IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

NETFLIX, INC.'S RESPONSIVE DISCOVERY DISPUTE LETTER TO THE HONORABLE JENNIFER L. HALL

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Dated: August 25, 2023

Dear Judge Hall:

Netflix respectfully requests that Robocast's motion be denied (D.I. 104). Robocast manufactures disputes where none exists; it submitted its motion minutes after the parties first conferred on these alleged disputes, even though the parties were not at an impasse. And Robocast demands irrelevant discovery from Netflix while shielding itself from discovery on highly relevant issues, including the claim scope, and alleged damages and secondary considerations.

A. Netflix's Identification of Initial ESI Custodians Is Proper

Following this Court's June 2 teleconference, Netflix properly identified an initial set of three ESI custodians most likely to have relevant custodial documents (Ex. A), notwithstanding Robocast's failure to serve its own list of custodians pursuant to the Court's Order. Consistent with the Court's Order that the parties may have the flexibility to use an appropriate methodology to identify relevant documents, Netflix has determined that collecting from noncustodial sources is more likely to efficiently uncover relevant documents than custodial files. Ex. B, 6/2/23 Tr. 47:11-48:7. This is especially so in this case given that Netflix's responsive information is primarily kept in noncustodial data sources, and in view of the fact that the patents have long-expired and the alleged damages are from many years ago. Searching Netflix's noncustodial sources occurs over a broader universe of documents (not limited to an individual's custodial files), and is the methodology Netflix explained to Robocast that it is applying here. Robocast cites no authority requiring Netflix to arbitrarily identify 10 custodians, who are less likely to possess non-duplicative information from years ago. Instead, Robocast pushes its attorney argument that Netflix should identify 10 custodians because it is a large company. Ex. C, 8/24/23 K. Li Ltr. at 2. That unsupported logic is untethered to the facts of this case and should be rejected.

Robocast's demands that Netflix identify custodians relating to "sales and marketing" are misplaced, when Robocast has acknowledged that these documents (and others) are in noncustodial data sources. D.I. 102, Ex. K, 8/1/23 Fry Ltr. at 5-6. This is also borne out by the record. For instance, Netflix's production of licenses, SEC filings (with financial information), and Netflix's public-facing statements about its products—all responsive to Robocast's document requests—comes from noncustodial sources. Netflix's produced source code—most pertinent to the accused features' operations—comes from noncustodial code bases. Netflix previously identified three ESI custodians with technical knowledge of the accused features who are most likely to have non-duplicative ESI, and has since identified two individuals with knowledge of Netflix's financials and marketing, but whose information primarily derive from noncustodial sources as well. Ex. D.

Conversely, Robocast has not justified its disclosure of only ***two*** custodians (inventor Damon Torres and IP Counsel Brett Smith). Based on documents produced in the prior *Microsoft* and *Apple* cases, it appears that Robocast has or had other employees with potentially relevant ESI, including before or within the alleged damages window (March 2016–August 2020). Ex. E, 8/9/23 Fry Ltr. at 1-2 (listing multiple employees' emails and titles); Ex. F, *Robocast, Inc. v. Microsoft Corp.*, No. 10-1055, D.I. 511-3 (D. Del. Feb. 26, 2014) (identifying current or former employees as witnesses). The Court should continue the practice observed in other cases that the number of custodians identified by a party should be determined by the facts and merits of each case, as justified by the claims at issue. Robocast's motion to compel should be denied.

B. Email Discovery from Netflix Is Burdensome and Not Proportional to the Needs of the Case

As the Court noted, "to the extent that there are e-mails produced, it seems to me that what needs to get produced is probably pretty limited." Ex. B, 6/2/23 Tr. 38:9-11. Yet, without engaging in a "meaningful discussion," Robocast demands broad email discovery from Netflix as to ***each*** of its document requests without limitation as to time or scope, and years before Netflix had knowledge of Robocast's expired patents.[1] Robocast's position is unreasonable. Netflix's emails are irrelevant to the claims in the case. The Court dismissed Robocast's indirect and willful infringement claims last year. D.I. 20, 21. Thus, no claims implicate Netflix's knowledge or intent. Ex. G, *Sentius Int'l, LLC v. HTC Corp.*, No. 18-1216, D.I. 49 (D. Del. May 12, 2020), 11:3-12 (email discovery not required in case with "only direct infringement" claims and "expired patents with a very limited damages period"). Robocast seeks to engage in a fishing expedition.

Robocast's letter fails to identify a single, substantive reason associated with its document requests that justifies email discovery from Netflix. D.I. 104 at 1-2. Instead, Robocast solely points to the number of documents Netflix has produced (currently 712 documents and its source code), to conclude that email discovery is necessary. Robocast's complaints are unfounded. Netflix timely served its responses and objections to Robocast's first set of document requests last month, has diligently sought to clarify the scope of Robocast's broad requests, and is searching for and producing, responsive documents, as it committed to do. Moreover, any potential relevance of Netflix's emails is outweighed by the burden of collecting and producing emails, given that the asserted patents all expired years ago and long before Netflix had knowledge of them. As explained above, many of the pertinent documents will be produced from noncustodial sources. In short, discovery of Netflix emails is not tailored to the issues here, not proportionate to the needs of the case, and will greatly and unnecessarily increase the cost and complexity of discovery.

C. Robocast's Request for Netflix to Produce Documents Is Moot

Netflix has produced, and will continue to produce, documents responsive to Robocast's requests on a rolling basis; Robocast's motion is moot. As Robocast acknowledges, the case schedule already provides a date for substantial completion of document production on November 17. D.I. 47. Nevertheless, Robocast demands that Netflix identify earlier dates for its production(s). In attempting to justify its request, Robocast does little more than point to its own production of documents that it had on-hand from its prior litigations, a large portion of which are junk files. Ex. H, 8/14/23 Fry Ltr. at 1-2. And even though Netflix served its document requests six months ago, Robocast has produced no documents within the damages window in ***this*** case.

The record also contradicts Robocast's insistence on urgent discovery and the alleged lack of diligence by Netflix. Robocast waited ***over four months*** after fact discovery opened to propound a single document request, and those were limited to damages. Robocast served requests related to technical documents for the first time this week (D.I. 99), which Netflix is currently

[1] Robocast refuses to produce ***any*** emails post-2014 and during the alleged damages window in this case, admitting that it has merely produced already-collected emails from the prior cases, much of which is non-responsive (i.e., spam emails and personal photos). In Robocast's view, only Netflix should be obligated to undertake the burden of collecting and producing email discovery.

reviewing for responsive documents. Robocast concedes, as it must, that Netflix ***has*** produced responsive documents in this case, including revenue data, prior licenses, documents regarding the accused features, and documents showing that Netflix's success is unsurprisingly owing to, in large part, its award-winning content. Netflix's success is unrelated to the accused product features and its revenues are irrelevant to the alleged inventions. D.I. 102, Ex. I, Li 8/15/23 Email. And although Netflix produced its source code in April, Robocast still has not reviewed it. Although Robocast seems to take issue that some of Netflix's responsive documents are also public, the substance of those documents is directly responsive to Robocast's requests. As Netflix has diligently been collecting and producing responsive documents, and has committed to producing additional documents on a rolling basis, Robocast's motion should be denied as moot.

D. Discovery from Netflix Should Be Presumptively Limited

Robocast has failed to show the requisite good cause to seek Netflix's documents from before the alleged damages window (March 2016-August 2020). Ex. I, Default Standard for Discovery, Including ESI ("[a]bsent a showing of good cause, follow-up discovery shall be limited to a term of 6 years before the filing of the complaint"). The presumption temporally limiting discovery to six years pre-complaint is to prevent unexplained delay from the plaintiff and forcing the defendant to undertake burdensome searches for documents years later. Ex. J, *United States v. Gilead Sciences, Inc.*, No. 19-2103-MN, D.I. 247 (D. Del. Dec. 21, 2021) (denying motion to compel production of pricing documents from 15 years before the case was filed). Robocast waited years after the patents expired to file this lawsuit, despite having asserted one of the patents against Microsoft and Apple over ten years ago (and during the time one of the accused features was publicly released). Robocast cannot make it Netflix's burden to search and produce all relevant documents from over a decade ago when Robocast's delay was its own strategic decision.

To demonstrate good cause to expand the Default Standard's six-year lookback on discovery, Robocast must articulate the specific documents it contends it needs and a basis for those documents, but it instead has taken the position that every single document request requires Netflix to undertake this burdensome search. *Leo Pharma A/S v. Glenmark Pharms. Ltd.*, No. 20-1359-CFC, 2021 U.S. Dist. LEXIS 98588, at *2-3 (D. Del. May 25, 2021) (denying the movant an "extreme, blanket order" to compel production of documents predating the complaint by six years). And Robocast's assertion that it needs discovery from Netflix to determine the hypothetical negotiation date makes little sense given that the date the accused features launched is publicly available. The same is true for obviousness, which is analyzed as of the alleged invention date, here, 1996, which far predates Netflix's introduction of online streaming and, thus, Netflix's documents. And, there are no asserted secondary considerations, as Robocast has disclosed none. While Netflix has produced some documents from outside of the potential damages window, including licenses, the burden on Netflix to produce "all relevant documents" before the presumptive six-year limit outweighs any potential relevance articulated by Robocast. D.I. 104.

Nowhere has Robocast explained the relevance of discovery from Netflix ***after*** the patents' expiration. Nor could it, as it cannot allege infringement or seek damages post-expiration, after August 2020 at the latest. *In re Syngenta Crop Prot. AG*, No. 21-375, 2022 WL 1690832, at *3 (D. Del. May 26, 2022) (denying discovery after patent expiration). Its request for documents outside the alleged damages window should be denied.

Respectfully,

/s/ Kelly E. Farnan

Kelly E. Farnan (#4395)

cc: All Counsel of Record (CM/ECF)