

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

ROBOCAST, INC.,	)	
	)	C.A. No. 22-305-RGA-JLH
Plaintiff and Counterclaim Defendant,	)	
	)	<b>JURY TRIAL DEMANDED</b>
v.	)	
	)	
NETFLIX, INC.,	)	
	)	
Defendant and Counterclaim Plaintiff.	)	

**NETFLIX, INC.’S OPENING DISCOVERY DISPUTE LETTER TO THE  
HONORABLE JENNIFER L. HALL**

OF COUNSEL:

Tara D. Elliott  
Rachel Weiner Cohen  
Ashley M. Fry  
Diane E. Ghrist  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW, Suite 1000  
Washington, DC 20004-1304  
(202) 637-2200

Kelly E. Farnan (#4395)  
Tyler E. Cragg (#6398)  
Richards, Layton & Finger, P.A.  
920 North King Street  
Wilmington, DE 19801  
(302) 651-7700  
farnan@rlf.com  
cragg@rlf.com

*Attorneys for Defendant Netflix, Inc.*

Kimberly Q. Li  
LATHAM & WATKINS LLP  
200 Clarendon Street  
Boston, MA 02116  
(617) 880-4500

Dated: August 23, 2023

Dear Judge Hall:

Pursuant to the Order Setting Teleconference (D.I. 93), Netflix respectfully requests that this Court compel Robocast to (a) provide substantive responses to Interrogatory Nos. 1-16; (b) supplement its Initial Disclosures on damages; and (c) produce emails and other responsive documents dated after the resolution of *Microsoft* and *Apple* cases, including documents seeking litigation funding and financing arrangements. These issues all arise from Robocast's refusal to provide discovery beyond re-producing documents from the prior cases, which pre-date the alleged damages window in *this* case. Robocast's tactics have hindered, and continue to hinder, Netflix's ability to understand, and develop rebuttals to, Robocast's claims and damages assertions.

### **I. Robocast's Refusal to Respond to Any Interrogatory**

Robocast has refused to provide a single substantive response to any of Netflix's Interrogatory Nos. 1-16, served on March 1, because it asserts that Netflix exceeded its limit of 25 interrogatories. Ex. A. On May 1, Robocast conveyed that six of Netflix's 16 interrogatories (Nos. 2, 5, 10-12, and 16) purportedly contain multiple subparts. Ex. B, 5/11/23 Fry Ltr. at 4. Yet Robocast has provided no authority from this Court to support withholding substantive responses to *all* interrogatories. No such authority exists.<sup>1</sup> In any event, as set forth below, each disputed interrogatory is properly counted as a single interrogatory and Robocast should promptly respond.

Robocast contends that Interrogatory No. 2 relating to patent agreements has two subparts: (1) "license agreements, assignments, settlement agreements, covenants not to sue," and (2) "any agreement granting any party any rights under or interest in any of the Asserted Patents." Ex. C, 4/26/23 Shomaker Ltr. at 1. But the second purported subpart "logically and factually" subsumes the first. *Medigus Ltd. v. Endochoice, Inc.*, No. 15-505-LPS-CJB, 2016 WL 5791409, at \*2 n.4 (D. Del. July 19, 2016) ("a general inquiry ... and then subsequent[] list[ing] specific types of information that are both logically and factually related to that inquiry" counts as a single interrogatory). The question at the interrogatory's core is to ascertain what agreements conveyed any rights or interest in the asserted patents. Cf. Ex. D, *Align Tech., Inc. v. 3Shape A/S*, No. 17-1646-LPS-CJB (D. Del. Jan. 22, 2019) (interrogatory had multiple subparts where it covered license/settlement agreements and also co-development and sale/resale distribution agreements). No. 5 concerns Robocast's knowledge of prior art. Robocast contends that seeking "the dates and circumstances of how such [p]rior [a]rt became known" is a separate subpart from seeking "[p]rior [a]rt ... that became known at any time to Robocast." Ex. C, 4/26/23 Shomaker Ltr., Ex. 1 at 1. But seeking dates and circumstances that go to the call of the question does not constitute a separate subpart. *Medigus*, 2016 WL 5791409, at \*2-3 (alleged subparts "simply request the dates for specific events ... 'necessary to complete the details required' by the call of the question"; "a request to set out 'the facts and circumstances'" did not comprise multiple subparts). The purported subparts of Nos. 10 and 11 relate to invalidity and unenforceability, respectively.

<sup>1</sup> Robocast contends it would waive its objection should it answer any interrogatory (even those not in dispute), but in its only cited Delaware case, waiver was found when defendants responded to 32 interrogatories "before raising an objection." *Barkes v. First Corr. Med.*, No. 06-104-JJF-MPT, 2010 WL 1962797, at \*2 (D. Del. May 17, 2010). Although Robocast attempts to justify its refusal to respond to any interrogatories with two outlier out-of-district cases, "the better rule is to require the responding party to answer the first 25 interrogatories, and object to the remainder." 7 Moore's Federal Practice - Civil § 33.30 (2023).

Robocast also contends both interrogatories are “premature,” Ex. E, 6/6/23 Shomaker Ltr. at 3, but that similarly is no legitimate basis to refuse to respond.

The purported subparts of Nos. 12 and 16 identify specific types of information that are logically and factually related to Robocast’s damages theories. Even specific pieces of requested information, while enumerated separately, may “form a combination that is most reasonably counted as a single interrogatory.” Ex. F, *Confluent Surgical, Inc. v. HyperBranch Med. Tech.*, No. 17-688-LPS-CJB, D.I. 212 (D. Del. June 18, 2019). This is “an especially understandable conclusion in complex cases such as a patent infringement case, where Plaintiffs’ method of counting subparts would hamstring a party’s ability to discover relevant information.” *Id.* Robocast’s treatment of No. 12, seeking its position on damages, as 17 alleged subparts contravenes the typical use of interrogatories. No. 16 concerns Robocast’s practice of the patents, and thus its lost profits claim. Ascertaining the facts and circumstances surrounding any Robocast practicing products does not constitute separate subparts. *Medigus*, 2016 WL 5791409, at \*2-3.

## II. Robocast’s Deficient Rule 26 Initial Disclosures on Damages

Robocast’s Initial Disclosures (Ex. G) fail to comply with Rule 26, requiring parties to provide “a computation of each category of damages claimed” and make available documents “on which each computation is based.” Fed. R. Civ. P. 26(a)(1)(A)(iii). Judge Andrews has recognized that Rule 26(a) “expressly require[s] an initial computation and disclosure of the evidence that will be relied on to the full extent the patent plaintiff could or should know of it.” *NexStep, Inc. v. Comcast Cable Commc’ns, LLC*, No. 19-1031-RGA, 2021 WL 5356293, at \*1 (D. Del. Nov. 17, 2021). Early discovery of the factual underpinnings and evidence supporting damages “promotes judicial efficiency, informs settlement discussions, and helps parties determine the resources that will be devoted to a case based on its potential value.” *MLC Intell. Prop., LLC v. Micron Tech., Inc.*, 10 F.4th 1358, 1372 (Fed. Cir. 2021). Robocast should provide fulsome damages disclosures.

Robocast contends that it needs discovery before it can disclose its damages theories. Ex. H, 6/23/23 Fry Ltr. at 7; Ex. I, 8/15/23 Li Email. But Robocast waited **four months** to propound discovery—any suggestion that it requires information from Netflix to provide its disclosures is belied by its own conduct. It is also inconsistent with the law, which places the onus on **Robocast** to provide an initial damages computation based on information in its possession and disclose the evidence it intends to rely on, independent from discovery from Netflix. *NexStep*, 2021 WL 5356293, at \*1. Although Robocast claims that it may seek lost profits, Robocast refuses to 1) identify **any** products that allegedly lost profits and had impacted sales, 2) explain **any** alleged capacity to have made any lost sales, or 3) produce **any** documents from the alleged damages window (March 2016–August 2020). Ex. J, *Commscope Techs. v. Rosenberger Site Sols. LLC*, No. 20-1053-RGA, D.I. 162 at 3 (D. Del. Jan. 24, 2022) (requiring plaintiff to identify “on a product-by-product basis” all products “whose sales and/or price[s] were allegedly impacted and/or harmed” by the infringement and “describe in detail” the impact or harm). Robocast should immediately make these disclosures. Robocast should also provide detailed contentions as to its reasonable royalty claim, such as the extent it considers any of its prior patent licenses to be comparable. *Id.* at 2-3 (requiring plaintiff “to identify a reasonable royalty rate,” “explain why [it] thinks the reasonable royalty rate is appropriate,” and “identify any and all license agreements it contends are comparable”). Robocast’s disclosures only vaguely mention the *Georgia-Pacific* factors without providing evidence or analysis. *Brandywine Commc’ns Techs. v. Cisco Sys.*, No. 12-1669, 2012 WL 5504036, at \*2 (N.D. Cal. Nov. 13, 2012) (patentee must identify its evidence).

### III. Robocast's Untenable Limitations on Its Document Production

**Post-2014 Documents/Emails:** Robocast should produce responsive documents from after 2014, when the prior cases resolved and during the only potential damages window, because these documents are highly relevant to at least lost profits, the hypothetical negotiation, and *Georgia-Pacific* factors. Ex. K, 8/1/23 Fry Ltr. at 3. Robocast represented that its “reasonable search” in response to requests served on March 1 has uncovered *no* non-privileged documents from after 2014, drawing into question Robocast’s basis for asserting at least lost profits. Ex. I, 8/15/23 Li Email. Robocast should also produce time-relevant, responsive emails consistent with its re-production of emails produced in the prior cases. Robocast argues that any relevance of post-2014 emails—even emails expressly referencing the patents—is outweighed by the burden of production. Its only contention as to burden is that the documents may implicate privilege. This position makes little sense in light of Robocast’s production of pre-2014 emails, and it ignores Robocast’s obligation to log documents withheld as privileged. Without support, Robocast insists on email discovery from Netflix. But contrary to the highly relevant information in Robocast’s emails, there are no claims of indirect or willful infringement relating to its long-expired patents (or that responsive documents cannot be obtained by less burdensome means). D.I. 74.

**Funding/Financing:** Robocast should produce documents responsive to RFP Nos. 21-23, 36, 47-48 relating to funding and financial interests in this case, which are relevant to damages. Ex. L, *MHL Custom, Inc. v. Waydoo USA, Inc.*, No. 21-91-RGA-MPT, D.I. 120 at 5 (D. Del. Dec. 1, 2022) (“insurance policy [related to litigation funding], correspondence, and opinion letters are clearly relevant” and “standard requests in patent litigation and relate to funding and financial interests in addition to perceived value, strengths, and weaknesses of the patents”); *Acceleration Bay LLC v. Activision Blizzard, Inc.*, No. 16-453-RGA, 2018 WL 798731, at \*3 (D. Del. Feb. 9, 2018) (communications related to litigation funding relevant to “central issues like validity and infringement, valuation, damages, royalty rates, pre-suit investigative diligence, and whether [Plaintiff] is an operating company”). Robocast told this Court that “litigation” is “a big piece of” Robocast’s business and is “raising capital” to “finance ... perhaps its litigation efforts.” Ex. M, *Robocast, Inc. v. YouTube, LLC*, No. 22-304-RGA-JLH, D.I. 43 (D. Del. Dec. 20, 2022), Tr. 33:6-10, 18-21. Such statements undermine Robocast’s privilege assertion. By asserting privilege, it must at least provide a log with sufficient information for Netflix or the Court to assess its claims. *Elm 3DS Innovations LLC v. Samsung Elecs. Co.*, No. 14-1430-LPS, 2020 U.S. Dist. LEXIS 216796, at \*2-4 (D. Del. Nov. 19, 2020). It cannot refuse production *or* logging, as disclosure poses no risk of “unfair and unwarranted advantage to” Netflix—the patents are expired and Robocast has no competing product. Ex. N, *TQ Delta LLC v. Adtran, Inc.*, No. 14-954-RGA, D.I. 419 at 2 (D. Del. June 6, 2018).

Netflix respectfully requests that the Court enter Netflix’s Proposed Order (Ex. O).

Respectfully,

/s/ Kelly E. Farnan

Kelly E. Farnan (#4395)