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October 2, 2015

Mr. Ortwin Freyermuth  
Cloud Imperium Games Corporation  
Roberts Space Industries Corp  
9255 Sunset Blvd STE 803  
West Hollywood, CA 90069

Re: **Derek Smart v. Cloud Imperium, Chris Roberts, et al**

Dear Mr. Freyermuth:

I write in response to your September 30, 2015 letter, again on behalf of Mr. Derek Smart (and others).

With all due respect, your client's claim under Civil Code Section 1708.7 is patently absurd. Nevertheless, because you are forcing my client to address this under threat of both civil *and criminal* penalties, we will, for the moment, respond, and insist upon an offer of proof of the evidence that you (and the authorities) will require to establish said claim.

First, however, we need to address a matter of grave concern: namely the precipitous and *potential* ethical violations inherent in threatening criminal prosecution against Mr. Smart, particularly *if* it is designed or intended to deter him from exercising his freedom of speech or pursuing civil action. Here, as you are well aware, The California Rules of Ethics, Rule 5-100, expressly states a bar member shall not threaten to present criminal charges to obtain an advantage in a civil dispute. In that regard, the term "civil dispute" means a controversy or *potential controversy* over the rights and duties of two or more parties under civil law, *whether or not an action has been commenced*.

Here, it *appears* you and/or your client are attempting to stifle Mr. Smart's freedom of speech, and prevent him from pursuing civil causes of action, by threatening criminal action against him based on a phantom and unsustainable cause of action for "stalking." It is, in fact, for this reason he is entitled to know the evidence your client has in support of this claim, since you are threatening criminal action against him, which appears to him as an attempt to prevent him from pursuing legitimate civil causes of action. In other words, in light of this threat of criminal action, Mr. Smart is entitled to know what illegal conduct he is to "cease and desist" from. The law itself *requires* that your client present proof of said claims with corroborating evidence. For Mr. Smart to "cease and desist", therefore, he and the authorities will need evidence that valid claims exist. This will be elaborated on further below.

Before proceeding to a discussion of Civil Code Section 1708.7, however, you must be advised that any attempt to utilize civil action against Mr. Smart that is designed to prevent his

freedom of speech will be met squarely with a Motion pursuant to Code of Civil Procedure Section 425.16, which is the Anti-Slapp statute, and which is designed to prevent any suit that is brought primarily to chill the valid exercise of the constitutional rights of freedom of speech. This is because, as explicitly expressed within the statute, it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. Here, as also explicitly stated within the statute, a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike.

Meantime, as to your client's Civil Code Section 1708.7 claim, a person is liable for the tort of stalking when the plaintiff proves *all* of the elements of the tort. First, Plaintiff must prove the defendant engaged in a pattern of conduct the intent of which was to follow, alarm, place under surveillance, or harass the plaintiff. In order to establish this element, *the plaintiff shall be required to support his or her allegations with independent corroborating evidence.*

Here, we have been presented with your client's so-called evidence, which we will address below, but which is clearly and unequivocally *not* a pattern of conduct that establishes an *intent* to harass. In fact, the "evidence" you have provided is comprised exclusively of information and facts that are (1) within the public domain and (2) placed there by *your* clients. Your clients cannot, therefore, pursue a cause of action for "stalking" based on information and facts that they, themselves, have posted online.

Regardless, your clients must *also prove* that, as a result of the foregoing pattern of conduct, either of the following occurred: (1) Plaintiff *reasonably feared* for his or her safety, or the safety of an immediate family member; *and* (2) Plaintiff suffered *substantial emotional distress*, and the pattern of conduct would cause a reasonable person to suffer substantial emotional distress. For this reason, Mr. Smart is entitled to know (1) how his re-posting of information placed online about your clients and their family *by your clients* and their family, cause them to *reasonably* fear for their safety. Equally important, please explain how your clients, who are public figures by their own actions (including, but not limited to, posting information about themselves on IMDB, producing films and games for public release and distribution, and distributing promotional videos on Youtube) suffered *substantial* emotional distress. For now, Mr. Smart will be content to receive evidence of counseling or other treatments for substantial emotional distress that arose specifically as a result of Mr. Smart's comments generally, and also that are derived from Mr. Smart re-posting information that was already posted online by your clients.

As if that were not enough, however, your clients would also be *required* to prove that Mr. Smart, as a part of the pattern of conduct specified above, made a *credible threat* with either (a) the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an

immediate family member, or (b) reckless disregard for the safety of the plaintiff or that of an immediate family member. Please identify the threat Mr. Smart has made against Mr. Roberts or any of his family members. Additionally, note that the subject statute specifically states it is not to be construed to impair any constitutionally protected activity, including, but not limited to, free speech. It also says nothing about criminal liability, which is why I have, unfortunately, been compelled to raise the issue pursuant to Rule 5-100 above.

Moving then to a discussion of your client's so-called "evidence," Mr. Smart presents the following in response:

- (1) He has not, *ever*, disclosed any identifiable address for the Roberts family. Your letter cryptically claims he has without the corroborating evidence required as set forth above. Here, for discussion purposes, however, please provide the corroborating evidence so that I may discuss with Mr. Smart: That is, simply claiming Mr. Smart has posted their address online does not make it true. Evidence is required. Please also identify the "other private information" Mr. Smart allegedly published. Meantime, note that a real estate "for rent" listing that contained NO identifying information about the Roberts did not disclose anyone's address; and it wasn't even originated by Mr. Smart.
- (2) Mr. Smart has *never* posted any material about the Roberts' children. What you allude to was a September 28 2015 Twitter post that was *not* posted by Mr. Smart. It appeared in his Twitter feed. And, in any case, the person posted it from **PUBLIC** records available on [www.imdb.com](http://www.imdb.com), where *Ms. Roberts herself posted them since her daughter is a child actress*, which further establishes her as a public figure. Contrary to the baseless claims asserted by your clients, however, Mr. Smart has actual archived evidence that this was posted by Ms. Roberts. Said information also appears on the public profile of her Facebook page, as well as publicity photos on Tumblr. In fact, this same information, and these same children, also appear in a **PUBLIC** Star Citizen pitch video from Youtube in 2012, which Mr. Smart has also archived for evidentiary purposes. For these reasons, please provide *actual evidence* to substantiate your client's baseless claims, as well as *any* legal authority that you have that Mr. Smart is subject to liability simply by reposting publicly available material, especially material that was placed into the public domain by your clients.
- (3) He has never threatened the Roberts family. Period. *Be advised that making such a baseless, unsubstantiated claim directly exposes anyone that publishes said contention directly liable for defamation.* Here, if Mr. Smart did not have any claims against the Roberts before, he would now have a claim for defamation; against them or anyone that publishes this false and defamatory contention. In other words, if this statement has been made to *any* third party, i.e. that Mr. Smart has threatened the

Roberts family or their children then it is publication of a false and defamatory statement. As you know, Mr. Smart is not the sort of person to take this lying down and the nature of this contention has the capacity to directly harm his reputation. If made with intent to injure Mr. Smart, as it appears to be, it could be the subject of a defamation claim and punitive damages. In the meantime, it would be helpful if you could provide actual evidence of a credible threat made by Mr. Smart, as opposed to simply claiming he has “made threats.”

- (4) He has not invaded your client’s privacy. He has not publicly disclosed any private facts. Once again, however, we welcome actual evidence to substantiate such a claim, other than the fact Mr. Smart has posted publicly available information about the Roberts, information that was posted by the Roberts, and information that was posted by third parties as well. It is clearly insufficient to say it is true because Mr. Roberts says it’s true. And it most definitely does not support a legal claim. In that regard, please explain how, and why, Mr. Smart would be required to remove from his sites publicly available information about the Roberts, especially when it this information was made available by the Roberts themselves. Only then can Mr. Smart understand why he has a legal obligation to remove said material.
- (5) Separately, although discussed in our prior correspondence, please note that both Chris and Sandra Roberts are public figures, meaning, as a general proposition they have no legal basis to prevent Mr. Smart from writing about them. Meantime, should they pursue any claim against Mr. Smart, his defense could directly place the Roberts’ credibility into question, which will include the very public representations that they have made about themselves, and which appear to be contradicted by the actual evidence Mr. Smart provided to you in his correspondence. This could include the recent disturbing revelations about the Roberts business and employment practices, as well as investigation into the truth or falsity of representations made to investors, and their documented credentials or lack thereof.
- (6) Additional Defamation Claims. More recently, Mr. Roberts has taken to public forums to air his grievances about Mr. Smart. In so doing, it appears he may have published additional false and potentially defamatory material. We are presently reviewing the potentially libelous statements recently made by Mr. Roberts to consider including them in potential legal action. In this regard, it is also important to note that, to the extent Mr. Roberts levels various allegations against Mr. Smart, then personally re-publishes said allegations, he is undermining and eliminating any potential claims, although we believe he has none anyway. In any case, one cannot re-publish material that is claimed to be defamatory, or a violation of a right of privacy, and then expect to pursue any cause of action therefor. There is, moreover, an irony inherent in Mr. Roberts’ claim that he has attempted to “stay above the

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internet drama currently surrounding Derek Smart and his claims about Star Citizen,” while at the same time threatening Mr. Smart with legal action seeking to prevent Mr. Smart from expressing his claims about Star Citizen. In the meantime, Mr. Roberts makes a false claim that he was doxed, while at the same time he was data-mining Mr. Smart’s social media feeds and grabbing material out of context to attack him, the researcher, and the author of the allegedly offending article. He also falsely implies that Mr. Smart was the source of the material of the articles. This too will need to be addressed, particularly as the magazine specifically refuted the claim that Mr. Smart was the source of the material for their investigation.

In the meantime, Mr. Smart’s primary demand was, and is, accountability. Mr. Smart has simply asked that Mr. Roberts provide accountability to the thousands of investors to demonstrate that he has not squandered nearly \$90,000,000, while failing, repeatedly, to deliver on milestones and promises. Objectively speaking, that does not appear to be an unreasonable request; however, rather than publicly disclose the actual status of the development, rather than committing to a delivery date, Mr. Roberts chose to escalate the matter by publicly and personally attacking Mr. Smart; and now threatening him with criminal liability. Needless to say, this will not deter Mr. Smart, who intends to protect the public’s interest and the integrity of game development.

Presently, therefore, Mr. Smart is considering his legal remedies and options related to Star Citizen project, and now the most recent defamatory comments made by Mr. Roberts. These will be discussed in a separate demand letter to Mr. Roberts as this letter is intended solely to respond to your most recent missive, within the artificial deadline you’ve created. In other words, please be advised that nothing herein shall constitute a waiver of any of Mr. Smart’s rights to pursue legal remedies and actions, all of which are expressly reserved herein.

Very truly yours,

DE LA PEÑA & HOLIDAY LLP

*/s/ dictated but not executed to prevent delay*

Keith L. Cooper

KLC:gdr