those on "CD No. 1," the falsehoods  
3 just get compounded; the Government's corrupt intrusion into a purely civil matter gets sneakier, and  
4 the Fourth Amendment gets forever subverted. As a matter of law, at this juncture, given the  
5 Government's knowing falsehoods, there can never be probable cause for this search. First, because the  
6 Government inserted the "conveyance sentence" in the affidavit without the deleted phrase, it fabricated  
7 a false basis for the Court to determine that the written Agreement conveyed "all" of Montgomery's  
8 intellectual property, i.e., all of his "software programs," all of his "copyrights," all of his "Source Codes,"  
9 etc. This is and was simply false because, as the evidence shows, only "CD No.1" had been conveyed.  
10 Second, by deleting the phrase in the Operating Agreement, it fabricated a false basis for the Court to  
11 determine that Montgomery was unlawfully in possession of "all" "Technology" and "software programs"  
12 which were "*in competition*" with eTrepid.

13 These compounded falsehoods caused the Court to issue overly broad warrants to seize "any  
14 computer files protected by copyright" etc., "any computer hardware" etc., "any computer software"  
15 etc., "any computer related documentation" etc., without regard to Montgomery's rightful ownership  
16 or possession of his own source codes, trade secrets etc., because the Government had deceived the  
17 Court into believing that "any" of the Technology in Montgomery's possession might be "in  
18 competition" with eTrepid. And this entire perverse scheme was based on the false nomenclature in  
19 the warrants that "any" of these items constituted "eTrepid Source Code"; and that Montgomery had  
20 "stolen" it as part of "eTrepid Trade Secrets." This, of course, all flies in the face of the truth in the  
21 "deleted phrases" that Montgomery had only conveyed his intellectual property "contained on CD No.  
22 1"; everything else was explicitly excluded by the Agreement; and that there was no "Agreement Not to  
23 Compete." Thus, Montgomery was legally entitled to be "in competition" with anyone involving his own

1 intellectual property. Again, one falsehood led to another.

2 Had the Government truthfully informed the Court of the deleted phrases, the Court would have  
3 known and had to confront multiple issues to determine whether the requisite probable cause even  
4 existed and the Court would have required constitutional "particularity." Issues such as the following:  
5 did the FBI have CD No. 1? Had it been analyzed? What was on it? Did Montgomery allegedly "steal"  
6 the codes on CD No. 1? Were other codes in dispute? Who owned them and what evidence existed to  
7 support ownership? Who possessed any other disputed source codes? Who had the right of possession?  
8 Who had actual possession? Were they "trade secrets?" Had they been "deleted" or "stolen?" Was  
9 Montgomery an owner, independent contractor, employee? Was there a covenant not to compete as the  
10 Government falsely claimed? Was this a civil matter that the FBI had no right to thrust itself into? Had  
11 the FBI properly investigated the matter before seeking a warrant? What was the relevance and legal  
12 significance of the patents, and/or of the dates when they were "assigned?" Was there any real and  
13 immediate threat to the Government? Was that threat legitimate, or were the sources for that threat  
14 legitimate, or in collusion with Trepp, or had those sources verified the threat? Did the threat involve  
15 "classified information?" Had the appropriate Government Agents checked, verified, and received  
16 certification of the "classified information" according to law from a source charged with responsibility  
17 by law? If there was a known civil dispute between two claimed owners, what if any DOJ policy existed  
18 on intruding into that dispute? Etcetera, etcetera.

19 The Government falsehoods thwarted legitimate judicial inquiry. The warrants, affidavits, search  
20 and seizure must be adjudged for what they are: cumulative falsehoods designed to improperly take  
21 property for Trepp. Otherwise, the Court can only conclude that the Government agents involved in a  
22 matter as serious as this, have the experience, expertise, legitimacy, training and vested authority of the  
23 village idiot acting as the Mayor. And we know that is not the case.

1                   Redactions and Sealed Materials Unavailable to Mr. Montgomery.

2                   If any portion of the redacted affidavit and/or sealed documents, not presently available to  
3 Montgomery, contain statements by either Haraldsen, or West, or Trepp or his employees, which purport  
4 to support probable cause, the evidence shows that *none* of these sources are either reliable, credible or  
5 trustworthy. Moreover, since Haraldsen, (sending a "cut off" CD and not checking with Nellis, when he  
6 worked for the Air Force as a Special Agent involving "classified information"), West and Trepp have  
7 demonstrably engaged in knowing falsehoods. This Court must reasonably disregard any of their  
8 redacted statements and/or sealed documents. The only reasonable conclusion is that Government  
9 efforts to maintain their secrecy is a continuum of Government deception. Montgomery's inability to  
10 challenge such misconduct is severely and fatally prejudicial under these circumstances.

13                   No "Inventory"—No "Stolen Property"

14                   One overriding factual basis for the foregoing conclusions repeatedly emerged during the  
15 evidentiary hearing. Notwithstanding the FBI's allegedly repeated requests prior to the raid in early  
16 March and right up to the last day of evidentiary hearing in this matter, *six months later*, Trepp and his  
17 cohorts have never given the FBI an *inventory* of the allegedly "stolen property," i.e., an inventory of the  
18 allegedly stolen "source codes." In other words, the alleged owner, to this day, cannot even describe  
19 or identify what if any "source codes" have been "stolen," or removed from eTreppid. The only  
20 reasonable conclusion to draw from these admittedly concrete facts is that Montgomery is the lawful  
21 owner and possessor of any disputed source codes—not Trepp and/or eTreppid. Because of these  
22 foundational facts neither the warrants nor the affidavit allege any specific facts claiming that  
23 Montgomery has "stolen" any particular source code. At best, there is only a vague and ambiguous  
24 general assertion that "source code" had been "deleted" from eTreppid computers.

27                   "Deleted" Not "Stolen" Source Code.

1 Deleted source code is obviously not "stolen source code" - hence no crime for the "theft of  
2 trade secrets." Moreover, source code that was never on the eTreppid computers or servers, ~~as~~ Venables  
3 admitted, could never have been deleted; and if Venables never had access to it, as he has admitted, he  
4 could never know whether it was either on the computers or deleted. Conclusively, "deleted" source  
5 code, even assuming there were facts to support that spurious accusation (source code was deleted on  
6 a routine basis at eTreppid, and the "executables" on the Government contracts were admittedly deleted  
7 in the spring/summer of 2005 by "Active Kill"), could not support probable cause to seize "stolen trade  
8 secrets" from Montgomery's home or storage. So the FBI simply ignored all of the basic and fundamental  
9 facts relating to the alleged "theft" of the "source codes," not even knowing if they constituted "trade  
10 secrets," and executed a proscribed "general warrant" utterly lacking in any specificity, let alone that  
11 required by the Fourth Amendment.  
12  
13

14 Six Months Later and the Government Still Cannot Identify "Stolen" Source Code.

15  
16 To this day, if the FBI opened the computers and storage media seized from Montgomery's home  
17 and storage, it could not identify, or even compare Montgomery's copyrighted and/or proprietary "source  
18 codes" developed over the previous twenty-eight years from the allegedly "deleted," or even "stolen"  
19 source code it sought to seize. And now the Government knows that Venables cannot identify the  
20 disputed codes. Incredibly, the FBI still does not have "CD No. 1," the only property conveyed by  
21 Montgomery to Trepp by written agreement as required by the 1976 Copyright Act, nor has it checked  
22 the publicly available source codes on the patents conveyed to eTreppid in 1990-91, nor does it have  
23 an "Inventory" of stolen property. Indeed, if the FBI ever does open the computers and storage media and  
24 obtains Montgomery's copyrighted and/or any of his exclusively proprietary source codes, all developed  
25 before December 31, 2002, it would be effectively stealing them for Trepp and/or for the Government.  
26  
27 Then a real crime and irreparable harm will have occurred.

1           Government Knowledge of Montgomery's Sole and Exclusive Access to the Source Codes.

2           This record contains unrefuted testimony by Montgomery from the preliminary injunction  
3 hearing, and in his declaration that *all* source codes used on the Government contracts were completely  
4 created and developed by Montgomery prior to December 31, 2002, when even eTrepid treated  
5 Montgomery as an independent contractor. (Prelim. Inj. Tr. Vol. 2, 163:7-165:3, Exhibit 33). This  
6 testimony is buttressed by Montgomery's K-1's (treated by the IRS as 1099's) as explained in the  
7 declaration of CPA Gilbert, attached hereto, (see also K1s, Exhibit 29), and by the fact that no one at  
8 eTrepid has ever had access to the source codes used on the government contracts, *as admitted under*  
9 *oath by Venables three weeks before the raid*, and by the explicitly exclusionary language in the  
10 Contribution Agreement.  
11

12           Again, the Government must be charged with this knowledge because sworn testimony on this  
13 material fact was in Trepp's possession, the complaining party, in a certified transcript, also available to  
14 the Government (notwithstanding West's lame protests to the contrary) weeks before the search. When  
15 he prepared his affidavit, West knew how important the fact of access was to the issue of lawful  
16 ownership and possession of the source codes/trade secrets; West knew that he needed an inventory of  
17 what was "stolen"; and that there was a dispute as to what source codes were owned by Trepp versus  
18 Montgomery. The specific testimony of Venables on this critical issue, West's only source on this point,  
19 stated that Montgomery had sole and exclusive access to the codes/trade secrets. The only reasonable  
20 conclusion, *given the Government deletions in both of the documents* cited by West in his affidavit, is  
21 that it knew that Montgomery, not eTrepid, had a superior claim to ownership of the source codes  
22 which the Government was trying to seize for Trepp. That is why the Government presented a now  
23 obviously false picture to this Court that eTrepid, through Venables had access to everything. This sworn  
24 part of the affidavit is just plain false. Yet, again, Agent West was not only obligated to determine it's  
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26  
27

1 accuracy, *his deletions* deceived the Court on this precise issue. It's difficult to believe West's testimony  
2 contradicting Venables, when Venables gave precisely the opposite testimony three weeks before under  
3 oath; and had worked for years with no access to perhaps the most vital source codes in the world  
4 involving the war on terror.  
5

6 Agent West Has Not Been Truthful with the Court.

7 Since they have now both testified under oath, someone is either lying, or grossly distorting the  
8 truth. Is it reasonable to believe that Venables would lie to a Government Agent engaged in an official  
9 criminal investigation on one of the most material facts involving the search when he had just testified  
10 truthfully days or weeks before—particularly where West intentionally made material deletions with  
11 respect to ownership of the codes? Or, is it more likely that Venables misled West by vague and  
12 ambiguous statements about access to "all" source code and that West just accepted these statements  
13 without further questioning? West and/or Venables are either now lying on this vital point or are still  
14 trying to mislead the Court. Reasonableness under all of the circumstances suggests that *West's deletions*  
15 *of the key phrases* conclusively places the mantle of responsibility for these fabrications on the  
16 Government. Plainly, if neither eTreppid, nor it's employees, like Venables, were ever given access to  
17 Montgomery's source codes, which the evidence clearly shows, the reasonable inference is that  
18 Montgomery, not eTreppid owned and lawfully possessed the codes. Coupled with the failure to obtain  
19 an inventory of the "stolen codes," both pre-raid and to this day, the only reasonable inference to draw  
20 on this record is the fabrication of a knowing falsehood on this vital issue of access/ownership. At some  
21 point, claims of blunder, incompetence, ignorance and "I was told something different" just don't ring  
22 true. Cumulative material misstatements by an experienced, intelligent Government Agent who  
23 professed expertise and experience in the very first line of his sworn affidavit, notwithstanding his sworn  
24 disclaimers in the hearing, (another change as soon as challenged), amount to knowing falsity.  
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27

1 The foregoing, coupled with the now infamous deletions, coupled with West's thoroughly  
2 implausible sworn testimony that Montgomery pulled his car into the driveway, then into the street, then  
3 Montgomery asked to pull into the garage, when, co-incidentally his lap top was in the car (for which  
4 there was no warrant) should cause this Court to seriously question the credibility, reliability and  
5 truthfulness of Agent West.  
6

7 Who Really Wanted to Steal the Source Codes?

8 The foregoing facts, and the fact that Trepp was demanding \$500 million from the Government  
9 for a portion of the source codes in September 2005, when his conflict with Montgomery reached its  
10 two-year zenith; coupled with the fact that the source codes are critical to the war on terror—the single  
11 most important, and costly issue confronting the U.S. and the world today—raises significant issues of  
12 motive and intent on the part of the two perpetrators—the Government, i.e. it's officials and agents on  
13 the one hand, and, of course, Trepp on the other. Montgomery has always solely and exclusively had  
14 the codes. The Government, its officials—former Air Force Pilot now General Bath, former Air Force  
15 Pilot now Congressman Gibbons, and Air Force Agent Haraldsen; and Trepp have never had possession  
16 or access to the codes. (It may not be a coincidence that Nevada U.S. Attorney Daniel Bogden, whose  
17 office generated the application for the warrants was also in the Air Force Jag office, is a Republican, and  
18 was sponsored for his appointment by Gibbons, and that Gibbons has received hundreds of thousands  
19 of dollars from Trepp). The Government/Trepp trying to seize these specific codes in a patently illegal  
20 search based on material falsehoods creates an overriding and compelling inference that certain  
21 Government officials related through Trepp also had a motive to steal the codes, and split the proceeds  
22 from any sale either to the U.S. or abroad. Indeed, given Trepp's unquenchable greed illustrated in his  
23 past Drexel Junk Bond criminal association to steal billions of dollars, Trepp and his Government cohorts  
24 are capable of trying to sell this technology to anyone, in order to blackmail the United States.  
25  
26  
27



1 Trepp's conduct and past history incontrovertibly support this premise. Montgomery's does not.  
2 Montgomery has had the codes for at least seven years and has only assisted the Government since  
3 9/11/01. Trepp pocketed all of the money from the Government contracts—over \$11 Million, giving  
4 Montgomery nothing. That is why their conflict began in September 2005 when Trepp said to "stop  
5 processing," "we'll make them buy it for \$500 Million." Since the raid, Montgomery has silently and  
6 without compensation, used the codes to process vital national security information relating to terrorist  
7 communications; and has given it to some of the highest officials of the Government, not associated with  
8 Haraldsen, Bath or Gibbons, et al. This information, including flight numbers, has been documented and  
9 used by officials within our Government weeks before the recent attempts to fly airliners containing  
10 "fluid bombs" out of London. They know that Montgomery is the real patriot; but at this time, local  
11 power brokers in Nevada appear to be directing this case, over money.

#### 14 Government Avoidance and Disregard of Established Law.

15 Moreover, Government avoidance of applicable statutory law relating to trade secrets—only  
16 the true owner can maintain secrecy—and ignoring Ninth Circuit precedent prohibiting searches based  
17 on "any" and "all" computer related items particularly in connection with intellectual property "crimes"  
18 further substantiates an inference of bad Government motive, at least on the part of some officials. The  
19 combined effect of avoidance and misconduct by the Government, aside from Trepp's falsehoods, raises  
20 a motive to steal intellectual property from Montgomery on the part of some Government officials. Their  
21 misconduct is too blatant and irrational to conclude otherwise.

#### 24 Source Code Secrecy and Irreparable Harm

25 For these reasons, the search and seizure should be adjudged unreasonable, unconstitutional,  
26 lacking in probable cause and based on an overbroad and facially invalid warrant. All of Mr.  
27 Montgomery's property, including copies of hard drives, should be returned forthwith. Once the secrecy

1 of the codes is compromised, their value is essentially destroyed. *Irreparable harm occurs the moment*  
2 *the secrecy is lost.* The Government and Trepp knew this fact before the raid. They didn't care what  
3 laws they violated as long as they seized Montgomery's codes. The Government and/or Trepp could  
4 then claim that they lawfully created the codes by "reverse engineering." In this matter, "possession is  
5 9/10th of the law." That is why Montgomery protected the codes and maintained their secrecy when  
6 he was at eTreppid. That is why the Government and Trepp ignored the Fourth Amendment, falsified,  
7 deleted and omitted material facts in the search affidavit, ignored all applicable DOJ policy, ignored  
8 Ninth Circuit precedent, never conducted any reasonable pre-raid investigation or analysis, and broke  
9 into Montgomery's home and storage like a common thief to steal something it didn't own. And that  
10 is only the beginning of the analysis.

#### 13 Searching Computers and Electronic Media

14 Unlike cases dealing with the "theft" of property where a criminal trespasser steals tangible  
15 property plainly owned by another, the purpose of this raid was to seize intellectual property lawfully  
16 in the possession of the only person who created it and who had ever utilized it or possessed it, for the  
17 purpose of giving it to someone who had never created it, possessed it, or owned it. But even if this  
18 matter did not involve sophisticated intellectual property, the conduct of the local FBI and the U.S.  
19 attorney's office in this matter does not pass the smell test let alone bedrock constitutional law.

22 *If these searches are deemed constitutional, in matters involving intellectual property, the*  
23 *Government can search any home, at any time, and for any reason, and, when challenged, simply claim*  
24 *ignorance of it's own policies and even of it's own personnel trained to protect Fourth Amendment*  
25 *rights. This is particularly true for searches and seizures of complex and technologically advanced*  
26 *intellectual property contained on computers and related electronic media, and the sophisticated*  
27 *technological expertise required to search and seize it.* For that reason, the DOJ and the FBI have

1 published detailed guidelines, (Exhibits 12, 14, 21) and have established special units trained in the legal  
2 and technological issues involved in intellectual property “crimes.” (Exhibits 12, 25) Here, these  
3 guidelines and the expertise of the special units trained to follow them were admittedly ignored or  
4 unknown to the Reno FBI and US Attorney’s Offices. The guidelines and the special units are directly  
5 applicable to the search and seize of the computers and computer related storage media between  
6 Trepp and Montgomery in their civil dispute. (Exhibit 25). The Government’s admitted ignorance of it’s  
7 own guidelines and special units, although suspect in itself, in the context of it’s cumulative misconduct,  
8 constitutes a direct admission that it did not know what it was doing, and, therefore, could not have  
9 acted reasonably when it raided Montgomery’s home. How can the Government, when it organizes  
10 specially trained units acting under explicitly developed policies for the specific purpose of investigating  
11 intellectual policy “crimes” and when it develops sophisticated search techniques for computers and  
12 electronic media, claim it didn’t even know the policies and units existed? Such Governmental conduct  
13 is per se unreasonable.  
14

15  
16  
17 This patently illegal raid empowered Government agents and officials, acting on behalf of a  
18 politically connected and powerful crony, to steal Montgomery’s property—in this case “property”  
19 developed over twenty-eight years that is so valuable, so advanced, so complex, so secretive, and so  
20 “intellectual,” neither the Government, nor it’s principal—Trepp and his PHD’s—are able to identify  
21 it, have ever used it, accessed it, or possessed it, and would not know it if they saw it.  
22

### 23 Factors the Court Should Consider for a Reasonable Analysis

24 In objectively reviewing the “*reasonableness*” of the Government’s conduct in this matter, this  
25 Court must consider the following essential factors:

26 1. The Government was seeking to search for and seize “source codes” that it could neither  
27 identify, nor describe by any means whatsoever, let alone with reasonable particularity; nor had the

1 "source codes" ever been created, seen, used, developed, possessed or placed on any electronic storage  
2 media by anyone other than Montgomery. (The sole iota of evidence to the contrary—Venables *alleged*  
3 *statement to West in the affidavit that he ad access to the codes, if you believe West*—is not only  
4 contradicted by Venable's sworn testimony just three weeks before the raid that he had never had access  
5 to the codes on the Government contracts—it is irrelevant to a reasonable conclusion that Montgomery  
6 had the right to posses the codes). Thus, no reasonable inference can ever be drawn that Montgomery  
7 did not, at the very least, have the right to possess the source codes, let alone own them.

8  
9  
10 2. There is no evidence whatsoever, and certainly not in the search affidavit, that the "source  
11 codes" the Government sought to seize had ever been on the premises of eTrepid, let alone outside  
12 the possession of Montgomery, nor did anyone, including the Government even possess the  
13 technological expertise to develop a program to identify and seize them, as is required by the FBI and  
14 DOJ's Manuals to search and seize computer related materials. Thus, they could only break in and steal  
15 something they had no ability and/or right to identify, let alone possess. Such conduct cannot be  
16 reasonable.

17  
18 3. The "classified information" referenced in the search affidavit, like all "classified  
19 information," was something susceptible to precise definition, particularly identifiable and *certifiable*  
20 by the "Original Classification Authority"—a *Government Agency—prior to the raid*. It was  
21 unreasonable for the Government not to check its own sources, that it owns and controls, for its own  
22 "classified information," yet raid a citizen's home on this purported basis. Because the Government  
23 was dealing with it's own "classified Information" the post raid reality that no "classified information"  
24 even existed compels an inference of pre-raid unreasonableness.

25  
26  
27 4. The same reasonable inferences must be drawn from the Government's failure to check  
and comply with it's own regulations and controls relating to Montgomery's top secret security

1 clearance. Obviously, none of the Government protocols to suspend or cancel it have ever been  
 2 complied with, and he still has it. How can the Government now claim it was reasonable not to comply  
 3 with such a fundamental process when it purportedly conducted the raid because Montgomery was in  
 4 "unlawful retention" of information which is not even "classified?" The accumulated Governmental  
 5 breakdowns manifest here cannot possibly justify any standard of reasonableness.  
 6

7 5. The avalanche of Governmental misconduct in this matter is reflected in the sworn  
 8 testimony and affidavit of Agent West. They are so replete with falsity, material omissions, evasiveness,  
 9 ambiguity and outright fabrications, they cannot objectively support any reasonable conclusion that the  
 10 Government had probable cause to conduct the raid.  
 11

12 6. Conclusively, Montgomery was an independent contractor when all of the disputed source  
 13 code had been created and developed prior to December 31, 2002. Under any applicable legal theory,  
 14 the disputed codes belonged to him.  
 15

16 7. Trepp and his agents and employees are not sufficiently reliable sources, or without bias  
 17 or motive, to justify the Government's utterly blind and unchecked acceptance of their statements,  
 18 particularly without checking the other side's facts. It just is not reasonable under all of the  
 19 circumstances to do so.  
 20

21 8. The "connection" between Warren Trepp and James Gibbons, a powerful federal official,  
 22 as evidenced by Trepp's contributions and Montgomery's Declaration must be factored into an analysis  
 23 of the Government's motive for thrusting itself into the civil dispute between Trepp and Montgomery  
 24 because it involves a civil dispute between two purported owners pending at the time of the raid and  
 25 the Government did not even check the claimed right of possession of it's target. In choosing sides, the  
 26 Government must be made to explain why it unilaterally chose Trepp's side.  
 27

**II. LEGAL ARGUMENTS AND EVIDENCE.**

1 **1. The Two Alleged Crimes Against Mr. Montgomery.**

2 Agent West claimed he had "probable cause to believe" Mr. Montgomery committed the  
3 following two crimes, (Warrant Affidavit, p. 15, Exhibit 2):

4 **A. Theft of Trade Secrets Under 18 U.S.C. §1832.**

5  
6 The government must prove beyond a reasonable doubt that (1) the defendant stole or *without*  
7 *authorization of the owner*, obtained, destroyed or conveyed information; (2) the defendant knew or  
8 *believed this information was a trade secret*; (3) the information was in fact a trade secret; (4) the  
9 defendant intended to convert the trade secret to the economic benefit of anyone *other than the owner*;  
10 (5) the defendant knew or intended that *the owner* of the trade secret would be injured; and (6) the trade  
11 secret was related to or was included on a product that was produced or placed in interstate or foreign  
12 commerce. (18 U.S.C. §1832; DOJ Manual, Computer Crimes & Intellectual Property Section,  
13 Prosecuting Intellectual Property Crimes, § VIII. B. 1. , p. 3 of 31 at Exhibit 12).

14 **B. Unlawful Retention of National Defense Information Under 18 U.S.C. §793(e).**

15  
16 "Whoever having unauthorized possession of, access to, or control over any document, writing,  
17 code book, signal book, sketch, photograph . . . relating to the national defense which information the  
18 possessor has reason to believe could be used to the injury of the United States or to the advantage of  
19 any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered  
20 . . . or attempts to communicate, deliver, transmit . . . to any person not entitled to receive it, or willfully  
21 retains the same and fails to deliver it to the officer or employee of the United States . . . Shall be fined  
22 under this title or imprisoned not more than ten years, or both. (See. *U.S. v. Morison*, 844 F.2d 1057  
23 (4<sup>th</sup> Cir), cert. denied 488 U.S. 908 (1988)[espionage statute applied to a military intelligence employee  
24 who made unauthorized transmittal of satellite-secured photographs to publisher]; *U.S. v. Weissman*,  
25 2006 U.S. Lexis 56443 (D. Va. Aug. 9, 2006)[*"To prove that the information was transmitted to one not*

1 entitled to receive it, the government must prove that a validly promulgated executive branch regulation  
2 or order restricted the disclosure of information to a certain set of identifiable people, and that the  
3 defendant delivered the information to a person outside this set . . . and knew that such communication  
4 was illegal.”)].

6 2. **The Standard of Review Is One of Reasonableness Under the Circumstances, And Here the**  
7 **Search and Seizure Were Unreasonable and Lacking Probable Cause.**

8 “The Fourth Amendment’s policy against unreasonable searches and seizures finds  
9 expression in Rule 41.” *U.S. v. Ventresca*, 380 U.S. 102 (1965). “Rule 41 reflects the Fourth  
10 Amendments policy against unreasonable searches and seizures.” *Zurcher v. Stanford Daily*, 436 U.S.  
11 547 (1978), *reh. denied* 439 U.S. 885 (1978).

13 “No standard is set forth in the rule [ 41] to govern the determination of whether property should  
14 be returned to a person aggrieved either by an unlawful seizure or by deprivation of the property.  
15 The Fourth Amendment protects people from unreasonable seizures as well as unreasonable  
16 searches, and **reasonableness under all of the circumstances must be the test when a person  
seeks to obtain the return of property.**” *Notes of Advisory Committee on 1989 Amendments  
to Rule 41, citing U.S. v. Place*, 462 U.S. 696, 701 (1983) [emphasis added].

17 The Court must consider “totality of the circumstances,” to determine whether there is a “substantial  
18 basis” for believing that what is being looked for will be found at the location to be searched. *Mass. v.*  
19 *Upton*, 466 U.S. 727, 104 S.Ct. 2085, 2088 (1984). The quantum of information which constitutes  
20 probable cause—evidence which would warrant a man of reasonable caution in the belief that a felony  
21 has been committed—must be measured by the facts of the particular case. *Ng Pui Yu v. U.S.*, 352 F.2d  
22 626 (9<sup>th</sup> Cir. 1965). The district court’s decision to grant or deny pre-indictment Rule 41 motions for  
23 return of property turns primarily on equitable considerations; and the court is entitled to balance the  
24 equities in deciding whether to return is in order. *U.S. v. Kama*, 394 F.3d 1236, 1238 (9<sup>th</sup> Cir. 2005);  
25  
26  
27

1 *Angel-Torres v. U.S.*, 712 F.2d 717 (1<sup>st</sup> Cir. 1983).<sup>4</sup> Under the circumstances of this case, these searches  
2 were clearly unreasonable.

3  
4 **A. There Was No Classified Information, and No Probable Cause to**  
5 **Believe Mr. Montgomery Unlawfully Retained Classified Information.**

6 Before the search, Agent West claimed he had probable cause to believe Mr. Montgomery  
7 “unlawfully retained National Defense Information.” (West Affidavit, p. 15, Exhibit 2). However, after  
8 the search the AUSA handling this case admitted there was “no classified information,” (AUSA Faxes,  
9 Exhibit 4). In two fax covers dated June 1, 2006, he said:

10  
11 **“the DoD has confirmed that material originally marked classified as SECRET, [in West’s**  
12 **affidavit] was, in fact, not properly classified by an Original Classification Authority within the**  
13 **U.S. Air Force. As such our concerns for protecting certain information and identities as**  
14 **reflected in the redacted affidavit provided to you in court on Friday May 26, 2006, are no**  
15 **longer present.” (Id.).**

16 Agent West confirmed his affidavit was incorrect. (Vol. I, 95:25-96:4, 98:1-5, 103:20-22).<sup>5</sup> This error  
17 fatally tainted the warrant. It was clearly not an innocuous mistake by the *Government*; and nor is the  
18 analysis confined to what Agent West knew before the raid. As previously stated, the *Government*,  
19 through an “OCA” determines, decides, designates and marks “classified information”. (Executive Order  
20

21  
22 <sup>4</sup> Before the Court “decides to entertain” the 41(g) motion it should balance the equities and  
23 decide whether it can reach the merits. See *U.S. v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005).  
24 Here, because Montgomery filed papers requesting the 41(g) hearing, which he requested *after* the  
25 government belatedly admitted there was no classified information, and the Court granted that  
26 request and proceeded with three days of hearings, it appears that the Court has already balanced the  
27 *Kama* factors and determined it should exercise its equitable jurisdiction to entertain the merits of  
Montgomery’s 41(g) motion. Assuming Montgomery is incorrect, then, alternatively, he argues that  
under the facts set forth herein, (§I-II.2), every *Kama* factor would weigh in his favor and therefore  
the balance of these equities tilts in favor of reaching the merits of his Rule 41(g) motion.

<sup>5</sup> Volumes I, II, and III refer to hearing transcripts from Mr. Montgomery’s 41(g) hearing held  
on June 29, July 31, and August 17, 2006, respectively. Agent West was the only witness.