

**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 OPENING DISCOVERY DISPUTE LETTER TO THE
HONORABLE JENNIFER L. HALL**

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Dated: November 17, 2023

Dear Judge Hall:

Netflix respectfully requests that this Court enter Netflix's Proposed Order to compel Robocast to: (a) comply with the Court's August 29, 2023 Oral Order and produce all responsive documents that post-date 2014 in response to Netflix's Requests for Production; and (b) provide a complete substantive response to Interrogatory No. 15, which seeks Robocast's sources of revenue and expenses from the date of conception of the Asserted Patents through patent expiration and persons with knowledge of the same. (Ex. A)

I. Robocast's Failure to Produce Any Post-2014 Documents

Notwithstanding the Court's August 29 Order, and that Netflix's requests that have been pending since March 2023, Robocast failed to produce a single responsive document that post-dates 2014—*not one*.¹ Robocast's productions to date have instead primarily consisted of the reproduction of documents from its prior litigations against Microsoft and Apple, and have not included any Robocast documents following the conclusion of those litigations in 2013. But the documents from the prior litigations do not address the alleged damages window in this case: March 2016–August 2020. *See* Exs. B, C. Netflix is thus forced to re-raise this issue to enforce the Court's prior order that "Robocast needs to search [for] documents that post-date 2014 that are responsive to the requests for production made by the defendant, and if those documents are responsive, they need to be produced." *See* Ex. D, 8/29/23 Hr'g Tr. 21:17-21.

Netflix's RFPs seek highly relevant information directed to patent validity, the alleged value of the Asserted Patents, whether Robocast exploited the patented technology through a practicing product, Robocast's licensing efforts, the hypothetical negotiation, and the *Georgia-Pacific* factors, by way of example. *See, e.g.*, Ex. E, 8/1/23 Fry Ltr. at 3-4; Ex. F, 11/14/23 M&C Tr. 13:6-14:5. Below are exemplary document requests for which Netflix would expect to see post-2014 documents or a representation that no such documents exist:

- Documents relating to patentability and secondary considerations of non-obvious (RFPs 9-10);
- Marketing, commercialization, demand for, and sales of any allegedly practicing product (RFPs 15, 59, 61, 72, 85);
- Sales, revenues, investments, and business information, including regarding the alleged invention and any related licensing, monetization, or patent litigation efforts (RFPs 20-22, 52, 62, 68, 70, 76, 79); and
- Documents related to the reasonably royalty calculation (RFPs 38-40).

Having received no Robocast post-2014 documents and with the November 17 substantial completion deadline rapidly approaching, Netflix attempted to understand Robocast's positions to no avail. For example, Netflix asked whether Robocast had any responsive documents, whether

¹ Although Robocast made a production on November 17 (the substantial completion deadline and when Netflix's brief was due), it was not accessible for review at the time of this submission. Notably, before this production, Robocast produced a total of 52 documents since the Court's August 29 Order, but none post-2014. It should not have taken several months of correspondence, multiple meet and confers, and the instant motion for Robocast to make its production.

and when Robocast will produce those documents, and the basis of withholding any post-2014 documents. *See, e.g.*, Ex. G at 38-39 (9/8/23 D. Ghrist Email); *id.* at 27-28 (10/10/23 D. Ghrist Email); *id.* at 4-5 (11/6/23 D. Ghrist Email); *id.* at 1 (11/8/23 D. Ghrist Email); Ex. H, 11/2/23 M&C Tr. 5:14-7:1; Ex. F, 11/14/23 M&C Tr. 14:20-17:10. Robocast has remained non-committal and evasive, as it had been regarding this issue during the August 29 hearing. Ex. D, 8/29/23 Hr’g Tr. 18:14-22. Robocast then took the untenable position that the Court’s Order only applied to Netflix’s first set of RFPs and not the second, though both seek highly relevant information related to the patentability and damages issues set forth above. Ex. H, 11/2/23 M&C Tr. 7:7-13, 11:12-20. The lack of clarity as to whether Robocast has any responsive post-2014 documents to produce or is withholding documents on some unknown basis has resulted in a denial of relevant discovery to Netflix. Robocast’s delays have forced Netflix to re-raise the same issue the Court previously ruled upon, rather than assess the sufficiency of Robocast’s post-2014 production—the exact situation the parties and the Court tried to avoid. *See* Ex. D, 8/29/23 Hr’g Tr. 38:17-20.

With no other way to understand what Robocast post-2014 documents exist and whether any are forthcoming or what is being withheld, Netflix moves the Court to compel Robocast to immediately comply with the Court’s August 29 Order by searching for and producing all post-2014 documents responsive to all of Netflix’s RFPs. In the alternative, Netflix requests an opportunity to review Robocast’s November 17 production and provide the Court with a one-page reply to address Robocast’s most recent production.

II. Robocast’s Ongoing Refusal to Fully Respond to Netflix’s Interrogatory No. 15

Netflix’s Interrogatory No. 15 asks Robocast to “[i]dentify all of Robocast’s expenses and sources of income since the alleged date of conception, all documents that show or reflect the information set forth in Robocast’s response, and the Person(s) most knowledgeable about the same.” Ex. I at 1. Seeking basic P&L information, Interrogatory No. 15 requests information only in Plaintiff Robocast’s possession that should be readily accessible. When Robocast refused to provide any substantive responses to any of Netflix’s sixteen interrogatories, Netflix raised this issue with the Court. D.I. 102 at 2-3. As Netflix’s Interrogatories had been pending since March, the Court ordered Robocast to substantively respond. *See* Ex. D, 8/29/23 Hr’g Tr. 9:22-24.

Robocast did not follow the Court’s Order with respect to Interrogatory No. 15.² Instead, Robocast simply stated that it was “willing to meet and confer on the proper scope, if any, of this Interrogatory.” Ex. J at 2. Both in meet and confers and written correspondence thereafter, Netflix repeatedly and patiently set forth in law and in fact the basis for its request for Robocast’s revenues and sources of income. Netflix explained that this information is highly relevant to Robocast’s request for reasonably royalty damages, including the success of any allegedly practicing products (a question Robocast has repeatedly avoided); whether any value is allegedly attributable to the alleged invention as opposed to other, unclaimed features; as well as any potential secondary considerations of non-obviousness, including any alleged commercial success demonstrated by Robocast or long-felt need. *See, e.g.*, Ex. G at 32-33 (9/18/23 D. Ghrist Email) (identifying *Georgia-Pacific* Factor 8); *id.* at 29-30 (9/28/23 D. Ghrist Email) (identifying *Georgia-Pacific* Factors 8, 10, 13, and 15; and commercial success). Netflix cited supporting law that explains that

² In narrowing the dispute for the Court, Netflix does not waive its challenges to the sufficiency of Robocast’s other interrogatory responses.

such information would allow Netflix to assess what portion of Robocast's realizable profits should be credited to the invention as distinguished from non-patented elements. *See id.* at 30 (9/28/23 D. Ghrist Email) (citing *MiiCs & Partners, Inc. v. Funai Elec. Co.*, No. 14-804-RGA, 2017 WL 6268072, at *4 (D. Del. Dec. 7, 2017) (“[A]s the Federal Circuit has recognized, ‘a patent owner participating in a hypothetical negotiation would consider the profits on sales it might lose as a result of granting a license.’” (quoting *Asetek Danmark A/S v. CMI USA Inc.*, 852 F.3d 1352, 1362 (Fed. Cir. 2017))); *Hitkansut LLC v. United States*, 130 Fed. Cl. 353, 393-94 (2017) (holding as relevant to the reasonable royalty analysis the state of development of the allegedly practicing product and the “risk that possible benefits associated with [the patent] might not be achieved”). For more than two months, the parties exchanged correspondence on this interrogatory without being any closer to resolving the dispute. *See generally* Ex. G.

On November 2, 2023, Netflix again provided its basis for the request and made clear that parties had reached an impasse (for the second time). Ex. H, 11/2/23 M&C Tr. 48:5-49:17, 54:8-56:12, 59:12-25, 61:6-62:6; Ex. G at 11 (10/24/23 D. Ghrist Email). But instead of responding on the merits, Robocast claimed that Netflix had agreed to narrow the date range to August 2011 through August 2013, while later admitting that the parties never had such an agreement. Ex. H, 11/2/23 M&C Tr. 65:24-25. Robocast then argued that Netflix's request for revenue information outside of that 2011-2013 window was “all new information I will take back to my client.” *Id.* at 63:2-7. This is belied by Robocast's own incorrect allegations from September, accusing Netflix of having no date limitation at all. Ex. G at 29-30 (9/28/23 D. Ghrist Email) (clarifying that the interrogatory was not unbounded by time, but rather sought information since the alleged date of conception). Following the November 2 call, Robocast supplemented its response and produced Robocast, Inc.'s tax returns for the years 2011-2013, which simply show Robocast's assets and any alleged income—not the requested “expenses and sources of income.” Ex. I at 2 (citing ROBOCAST027201, ROBOCAST027187, ROBOCAST027173). Netflix promptly explained why this issue was still ripe. Ex. G at 5 (11/6/23 D. Ghrist Email).

Netflix's request is simple. As the plaintiff, Robocast should provide a proper response with its P&Ls or other accounting information. Robocast has never legitimately disputed its relevance, but has obstructed discovery into the information, or failed to conduct a reasonable search to locate it. Tellingly, during the parties' November 14 call, the parties discussed Netflix's RFP 52, which likewise seeks Robocast's revenue information. Ex. C at 3; Ex. F, 11/14/23 M&C Tr. 29:22-33:23. Notwithstanding the fact that RFP 52 seeks some of the same revenue information sought in Interrogatory No. 15—served *eight months ago*—counsel had no idea whether Robocast has responsive documents *just three days* before the November 17 substantial completion deadline. Ex. F, 11/14/23 M&C Tr. 34:1-37:3. Robocast's obstruction is exacerbated by its previous denial of Netflix's Request for Admission No. 7, asking Robocast to admit that it “did not generate any revenue from any Robocast product or service after January 2002.” Ex. C at 2. Robocast's blanket denial suggests that it did indeed generate revenues after January 2002, which likewise supports that Robocast should supplement its response to Interrogatory No. 15. *See Natera, Inc. v. ArcherDX, Inc.*, No. 20-125-LPS, 2021 WL 4284580, at *3 (D. Del. Sept. 21, 2021) (compelling plaintiff to explain its denial of RFAs, and permitting defendants to renew its request for plaintiff to supplement its response to a related interrogatory if still incomplete). Accordingly, Netflix requests the Court order Robocast to provide a response in full, by providing its “expenses and sources of income” from the alleged date of conception of the alleged inventions through the close of the damages period, along with persons with knowledge.

Respectfully,

/s/ Kelly E. Farnan

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