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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY _____ DEPUTY



06-MC-00192-M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ETREPPID TECHNOLOGIES, L.L.C., a
Nevada Limited Liability Company

Plaintiff,

vs.

DENNIS MONTGOMERY, THE
MONTGOMERY FAMILY TRUST, DENNIS
MONTGOMERY and BRENDA
MONTGOMERY as Trustees of The
MONTGOMERY FAMILY TRUST; and
DOES 1 through 20,

Defendants.

DENNIS MONTGOMERY; MONTGOMERY
FAMILY TRUST,

Counterclaimants and Third-Party
Plaintiffs,

vs.

ETREPPID TECHNOLOGIES, L.L.C.; a
California Corporation, WARREN TREPP;
DEPARTMENT OF DEFENSE of the UNITED
STATES OF AMERICA; and DOES 1-10,

Counterdefendants and Third-Party Defendants

MISC. CAUSE NO. **MS6 192M**

No.: 3:06CV00145-BES-VPC
United States District Court for The
District of Nevada

MOTION BY ETREPPID
TECHNOLOGIES, LLC TO COMPEL
PRODUCTION OF DOCUMENTS BY
MICHAEL SANDOVAL AND BY
AZIMYTH

NOTE ON MOTION CALENDAR:
DECEMBER 15, 2006

SEA 5614

ORIGINAL

MOTION BY ETREPPID TECHNOLOGIES, LLC TO
COMPEL PRODUCTION OF DOCUMENTS BY
MICHAEL SANDOVAL AND BY AZIMYTH - 1

O'BRIEN BARTON WIECK & JOE, PLLP
175 N.E. Gilman Boulevard
Issaquah, Washington 98027
425-391-7427 / Fax 425-391-7489

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that, pursuant to Rule 45(c)(2)(B) of the Federal Rules of
3 Civil Procedure, eTreppid Technologies, LLC ("eTreppid") hereby moves the above-entitled
4 Court to compel Michael Sandoval and Azimyth to produce the documents requested in the
5 subpoenas served by eTreppid.

6 The present motion is supported by the attached Declaration of Jerry M. Snyder in
7 Support of the Motion to Compel Document Production and by the following Memorandum of
8 Points and Authorities and the evidence currently before the Court.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. INTRODUCTION**

11 This matter arises out of the claims by plaintiff eTreppid against defendants Dennis
12 Montgomery ("Montgomery") and the Montgomery Family Trust (collectively,
13 "Montgomery"). Specifically, eTreppid alleges that Montgomery misappropriated certain trade
14 secrets belonging to eTreppid, such that Montgomery is liable for, *inter alia*, conversion,
15 breach of contract, and breach of fiduciary duty. The Nevada State Court in which eTreppid
16 initiated this action found that eTreppid was reasonably likely to prevail on its allegations
17 against Montgomery; after conducting a lengthy evidentiary hearing, that court entered a
18 Preliminary Injunction Order against Dennis Montgomery on February 8, 2006 (the "PI
19 Order") that precludes him from further destroying and/or disseminating certain source codes
20 and computer software.

21 The computer software and source codes subject to the PI Order incorporate
22 applications for data compression, object tracking, pattern recognition, and anomaly detection
23 (the "Software"). The Software is protected as a trade secret owned by eTreppid because, *inter*
24 *alia*, it was developed by eTreppid personnel using eTreppid equipment and because
25 Montgomery was employed as eTreppid's Chief Technology Officer.

1 eTreppid has learned that Montgomery is now employed by (or is working with) an
2 information technology company, Azimyth, and/or its Chairman and CEO, Michael Sandoval,
3 in the state of Washington. Azimyth's business involves data handling and communications
4 protocols, among other applications, and Azimyth is currently "developing key intellectual
5 property and capabilities around leaner and embeddable algorithms that are significantly faster
6 than existing commercial implementations for raw data compression, encryption and pattern
7 recognition capabilities." See Declaration of Jerry M. Snyder ("Snyder Decl."), Ex. 2 (Azimyth
8 webpage printout).

9 eTreppid attempted to obtain documents from Azimyth and its CEO, Michael Sandoval,
10 to discover whether Montgomery was or is violating the terms of the PI Order.

11 **II. STATEMENT OF FACTS**

12 **A. Relevant Procedural Background.**

13 On January 19, 2006, eTreppid filed its Complaint in the Second Judicial District Court
14 for the State of Nevada, Washoc County. Following a lengthy evidentiary hearing, the court
15 entered the PI Order on February 8, 2006. The PI Order states that "Montgomery and all
16 persons or entities in active concert or participation therewith, are enjoined and restrained from
17 destroying, hypothecating, transferring, modifying, and/or assigning the ETreppid Source Code
18 (*sic*), [and] from discussing any ETreppid (*sic*) technology, including anomaly detection and
19 pattern recognition software, with any third-party, except" in connection with this litigation.
20 Snyder Decl., Ex. 1 (PI Order, at 3:6-10). The court reasoned that eTreppid "is likely to prevail
21 on the merits of [its] claims" due, *inter alia*, to "the subsequent undisputed conduct of the
22 parties throughout the course of Montgomery's employment with ETreppid (*sic*), and
23 Montgomery's acquiescence to and active participation in contractual agreements entered into
24 by ETreppid (*sic*) with third-parties involving the Source Code and technology at issue."
25 Snyder Decl., Ex. 1 (PI Order, at 2:7-11).

1 On or about July 2006, eTreppid learned that Montgomery may have been in
2 communication with Azimyth, an information technology company in Washington, and
3 Sandoval, Azimyth's Chairman and CEO. See Snyder Decl., ¶ 3. Azimyth advertises itself as
4 having expertise in key technologies including data compression and pattern recognition
5 technologies. Snyder Decl., ¶ 4, Ex. 2 (Azimyth webpage printout). Fearing that
6 Montgomery's interactions with Azimyth and/or Sandoval were violations of the PI Order,
7 eTreppid requested documents from Azimyth and Sandoval by subpoena. Snyder Decl., Ex. 3
8 (eTreppid Subpoena to the Custodian of Records at Azimyth); Snyder Decl., Ex. 4 (eTreppid
9 Subpoena to Michael Sandoval).

10 On or about August 9, 2006, Azimyth's counsel for served objections and responses to
11 the subpoena. Snyder Decl., Ex. 5 (Non-Party Azimyth's Objections and Responses to the
12 Subpoena of eTreppid Technologies, LLC). The same counsel also served objections on behalf
13 of Sandoval, stating that "on the basis of the foregoing objections, Michael Sandoval will not
14 produce any documents." See Snyder Decl., Ex. 6 (Non-Party Michael Sandoval's Objections
15 and Responses to the Subpoena of eTreppid Technologies, LLC); Snyder Decl..

16 Counsel for eTreppid met and conferred with Mr. Keeley, counsel for both Azimyth and
17 Sandoval, in an attempt to resolve this matter informally. Snyder Decl., ¶ 8 Ex. 7. (Jerry M.
18 Snyder, Esq. letter). Mr. Keeley refused to provide any of the requested documents, leaving
19 eTreppid with no choice but to move to compel their production.

20 **III. ARGUMENT**

21 If an objection is asserted to inspection or copying of materials requested by subpoena,
22 the requesting party may only inspect those materials pursuant to a court order. Fed. R. Civ. P.
23 45(c)(2)(B). The requesting party may move to compel production at any time. *Id.*

24 The objections interposed by Sandoval and Azimyth fall into four basic categories: (i)
25 the requests are unduly burdensome and not reasonably calculated to lead to the discovery of

1 admissible evidence, (ii) the production would vitiate various privileges, (iii) the documents
2 requested are confidential, proprietary and/or trade secrets, and (iv) the requests violate the
3 privacy rights of Sandoval, Montgomery, the Montgomery Family Trust, and/or others. None
4 of these purported objections supports the refusal by Sandoval or Azimyth to produce the
5 requested documents.

6 A. The Document Requests are Narrowly Tailored and Seek Permissible
7 Discovery.

8 eTreppid's documents requests are narrowly tailored to elicit those documents that
9 evidence (i) communications that would reveal that Montgomery had violated the PI Order
10 and/or engaged in the other misconduct alleged in eTreppid's complaint; and (ii) compensation
11 received as the result of any such communications. These issues relate to the claims between
12 eTreppid and Montgomery regarding ownership rights over the Software. Fed. R. Civ. P.
13 26(b)(1). Further, the subpoenas are likely to lead to discovery of admissible evidence. *Id.*

14 It is undisputed that Sandoval and/or Azimyth now employ(s) Montgomery. Snyder
15 Decl., Ex. 8 (letter from Michael Flynn, Montgomery's counsel of record). Further, Sandoval
16 is closely linked to Azimyth, as its Chairman and CEO, and Azimyth admittedly utilizes
17 technology that appears to function in a similar manner to that which Montgomery is enjoined
18 from using or discussing with any third-party not involved in the litigation. Snyder Decl., Ex. 2
19 (Azimyth Products and Solutions webpage printout). The PI Order issued in part because the
20 court found a reasonable probability that eTreppid could suffer irreparable harm. Snyder Decl.,
21 Ex. 1 (PI Order, at 2:14-15). eTreppid requested documents from Sandoval and Azimyth
22 which could establish whether Montgomery has violated the PI Order. Further, Sandoval and
23 Azimyth are aware of the PI Order and are likewise bound by its terms (the PI Order applies to
24 "all persons or entities in active concert or participation" with Montgomery). The subpoenas
25

1 are therefore a reasonable means to investigate the possible disclosure of eTreppid's
2 confidential Software.

3 B. No Privilege Claim May Stand Without a Privilege Log.

4 Sandoval and Azimyth object to eTreppid's document requests on the basis of the
5 attorney-client privilege or work product doctrine, but have refused to provide the requisite
6 privilege log. Fed. R. Civ. P. 26(b)(5). Sandoval and Azimyth bear the burden of properly
7 identifying the documents and justifying the privilege which purportedly precludes their
8 disclosure by, inter alia, providing a privilege log. *Id.* Unless Sandoval and Azimyth meet this
9 standard, they cannot refuse to produce documents based on the asserted privileges. *Id.*

10 Even had Sandoval and Azimyth provided an adequate privilege log, however, it is
11 unclear how any evidence of communications between Sandoval and Montgomery (or anyone
12 acting on their respective behalf) could be protected by the attorney-client privilege. It is
13 likewise unclear how any evidence of communications between Sandoval and Montgomery
14 could be protected by the work product doctrine. The Objections filed by Sandoval and
15 Azimyth clearly state that they are not parties to this litigation; had they been parties, eTreppid
16 would have served them with discovery requests rather than subpoenas. Snyder Decl., Ex. 3
17 (eTreppid Subpoena to the Custodian of Records at Azimyth); Snyder Decl., Ex. 4 (eTreppid
18 Subpoena to Michael Sandoval).

19 The Court should require Sandoval and Azimyth to either (i) provide a privilege log that
20 fully satisfies the requirements of Fed. R. Civ. P. 26(b)(5), or (ii) produce the requested
21 documents.

22 C. The Court May Order Production In a Manner That Protects Confidential
23 Information.

24 Sandoval and Azimyth raise concerns as to the confidentiality and/or trade secret nature
25 of the documents requested. Throughout this litigation, eTreppid has made every effort to

1 protect the confidentiality of all trade secret, classified, and/or commercially sensitive
2 information. *See, e.g.*, Snyder Decl., ¶ 10. eTrepid is likewise willing to stipulate that any
3 materials produced pursuant to the subpoenas will be subject to a protective order and/or
4 confidentiality agreement. The Court should order Sandoval and Azimyth to negotiate the
5 terms of such an order and/or agreement in good faith and, after entry of such order and/or
6 agreement, produce the requested documents.

7 D. Privacy Concerns Do Not Preclude Production of the Requested Documents.

8 Sandoval and Azimyth object to production of the materials requested by subpoena on
9 privacy grounds, without articulating how production would vitiate any privacy rights.
10 However, they may not invoke privacy as a blanket denial of discovery of relevant information.
11 *See Hassan v. United States of America*, 2006 U.S. Dist. LEXIS 14774, *5 (W.D. Wash. Mar.
12 16, 2006) (granting motion to compel in part because “there is no generic ‘privacy’ objection”).

13 Further, the Court may take those measures necessary to protect any privacy concerns
14 by, *e.g.*, entering a protective order or conducting an *in camera* inspection. Fed. R. Civ. P.
15 26(c); *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987) (the court must consider the
16 use of protective orders and the possibility of *in camera* inspections). Any privacy concerns
17 are outweighed by eTrepid’s need to stop any ongoing violations of the PI Order and to
18 prevent future violations, in order to avert the irreparable harm recognized by the Nevada State
19 Court in the PI Order. *Id.* at 889 (even if privacy concerns are invoked, “the test of
20 discoverability is the relevance standard of Rule 26(b)(1) of the FRCP”). If Montgomery,
21 Sandoval and/or Azimyth have violated the PI Order, evidence of such a violation is crucial to
22 the determination of the issues raised in the underlying litigation.

23 During the meet and confer process, eTrepid proposed a confidentiality agreement to
24 allay the privacy concerns of Sandoval and Azimyth. Snyder Decl., Ex. 7 (meet and confer
25 letter proposing the parties negotiate the terms of a confidentiality agreement). eTrepid

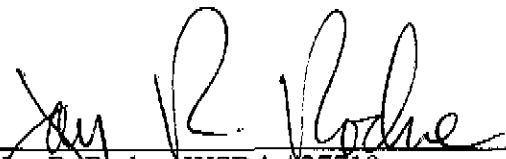
1 hereby renews its offer to enter into such an agreement, and requests that the Court order
2 Sandoval and Azimyth to negotiate in good faith the terms for such an agreement and/or a
3 similar protective order and, after entry of such an agreement or order, to produce the requested
4 documents.

5 **IV. CONCLUSION**

6 For the foregoing reasons, the Court should grant eTreppid's motion to compel.

7 Dated: November 27, 2006.

8 O'BRIEN BARTON WIECK & JOE, PLLP

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10 

11 Jay R. Rodne, WSBA #27719
12 175 N.E. Gilman Boulevard
13 Issaquah, WA 98027
14 Telephone: (425) 391-7427
15 Facsimile: (425) 391-7489

16 HALE LANE PEEK DENNISON AND HOWARD

17 J. Stephen Peek, Esq., Nevada Bar Number 1758
18 Jerry M. Snyder, Esq., Nevada Bar Number 6830
19 5441 Kietzke Lane, Second Floor
20 Reno, Nevada 89511
21 Telephone: (775) 327-3000
22 Facsimile: (775) 786-6179

23 PILLSBURY WINTHROP SHAW PITTMAN, LLP

24 David A. Jakopin, Esq. (CA Bar No. 209950)
25 Jonathan D. Butler, Esq. (CA Bar No. 229638)
26 2475 Hanover Street
27 Palo Alto, CA 94304-1114
28 Telephone: (650) 233-4500
29 Facsimile: (650) 233-4545

*Attorneys for Defendants eTreppid Technologies, L.L.C.
and Warren Trepp*

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CERTIFICATE OF SERVICE

I, Barbara Westfall, declare:

I am employed in the City of Issaquah, County of King, State of Washington, by the law offices of O'Brien, Barton, Wieck, & Joe, PLLP. My business address is: 175 N.E. Gilman Boulevard, Issaquah, Washington 98027. I am over the age of 18 years and not a party to this action

On November 27, 2006, I caused the foregoing **MOTION BY ETREPPID TECHNOLOGIES, LLC TO COMPEL PRODUCTION OF DOCUMENTS BY MICHAEL SANDOVAL, DECLARATION OF JERRY SNYDER IN SUPPORT OF ETREPPID'S MOTION TO COMPEL, AND PROPOSED ORDER GRANTING ETREPPID TECHNOLOGIES, LLC'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS** to be:

 X mailed a true copy thereof to the following person(s) at the address(es) listed below by placing the documents in O'Brien, Barton, Wieck, & Joe, PLLP's outgoing mail with the United States Postal Service to the following:

 X filed the foregoing documents with the U.S. District Court for the Western District of Washington at Seattle.

Ronald J. Logar, Esq.
Eric A. Pulver, Esq.
The Law Offices of Logar & Pulver
225 S. Arlington Avenue, Suite A
Reno, NV 89501

Fax No.: (775) 786-5044

Email: Lezljc@renofamilylaw.com

Carlotta P. Wells
Senior Trial Counsel, Federal Programs Branch
Civil Division - Room 7150
U.S. Department of Justice
20 Massachusetts Ave., NW
P.O. Box 883
Washington, DC 20044

Fax No.: (202) 616-8470

Email: Carlotta.wells@usdoj.gov

Michael J. Flynn, Esq.
Philip H. Stillman, Esq.
Flynn & Stillman
224 Bermingham Dr., Ste. 1A4
Cardiff, CA 92007

Fax No.: (888) 235-4279

Email: pstillman@flynnstillman.com

Medora A. Marisseau, WSBA #23114
Brian K. Keecey, WSBA #32121
Bullivant Houser Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, WA 98101-1618

Fax No.: 206-386-5130

MOTION BY ETREPPID TECHNOLOGIES, LLC TO
COMPEL PRODUCTION OF DOCUMENTS BY
MICHAEL SANDOVAL AND BY AZIMYTH - 9

O'BRIEN BARTON WIECK & JOE, PLLP
175 N.E. Gilman Boulevard
Issaquah, Washington 98027
425-391-7427 / Fax 425-391-7489

1 William J. Goines
Cindy Hamilton
2 Alisha M. Louie
Greenberg Traurig, LLP
3 1900 University Avenue, 5th Floor
East Palo Alto, CA 94303
4 Fax No.: 650.328.8508

5 I declare under penalty of perjury under the laws of the United States of America that
6 the foregoing is true and correct, and that this declaration was executed on November 27, 2006.
7

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9 Barbara Westfall
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