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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ETREPPID TECHNOLOGIES, LLC,  
  
Plaintiff,  
  
v.  
  
DENNIS MONTGOMERY, et al.,  
  
Defendants.

CASE NO. C07-0003RSM  
  
ORDER DENYING ETREPPID'S  
MOTION TO COMPEL PRODUCTION  
OF DOCUMENTS

DENNIS MONTGOMERY, et al.,  
  
Counterclaimants and  
Third-Party Plaintiffs,  
  
v.  
  
ETREPPID TECHNOLOGIES, LLC, et al.,  
  
Counterdefendants and  
Third-Party Defendants

This matter is before the Court for consideration of eTreppid's motion to compel production from nonparty competitors located in the State of Washington (Dkt. # 1). For the reasons that follow, the Court denies the motion.

This matter arises out of a lawsuit originally filed in Nevada State Court by eTreppid against Dennis Montgomery and the Montgomery Family Trust for, among other things, misappropriation of

1 trade secrets, breach of contract, breach of fiduciary duty, and tortious and contractual bad faith. On  
2 February 8, 2006, shortly after the complaint was filed, the Nevada court entered a preliminary injunction  
3 against Montgomery enjoining them from “destroying, hypothecating, transferring, modifying, and/or  
4 assigning the Etreppid Source Code, [and] from discussing any Etreppid technology, including anomaly  
5 detection and pattern recognition software, with any third-party. . . .” (Dkt. #2, Ex. 1, at 3:6-10).

6 On January 31, 2006, Montgomery filed a counter-complaint, amended on February 21, 2006,  
7 against eTreppid for copyright infringement and misappropriation of trade secrets. In addition,  
8 Montgomery asserted a claim for declaratory relief against the U.S. Department of Defense, who  
9 subsequently removed the case to United States District Court, District of Nevada, on March 20, 2006.  
10 There are several motions pending before the Nevada district court.<sup>1</sup>

11 eTreppid alleges that Dennis Montgomery now works for or with AziMyth, a nonparty  
12 competitor located in Washington, or its Chairman and CEO, Michael Sandoval. Fearing that  
13 Montgomery may have violated the preliminary injunction order through his interactions with AziMyth or  
14 Sandoval, eTreppid served subpoena duces tecum on AziMyth and Sandoval for the production of  
15 documents under Fed. R. Civ. P. 45(b)(1). AziMyth and Sandoval objected to the subpoena and refused  
16 to produce requested documents. In accordance with Rule 45(c)(2)(B), eTreppid filed this motion to  
17 compel production.

18 First, the Court finds that the moving party failed to sufficiently certify to a good faith effort to  
19 resolve the matter as required by federal and local Rule 37. Rule 37 states, in relevant part, that a motion  
20 to compel “must include a certification that the movant has in good faith conferred or attempted to confer  
21 with the party not making the disclosure in an effort to secure the disclosure without court action.” Fed.  
22 R. Civ. P. 37(a)(2)(A). The companion local rule requires that such a good faith conference must be  
23 either face-to-face or by telephone. Local Rule CR 37(a)(2)(A). These rules are designed to encourage  
24 the resolution of discovery disputes without court intervention. *Tri-Star Pictures, Inc. v. Unger*, 171

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26 <sup>1</sup> Four of these motions may be relevant to the instant motion to compel. First, a motion to vacate  
27 the preliminary injunction order filed by Montgomery. Second, a motion for protective order to prevent  
28 disclosure of information that could be harmful to national security interests filed by the U.S. Dept. of  
Defense. Third, a motion for judgment on the pleadings filed by Montgomery. Fourth, a motion to  
remand or sever Montgomery’s claims against the U.S. Government filed by eTreppid.

1 F.R.D. 94, 99 (S.D.N.Y. 1997).

2 Although eTreppid's counsel has attached a declaration to the motion attesting to a good faith  
3 meet and confer, it is too vague to constitute "certification" within the meaning of Rule 37. A proper  
4 certification, stated and signed by counsel, must "accurately and specifically convey to the court who,  
5 where, how, and when the respective parties attempted to personally resolve the discovery dispute."  
6 *Shuffle Master, Inc., v. Progressive Games, Inc.*, 170 F.R.D. 166, 170 (D. Nev. 1996). This is  
7 necessary so that the Court may make a determination as to the adequacy of the good faith conference or  
8 attempt required by Rule 37. *Id.* In this case, counsel for eTreppid has declared that he "communicated"  
9 with nonparty counsel and "discussed reaching an agreement" during the weeks of August 7 and 14,  
10 2006. Dkt. #2, at ¶ 8. In addition, counsel has attached a letter (Dkt. #2, Ex. 7) that was sent to  
11 nonparty counsel on August 18, 2006, "detailing our arguments regarding the invalidity of Mr.  
12 Sandoval's objections . . . and again suggesting . . . that the parties discuss the terms of a confidentiality  
13 agreement." Dkt. #2, at ¶ 8. It is unclear from these declarations how the parties conferred or attempted  
14 to confer and why these efforts proved fruitless. As stated earlier, the local rule requires that such  
15 conferences be face-to-face or by telephone. Absent sufficient certification of good faith efforts, the  
16 Court will deny the motion to compel.

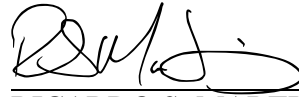
17 In addition, the Court finds that the motion fails on its merits. Rule 45 governs discovery of  
18 nonparties by subpoena. Fed. R. Civ. P. 45(b). The scope of discovery under Rule 45(b)(1) is  
19 considered in light of Rule 26(b). *See Gonzales v. Google, Inc.*, 234 F.R.D. 674, 679-80 (N.D. Cal.  
20 2006); *Kona Spring Water Distrib. LTD v. World Triathlon Corp.*, 2006 WL 905517 (M.D. Fla. 2006).  
21 Rule 26(b) permits the discovery of non-privileged material that is "relevant to the claim or defense of  
22 any party." Fed. R. Civ. P. 26(b). Relevant material "need not be admissible at trial if the discovery  
23 appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 26(b)(1).  
24 Discovery is limited where, among others, discovery is cumulative or obtainable from a more convenient  
25 source, or the burden outweighs the likely benefit. *Id.* at 26(b)(2)(i), (iii). In addition, Rule 45 itself  
26 provides that on a timely motion the court "shall quash or modify the subpoena if it . . . subjects a person  
27 to undue burden." *Id.* at 45(c)(3)(A)(iv). The court may quash or modify the subpoena if it "requires

1 disclosure of a trade secret or other confidential research, development, or commercial information,” or  
2 may order production of the material upon specified conditions if substantial need for the material is  
3 shown. *Id.* at 45(c)(3)(B). “Thus, a court determining the propriety of a subpoena balances the relevance  
4 of the discovery sought, the requesting party’s need, and the potential hardship to the party subject to the  
5 subpoena.” *Google*, 234 F.R.D. at 680 (citing *Heat & Control, Inc. v. Hester Industries, Inc.*, 785 F.2d  
6 1017, 1024 (Fed. Cir. 1986)).

7 eTreppid argues that the requested documents are relevant to determine if Montgomery has  
8 violated the terms of the preliminary injunction issued by the state court in Nevada. AziMyth and  
9 Sandoval counter that eTreppid is conducting a “fishing expedition” against a nonparty competitor. They  
10 argue that the subpoena is overbroad and the hardship of having to reveal confidential and proprietary  
11 trade secrets is unduly burdensome when compared with the relevance of the requested documents and  
12 eTreppid’s need. The Court agrees. First, the preliminary injunction is limited to “the Etreppid Source  
13 Code” and “any Etreppid technology, including anomaly detection and pattern recognition software.”  
14 Dkt. #2, Ex. 1. However, the subpoena is much broader, referring in part to “all documents . . . that  
15 memorialize, refer to or constitute any communications between you . . . and Montgomery”; “all  
16 documents . . . relating in any manner to software or other technology in the fields of data compression,  
17 object tracking, pattern recognition and/or anomaly detection, which were received by you . . . and  
18 provided by . . . Montgomery”; and “all documents . . . that memorialize, refer to or constitute  
19 commercialization of any product or service . . . that is based upon information . . . that you . . . received  
20 from . . . Montgomery.” Dkt. #2, Ex. 3, 4, at ¶¶ 1, 4, and 6. As AziMyth and Sandoval argue, these  
21 requests encompass anything that Montgomery may be working on with AziMyth or Sandoval and are  
22 not limited to eTreppid technologies. Furthermore, the subpoena requests production of documents from  
23 “January 2004 to the present,” (Dkt. #2, Ex. 3, 4, at ¶¶ 1–6) but the preliminary injunction was issued on  
24 February 8, 2006. It is unclear to the Court why information relating back to January 2004 is relevant to  
25 a violation of a preliminary injunction issued two years later. Finally, the relevance of the requested  
26 documents is questionable, because it appears that eTreppid’s concern regarding violation of the  
27 preliminary injunction is only speculative at this time.

1 For these reasons, eTrepid's motion to compel (Dkt. # 1) is DENIED. This denial is without  
2 prejudice to renewal in the event that the parties are unable to resolve this matter without court action.

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4 DATED this 19 day of March 2007.

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7 RICARDO S. MARTINEZ  
8 UNITED STATES DISTRICT JUDGE  
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