

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ETREPPID TECHNOLOGIES, LLC,

Plaintiff,

v.

DENNIS MONTGOMERY, et al.,

Defendants.

No. 2:06-MC-00192-RSM

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

MICHAEL SANDOVAL AND
AZIMYTH'S OPPOSITION TO
ETREPPID'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS

Noted January 5, 2007

DENNIS MONTGOMERY, et al.,

Counterclaimants and
Third-Party Plaintiffs,

v.

ETREPPID TECHNOLOGIES, LLC, et al.,

Counterdefendants and
Third-Party Defendants.

1 **I. INTRODUCTION**

2 Through this motion Plaintiff eTreppid Technologies, L.L.C (“eTreppid”) seeks to
3 force AziMyth and its CEO, Michael Sandoval, (collectively, “AziMyth”) non-parties to this
4 case who have not been accused of any wrongdoing, to turn over its confidential and
5 proprietary trade secret information to a competitor based purely upon eTreppid’s
6 speculation and the unproven allegations contained in their Complaint in the above captioned
7 action currently pending in the United States District Court for the District of Nevada
8 (“Nevada Court”). In eTreppid’s own words, it seeks production of AziMyth’s trade secrets
9 because Defendant Montgomery “*may* have been in communication with AziMyth.”
10 (Etreppid Motion to Compel, Dkt. No. 1 (“Mot.”), p.4 lines 1-2, emphasis added.) Non-
11 parties should not be subjected to the invasive discovery that eTreppid requests based solely
12 on such speculation.

13 In addition to the fact that eTreppid is simply not entitled to this information, the
14 procedural posture of this case, including dispositive motions currently pending in the
15 Nevada Court, makes granting eTreppid’s motion premature and impractical. If any of the
16 motions currently pending in the Nevada Court are granted, eTreppid’s invasive third party
17 subpoena and this motion to compel are moot. For these reasons, and as more fully
18 explained below, this Court should deny eTreppid’s motion to compel production of
19 AziMyth’s confidential and proprietary trade secrets, or in the alternative, stay its ruling until
20 the Nevada Court rules on the pending motions, including the Motion to Vacate Preliminary
21 Injunction, the Motion for Judgment on the Pleadings, the Motion for Protective Order
22 brought by the United States Department of Defense (“DoD”) based on the State Secrets
23 privilege, and the Motion to Sever or Remand Montgomery’s Third-Party Claim.

1 **II. STATEMENT OF THE FACTS**

2 **A. Background**

3 The factual allegations in this case, *eTreppid v. Montgomery*, USDC Nevada Case
4 No. 3:06-CV-00145-LRH-VPC, and the related, joined case captioned *Montgomery v.*
5 *eTreppid*, USDC Nevada Case No. 3:06-CV-00056-LRH-VPC, are essentially the same.
6 AziMyth asks this Court to take judicial notice under Federal Rule of Evidence 201 of the
7 pleadings and papers filed in these cases, copies of which are attached to the Declaration of
8 Brian Keeley, filed with this opposition. The facts set forth here come from the First
9 Amended Complaint in *Montgomery v. eTreppid*. These cases arise out of the attempts of
10 eTreppid’s managing shareholder, Warren Trepp (“Trepp”), to gain control and ownership of
11 software that Montgomery authored, copyrighted, and owns, and that was never assigned to
12 eTreppid or Trepp.

13 Montgomery¹ is an investor and software developer. (First Am. Compl., Keeley Dec.
14 p. 6, ¶8.) In 1982, he developed certain pattern-recognition software, which he copyrighted;
15 he then developed “derivative works” based on his original copyrights. (*Id.*, ¶8-9). In 1998
16 he and Trepp founded and formed Inteppid Technologies, LLC in 1998 (later called
17 eTreppid). Pursuant to a “Contribution Agreement”, Montgomery contributed specific
18 technology, specifically identified as technology contained in “CD number one,” to this
19 company. (*Id.*, ¶10-14). Because Montgomery owned other technology, the Contribution
20 Agreement specifically states that Montgomery was not contributing technology not
21 contained in “CD number one.” (*Id.*) Montgomery’s “derivative works,” were not included
22 on CD number one, and therefore were not included in his contributions to eTreppid. (*Id.*)

23
24
25 ¹ “Montgomery” refers collectively to Dennis Montgomery and the Montgomery Family
26 Trust, which are parties to these actions.

1 In 2003, eTreppid began to sublicense the “derivative works” to the U.S. government,
2 and collect license fees. (*Id.*, ¶16.) ETreppid was never granted a license to the “derivative
3 works” and failed to pay any royalties. (*Id.*) About the same time in 2003, Montgomery
4 executed a ‘secrecy oath’ with the DoD, which prevents him from discussing, disclosing, or
5 identifying the subject matter of this work for the United States on penalty for criminal
6 prosecution of treason. (*Id.*, ¶69.) Shortly thereafter, a disagreement between Trepp and
7 Montgomery erupted, culminating in these actions.

8 **B. Procedural History**

9 ETreppid and Trepp filed a complaint on January 19, 2006, amended on February 1,
10 2006, in Nevada state court, entitled *eTreppid v. Montgomery*, alleging misappropriation of
11 trade secrets, breach of contract, conversion, breach of fiduciary duty, tortious and
12 contractual bad faith, declaratory relief and intentional interference with contractual
13 relations. (Keeley Dec. pp. 17-20, which sets forth the answers to these claims.)
14 Montgomery’s counterclaims in that case are for declaratory judgment and accounting; and
15 his defenses are, *inter alia*, Montgomery never transferred ownership to eTreppid;
16 Montgomery was an independent contractor, and not an employee, of eTreppid; there was no
17 work for hire between Montgomery and eTreppid; and eTreppid failed to state a claim
18 against Montgomery. On January 31, 2006, Montgomery filed a complaint against eTreppid
19 and Trepp, amended on February 21, 2006, entitled *Montgomery v. eTreppid*, alleging
20 copyright infringement, copyright infringement by distribution, declaratory judgment,
21 accounting, breach of fiduciary duty, fraud, misappropriation of trade secrets, conversion and
22 declaratory relief. (Keeley Dec. pp. 20-27.) As part of this complaint, Montgomery asserted a
23 claim for declaratory relief against the U.S. Government. (*Id.*)

24 On February 8, 2006, the Nevada state court issued a preliminary injunction enjoining
25 Mr. Montgomery from destroying, hypothecating, modifying, transferring and/or assigning

1 the “Etreppid Source Code”. (Keeley Dec. pp. 29-32.) The phrase “Etreppid Source Code”
2 was not defined. (*Id.*) In addition, Mr. Montgomery was enjoined from discussing any
3 Etreppid technology, “including anomaly detection and pattern recognition software” with
4 any third party. The injunction does not define these terms either; therefore, as used in the
5 preliminary injunction, “pattern recognition” could mean anything from video games to
6 motion detector cameras.

7 Following the Nevada state court’s ruling on the preliminary injunction, on March 20,
8 2006 the United State government removed this case to federal court. (Keeley Dec. pp. 33-
9 35.) Montgomery has filed a motion to vacate the preliminary injunction entered by the
10 Nevada state court. (Keeley Dec. pp. 36-38.) AziMyth is informed and believes that this
11 matter is currently under submission in the Nevada Court.

12 On September 26, 2006, the DoD filed a Motion for Protective Order to prevent
13 disclosure of information that could harm the national security interests of the United States
14 based on Montgomery’s attempt to defend himself in the above-entitled action. (Keeley Dec.
15 pp. 69-85.) AziMyth is informed and believes that this matter is also currently under
16 submission in the Nevada Court.

17 Montgomery has also filed a Motion for Judgment on the Pleadings, which is
18 currently under submission in the Nevada Court. (Keeley Dec. pp. 86-94.)

19 Finally, eTreppid has filed a Motion to Remand or Sever Montgomery’s claims against
20 the U.S. Government, which is also currently under submission in the Nevada Court. (Keeley
21 Dec. pp. 95-100.)

22 **III. ARGUMENT**

23 **A. Motions currently pending in Nevada Court have to the potential to make** 24 **eTreppid’s motion moot.**

25 There are currently no less than four motions pending in the Nevada Court that have

1 the potential to make eTreppid's grounds for seeking this discovery moot, or in the case of
2 Montgomery's Motion for Judgment on the Pleadings, to make the entire case moot. The
3 multiple pending motions in the Nevada Court provide sufficient grounds to the Court to
4 deny this motion. Courts have been given "broad discretion to stay discovery pending
5 decisions on dispositive motions, including motions for summary judgment. . . . The court
6 may, for example, stay discovery when it is convinced that plaintiff will be unable to state a
7 claim for relief or if the action is moot." *Pacific Lumber v. National Union Fire Insurance*
8 *Company*, 220 F.R.D. 349 (N.D. Cal. 2003) (internal citations omitted), *citing Panola Land*
9 *Buyers Ass'n v. Shuman*, 762 F.2d (11th Cir. 1985) and *Wood v. McEwen*, 664 F.2d 797, 801
10 (9th Cir. 1981). A district court "has wide latitude in controlling discovery, and its rulings
11 will not be overturned in the absence of a clear abuse of discretion." *Volk v. D.A. Davidson*
12 *& Co.*, 816 F.2d 1406, 1416-17 (9th Cir. 1987), *quoting Foster v. Arcata Associates Inc.*, 772
13 F.2d 1453, 1467 (9th Cir. 1985).

14 Four motions are currently pending in the Nevada Court that, if granted, would render
15 eTreppid's instant motion to compel moot or groundless:

16 **1. Motion to Vacate Preliminary Injunction**

17 In its moving papers, eTreppid cites the preliminary injunction issued by the Nevada
18 state court against the Defendant in the above entitled action as its grounds for compelling a
19 third party, AziMyth, to produce its proprietary trade secret information to a competitor. The
20 use of a preliminary injunction against a third party competitor in another state is tenuous at
21 best; however, the preliminary injunction itself may soon be vacated, entirely removing
22 eTreppid's dubious justification for this motion.

23 The preliminary injunction was issued by the Nevada state court, where this action
24 was originally filed. Following the ruling on the preliminary injunction, the United States
25 government removed this case to federal court. Montgomery has filed a motion to vacate the

1 preliminary injunction entered by the Nevada state court, on the grounds that once a case is
2 removed to federal court, the federal court then has jurisdiction to vacate, modify or adopt
3 the injunction issued the by the state court prior to removal. (Keeley Dec. pp. 36-68.)
4 AziMyth need not argue the merits of that motion here; if it is granted, however, eTrepid
5 will be stripped of its already attenuated support for bringing this motion, and AziMyth
6 would have needlessly produced its trade secrets to a competitor. AziMyth therefore
7 requests that this Court deny this motion to compel in its entirety or, in the alternative, stay
8 its ruling until the Nevada Court rules on Montgomery's Motion to Vacate.

9 **2. Motion for Judgment on the Pleadings**

10 Montgomery has filed a Motion for Judgment on the Pleadings based on eTrepid's
11 failure to plead its trade secrets with particularity. (Keeley Dec. pp. 86-94.) While eTrepid's
12 failure to plead its trade secret claim with sufficient particularity is obviously problematic for
13 Montgomery, in this instance it is also problematic for AziMyth, who, despite having
14 reviewed the pleadings in this case, is not properly able to ascertain what, exactly, eTrepid
15 is claiming as trade secret. AziMyth therefore is disabled in its attempts to oppose this
16 motion. By way of example, in its moving papers, eTrepid claims that it is entitled to
17 AziMyth's trade secrets because "AziMyth advertises itself as having expertise in key
18 technologies including data compression and pattern recognition technologies" (Mot. p. 4.)
19 As mentioned above, "pattern recognition technologies" can encompass anything from video
20 games to motion detector cameras. Although AziMyth need not argue the merits of
21 Montgomery's motion, the outcome of Montgomery's Motion for Judgment on the Pleadings
22 undoubtedly impacts eTrepid's current motion to compel because if Montgomery prevails,
23 then this motion to compel is moot; and if eTrepid is forced to refine its definition of trade
24 secret, AziMyth may then be in a better position to defend itself on the merits of this motion
25 and how to distinguish its technology from eTrepid's.

1 Given that Montgomery's pending Motion for Judgment on the Pleadings has the
2 ability to render eTreppid's current motion entirely moot, AziMyth requests that this Court
3 deny this motion to compel in its entirety or, in the alternative, stay its ruling until the
4 Nevada Court rules on Montgomery's Motion for Judgment on the Pleadings.

5 3. Motion for Protective Order

6 The DoD has filed a motion for protective order in this action to prevent the
7 disclosure of any technology Montgomery developed for the United States, and specifically
8 to prevent any discussion or disclosure of the technology at issue in this case. (Keeley Dec.
9 pp. 69-85.) The DoD has cited the States Secrets privilege in its motion, claiming "the
10 disclosure of information at issue in this litigation reasonably could be expected to cause
11 serious, and in some cases exceptionally grave, damage to national security." (*Id.*, p. 70, *ll.*
12 16-20.)

13 If successful, the DoD will basically prevent eTreppid's action from going forward in
14 any meaningful fashion, because all of the technology at issue in this case would be
15 considered a state secret. This impacts eTreppid's current motion to compel in two important
16 ways. First, if the DoD is successful, than all intellectual property at issue in this case will be
17 considered a state secret, which will have the practical effect of hobbling both the
18 prosecution and the defense of this case and preventing it from moving forward in any
19 meaningful way. In that instance, there would be no grounds to compel a third party
20 competitor to unnecessarily reveal its trade secrets. Second, eTreppid's motion essentially
21 asks the Court to order AziMyth to produce its software and other intellectual property to
22 eTreppid so that eTreppid can examine it to determine if eTreppid believes it infringes on
23 eTreppid's claimed intellectual property. If AziMyth is required to produce its trade secrets
24 at this time, and if eTreppid sees something it does not like and either joins AziMyth in the
25 current suit or files a separate suit against AziMyth, AziMyth will be unable to defend itself

1 against these claims because the classification of eTreppid's technology as a state secret will
2 prevent eTreppid's from comparing its own intellectual property with eTreppid's. Out of an
3 abundance of caution, and to avoid putting a third party in any of these untenable positions,
4 AziMyth requests that this Court deny this motion to compel or, in the alternative, stay its
5 ruling until the Nevada Court rules on the DoD's Motion for Protective Order.

6 **4. Motion to Remand/Sever Montgomery's Third Party Claim**

7 Montgomery has asserted a third-party claim against the US government seeking
8 declaratory relief regarding the use and ownership of Montgomery's pattern recognition and
9 anomaly detection software and Montgomery's ability to disclose or discuss this information.
10 ETreppid has filed a motion in the Nevada Court arguing that Montgomery's third party
11 claims against the government must be severed and "resolved before the Court can resolve
12 the dispute between [eTreppid] and [Montgomery]." (Keeley Dec. p. 96, ll. 15-16.)

13 By eTreppid's own admission, the dispute between Montgomery and the government
14 must be resolved before eTreppid's current motion to compel becomes timely or relevant. If
15 eTreppid's Motion to Remand/Sever is granted then its motion to compel is moot, or at the
16 very least extremely premature as eTreppid would be looking at a substantial delay in the
17 prosecution of its case. Depending on the outcome between Montgomery and the
18 government, eTreppid might be forced to dismiss its case in its entirety. In either instance,
19 there is no benefit to compelling AziMyth to produce its trade secrets at this juncture, and so
20 this Court should deny eTreppid's motion to compel.

21 **B. ETreppid is not entitled to competitor and nonparty AziMyth's confidential and**
22 **proprietary trade secrets.**

23 **1. Nonparties such as AziMyth are entitled to extra protection against**
24 **burdensome, invasive discovery.**

25 Even if all of the motions discussed above are denied and eTreppid's preliminary
26 injunction remains in place, eTreppid is simply not entitled to use the preliminary injunction

1 as a fishing expedition against a third party. eTreppid's motion to compel against AziMyth
2 is based on its suspicion that "Montgomery *may* have been in communication with
3 AziMyth." (Mot., p. 4, lines 1-2.) While mere suspicion may suffice in discovery directed to
4 a party to litigation, eTreppid's mere suspicion does not constitute sufficient grounds to
5 allow it to gain access to its competitor's trade secrets under the heightened protection given
6 to a third party. "There appear to be quite strong considerations indicating that discovery
7 should be more limited to protect third parties from harassment, inconvenience, or disclosure
8 of confidential documents." *Dart Industries v. Westwood Chemical Company*, 649 F.2d 646
9 (9th Cir. 1980), *quoting Collins & Aikman Corp. v. J.P. Stevens & Co. Inc.*, 51 F.R.D. 219,
10 221 (D.S.C. 1971).

11 A court determining the propriety of a subpoena "balances the relevance of the
12 discovery sought, the requesting party's need, and the potential hardship to the party subject
13 to the subpoena." *Del Campo v. Kennedy*, 236 F.R.D. 454 (N.D. Cal. 2006). Applying this
14 test to eTreppid's motion to compel, eTreppid's requested discovery will not be relevant at
15 all if any of the motions pending in the Nevada Court are granted. Moreover, eTreppid's
16 need for this information would also be negated, while the burdens and hardships on
17 AziMyth are very high given that the requested information would reveal AziMyth's
18 confidential and proprietary trade secrets.

19 Due process and fundamental fairness require that eTreppid have more than a
20 suspicion of wrongdoing before AziMyth should be required to turn over its proprietary trade
21 secret information to a competitor. As a non-party to this litigation, AziMyth is entitled to
22 extra protection against burdensome and overbroad discovery requests. "Additionally, the
23 Ninth Circuit has long held that nonparties subject to discovery requests deserve extra
24 protection from the courts." *High Tech Medical Instrumentation, Inc. v. New Image*
25 *Industries*, 161 F.R.D. 86 (N.D. Cal., 1995), *quoting United States v. C.B.S.*, 666 F.2d 364,

1 371-72 (9th Cir. 1982). The logic behind this position is as follows: because nonparty
2 witnesses are powerless to control the scope of litigation and discovery, they should not be
3 subject to unreasonable burdens imposed by litigation. *Id.*

4 Being compelled to produce proprietary trade secrets to a competitor is unduly
5 burdensome on non-party AziMyth and sufficient grounds to deny eTreppid's motion. FRCP
6 45(c)(3)(A).

7 **2. ETreppid's subpoena is overbroad, and appears to be an attempt to**
8 **obtain the product of AziMyth, eTreppid's competitor.**

9 Although eTreppid claims to be interested in only "anomaly detection and pattern
10 recognition software," Paragraph 6 of eTreppid's subpoena reveals otherwise. It is
11 unlimited, requesting "any and all documents (electronic or otherwise) that memorialize,
12 refer to or constitute commercialization of any product or service (or any offer to
13 commercialize any product or service) that is based upon information, including but not
14 limited to software or other technology that you or anyone acting on your behalf received
15 from Dennis Montgomery, the Montgomery Family Trust, or any individual representing or
16 otherwise acting on behalf of Dennis Montgomery or the Montgomery Family Trust, from
17 January 2004 to the present". (Subpoena, ¶ 6, which is Exhibit 3 to the declaration of Jerry
18 Snyder in support of the instant motion to compel.) Essentially, eTreppid is requesting carte
19 blanche access to every project that Montgomery is working on for AziMyth, regardless of
20 whether or not eTreppid even develops that technology. This Court should therefore deny
21 eTreppid's motion based on its overbroad and unreasonable subpoena.

22 **3. AziMyth has not been accused of any wrongdoing**

23 ETreppid has not sued AziMyth LLC or Michael Sandoval, nor accused them of any
24 wrongdoing. Yet eTreppid's motion appears to be based entirely on three suspicions: 1)
25 Montgomery used to work for eTreppid and now "may" have had communications with

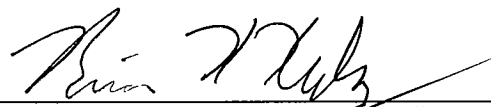
1 AziMyth; 2) because AziMyth's website describes its company as using "pattern recognition
2 technologies," AziMyth must therefore use the exact same technology as eTreppid; and 3)
3 eTreppid actually owns the rights to the technology at issue in this case. For the sake of
4 argument, even if all of these propositions are true, these assumptions are not grounds to
5 compel AziMyth to produce its trade secrets to a competitor. Because eTreppid has no actual
6 grounds or evidence (other than these suspicions) to claim that AziMyth has done anything
7 wrong, its motion to compel should be denied as overbroad and overreaching.

8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court should deny eTreppid's motion to
10 compel, or in the alternative, stay its determination until after the Nevada Court rules on the
11 pending dispositive motions that affect the outcome of eTreppid's current motion. If the
12 Court is inclined to grant eTreppid's motion, AziMyth requests that any production be
13 protected to the highest degree possible by limiting production of the requested material to
14 attorney's eyes only and by submitting it not to AziMyth's competitor, eTreppid, but to an
15 independent consultant for review and comparison.

16 DATED this 28th day of December, 2006.

17 BULLIVANT HOUSER BAILEY PC

18
19 By 
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24 Attorneys for Third Parties Michael Sandoval and
25 AziMyth LLC

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 29, 2006, I electronically filed the foregoing with the
3 Clerk of the Court using the CM/ECF system which will send notification of such filing to
4 the persons listed below:

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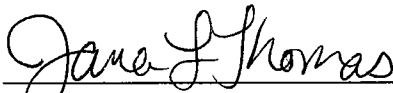
10 I also hereby certify that on this day I caused to be delivered via facsimile and the
11 U.S. Postal Service a copy of this document to the persons listed below:

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