

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBOCAST, INC.,

Plaintiff and
Counterclaim
Defendant,

v.

NETFLIX, INC.,

Defendant and
Counterclaim Plaintiff.

Civil Action No. 1:22-cv-00305-JLH-
CJB

JURY TRIAL DEMANDED

████████████████████
[PUBLIC VERSION]

**LETTER TO THE HONORABLE UNITED STATES MAGISTRATE JUDGE
CHRISTOPHER J. BURKE REGARDNG PONCE DEPOSITION**

Dear Judge Burke:

Robocast writes in further support of its request to require Netflix to produce Ms. Helen Ponce for deposition remotely or in person. This dispute is simple. Netflix seeks to avoid producing for deposition an individual it identified as a person with knowledge of important facts who Netflix implicitly concedes will testify at trial. Netflix's excuses for doing so are unavailing.

First, Netflix's lengthy recitation of the procedural history of this case is beside the point. As Netflix concedes, Ms. Ponce's deposition was noticed over two weeks prior to the May 13, 2024, extended deadline for fact discovery. In fact, any logjam was a product of Netflix's own unwillingness to appropriately coordinate discovery with Google/YouTube and its insistence on an unrealistic discovery deadline.

Second, Robocast diligently sought to schedule Ms. Ponce's deposition. Following the April 5, 2024 discovery conference, when it became clear that the Parties would need to schedule 30 depositions in a little more than one month, Robocast repeatedly sought to confer with Netflix in order to come to agreement on a comprehensive schedule for all depositions. Netflix refused. Instead, Netflix insisted on scheduling its depositions first, including depositions of third-party patent prosecution attorneys during the week of April 15, 2024-April 19, 2024. Robocast largely acquiesced to this maneuvering to avoid disputes. It was only after those depositions were scheduled, however, that Netflix then sprung Ms. Ponce's supposed single day of availability, despite Netflix's knowledge that Robocast's counsel was otherwise committed to attending the already scheduled depositions. Nevertheless, Robocast again attempted to accommodate Ms. Ponce's supposedly limited availability by asking that Netflix either a) indicate whether she would be designated as a 30(b)(6) witness or b) indicate that it did not intend to call Ms. Ponce's at trial. Netflix failed to respond to either offer in a timely manner. Instead, Netflix unilaterally decided that Ms. Ponce's deposition had been "released" *before the date had even arrived*. Netflix's defense of this conduct—that Robocast was not "diligent"—ignores that Robocast repeatedly sought a mutually workable deposition date or, failing that, some other compromise, and Netflix responded by unilaterally "releasing"¹ the witness.

Netflix's other defense—that another member of Robocast's team should have taken Ms. Ponce's deposition—ignores the obvious fact that not each member of Robocast's small team (all of whom are responsible for other matters as well)—was equally qualified to conduct Ms. Ponce's deposition. That several members of Robocast's team deposed 30(b)(6) witnesses does not mean that each member was appropriate to depose *this particular* 30(b)(6) witness. Netflix's argument also ignores the fact that Netflix unilaterally "released" the witness without making any attempt at good faith coordination.

Notably, Netflix failed to designate any witness on three crucial topics (Netflix's corporate structure, Netflix's financials, and the costs and profits associated with each Accused Functionality). Ms. Ponce was identified as a person with knowledge on revenues and costs related to Netflix's products in Netflix's Interrogatory Responses and would likely have been designated

¹ It is unclear what "releasing" a witness means in this context, but Robocast understands that Netflix will not produce Ms. Ponce for deposition.

on these topics. (Exhibit A at Interrogatory 5, 10.) Of course, if its “release” of Ms. Ponce was truly a scheduling issue, Netflix could have designated another witness on these topics to avoid the obvious prejudice to Robocast. Its refusal to make Ms. Ponce available for deposition has instead served to deprive Robocast of highly relevant information for its damages case while the case progresses into expert discovery.

Third, it is notable that Netflix still declines to explain Ms. Ponce’s supposed unavailability outside of April 17. While Netflix again repeats that Ms. Ponce was on “business travel,” it does not explain how this precluded her remote deposition, other than to insist that because “Netflix disclosed her limitations”—that is, offered one day of availability—Netflix was relieved of any obligation to otherwise comply with the deposition notice.

Fourth, that Netflix’s position is untenable is demonstrated by the fact that Netflix has also sought to depose a witness out of time —Robocast’s third-party accountant Ken Hicks. Netflix did not serve its subpoena on Mr. Hicks until April 29, over four weeks after Robocast noticed Ms. Ponce, *after* the April 11, 2024, original deadline for fact discovery, and just two weeks before the May 13 extended deadline for fact discovery. In doing so, Netflix insisted that a deposition taken outside of the fact discovery period was not “out of time” if noticed within the (extended) fact discovery period. (Exhibit B). Unlike Netflix, Mr. Hicks, who is also represented by Robocast’s undersigned counsel, nevertheless *agreed* to sit for deposition out of time. Netflix should not be heard to advocate for a double standard.

Finally, the equities favor granting Robocast’s request. The discovery process is meant to encourage full disclosure, not gamesmanship and sandbagging. Netflix’s tactics are transparent and should not be rewarded.

Thus, Robocast asks the Court to order Netflix to produce Ms. Ponce for deposition in the month of May 2024.

Sincerely,

/s/ Stephen B. Brauerman
Stephen B. Brauerman

Cc: Counsel of Record

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 22, 2024, copies of the attached document were served via electronic mail on all counsel of record.

/s/ Stephen B. Braerman
Stephen B. Braerman

EXHIBIT A

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