

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DENNIS MONTGOMERY and the
MONTGOMERY FAMILY TRUST

Plaintiffs,

vs.

ETREPPID TECHNOLOGIES, LLC;
WARREN TREPP; and the UNITED
STATES DEPARTMENT OF DEFENSE,

Defendants.

AND ALL RELATED MATTERS.

3:06-CV-00056-PMP-VPC
BASE FILE

3:06-CV-00145-PMP-VPC

ORDER RE PROTECTIVE ORDER

Prior to consolidation of these two related cases, Defendant United States Department of Defense filed Motions for Protective Order (3:06-CV-00056-PMP-VPC, Doc. #83, and 3:06-CV-00145-PMP-VPC, Doc. #51) to prevent disclosure of information that could harm the national security interests of the United States. Specifically, the United States' seeks a protective order pursuant to Federal Rule of Civil Procedure 26(c) to prevent the disclosure of information relating to (1) the existence or non-existence of any actual or proposed relationship, agreement, connection, contract, transaction, communication or meeting of any kind between an intelligence agency as defined in 50 U.S.C. § 401(a)(4), which includes intelligence elements of the military services; and (2) any actual or proposed interest in, application, or use by any intelligence agency, or any current or former official, employee, or representative thereof, of any technology, software, or source code owned or claimed by any individuals or entities associated with these lawsuits.

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1 The United States' supports its application for protective order under the military
2 and States Secret privilege by the Declaration of John D. Negroponte, formally Director of
3 National Intelligence, and a Classified Declaration which has been reviewed by the Court in
4 camera and ex parte, which demonstrate that disclosure of information at issue in this
5 litigation subject to the proposed protective order could be **expected to cause serious, and**
6 **some cases exceptionally grave damage to national security.**

7 Issues relating to whether information subject to a claim of military and **states**
8 **secrets privilege were contained in pleadings, motions, declarations and other materials**
9 **filed in these consolidated cases** as well as in the related in the Search Warrant case (3:06-
10 CV-0263-PMP-VPC), have required considerable attention by the parties and the Court. In
11 this regard, counsel for Defendant United States' and those authorized to assert the military and
12 states secrets privilege on behalf of Defendant United States' have met with counsel in these
13 related actions as well as with counsel in the related Search Warrant case, and have reviewed
14 copies of all pleadings, motions, documents and exhibits filed in the above referenced cases
15 for the purpose of identifying and redacting those portions subject to a claim of military and
16 state secrets privilege on behalf of Defendant United States. The Court has reviewed all
17 such papers in camera and ex parte with counsel for Defendant United States' and those
18 authorized to assert the military and states secret privilege on behalf of Defendant United
19 States, and has approved the **redaction of material subject** to the privilege claim.

20 Defendant United States' Department of Defense Motion for Protective Order
21 has now been fully briefed and on June 12, 2007, the Court conducted a hearing regarding
22 the United States' Motion for Protective Order and other pending motions.

23 On June 21, 2007, Defendant United States' filed a Revised Proposed Protective
24 Order (3:06-CV-00056-PMP-VPC (Doc. #196). The Court finds that said **Protective Order**
25 **is warranted as to form and content and hereby approves** the same.

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1 IT IS THEREFORE ORDERED that Defendant United States Department of
2 Defense Motions for Protective Order (3:06-CV-00056-PMP-VPC, Doc. #83, and 3:06-CV-
3 00145-PMP-VPC, Doc. #51) is GRANTED.

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5 DATED: August 29, 2007.

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8 PHILIP M. PRO
9 United States District Judge
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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DENNIS MONTGOMERY, et al.,
Plaintiffs,
v.
ETREPPID TECHNOLOGIES, INC.,
et al.,
Defendants.

3:06-CV-00056-PMP-VPC
BASE FILE

3:06-CV-00145-PMP-VPC

UNITED STATES PROTECTIVE ORDER

Pursuant to Federal Rule of Civil Procedure 26, in order to protect the classification, confidentiality and the rights to information and documents developed and disclosed in connection with this litigation, and to facilitate discovery by and among the parties to this action and from third parties, the United States hereby proposes entry of the following protective order.

1 IT IS HEREBY ORDERED as follows:

2 1. Certain information that may or may not be relevant to the claims and/or
3 defenses of eTreppid Technologies, LLC and its current or former officers or employees
4 (hereinafter collectively referred to as “eTreppid”), Warren Trepp, Dennis Montgomery, the
5 Montgomery Family Trust and/or Dennis Montgomery and Brenda Montgomery as trustees of
6 the Montgomery Family Trust (hereinafter collectively referred to as “the Parties”), as
7 delineated in paragraphs 2 and 3 below, is subject to the state secrets privilege, the disclosure
8 of which reasonably could be expected to cause serious, and in some cases exceptionally
9 grave, damage to the national security of the United States. Such information shall not be
10 subject to discovery or disclosure by any of the Parties during all proceedings in these actions,
11 and shall be excluded from evidence at trial.

12 2. The Parties shall not serve or take any discovery relating to or questioning the
13 existence or non-existence of any actual or proposed relationship, agreement, connection,
14 contract, transaction, communication or meeting of any kind between any entity in the
15 intelligence community as defined by the National Security Act of 1947,
16 50 U.S.C. § 401(a)(4), which includes intelligence elements of the military services, or any
17 current or former official, employee or representative thereof (hereinafter collectively referred
18 to as “intelligence agency”) and the Parties.

19 3. The Parties shall not serve or take any discovery relating to or questioning any
20 actual or proposed intelligence agency interest in, application of or use of any technology,
21 software or source code owned or claimed by the Parties.

22 4. This Order does not preclude the Parties from serving or taking any discovery
23 from other Parties or third parties relating to, or questioning, the following:
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a. The existence and nature of the “Big Safari” contract (hereinafter referred to as “the Big Safari Contract”) between eTrepid and the United States Air Force, including but not limited to the fact that the Big Safari Contract required eTrepid to perform data analysis and the fact that the data analysis eTrepid performed under the Big Safari Contract involved image identification technology;

b. The fact that the Big Safari Contract required employees and/or officers of eTrepid to sign secrecy agreements with the Department of Defense;

c. The computer source code, software, programs, or technical specifications relating to any technology owned or claimed by any of the Parties (“the Technology”);

d. Any contract, relationship, agreement, connection, transaction, communication or meeting of any kind relating to the Technology, unless covered by paragraphs 2 or 3 above;

e. Any actual or potential commercial or government applications of the Technology, unless covered by paragraphs 2 or 3 above;

f. Facts relating to the issue of ownership by the Parties of any right or interest in the Technology, unless covered by paragraphs 2 or 3 above;

g. The revenue, income, expenses, profits and losses of the Parties, unless disclosure of such information would be covered by paragraphs 2 or 3 above; and

h. Any consideration received by any of the Parties relating to the Technology, unless covered by paragraphs 2 or 3 above.

5. The Parties shall not discuss, mention, question or introduce as evidence, either at trial, in any pleading or motion, or in any case-related correspondence, any actual or proposed relationship, agreement, connection, contract, transaction, communication or meeting of any kind between any intelligence agency and any of the Parties.

1 6. The Parties shall not discuss, mention, question or introduce as evidence, either
2 at trial, in any pleading or motion, or in any case-related correspondence, any actual or
3 proposed intelligence agency interest in, application of or use of the Technology.

4 7. No question and no document request in discovery or at trial shall require a
5 response that would include any information covered by paragraphs 2, 3, 5 or 6 above, but if
6 the responding party believes that a full and complete response could disclose information
7 within the scope of the state secrets privilege, the responding party shall provide timely notice
8 of such belief and the full and complete response to the United States prior to responding, and
9 shall respond only with information that the United States has determined is not subject to the
10 state secrets privilege.

11 8. The military and state secrets privilege, the claim that any discovery is
12 covered by paragraphs 2 or 3 above, and the claim that any evidence is covered by
13 paragraphs 2 or 3 above, can only be invoked by the United States. These claims cannot be
14 asserted by a private individual or entity.

15 9. All Parties shall serve the attorneys for the United States with (a) a copy of
16 all notices of depositions, (b) a copy of all requests for discovery and responses thereto,
17 and (c) a copy of all pleadings and motions filed together with supporting memoranda
18 (hereinafter collectively referred to as the "documents"), unless such documents request or
19 relate to information covered by paragraphs 2 or 3 above. If the documents request or
20 relate to information covered by paragraphs 2 or 3 above, the Parties shall submit the
21 documents to the United States for privilege review prior to service or filing. All
22 documents filed or sought to be used as evidence by the Parties in this case shall be
23 unclassified. This requirement applies to all motions, pleadings, briefs, and any other
24 document, including exhibits, correspondence, or anything appended thereto or filed
25 therewith. If the United States determines that a document or discovery response includes
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1 information covered by paragraphs 2 or 3 above, the United States shall redact the
2 information and provide the parties and Court with a redacted copy of the document or
3 discovery response.

4 10. The Clerk of the Court shall send attorneys for the United States a copy of all
5 future decisions and notices for hearings in these cases.

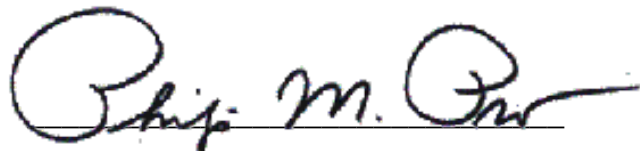
6 11. As the United States deems necessary, attorneys for the United States may
7 attend all depositions and proceedings in this case and may make objections as necessary to
8 protect national security information. If attorneys for the United States assert an objection
9 based on the need to protect national security information with respect to either witness
10 testimony or documents introduced or otherwise relied upon during a deposition, then the
11 witness shall be precluded from testifying with respect to the line of inquiry that engendered
12 the objection, and the document shall be withdrawn from the record pending an order of the
13 Court with respect to the scope of the government's national security objection.

14 12. To protect the United States' interests, attorneys for the United States may
15 participate in any proceeding in these cases, including but not limited to motions hearings, all
16 pre-trial proceedings, or trial by making and opposing motions, submitting briefs, and
17 participating in arguments.

18 13. The United States shall be excepted from all party discovery during the
19 pendency of its motions to dismiss the claims against the Department of Defense.

20 It is so ordered.

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22 Dated: August 29, 2007

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25 PHILIP M. PRO
26 United States District Judge
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**UNITED STATES' MOTION FOR
PROTECTIVE ORDER**

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ETREPPID TECHNOLOGIES, LLC, a)
California Corporation,) CV-N-06-00415 (BES) (VPC)

Plaintiff)

v.)

DENNIS MONTGOMERY, et. al.,)

Defendants.)

DENNIS MONTGOMERY, et. al.,)

Plaintiffs)

CV-N-06-00056 (BES) (VPC)

v.)

ETREPPID TECHNOLOGIES, INC.,)
et. al.)

Defendants.)

DECLARATION AND FORMAL CLAIM OF
STATE SECRETS AND STATUTORY PRIVILEGES
BY JOHN D. NEGROPONTE,
DIRECTOR OF NATIONAL INTELLIGENCE

I, JOHN D. NEGROPONTE, hereby declare as follows:

1. I am the Director of National Intelligence (DNI)
of the United States. I have held this position since
April 21, 2005. From June 28, 2004, until my appointment
as DNI, I served as the United States Ambassador to Iraq.

From September 18, 2001, until my appointment in Iraq, I served as the United States Permanent Representative to the United Nations. I have also served as Ambassador to Honduras (1981-1985), Mexico (1989-1993), and the Philippines (1993-1996), and as Deputy Assistant to the President for National Security Affairs (1987-1989).

2. The statements made herein are based on my personal knowledge, as well as on information provided to me in my official capacity as DNI, and on my personal evaluation of that information. In personally considering this matter, I have read the information contained in the separate classified declaration filed in camera and ex parte in this case.

3. The purpose of this declaration is to assert formally, in my capacity as DNI and head of the United States Intelligence Community, the state secrets privilege to protect intelligence information ("state secrets privilege"), as well as a statutory privilege under the National Security Act, 50 U.S.C. § 403-1(i)(1), to protect intelligence sources and methods from unauthorized disclosure. Unauthorized disclosure of information covered by the state secrets and statutory privileges reasonably could be expected to cause serious, and in some cases exceptionally grave damage to the national security of the

United States, and such information should therefore be excluded from any use in this litigation.

I. STATUTORY AND EXECUTIVE ORDER AUTHORITIES

4. The position of Director of National Intelligence was created by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a), 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004) (amending sections 102 through 104 of Title I of the National Security Act of 1947). Subject to the authority, direction, and control of the President of the United States, the DNI serves as the head of the United States Intelligence Community and as the principal advisor to the President, the National Security Council, and the Homeland Security Council for matters related to intelligence and national security. See, 50 U.S.C. § 403 (b) (1), (2).

5. The "United States Intelligence Community" includes the Office of the Director of National Intelligence; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; the intelligence elements of the military services, the Federal

Bureau of Investigation, and the Department of Energy; the Office of Intelligence and Analysis of the Department of the Treasury; the Drug Enforcement Administration's Intelligence Division; the Bureau of Intelligence and Research of the Department of State; elements of the Department of Homeland Security concerned with the analysis of intelligence information (including the Office of Intelligence of the Coast Guard); and such other elements of any other department or agency as the President may designate, or as may be jointly designated by the DNI and the head of the department or agency concerned, as an element of the United States Intelligence Community. See, 50 U.S.C. § 401(a)(4).

6. The responsibilities and authorities of the DNI, enumerated in the National Security Act, as amended, at 50 U.S.C. § 403-1, include ensuring that national intelligence is provided to the President, the heads of the departments and agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military commanders, and the Senate and House of Representatives and committees thereof. 50 U.S.C. § 403-1(a)(1). The DNI is also charged with establishing the objectives of, determining the requirements and priorities for, and managing and directing the tasking, collection, analysis, production, and

dissemination of national intelligence by elements of the United States Intelligence Community. 50 U.S.C. § 403-1(f)(1)(A)(i), (ii). The DNI is responsible for developing and determining, based on proposals submitted by heads of agencies and departments within the United States Intelligence Community, an annual consolidated budget for the National Intelligence Program for presentation to the President, and for ensuring the effective execution of the annual budget for intelligence and intelligence-related activities, including managing and allotting appropriations for the National Intelligence Program. Id. § 403-1(c)(1)-(5).

7. In addition, the National Security Act of 1947, as amended, provides that "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1).

Consistent with this responsibility, the DNI establishes and implements the guidelines of the United States Intelligence Community for the classification of information under applicable law, Executive Orders, or other Presidential directives, and access and dissemination of intelligence. Id. § 403-1(i)(2)(A), (b). In particular, the DNI is responsible for the establishment of uniform standards and procedures for granting access to Sensitive

Compartmented Information to any officer or employee of any agency or department of the United States and for ensuring consistent implementation of those standards throughout such departments and agencies. *Id.* § 403-1(j)(1), (2).

8. By virtue of my position as the DNI, and unless otherwise directed by the President, I have access to all intelligence related to national security that is collected by any department, agency, or other entity of the United States. Pursuant to Executive Order 12958, as amended,¹ the President has authorized me to exercise original TOP SECRET classification authority. After personal consideration of the matter, I have determined that the classified *ex parte*, *in camera* declaration which accompanies this assertion of the state secrets privilege and the statutory privilege to protect intelligence sources and methods is properly classified under § 1.3 of E.O. 12958, because the unauthorized public disclosure of information contained in that declaration reasonably could be expected to cause serious, and in some cases exceptionally grave damage to the foreign policy and national security of the United States.

¹ Executive Order 12958 was amended by Executive Order 13292. See Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). All citations to Exec. Order No. 12958 are to the Order as amended by Exec. Order No. 13292. See Exec. Order No. 12,958, 60 Fed. Reg. 19825 (1995), reprinted as amended in 50 U.S.C.A. § 435 note at 180 (West Supp. 2006).

II. ASSERTION OF THE STATE SECRETS
AND STATUTORY PRIVILEGES

9. After careful and actual personal consideration of the matter, I have determined that the unauthorized disclosure of certain information that may be implicated by the parties' claims in this matter, as set forth here and described in more detail in the classified *ex parte*, in camera declaration which accompanies this declaration, reasonably could be expected to cause serious, and in some cases exceptionally grave damage to the national security of the United States, and thus must be protected from disclosure and excluded from this case. Therefore, I formally invoke and assert the state secrets privilege to prevent the disclosure of that information.

10. Through this declaration, I also invoke and assert a statutory privilege held by the DNI under the National Security Act, as amended, to protect the intelligence sources and methods implicated by this case. See, 50 U.S.C. § 403-1(i)(1). My assertion of this statutory privilege for intelligence sources and methods is coextensive with my state secrets privilege assertion.

11. With my assertion of the state secrets privilege and the statutory privilege to protect intelligence sources and methods, I respectfully ask the Court to prevent any

party from testifying, eliciting testimony, producing, disclosing, entering into evidence or making any other use in discovery, at trial, or in any other way in connection with this case, information concerning: (a) the existence or non-existence of, any actual or proposed relationship, agreement, connection, contract, transaction, communication, or meeting of any kind between any entity in the United States Intelligence Community, or any current or former official, employee, or representative thereof, and any individuals or entities associated with this lawsuit, on any current or former officer or employee thereof; and (b) any actual or proposed interest in, application, or use by any entity in the United States Intelligence Agency, or any current or former official, employee, or representative thereof, of any technology, software, or source code owned or claimed by any individuals or entities associated with this lawsuit.

12. I have determined that any unauthorized disclosure of the information described in Paragraph 11 reasonably could be expected to cause serious, and in some case exceptionally grave damage to national security since the United States can neither confirm nor deny such information without compromising the effectiveness of intelligence sources and methods. Public disclosure of

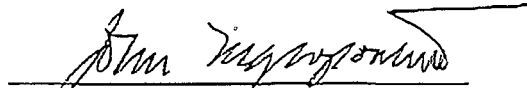
information that confirms the use of particular intelligence sources and methods compromises the effectiveness of those sources and methods by alerting likely targets to their use, while public denial of the use of particular intelligence sources and methods reveals to adversaries that some practices are secure. Any truthful response to confirm or deny allegations related to intelligence sources or methods informs hostile foreign intelligence agencies about the manner in which the United States collects intelligence information, and could result in a loss of valuable intelligence when our adversaries are able to take countermeasures. Similarly, if the United States government was required to admit or deny allegations made in litigation concerning its classified contracting process, then classified contract relationships could be exposed, which would cause harm to the national security. The precise nature of the harm that would ensue from the disclosure of the information protected by the state secrets privilege and statutory privilege to protect intelligence sources and methods is set forth in detail in the *in camera*, *ex parte* declaration.

CONCLUSION

13. I respectfully request that the Court grant the Department of Defense's motion for a protective order.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of September 2006.



JOHN D. NEGROPONTE

DIRECTOR OF NATIONAL INTELLIGENCE