

1 Mark H. Gunderson, Esq. (SBN: 2134)  
Catherine A. Reichenberg, Esq. (SBN: 10362)  
2 MARK H. GUNDERSON, LTD.  
5345 Kietzke Lane, Suite 200  
3 Reno, Nevada 89511  
Telephone: (775) 829-1222  
4 Facsimile: (775) 829-1226

5 Deborah A. Klar, Esq. (SBN: CA 124750)  
Teri T. Pham, Esq. (SBN: CA 193383)  
6 LINER YANKELEVITZ  
SUNSHINE & REGENSTREIF LLP  
7 1100 Glendon Avenue, 14th Floor  
Los Angeles, California 90024-3503  
8 Telephone: (310) 500-3500  
Facsimile: (310) 500-3501  
9 [ADMITTED PRO HAC VICE]

10 Attorneys for Defendants and Counterclaimants  
Dennis Montgomery, Brenda Montgomery, and the  
11 Montgomery Family Trust

12 UNITED STATES DISTRICT COURT  
13 DISTRICT OF NEVADA  
14

15 FRIENDLY CAPITAL PARTNERS, L.P., a  
California Limited Partnership,

16 Plaintiff,

17 vs.

18 DENNIS MONTGOMERY, BRENDA  
19 MONTGOMERY, and the MONTGOMERY  
FAMILY TRUST, a California trust, and DOES  
20 1 through 10, individually,

21 Defendants.

22  
23 AND RELATED COUNTERCLAIM.  
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) Case No. 3:07-CV-00250-TBA-VPC

) [MOTION TO CONSOLIDATE WITH  
) CASE NOS. CV-00056-PMP-VPC AND  
) CV-00145-PMP-VPC PENDING]

) COUNTERCLAIMANTS' OPPOSITION  
) TO MOTION TO DISMISS FIRST  
) AMENDED COUNTERCLAIM;  
) MEMORANDUM OF POINTS AND  
) AUTHORITIES

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 **INTRODUCTION AND SUMMARY OF ARGUMENT**

4 This action is the latest in several litigations initiated by counterdefendant Warren Trepp  
5 and his alter ego company Friendly Capital Partners, L.P. ("FCP") in their attempts to oust  
6 counterclaimants Dennis Montgomery and the Montgomery Family Trust ("the Montgomery  
7 parties") as owners of eTreppid Technologies, LLC ("eTreppid") and to steal valuable technology  
8 developed and owned by the Montgomery parties. Having failed in their attempts to obtain a  
9 turnover order of the Montgomery parties' valuable technology from the Nevada State Court  
10 through their request for an injunction, Trepp then enlisted the aid of the United States Government  
11 to obtain a search warrant and to seize the technology from Mr. Montgomery's home under the  
12 guise of "classified" information. That search warrant was subsequently found to be  
13 unconstitutional by this Court and all property seized from Mr. Montgomery was returned to him.  
14 This Court also denied Trepp's request to have the property delivered to eTreppid instead, and most  
15 recently denied Trepp's request to "modify" the Nevada State Court's injunction to require the  
16 materials turned over to eTreppid in connection with the litigation before this Court concerning  
17 ownership of the technology (the "Technology Litigation").

18 By this action, Trepp now seeks to foreclose on the Montgomery parties' interests in  
19 eTreppid pursuant to alleged promissory notes and security agreements, in the hopes of seizing the  
20 technology from the Montgomery parties as part of their alleged collateral. This latest litigation  
21 tactic, like the previous, must also fail since (1) the Montgomery parties' technology is not part of  
22 the collateral, and (2) the alleged promissory note which is the basis of Trepp's latest complaint via  
23 FCP is a forgery.

24 The Montgomery parties' counterclaim in this action, on the other hand, alleges very  
25 specific meritorious claims against Trepp, FCP and eTreppid for breach of contract, fraud, breach  
26 of fiduciary duty, conversion, and declaratory relief in connection with Trepp's mismanagement of  
27 eTreppid and dilution of the Montgomery parties' interests in eTreppid using the promissory notes  
28 and related agreements. Given the clear overlap in facts and issues, the Montgomery parties have

1 accordingly made a motion to consolidate this action with the Technology Litigation, and that  
2 motion is presently pending. Although Trepp opposes the motion to consolidate, he now brings  
3 this motion to dismiss on the ground that all of the claims alleged in the Montgomery parties'  
4 counterclaim are identical to their claims in the Technology Litigation. While the claims are  
5 clearly related and should be consolidated, they are distinctive in that the claims in the Technology  
6 Litigation are focused on Trepp's wrongful actions in connection with the misappropriation of the  
7 Montgomery parties' technology, while the claims in this action are focused on Trepp's misuse and  
8 mismanagement of eTreppid's financial assets and fraud in inducing the Montgomery parties to  
9 enter into the promissory notes and related agreements. Trepp's arguments regarding claim-  
10 splitting are therefore misplaced.

11 Furthermore, Trepp's argument that the Montgomery parties' fraud claim is not plead with  
12 sufficient particularity misconstrues the requirements of Federal Rule of Civil Procedure 9, and  
13 ignores the very specific and plain allegations concerning Trepp's false representations and the  
14 Montgomery parties' reliance. Similarly, Trepp ignores clear Nevada authority allowing the  
15 Montgomery parties to pursue direct claims against Trepp for his conversion of eTreppid's assets,  
16 and further ignores the specific allegations supporting the Montgomery parties' unjust enrichment  
17 claim. Trepp's motion to dismiss should accordingly be denied.

## 18 II.

### 19 FACTUAL BACKGROUND

20 Counterclaimant Dennis Montgomery is a highly skilled scientist and software engineer.  
21 Prior to 1998, Dennis Montgomery developed certain software, which was copyrighted with the  
22 United States Copyright Office and assigned to the Montgomery Family Trust ("Trust"). First  
23 Amended Counterclaim ("FAC") at ¶ 3.

24 In or around September 1998, Dennis Montgomery and Trepp formed eTreppid. FAC at  
25 ¶ 10). Pursuant to a "Contribution Agreement" dated September 28, 1998, the Montgomery parties  
26 contributed specific technology identified in Paragraph 1.2.1 of the Contribution Agreement (the  
27 "Compression Technology") in exchange for a 50% interest in eTreppid. FAC at ¶ 11. No other  
28 technology was contributed.

1 At the same time, Trepp and his alter ego company, FCP, agreed to contribute \$1,300,000  
2 in liquid capital into eTreppid in exchange for a 50% interest in eTreppid. FAC at ¶ 12. The  
3 Montgomery Parties are informed and believe, however, that Trepp and FCP never made the  
4 required capital contribution. FAC at ¶ 25. Instead, unbeknownst to the Montgomery parties,  
5 Trepp treated eTreppid like his own personal piggy bank. Among other things, Trepp paid for  
6 personal trips for himself and his family, and others with eTreppid funds. FAC at ¶ 25. He hired  
7 illegal aliens to work in his home and compensated them with eTreppid funds. FAC at ¶ 26. He  
8 also channeled money out of eTreppid and into other entities owned by him and his family  
9 members, including FCP. FAC at ¶ 28. At the same time, however, Trepp demanded that the  
10 Montgomery parties contribute additional money into eTreppid for the company's operations and  
11 to maintain their ownership interests in eTreppid. FAC at ¶¶ 15,16, 20. Trepp further induced the  
12 Montgomery parties to borrow money from FCP pursuant to various promissory notes in order to  
13 make those additional contributions to eTreppid. FAC at ¶¶ 17-18, 20, 21. Trepp also induced the  
14 Montgomery parties to sell portions of their ownership interest in eTreppid to others in order to  
15 repay the promissory notes. FAC at ¶ 24.

16 Over the course of their business relationship, Trepp, through eTreppid, also  
17 misappropriated and exploited software and technology developed and owned by the Montgomery  
18 parties, which had not been contributed to the company. See First Amended Complaint by Dennis  
19 Montgomery and the Montgomery Family Trust, *Montgomery et al. v. eTreppid Technologies, LLC*  
20 *et al.*, USDC NV Case No. 06-CV-00056-PMP-VPC, attached to Request for Judicial Notice  
21 ("RFJN") 1. Rather than pay and compensate the Montgomery parties for eTreppid's use of the  
22 Montgomery parties' technology, Trepp sought to end the parties' business relationship and to steal  
23 the technology for himself.

24 On January 19, 2006, Trepp, through eTreppid, filed a Complaint against the Montgomery  
25 parties in the Nevada State Court seeking a determination that eTreppid is the owner of the  
26 Montgomery parties' technology, and alleging claims for misappropriation and breach of fiduciary  
27 duty against the Montgomery Parties. On January 31, 2006, the Montgomery parties filed a  
28 Complaint in this Court alleging copyright infringement, misappropriation of trade secrets, breach

1 of fiduciary duty and related claims against Trepp, and eTreppid and thereafter filed a First  
2 Amended Complaint. See RFJN 1

3 On March 20, 2006, eTreppid's state court action was removed to this Court, and eTreppid  
4 thereafter filed a Second Amended Complaint. See Second Amended Complaint by eTreppid  
5 Technologies, LLC, *eTreppid Technologies, LLC v Montgomery et al.*, USDC NV Case No. 06-  
6 CV-00145-PMP-VPC, RFJN 2 On May 15, 2006, the Montgomery parties filed a motion to  
7 consolidate the two actions. On March 15, 2007, this Court granted that motion and consolidated  
8 both actions for all purposes (collectively "the Technology Litigation").<sup>1</sup> See RFJN 3.

9 On April 23, 2007, Trepp, through his alter ego corporation, FCP, filed the present action in  
10 the Nevada State Court against the Montgomery parties for breach of contract and related claims  
11 relating to the purported promissory notes between FCP and the Montgomery parties On May 25,  
12 2007, the Montgomery Parties removed this action to this Court. On June 8, 2007, the  
13 Montgomery parties filed an Answer and Counterclaim against FCP, Trepp and others for breach  
14 of fiduciary duty, fraud and related claims concerning the promissory notes and Trepp's dilution of  
15 eTreppid and thereafter filed a First Amended Counterclaim. See RFJN 6.

16 Trepp now seeks to dismiss certain of the Montgomery parties' counterclaims on the  
17 ground that they are identical to the claims alleged in the Technology Litigation and/or fail to state  
18 a claim. As discussed below, Trepp's arguments are misplaced and fail to acknowledge the plain  
19 allegations in the Montgomery parties' counterclaim.

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22 <sup>1</sup> Upon filing its state court action, eTreppid immediately sought and obtained a preliminary  
23 injunction enjoining the Montgomery parties from transferring the technology during the pendency  
24 of the litigation. However, the state court refused to grant an order requiring the Montgomery  
25 parties to turn over the technology to eTreppid. RFJN 4 eTreppid then attempted to use the  
26 government as a pawn to seize the Montgomery parties' property via a search warrant. That search  
27 warrant was subsequently found to be unconstitutional, and this Court ordered the Montgomery  
28 parties' property returned to them. eTreppid filed a motion requesting that the Montgomery  
parties' property be returned to eTreppid instead. This Court denied that request. RFJN 5. Upon  
removal of the state court case to this Court, eTreppid then filed a motion to modify the state court  
preliminary injunction in yet another attempt to require the Montgomery parties to turn over the  
technology to eTreppid. This Court also denied that request and instead sought to maintain the  
status quo. RFJN 6.

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III.ARGUMENTA. The Fraud Claim is Sufficient.

As a preliminary matter, the Montgomery parties' fraud claim is sufficiently plead with particularity and facts to state a claim. Federal Rule of Civil Procedure 9(b) requires a plaintiff to plead averments of fraud or mistake with particularity. Fed. R. Civ. Proc. 9(b). Rule 9(b)'s particularity requirement, however, must be read in harmony with Rule 8's requirement of a short and plain statement of the claim. Sanderson v. HCA-The Healthcare Co., 447 F.3d 873, 876 (6th Cir. 2006). Thus, the particularity requirement is satisfied if the pleading "identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989).

Here, the Montgomery parties allege in their First Amended Counterclaim:

14. In or about late 1998, Mr. Montgomery learned that Trepp had unilaterally increased his and FCP's ownership interest in eTreppid and decreased the Trust's ownership interest in eTreppid.

15. Trepp represented to Mr. Montgomery that eTreppid's business needs required him and FCP to invest more than the \$1,300,000 that he initially agreed to infuse as capital into eTreppid. As a result of this additional capitalization, Trepp claimed that he and FCP were entitled to an increased ownership interest in eTreppid.

16. Knowing that the Counterclaimants did not have liquid funds to invest, Trepp represented that FCP could advance the needed funds to eTreppid on behalf of the Trust.

17. Accordingly, on or about January 14, 1999, Dennis and Brenda Montgomery, on behalf of the Trust, signed a promissory note in favor of FCP that would allow the Trust to borrow up to \$180,000, which was to be used, for among other things, to supply the Trust's portion of additional capital to eTreppid ("the First Promissory Note")

The Montgomery parties also allege:

20. On several occasions between 1999 and 2000, Trepp again represented to Mr. Montgomery that eTreppid needed a capital infusion to remain viable. Trepp again represented to Mr. Montgomery that Trepp had made an additional capital contribution to eTreppid to keep it operating and that if the Trust wished to maintain a 50% ownership interest in eTreppid, the Trust would also need to make an additional capital investment in eTreppid. Trepp represented to Mr. Montgomery that FCP would advance the money on behalf of the Trust in order to make the investment

1           21. In reliance on Trepp's representations, on or about December 21,  
2 2000, Dennis and Brenda Montgomery, on behalf of the Trust, signed a  
3 modification to the First Promissory Note dated December 21, 2000 in favor of FCP  
4 (the "Second Promissory Note").

5           22. Counterclaimants are informed and believe and thereupon allege that  
6 Trepp and FCP never did invest the monies purportedly borrowed from FCP into  
7 eTreppid.

8 The Montgomery parties further specifically allege:

9           36. As set forth above, beginning in or about 1998, Trepp represented to  
10 Counterclaimants that eTreppid required funds for its operations, and that he and  
11 FCP had and would invest monies into eTreppid on behalf of themselves and as  
12 loans to the Trust to capitalize the company and to supply its operating expenses.

13           37. When Trepp made these representations, he knew them to be false  
14 and made these representations with the intention to deceive and defraud the  
15 Counterclaimants to act in reliance on these representations, or with the expectation  
16 that they would so act.

17           38. At the time these representations were made by Trepp and at the time  
18 Counterclaimants took the actions herein alleged, they were ignorant of the falsity of  
19 Trepp's representations and believed them to be true. In reliance upon these  
20 representations, Counterclaimants were induced to and did execute and thereafter  
21 repaid the First Promissory Note and the Second Promissory Note on behalf of the  
22 Trust, and did sell a portion of the Trust's ownership interest in eTreppid to others  
23 Had Counterclaimants known of the actual facts, they would not have taken such  
24 actions

25           Given these very specific allegations of the false representations made by Trepp on behalf  
26 of himself and FCP and the Montgomery parties' detrimental reliance, it is unclear what allegations  
27 Trepp claims lacks particularity. As the managing member of eTreppid, Trepp represented to the  
28 Montgomery parties that the company was in need of funds to continue operations. Those  
statements were false. In fact, the company had sufficient funds, but Trepp was mismanaging the  
company's assets and using them for his own benefit. The Montgomery parties detrimentally  
relied on Trepp's false statements by borrowing money from FCP and selling off their ownership  
interests in order to contribute the funds to eTreppid. Nothing could be more clear.

          For these same reasons, Trepp's argument that the Montgomery parties have failed to state  
a claim for fraud must also fail. First, in support of his argument, Trepp relies upon an Amended  
and Restated Operating Agreement ("the Operating Agreement") which is outside the scope of the  
pleadings and should not be considered in connection with this Rule 12(b)(6) motion. Arpin v.

1 Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001). Second, Trepp's argument  
2 that the Operating Agreement somehow shields him from a claim of fraud is nonsensical. Nothing  
3 in the Operating Agreement allows Trepp to make capital contribution calls under false pretenses.  
4 Furthermore, nothing in the Operating Agreement allows Trepp to misuse the company's funds.  
5 Indeed, as the managing member and an officer of the company, Trepp owed a fiduciary duty to the  
6 company and to the Montgomery parties to act in their best interests, and not merely for the benefit  
7 of himself. Accordingly, the Montgomery parties have sufficiently stated a claim for fraud

8 **B. The Montgomery Parties Have Standing to Bring the Conversion Claim.**

9 Contrary to Trepp's claim, the Montgomery parties do allege that Trepp and FCP  
10 wrongfully converted assets belonging to them. As set forth above and in the FAC, the  
11 Montgomery parties allege that Trepp and FCP never deposited the monies borrowed by the  
12 Montgomery parties from FCP into eTreppid, but instead, used those monies for their own benefit.  
13 FAC at ¶¶ 19, 22, 25-30. Because the Montgomery parties borrowed those monies and ultimately  
14 had to repay those monies to FCP, Trepp and FCP unlawfully converted those monies belonging to  
15 the Montgomery parties.

16 Furthermore, to the extent the monies were converted once deposited into eTreppid, the  
17 Montgomery parties clearly have standing to bring the claim for conversion on behalf of eTreppid.  
18 Nevada law permits direct actions by minority shareholders on behalf of the corporation against  
19 majority shareholders in closely held corporations. Simon v. Mann, 373 F.Supp 2d 1196, 1198-99  
20 (D.Nev. 2005). Additionally, Nevada law permits minority shareholders in closely held  
21 corporations to bring an individual cause of action "when the wrong is both to the stockholder as an  
22 individual and to the corporation." Id.; see also Phillips v. Parker, 794 P 2d 716, 718 (Nev 1990)  
23 (referring to statutory and common law rights accompanying status as a minority shareholder in a  
24 closely held corporation). Therefore, the Montgomery parties have standing to pursue a claim for  
25 conversion against Trepp and FCP.



1           **C. The Montgomery Parties Have Properly Alleged a Claim for Unjust**  
2           **Enrichment.**

3           Like his argument regarding the fraud claim, Trepp's argument that the unjust enrichment  
4 claim lacks specificity is also without merit. As clearly alleged in the FAC, among other things,  
5 Trepp and his alter ego company, FCP, took money and assets belonging to eTreppid for their own  
6 personal use and enjoyment FAC at ¶¶ 25-26. They also unilaterally increased their own interests  
7 in eTreppid, while reducing the Montgomery parties' interests under false pretenses FAC at ¶ 14  
8 Furthermore, they fraudulently transferred money out of eTreppid into companies owned and  
9 controlled by Trepp. FAC at ¶¶ 27-30. All of these allegations are specifically incorporated into  
10 the Montgomery parties' sixth counterclaim for unjust enrichment FAC at ¶ 61 Moreover, as  
11 alter egos of one another, Trepp and FCP are equally liable for the damages suffered by the  
12 Montgomery parties as a result of their wrongful conduct. Accordingly, this claim is also  
13 sufficiently plead

14           **D. The Counterclaims Are Not Identical to the Montgomery Parties' Technology**  
15           **Litigation Claims.**

16           While arguing that this action should not be consolidated with the Technology Litigation,  
17 Trepp claims that the claims in this action are identical to those alleged in the Technology  
18 Litigation. Although clearly related, these claims are clearly not identical. Each of the fraud,  
19 breach of fiduciary duty, breach of contract, and conversion claims in this action relate to and arise  
20 out of Trepp's and FCP's fraud and mismanagement relating to eTreppid's funds and monetary  
21 capital contributions. Indeed, as clearly set forth in the FAC, but for Trepp's and FCP's mis-  
22 management, breaches of fiduciary duty, fraud and conversion, the Montgomery parties would not  
23 have entered into the promissory notes with FCP which are the basis of FCP's complaint These  
24 claims are therefore distinguished from the Montgomery parties' claims in the Technology  
25 Litigation which focus on Trepp's and eTreppid's fraud and misappropriation relating to certain  
26 technology developed by the Montgomery parties, the value of such technology, and the distinction  
27 between technology which was contributed to eTreppid pursuant to the Contribution Agreement,  
28

1 and technology that was not. Trepp's attempts to lump these claims all together in order to avoid  
2 responsibility for all of his wrongful conduct must therefore fail.

3 IV.

4 CONCLUSION

5 For all the foregoing reasons, Counterclaimants Dennis Montgomery, Brenda Montgomery  
6 and the Montgomery Family Trust respectfully request that the Court deny counterdefendants'  
7 Motion to Dismiss the First Amended Counterclaim.

8 Dated: October 5, 2007

Respectfully submitted,

9 LINER YANKELEVITZ  
10 SUNSHINE & REGENSTREIF LLP

11 By: 

12 Teri T. Pham  
13 Attorneys for Defendants and  
14 Counterclaimants Dennis Montgomery,  
15 Brenda Montgomery and the Montgomery  
16 Family Trust

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**CERTIFICATE OF SERVICE**

Pursuant to NRC 5(b), I certify that I am an employee of the LAW OFFICES OF LINER YANKELEVITZ SUNSHINE & REGENSTREIF LLP, and that on the **5th day of October, 2007**, I caused to be served the within document described as **COUNTERCLAIMANTS' OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COUNTERCLAIM; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as stated below:

J. Stephen Peek, Esq.  
Jerry M. Snyder, Esq.  
Adam G. Lang, Esq.  
Hale Lane Peek Dennison and Howard  
5441 Kietzke Lane  
SecondFloor  
Reno, Nevada 89511  
(775) 327-3000; 786-6179 - FAX  
E-mail: [speek@halelane.com](mailto:speek@halelane.com)  
E-mail: [jsnyder@halelane.com](mailto:jsnyder@halelane.com)  
E-mail: [alang@halelane.com](mailto:alang@halelane.com)

Mark H. Gunderson, Esq.  
Catherine A. Reichenberg, Esq.  
MARK H. GUNDERSON, Ltd , APC  
5345 Kietzke Lane  
Suite 200  
Reno, Nevada 89511  
(775) 829-1222; 829-1226 - FAX  
e-Mail: [mgunderson@gundersonlaw.com](mailto:mgunderson@gundersonlaw.com)  
e-Mail: [creichenberg@gundersonlaw.com](mailto:creichenberg@gundersonlaw.com)  
and [poneill@gundersonlaw.com](mailto:poneill@gundersonlaw.com)

Attorneys for Plaintiff/Counterdefendants  
Friendly Capital Partners, L P , eTrepid  
Technologies, LLC and Warren Trepp

**[ELECTRONIC]** By filing the document(s) electronically with the U.S. District Court and therefore the court's computer system has electronically delivered a copy of the foregoing document(s) to the persons listed above at their respective email address.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed on 10/5/2007, at Los Angeles, California.

  
NANCY TORRECILLAS

PROOF OF SERVICE