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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-DMG-FFM

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

Date: April 17, 2018

Time: 10:00 a.m.

Courtroom: 580

Magistrate Judge Frederick F. Mumm

1 PRELIMINARY STATEMENT

2 Relevance and proportionality are the required cornerstones of responsible
3 discovery in federal court since 2015. Crytek’s dubious pleading makes application of
4 these principles impossible. The pending motion to dismiss will clear up what properly is
5 at issue, if anything. Crytek’s overwhelming discovery needs Court guidance to serve the
6 relevance and proportionality requirements.

7 Crytek’s generalized (no showing) opposition demonstrates why this unusual case
8 warrants early, practical, and decisive Court protective intervention on timing to ensure
9 just, proportional discovery that complies with federal law:

10 (1) Crytek started this case by twice concealing the contract from its two
11 shotgun complaints, leading to significant pleading tangles that need to be resolved at the
12 outset to determine if there will even be a case and, if so, its responsible contours as
13 guided by the agreement.¹

14 (2) Crytek then served sprawling, expensive and disruptive discovery while the
15 pleading was attacked.

16 (3) Without knowing what, if anything, survives from Crytek’s peculiarly
17 deceptive pleading, it is *impossible to apply federally-required proportionality* to
18 untethered, out-of-control discovery.

19
20
21 _____
22 ¹ Crytek (a) hides the contract; (b) seeks punitive damages for breach of contract and
23 copyright infringement; (c) alleges copyright infringement without identifying any
24 supposedly infringing work; (d) seeks monetary and injunctive damages that the hidden
25 contract specifically prohibits; (e) alleges that use of Crytek’s game engine in *Squadron*
26 *42* is a breach, when the contract explicitly contemplates exactly such a use, and (f)
27 inconsistently alleges that not using the game engine is also a breach. This is the rare
28 pleading mess where the plaintiff commenced litigation without regard for law or
contract. Discovery is a consuming and expensive process, and Crytek should not be
permitted to conduct it in the same reckless manner.

1 (4) Crytek opposes Defendants’ motion based entirely on generalities, without
 2 any showing whatsoever that Crytek would suffer any prejudice from waiting until the
 3 Court can untangle its pleadings.

4 It is not every case where the plaintiff hides the contract, commits numerous black-
 5 letter law pleading violations, then seeks top-to-bottom unlimited and destructive
 6 discovery with a dismissal motion pending. Every aspect of Crytek’s actions in this
 7 proceeding needs to get on a responsible path. The best Court discretion here is a
 8 protective order controlling the timing of discovery pending the outcome of Defendants’
 9 dispositive motion. Relevance and proportionality are measured by the needs of what is
 10 truly at issue substantively. If any case is left after the motion to dismiss, protective relief
 11 will allow the parties to manage discovery within the substantive confines dictated by the
 12 Court, so an educated approach to proportionality becomes even possible.

13 ARGUMENT

14 **I. Protective relief is discretionary, yet necessary.**

15 Crytek’s opposition quotes district courts that have stated that “as a general matter”
 16 courts do not stay discovery where a motion to dismiss is pending (*Vista del Sol Health*
 17 *Care Servs., Inc. v. Nat’l Labor Relations Bd., Region 31*), that discovery should not be
 18 delayed “every time” a dispositive motion is pending (*Carver Int’l, Inc. v. SurfSkate*
 19 *Indus., LLC*), and that there are no “automatic or blanket stays” of discovery when a
 20 potentially dispositive motion is pending (*Singh v. Google, Inc.*). Opp. at 2-4.
 21 Defendants do not contend that Rule 12 should halt discovery “as a general matter” or
 22 “every time,” or “automatically.” Defendants have demonstrated, and Crytek simply
 23 ignores, that *in this case, under the particular circumstances created by Crytek*, the
 24 parties should not commence discovery until the Court decides the fully-briefed motion
 25 to dismiss, and sets the parameters and future of this case, if any.

26 Crytek submits no rebuttal showing whatsoever. Crytek retreats to discussing, in
 27 generalities, cases in which various circumstances warranted staying discovery pending a
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1 decision on a motion to dismiss, and attempts to argue that this case does not fall squarely
 2 within one of those previously-adjudicated circumstances. Opp. at 5-9. Crytek ignores
 3 that the wide range of cases noted in the opposition shows that there are *many*
 4 circumstances under which Courts have *exercised their discretion* to stay discovery, with
 5 each case-by-case inquiry entirely fact-specific.² This case bears unusual hallmarks
 6 warranting protective relief while the motion to dismiss is pending, particularly since
 7 proportionality must be applied.

8 **II. Essential proportionality, relevance, and efficiency are controlled by the**
 9 **surviving substance of the case (if any) that remains properly at issue.**

10 Federal Rule of Civil Procedure 26 was amended in 2015 to dispense with the prior
 11 broad discovery standard of “relevant to the subject matter involved in the action,”
 12 replacing it with a new standard designed to streamline the discovery process. Under this
 13 new Rule 26 standard, parties may only obtain discovery regarding “any nonprivileged
 14 matter that is *relevant to any party’s claim or defense* and *proportional to the needs* of
 15 the case[.]” (emphasis added). The “parties and the court have a collective responsibility
 16 to consider the proportionality of all discovery and consider it in resolving discovery
 17 disputes.” Fed. R. Civ. P. 26, Advis. Comm. Notes for 2015 Amends. Crytek’s decision
 18 to attempt two pleadings that contradict the contract, among numerous other pleading
 19 transgressions, renders such a proportionality analysis impossible to apply.

21 ² The types of cases classified by Crytek include cases pending a transfer decision by the
 22 Judicial Panel of Multidistrict Litigation; dubious fraud claims (Crytek’s claims are
 23 dubious at best, which is why Crytek hid the contract); cases raising questions of
 24 immunity; antitrust actions; “patently unmeritorious claims” (here, the Court has Crytek
 25 seeking punitive damages for copyright and contract claims, both prohibited by black-
 26 letter law, and without even identifying infringing works); claims barred by applicable
 27 statutes of limitations; and patent cases with procedural deficiencies. Crytek points to no
 28 authority stating that a motion such as this one *may only* be granted in the specific
 circumstances enumerated in its opposition.

1 **A. Whatever remains (if anything) after the pending motion to dismiss**
2 **defines relevance and proportionality.**

3 Permitting discovery before the dismissal ruling means no one (Court, parties,
4 counsel) can tell if the overwhelming discovery propounded is proportional or relevant to
5 anything. Permitting Crytek to proceed with such discovery before the viability and
6 parameters of Crytek’s unusual pleading have even been determined by the Court is
7 likely to cause an unnecessary and unwarranted waste of Defendants’ resources.

8 Crytek pretends that there is something improper about Defendants moving for
9 relief. It thinks that Defendants and their counsel should have isolated particular
10 objections to Crytek’s 69 individual document discovery requests and its enormously
11 broad and compound interrogatory seeking information on every iteration of every
12 product developed by Defendants, and should have met and conferred with Crytek
13 regarding each one pursuant to the Local Rules, on a pleading that has not moved and
14 should not move off of square one. Opp. at 12. There is every reason for a party moving
15 for broader protective relief where, as here, the troubling circumstances of Crytek’s case
16 provide good cause for the Court to control the overall timing and scope of discovery.
17 Once the parameters and the future disposition of the case, if any, are determined,
18 Defendants will, of course, engage in meet and confers with Crytek on any proportional
19 and relevant discovery remaining and bring only disputes that the parties cannot resolve
20 to the Court’s attention for intervention and guidance. It would be wasteful and
21 premature for Defendants to do so at this juncture, when the Court would not even be
22 able to assess the propriety of each individual discovery request because the scope and
23 parameters of Crytek’s alleged claims are so indeterminate.

24 **B. Crytek attempts no showing that it would suffer prejudice from protective**
25 **relief against limitless discovery while the motion to dismiss is pending.**

26 The opposition does not attempt to rebut that there is no bona fide urgency to
27 Crytek’s discovery. Crytek attempts no showing (declaration or evidence) that Crytek
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1 would suffer prejudice from protective relief until the Court has had a chance to rule on
2 the motion to dismiss, which would allow the parties to understand what, if anything, is
3 left and apply proportionality to that. The only impediment that Crytek notes in its
4 opposition is that a temporary stay might not allow it enough time to analyze the
5 “millions of lines of code” it has sought in discovery before the July 16, 2019 trial date
6 *that Crytek itself has unilaterally proposed* and that has not been set by the Court (and,
7 on the current pleading, could never be set). Opp. at 10; Joint Rule 26(f) Report at 15
8 [ECF 28]. This statement underscores how Crytek overreaches in discovery.

9 By contrast, if protective relief is not granted, Defendants will be prejudiced, given
10 that they cannot possibly measure proportionality or relevance. As things now stand,
11 Defendants must choose between spending time and money responding to Crytek’s
12 sprawling discovery requests, including for “millions of lines of code,” or engaging in
13 senseless individual disputes over virtually every discovery request, all on a case that
14 should never survive a Rule 12 motion.

15 **III. Crytek has taken peculiar and questionable steps in this action.**

16 **A. The case is off to a bad start since the hidden contract precludes**
17 **virtually every one of Crytek’s claims.**

18 Crytek asserts claims for breach of contract and copyright infringement, but the
19 unusual manner in which Crytek pleaded raises red flags about discovery abuse. As best
20 Defendants can tell, Crytek’s claims center on a particular Game License Agreement (the
21 “GLA”) between Crytek and defendant CIG. Crytek conspicuously omitted this contract
22 from its two attempts at pleading so far. The express language of the GLA precludes
23 virtually every claim asserted by Crytek. The GLA is currently before Judge Gee on
24 Rule 12. Crytek’s actions and omission make this case different than the run-of-the-mill
25 breach of contract claim regarding reasonable disputes over interpretation or claims of
26 non-performance of an attached contract.

27 Crytek’s opposition characterizes Defendants’ confidence in the strength of their
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1 underlying motion to dismiss as “hyperbolic” (Opp. at 9), but Defendants are not simply
2 asking the Magistrate Judge to take their word for it. On a protective order motion, the
3 Court possesses the power to take a “preliminary peek” at the merits of Defendants’
4 fully-briefed motion to dismiss. It will see for itself that Crytek’s furtive claims are
5 baseless, or at a minimum, have a strong likelihood of being dismissed outright or being
6 severely truncated. *GTE Wireless, Inc. v. Qualcomm, Inc.*, 192 F.R.D. 284, 286 (S.D.
7 Cal. 2000) (court considered whether there appeared to be “an immediate and clear
8 possibility” that a dispositive motion would be granted after taking “preliminary peek” at
9 the merits of the motion). The strength of Defendants’ motion to dismiss (and Crytek’s
10 profound evasiveness) demonstrates that Crytek’s pleading is in the same vein as the
11 “patently unmeritorious claims” cited in Crytek’s opposition that led the court in those
12 cases to stay discovery. Opp. at 7-9; *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94-cv-
13 2120, 1996 WL 101277, at *4 (S.D.N.Y. Mar. 7, 1996) (Court granted motion to stay
14 discovery pending a decision on a dispositive motion when a preliminary look at the
15 underlying motion showed that “the motion [was] not unfounded in the law and
16 appear[ed] to have substantial grounds”; internal quotations omitted). Defendants entreat
17 the Magistrate Judge to have a look.

18 **B. Crytek’s propounded discovery requests exceed all possible proportion**
19 **and inflict maximum burden.**

20 Without a responsible pleading, Crytek has propounded 69 document requests
21 seeking everything under the sun, and a remarkably compound interrogatory seeking
22 everything about every iteration of every product developed by Defendants. These
23 discovery requests are so broad that essentially every aspect of Defendants’ business
24 (product development, personnel matters, financial data, relationships with third parties,
25 etc.) would be disrupted. The sheer overbreadth, unlimited scope, and intrusive nature of
26 the discovery requests that Crytek has propounded to date reveal that Crytek’s litigation
27 tactic is to inundate Defendants with discovery demands out of all reasonable proportion,
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1 designed to nobble Defendants from their business, divert their resources, and cause
 2 Defendants to incur substantial legal fees, even though it is distinctly dubious this
 3 pleading can proceed past Rule 12.

4 The current state of this matter presents troubling and unusual circumstances that
 5 courts look at to grant protective relief while a motion to dismiss is pending. *Anti-*
 6 *Monopoly, Inc. v. Hasbro, Inc.*, No. 94-Civ-2120-LMM, 1996 WL 101277, *3-4 (S.D.
 7 N.Y. Mar. 7, 1996) (granting stay of discovery and noting that the discovery requests
 8 already propounded were “quite extensive” and the underlying dispositive motion
 9 “appear[ed] to have substantial grounds”); *Chudasama v. Mazda Motor Corp.*, 123 F.3d
 10 1353, 1356-58, 1368 (11th Cir. 1997) (finding the district court failed to properly manage
 11 discovery where the plaintiffs’ claims were “dubious” and “of questionable validity,” and
 12 where plaintiffs “asked for production of nearly every document ever made that would
 13 list or assist in finding every person that ever had anything to do with any component of”
 14 the product at issue, as well as all “similar” products).

15 **C. *McCall v. Monsanto* presents completely different circumstances.**

16 Crytek’s opposition relies on Judge Gee’s denial of a motion to stay in *McCall v.*
 17 *Monsanto* (Opp. 1, 4-5), as though all cases are the same.³ Crytek deliberately omitted
 18 the key facts of that case that easily distinguish this case from *McCall*.

19 Crytek neglects that, in *McCall*, the defendant moved for relief until the court ruled
 20 on a motion to dismiss that *defendant had not yet filed* but stated it *intended* to file
 21 within the next month. *McCall v. Monsanto Co.*, No. 16-cv-1609, at 3 (C.D. Cal. Apr.
 22 29, 2016), ECF No. 35. The Court noted that, without having the opportunity to review
 23

24 ³ Notably, while Crytek quotes the *McCall* decision on the first page of the Opposition, it
 25 omits the final sentence of that quote, presumably because it does not support Crytek’s
 26 position: “Of course, the Court expects that the parties’ counsel will exercise sound
 27 professional judgment to refrain from making burdensome or duplicative discovery
 28 requests” *McCall*, No. 16-cv-1609 at 3.

1 the defendant’s “hypothetical motion to dismiss,” the Court could not evaluate whether
 2 defendant was likely to succeed on the merits. *Id.* In contrast, here, Defendants’ motion
 3 has been filed, fully-briefed, and taken under submission by the Court. The Court is
 4 empowered to review it to evaluate whether Defendants are likely to succeed on the
 5 merits.

6 Crytek also omits that Judge Gee also based her decision in *McCall* on the fact that
 7 the defendant in that case was already “engaged in similar or identical discovery in
 8 several other cases” brought against it by similarly-situated plaintiffs. *Id.* Given this
 9 fact, the Court found that there was no indication that denial of the motion to stay would
 10 cause the defendant irreparable injury. *Id.* Here, Defendants are not engaged in any
 11 similar litigation with other plaintiffs that would require Defendants to engage in “similar
 12 or identical discovery.” Responding to Crytek’s boundless discovery requests at this
 13 juncture (before the bounds of this case, if any, have been guided by the Court) would
 14 require Defendants to expend outrageous amounts of time, money, and resources that
 15 they otherwise would not be expending.

16 **IV. The Parties agree that it would be appropriate for the Court to conduct a**
 17 **conference with the Parties to discuss the orderly administration of discovery.**

18 Defendants alternatively prayed for the Court to at the very least conduct a
 19 conference to supply orderly administration of discovery in this matter, including the
 20 issues raised by Defendants in the parties’ Joint Rule 26(f) Report [ECF 28]. Crytek
 21 “would of course welcome any conference that the Court wishes to hold.”⁴ Opp. at 11.
 22 Given the parties’ mutual agreement that a conference to discuss the orderly
 23 administration of discovery would be appropriate, Defendants are confident that, if
 24

25 ⁴ Crytek states that “Defendants are not correct when they complain that ‘[t]o date,
 26 Crytek has been unwilling to agree to any reasonable limitations on the timing or scope
 27 of discovery.” Opp. at 11. Crytek fails to provide any further details or evidence about
 28 why or how Defendants are “not correct” on this point.

1 discovery is to proceed at all, such a conference would allow for the development of a
2 controlled discovery plan satisfying Fed. R. Civ. P. 1 and the requirements of Fed. R.
3 Civ. P. 26.

4 **CONCLUSION**

5 This is not a case where a plaintiff pled straightforward breaches of an attached
6 written contract. This is not a case where a plaintiff alleged that defendant's work A
7 infringed plaintiff's work B. Instead, this is a case where a plaintiff has subjected
8 Defendants to ridiculous positions like punitive damages for contract breach, and to
9 prepare a Rule 11 motion for factually-false statements, and now to answer and object to
10 behemoth discovery where proportionality is impossible to fathom because it is not at all
11 clear what, if anything, is at issue. The Court should issue practical protective relief
12 controlling the timing and scope of discovery in this matter until the Court decides
13 Defendants' motion to dismiss so any claims remaining in the lawsuit, and thus discovery
14 proportionality, are determined in a responsible fashion. Alternatively, Defendants
15 request a conference before the Court so that the parties and the Court may conceive
16 orderly administration of proportional discovery in this matter.

17 Dated: April 3, 2018

FRANKFURT KURNIT KLEIN & SELZ P.C.

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CERTIFICATE OF SERVICE

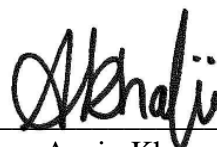
I hereby certify that on the 3rd day of April, 2018, I electronically filed the foregoing DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION FOR A PROTECTIVE ORDER CONTROLLING TIMING AND SCOPE OF DISCOVERY PENDING RESOLUTION OF MOTION TO DISMISS, with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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