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14 **UNITED STATES DISTRICT COURT**  
15 **CENTRAL DISTRICT OF CALIFORNIA**

16 CRYTEK GMBH,

17 vs.

18 CLOUD IMPERIUM GAMES CORP. and  
19 ROBERTS SPACE INDUSTRIES CORP.,

20 Defendants.

Case No. 2:17-CV-08937

[HON. DOLLY M. GEE]

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF DEFENDANTS'  
MOTION FOR A PROTECTIVE  
ORDER CONTROLLING TIMING  
AND SCOPE OF DISCOVERY  
PENDING RESOLUTION OF  
MOTION TO DISMISS**

Date: April 13, 2018

Time: 9:30 a.m.

Courtroom: 8C

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1 **I. INTRODUCTION**

2 For the last five and half years, Defendants Cloud Imperium Games Corp. and  
3 Roberts Space Industries Corp. have been developing a multiplayer science fiction video  
4 game of unprecedented scale through funding raised in a successful public crowdfunding  
5 campaign. In this lawsuit, Crytek has asserted a series of contrived claims against  
6 Defendants, all of which Defendants have moved to dismiss for failure to state a claim  
7 based primarily on the terms of the Game License Agreement (“GLA”), concealed by  
8 Crytek in both of its pleadings, that expressly authorize Defendants’ conduct which  
9 Crytek alleges to be wrongful. The pending motion to dismiss, if granted, could and  
10 should dispose of all of Crytek’s claims. If any portions survive, the parameters of this  
11 lawsuit, which are impossible for Defendants to discern based upon the fragmented and  
12 internally-inconsistent series of allegations comprising the FAC, likely will dramatically  
13 narrow.

14 Nevertheless, Crytek has barreled ahead with the broadest possible discovery,  
15 designed to be as intrusive and expensive as possible, propounding a litany of onerous  
16 demands even before the statutorily-mandated time for the commencement of discovery.  
17 These demands all relate either to no claim in the FAC or to claims that should be  
18 dismissed by the Court. Recognizing the absence of any merit to its claims, Crytek  
19 instead hopes to inflict damage upon Defendants by abusing the discovery process. At a  
20 minimum, the Court should determine whether Crytek’s claims are even viable (and if so,  
21 what their parameters are) before Crytek is entitled to proceed with such wasteful and  
22 expensive discovery.

23 Crytek refuses to consider or discuss a stay or other orderly management of the  
24 scope and scheduling for discovery pending a decision on the fully-briefed motion to  
25 dismiss, where the boundaries of this lawsuit will be defined, despite the absence of any  
26 prejudice that a stay would cause to Crytek. Defendants thus are forced to move for  
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1 practical protective relief to bring sense and order to otherwise sprawling, expensive, and  
2 unnecessary discovery.

3 **II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND**

4 **A. CIG licenses CryEngine to develop *Star Citizen* and *SQ42*.**

5 CIG is developing a multi-player video game called *Star Citizen* and its related  
6 single-player game called *Squadron 42* (“*SQ42*”). On November 20, 2012, CIG and  
7 Crytek entered into the GLA (concealed by Crytek in its two pleadings), granting CIG the  
8 exclusive right to use Crytek’s game engine, called “CryEngine,” for exactly these  
9 purposes. In December 2016, CIG announced that it had begun to use another game  
10 engine, licensed to CIG by Amazon, called “Lumberyard” for both its *Star Citizen* and  
11 *SQ42* games.

12 **B. Crytek sues CIG and RSI based on a pleading replete with deficiencies.**

13 Crytek commenced this action against CIG and RSI on December 12, 2017 and  
14 filed its FAC on January 2, 2018. The FAC purports to assert two claims against CIG  
15 and RSI: breach of the contract that Crytek did not attach to the FAC and copyright  
16 infringement of CryEngine by some unspecified work or works. Defendants are unable  
17 to understand Crytek’s allegations based on the current operative pleading and in light of  
18 the plain language of the GLA, which contradicts virtually all of Crytek’s claims. It is  
19 not clear whether Crytek sued Defendants for *not* using CryEngine, for *using* CryEngine,  
20 or both. It also is not clear why Crytek sued RSI for breaching a contract to which RSI is  
21 not a party.

22 Crytek complains that Defendants are *not using* CryEngine and switched to  
23 Lumberyard, even though the GLA grants CIG a *license*, not an obligation, to use  
24 CryEngine. At the same time, Crytek complains that Defendants *are using* CryEngine to  
25 develop *SQ42*, even though the GLA expressly allows just that. Crytek further complains  
26 about Defendants’ announcement that *SQ42* would be distributed as a standalone game,  
27 but the very documents incorporated by reference into the FAC establish that Defendants  
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1 are using *Lumberyard* to develop *SQ42* and, in any event, *SQ42* has not yet been  
2 distributed at all, either with or without *Star Citizen*. Crytek also complains about  
3 Defendants not using Crytek’s copyright and trademark notices for a game that uses  
4 Amazon’s licensed engine.

5 Crytek tacks on several additional fragmented allegations, each of which is equally  
6 confusing and baseless. Crytek contends that Defendants failed to deliver certain bug  
7 fixes, while knowing that Defendants tendered them years ago and recently delivered  
8 them to Crytek. Crytek complains about Defendants posting instructional videos called  
9 “Bugsmashers” that purportedly display Crytek’s source code, but fails to identify the  
10 videos or code at issue. Crytek also ignores that any use of the source code likely is *de*  
11 *minimis*, fair use and duplicative of source code already available to the public. Finally,  
12 Crytek complains about Defendants granting third-party developer Faceware  
13 Technologies access to Crytek’s source code, but this is simply not true and Crytek’s  
14 “information and belief” for contending otherwise is baseless.

15 **C. Defendants move to dismiss the FAC.**

16 Defendants should not have to guess at what is at issue in this case, but the  
17 fragments found in the FAC do not support claims for breach of contract or copyright  
18 infringement. Accordingly, on January 5, 2018, Defendants moved to dismiss the FAC  
19 in its entirety, showing the Court the GLA. ECF 19.

20 The motion was fully briefed as of January 26, 2018. ECF 25, 26. On February 8,  
21 2018, the Court entered an order finding that the motion to dismiss, which was scheduled  
22 for hearing on February 9, 2018, is appropriate for a decision without oral argument and  
23 the Court took the motion under submission. ECF 27.

24 **D. Crytek jumps the gun on discovery.**

25 Rather than attempting to amend its pleading to correct the numerous deficiencies  
26 with the FAC highlighted in the motion to dismiss or awaiting the Court’s determination,  
27 Crytek revealed that its strategy is instead to inundate Defendants with unlimited  
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1 discovery demands designed to distract Defendants and waste their resources without  
2 justification. Despite Rule 26(d)(1)'s provision that "[a] party may not seek discovery  
3 from any source before the parties have conferred as required by Rule 26(f)," Crytek  
4 attempted to serve Defendants' counsel with Crytek's Initial Disclosures, First Set of  
5 Requests for Production ("RFPs"), and First Set of Interrogatories ("ROGs") on January  
6 19, 2018, in the middle of the briefing schedule for Defendants' motion to dismiss,  
7 without the Court having set an initial Scheduling Conference, and before the parties held  
8 their Rule 26(f) conference (which took place on February 13, 2018).

9 The sheer overbreadth, unlimited scope and intrusiveness of the requests  
10 underscores the need for a stay of discovery while the contours of this lawsuit are  
11 defined. The RFPs include sixty-nine (69) document requests seeking virtually every  
12 document or communication on a vast range of topics including, without limitation (a)  
13 nearly every aspect of the development and marketing of *Star Citizen* and *SQ42*; (b)  
14 Defendants' business dealings with third parties unrelated to any claim or defense at issue  
15 (including license agreements between Defendants and third parties); (c) Defendants'  
16 agreements with their past, present, or potential suppliers, contractors, and customers; (d)  
17 Defendants' business structures and employees (including employment agreements and  
18 personnel files); (e) the ownership interests of Defendants' officers and all of their past  
19 and present shareholders; (f) the names and roles of all employees or contractors involved  
20 in the development of any products ever developed by Defendants; (g) the corporate  
21 structures of various companies related to Defendants; (h) Defendants' fundraising  
22 efforts, including the funds, contributions, or support provided to Defendants by any  
23 persons; (i) Defendants' financial statements, tax returns, and profits and revenue  
24 information for each fiscal year and quarter going back to Defendants' inceptions; (j)  
25 investment memoranda pertaining to Defendants and any products ever developed by  
26 Defendants, and (k) all versions of any source code for any products ever developed by  
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1 Defendants and any game engines used by Defendants. *See* Exhibit A to the Declaration  
2 of Jeremy S. Goldman filed herewith (“Goldman Decl.”).

3 The ROGs, though styled as a single request, are equally overbroad and abusive,  
4 seeking detailed technical information about every “version” of every “build” of every  
5 “product” ever created by Defendants or by a long list of people associated with  
6 Defendants. *See id.*, Exhibit B. Collecting this data would require Defendants to  
7 undertake a wasteful and burdensome task that likely will be mooted, or at least  
8 significantly narrowed, by the disposition of Defendants’ motion to dismiss.

9 Crytek’s portion of the Joint Rule 26(f) Report [ECF 28] further highlights the  
10 problems with allowing discovery to proceed at this stage. For example, Crytek states  
11 that it plans to seek discovery on subjects including the “revenue, profits, and  
12 crowdfunding obtained by Defendants” – financial subjects that have no relevance to  
13 Crytek’s breach of contract or copyright infringement claims, but that are designed to be  
14 as intrusive and burdensome as possible to Defendants.

15 **E. Crytek rejects Defendants’ proposal to commence discovery after the**  
16 **Court rules on the pending motion to dismiss.**

17 The parties conducted their Rule 26(f) conference on February 13, 2018. During  
18 the conference, Defendants explained their view that, in the interest of maximizing  
19 efficiency for the parties and the Court, it would make sense for the parties to agree to  
20 commence discovery after the Court rules on the pending motion to dismiss and the  
21 contours of the claims and issues remaining in this case, if any, are solidified. Goldman  
22 Decl. ¶ 6. Crytek refused even to discuss Defendants’ proposal, without explanation,  
23 instead robotically reading aloud from the draft joint report. *Id.* at ¶ 7. Defendants  
24 expressed their intent to file a motion for a protective order if Crytek would not stipulate  
25 to a reasonable postponement or any other sensible management of discovery, and  
26 indicated that they would consider the conversation to constitute their meet and confer in  
27 accordance with Local Rule 7-3. *Id.* at ¶ 8. Crytek acknowledged that the discussion  
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1 satisfied the Rule 7-3 requirement, and told Defendants to make their motion. *Id.* at ¶ 9.  
2 This motion followed. As of this filing, no trial date or discovery deadlines have been set  
3 by the Court.

4 **III. ARGUMENT**

5 **A. The just, speedy and inexpensive adjudication of this action mandates a**  
6 **stay of discovery pending resolution of Defendants’ motion to dismiss.**

7 The Federal Rules of Civil Procedure are designed “to secure the just, speedy, and  
8 inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. To  
9 achieve that goal, the Court has wide discretion to issue “an order to protect a party or  
10 person from . . . undue burden or expense,” including an order “specifying terms,  
11 including time and place, for the disclosure or discovery[.]” Fed. R. Civ. P. 26(c)(1)(B);  
12 *see Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988) (court has “wide discretion  
13 in controlling discovery”). The Court’s power to stay discovery in appropriate cases is  
14 “incidental to the power inherent in every court to control the disposition of the causes on  
15 its docket with economy of time and effort for itself, for counsel, and for litigants.” *Good*  
16 *v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 806 (N.D. Cal. 1998) (citing *Landis v.*  
17 *N. Am. Co.*, 299 U.S. 248, 254-55 (1936)).

18 A stay of discovery is appropriate where, as here, a dispositive motion is pending.  
19 *See Wenger v. Monroe*, 282 F.3d 1068, 1077 (9th Cir. 2002) (affirming district court’s  
20 grant of protective order staying discovery pending resolution of motion to dismiss for  
21 failure to state a claim); *Wood v. McEwen*, 644 F.2d 797, 801-02 (9th Cir. 1981) (per  
22 curiam) (affirming district court’s grant of protective order staying discovery in light of a  
23 pending motion to dismiss for failure to state a claim). The Ninth Circuit recognizes that  
24 the “purpose of Fed. R. Civ. P. 12(b)(6) is to enable defendants to challenge the legal  
25 sufficiency of complaints *without* subjecting themselves to discovery.” *Rutman Wine*  
26 *Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (emphasis added). Thus,  
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1 courts should “determine whether there is any reasonable likelihood that plaintiffs can  
2 construct a claim before forcing the parties to undergo the expense of discovery.” *Id.*

3 District courts in California use a two-pronged test to determine whether a  
4 protective order staying discovery should issue while other motions are pending: “First, a  
5 pending motion must be potentially dispositive of the entire case, or at least dispositive  
6 on the issue at which discovery is directed. And second, the Court must determine  
7 whether the pending dispositive motion can be decided absent discovery.” *Hall v. Tilton*,  
8 No. C 07-3233-RMW, 2010 WL 539679, \*2 (N.D. Cal. Feb. 9, 2010); *see also Lowery v.*  
9 *F.A.A.*, No. CIV.S93-1352-EJG, 1994 WL 912632, \*3 (E.D. Cal. April 11, 1994).

10 Here, the motion to dismiss, if granted, would dispose of Crytek’s entire case or, if  
11 granted only in part, would narrow the issues at stake in this litigation. Moreover, there  
12 is a significant likelihood that Defendants will succeed on their motion to dismiss, either  
13 in whole or in part, given the numerous deficiencies with the FAC, the plain language of  
14 the GLA precluding virtually every one of Crytek’s claims, and documents incorporated  
15 by reference into the FAC that directly contradict the allegations in Crytek’s pleading.  
16 *See GTE Wireless, Inc. v. Qualcomm, Inc.*, 192 F.R.D. 284, 286 (S.D. Cal. 2000) (court  
17 considered whether there appeared to be “an immediate and clear possibility” that motion  
18 would be granted after taking “preliminary peek” at the merits of the motion). Finally,  
19 the Motion can be decided without resort to discovery. *See Jarvis v. Regan*, 833 F.2d  
20 149, 155 (9th Cir. 1987) (affirming district court’s order staying discovery pending a  
21 hearing on motion to dismiss, holding that “[d]iscovery is only appropriate where there  
22 are factual issues raised by a Rule 12(b) motion”); *Mlejnecky v. Olympus Imaging*  
23 *America, Inc.*, No. 10 Civ. 2630, 2011 WL 489743, at \*6-7 (E.D. Cal. Feb. 7, 2011) (in  
24 considering a stay of discovery, court considered whether motion was dispositive and  
25 could be resolved without additional discovery).

1           **B.     Permitting discovery before resolution of the motion to dismiss would**  
2           **be unduly burdensome for Defendants and inefficient for the Court.**

3           In *Twombly*, the Supreme Court held that a plaintiff should present viable claims in  
4 a complaint before the plaintiff is entitled to proceed with burdensome and expensive  
5 discovery. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007) (when the  
6 allegations in a complaint cannot “raise a claim of entitlement to relief, this basic  
7 deficiency should be exposed at the point of minimum expenditure of time and money by  
8 the parties and the court”; internal quotations omitted). The Court recognized that  
9 subjecting defendants to intrusive discovery without a viable pleading is inherently  
10 unfair, especially since the vast majority of litigation costs arise from discovery. *Id.*

11           As in *Twombly*, this case involves complex litigation where discovery will be  
12 extensive, burdensome, and costly. Indeed, Crytek’s FAC alleges at least five different  
13 theories of liability against Defendants, the crux of which attempts to put at issue  
14 Defendants’ use (and non-use) of Crytek’s game engine source code in Defendants’  
15 source code underlying *Star Citizen* and *SQ42*. That source code comprises *millions* of  
16 lines of code that, over the course of the last six years, have evolved and been compiled  
17 into hundreds of different “builds.” As discussed above, Crytek has already sought to  
18 capitalize on this complexity by prematurely inundating Defendants with extensive and  
19 all-encompassing discovery demands, in an attempt to inflict maximum damage upon  
20 Defendants by distracting them from game development and wasting their resources.  
21 Staying discovery while the motion to dismiss is pending will allow Defendants to avoid  
22 unnecessarily incurring these costs until “[a]fter full ventilation of the viability *vel non* of  
23 the complaint,” when “we will all be in a much better position to evaluate how much, if  
24 any discovery to allow.” *In re Graphics Processing Units Antitrust Litigation*, No. C 06-  
25 07417-WHA, 2007 WL 2127577, \*5 (N.D. Cal. July 24, 2007) (staying discovery  
26 pending resolution of a motion to dismiss).

1 The Court should determine whether Crytek’s claims are even viable (and if so,  
2 what their parameters are) before Crytek is entitled to proceed with burdensome and  
3 expensive discovery. *Twombly*, 550 U.S. at 558-59; *see Anti-Monopoly, Inc. v. Hasbro,*  
4 *Inc.*, No. 94-Civ-2120-LMM, 1996 WL 101277, \*3 (S.D. N.Y. Mar. 7, 1996) (granting  
5 stay of discovery and noting that the discovery requests already propounded were “quite  
6 extensive” and would be “totally unnecessary” if defendant prevailed on its pending Rule  
7 12 motion); *see also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1368 (11th Cir.  
8 1997) (“Allowing a case to proceed through the pretrial processes with an invalid claim  
9 that increases the costs of the case does nothing but waste the resources of the litigants in  
10 the action before the court, delay resolution of disputes between other litigants, squander  
11 scarce judicial resources, and damage the integrity and the public's perception of the  
12 federal judicial system.”).

13 **C. Plaintiff will not be prejudiced by a short stay while the Court decides**  
14 **Defendants’ motion to dismiss.**

15 In contrast to the enormous and, in all likelihood, wasteful exercise that will be  
16 imposed upon Defendants if discovery is allowed to proceed without limitation at this  
17 juncture, Crytek will suffer no prejudice by a stay of discovery while the motion to  
18 dismiss is pending.

19 Defendants’ motion to dismiss is fully briefed and has been taken under  
20 submission by the Court. Once the Court decides the motion, the parties will know  
21 which of Crytek’s claims, if any, will be permitted to proceed, and in what form. No trial  
22 date or discovery deadlines have been set by the Court. There is no urgency to Crytek’s  
23 discovery. If the Court determines that any of Crytek’s theories of liability in the FAC  
24 state a claim for relief, all of the documents and information to which Crytek is thereby  
25 entitled through discovery have been preserved. Thus, Plaintiff will not be prejudiced by  
26 a short stay while the Court decides the motion. *See In re Graphics Processing, 2007*  
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1 WL 2127577, \*5 (“[W]e have no urgent need for immediate discovery. We have time  
2 enough to critique the complaint and to then consider the best course for discovery.”).

3 **D. If the Court declines to stay discovery pending resolution of Defendants’**  
4 **motion to dismiss, Defendants request a conference before the Court to**  
5 **discuss the orderly administration of discovery in this matter.**

6 In the event that the Court declines to grant a protective order staying  
7 commencement of discovery pending resolution of Defendants’ motion to dismiss,  
8 Defendants request a conference before the Court so that the parties and the Court may  
9 discuss the orderly administration of discovery in this matter, including the issues raised  
10 by Defendants in the parties’ Joint Rule 26(f) Report [ECF 28]. These issues include  
11 Defendants’ request that, in the event that any claims remain for adjudication following  
12 the Court’s ruling on the motion to dismiss, the Court bifurcate discovery into two phases  
13 (discovery regarding liability and, only if necessary, discovery regarding damages). To  
14 date, Crytek has been unwilling to agree to any reasonable limitations on the timing or  
15 scope of discovery. A conference before the Court will allow the parties to develop a  
16 controlled and appropriate discovery plan that comports with the needs of this case, rather  
17 than subjecting Defendants to the costly and burdensome discovery free-for-all urged by  
18 Crytek.

19 ///

20 ///

1 **IV. CONCLUSION**

2 For the reasons stated herein, the Court should enter a protective order staying  
3 discovery in this matter until the Court decides Defendants' motion to dismiss and the  
4 claims remaining in the lawsuit, if any, are determined. If the Court declines to grant  
5 such a protective order, Defendants request a conference before the Court so that the  
6 parties and the Court may discuss the orderly administration of discovery in this matter.

7  
8 Dated: March 9, 2018

FRANKFURT KURNIT KLEIN & SELZ P.C.

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