

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
Marshall Division**

ROCKSTAR CONSORTIUM US LP and
NETSTAR TECHNOLOGIES LLC,

Plaintiffs,

v.

GOOGLE, INC.,

Defendant.

Case No. 2:13-cv-00893-JRG

**MOTION OF NON-PARTIES NORTEL NETWORKS CORPORATION AND
NORTEL NETWORKS LIMITED FOR A PROTECTIVE ORDER
UNDER FEDERAL RULES OF CIVIL PROCEDURE 26(c) AND 45(d)(3)**

Non-parties Nortel Networks Corporation (“NNC”) and Nortel Networks Limited (“NNL”) (collectively, with all subsidiaries (“Nortel”)), by Ernst & Young Inc. as court-appointed Monitor, file this motion for a protective order under Federal Rules of Civil Procedure 26(c) and 45(d)(3) to prevent the disclosure of privileged and confidential materials in response to subpoenas and requests for production of documents. Nortel also joins in the arguments contained in Non-Party Nortel Networks Inc.’s Motion for a Protective Order, filed with this Court on September 12, 2014. Rockstar Consortium US LLP (“Rockstar”) does not oppose the relief requested in this motion.

FACTUAL BACKGROUND

NNC is the Canadian parent company of the Nortel group of companies and on January 14, 2009, together with NNL and various Canadian subsidiaries, filed for and obtained protection under the *Companies’ Creditors Arrangement Act* (“CCAA”) in the Ontario Superior Court of Justice. A number of parallel proceedings have been filed by various Nortel entities in bankruptcy courts and reorganization proceedings around the world, including voluntary

petitions under Chapter 11 filed by Nortel Networks Inc. (“NNI”) and certain of its U.S. subsidiaries and affiliates in the U.S. Bankruptcy Court for the District of Delaware in January 2009. In addition, by order dated February 27, 2009, the U.S. Bankruptcy Court for the District of Delaware granted recognition under Chapter 15 to the Canadian proceedings.

In June 2011, an auction process took place culminating in the sale by Nortel of a patent portfolio of some 7,000 NNL patents to Rockstar. Rockstar was the winning bidder in the auction over a Google subsidiary and other bidders, and Rockstar and Nortel then signed a series of agreements, approved by the U.S. Bankruptcy Court for the District of Delaware and the Ontario court conducting the CCAA Proceeding, that provided for the sale of the Nortel patent portfolio to Rockstar. Pursuant to the sales agreements, certain electronic information was to be transferred to Rockstar along with the employees who were leaving Nortel to go to work for Rockstar.

Certain of these former Nortel employees, who were mostly former Nortel attorneys, took their Nortel computers with them containing the files and information that Rockstar acquired in the auction. Specifically, Rockstar was entitled to obtain those files that relate to the patent assets that Rockstar acquired from Nortel. Those acquired and transferred files are *not* the subject of this motion. However, there was additional information and documents on their computers that were “non-transferred”, meaning that such information was Nortel information that was not a part of the contractual transfer to Rockstar. Any such information should have been deleted by Rockstar under the governing transfer agreement but apparently this was not done given concerns by Rockstar about pending litigation.

It is the non-transferred files of those employees residing on those computers that this motion addresses. Specifically, Nortel files this motion for a protective order to protect the Nortel privileges and the confidentiality of these non-transferred Nortel files that were not

transferred to, and do not belong to, Rockstar. Nortel, therefore, asks the Court to issue a protective order preventing Rockstar from accessing, reviewing, using or disclosing any material on the relevant computers except those that are readily identifiable as relating to the patent assets that Rockstar acquired from Nortel.¹

Although the Nortel estates have been in bankruptcy proceedings for more than five years, there are still certain key areas in these documents that present confidentiality concerns. Specifically, all of the sales agreements of the major lines of business contained confidentiality provisions imposing restrictions on Nortel with respect to certain business information and types of transaction documentation. Although Nortel may no longer be active in these business segments, the third party buyers are running these active businesses and have substantial concerns with respect to the confidentiality of this information. Similarly, many other Nortel contracts with third parties contained confidentiality clauses covering commercially sensitive information of those third parties. There are also numerous documents subject to privacy and related laws in various jurisdictions, including potentially personal and financial information. In sum, those differing types of sensitive information remain confidential and subject to varying laws, regulations and confidentiality agreements.

It was determined in response to the discovery requests in this action that certain electronic documents were transferred in those computers to Rockstar that contained privileged and confidential Nortel information. By this motion, Movants seek to ensure the protection of Nortel's attorney client privilege information and the preservation of confidentiality of Nortel documents mandated by applicable agreements and laws. Movants therefore seek relief from the Court preventing the invasion of the Nortel privileges at issue through entry of a protective order directing that Rockstar not access the "non-transferred" items contained on the relevant

¹ The non-transferred information is owned by the Nortel estate and is subject to the jurisdiction of the courts in Delaware and Ontario in the pending proceedings.

computers. By ordering this protection, the Court will balance the legitimate interests of Movants in protecting their privileges and the interest of the parties here in permitting production of relevant, non-privileged documents. This process will allow Nortel to protect its privilege from invasion or waiver, protect third party interests in maintaining confidentiality and will not visit undue delay on the parties to this case.

Alternatively, if the Court concludes that the materials on the relevant computers that were not transferred to Rockstar must also be searched in connection with Google's discovery requests, Nortel requests that the Court order Google and Rockstar to work in good faith with Nortel to establish an appropriate mechanism for review of the documents at issue that sufficiently protects Nortel's privileged and confidential documents.² In the meantime, Rockstar should be barred from accessing, reviewing or disclosing any documents on the computers at issue besides those that are readily identifiable as "transferred items" that are rightfully in Rockstar's possession.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 26(c), a court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . . including . . . forbidding the disclosure or discovery . . . forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters . . . [and] requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way." Fed. R. Civ. P. 26(c)(1). This Court has "broad discretion" in deciding whether to grant such a protective order. *See Avance v. Kerr-McGee Chem. LLC*, No. 5:04-CV-209, 2005 WL 5315658, at *2 (E.D. Tex. July 1, 2005); *accord Harris v. Amoco Prod. Co.*, 768 F.2d 669, 684 (5th Cir. 1985) (upon a showing

² This motion is made with full reservation of Nortel's right to seek reimbursement from Rockstar for all attorney's fees and expenses Nortel incurs in connection with this issue.

of good cause, “the district court can exercise its sound discretion to restrict what materials are obtainable, how they can be obtained, and what use can be made of them once obtained”). It is that sound discretion of the Court to fashion a remedy to protect privileged and confidential information that Nortel here seeks to exercise by this motion.

Courts uniformly hold that the prevention of the disclosure of privileged information constitutes good cause for the entry of a protective order pursuant to Federal Rule of Civil Procedure 26(c). *See, e.g., United States Equal Employment Opportunity Comm. v. TIC-The Industrial Company*, No. Civ.A. 01-1776, 2002 WL 31654977, at *3 (E.D. La. Nov. 21, 2002) (“[T]he burden of showing good cause for a protective order under Fed. R. Civ. P. 26(c) is satisfied if [the movant] is entitled to invoke the attorney-client privilege. That privilege, if applicable, provides good cause for a protective order without any other showing.”); Ferko v. Nat’l Ass’n for Stock Car Auto Racing, Inc., 218 F.R.D. 125, 141, 144 (E.D. Tex. 2003) (granting protective order preventing the disclosure of documents and communications protected by the attorney-client privilege); Brill Edwards v. Ryder Truck Rental, Inc., No. 3:01CV915, 2003 WL 23511733, at *1-2 (D. Conn. Jan. 24, 2003) (issuing protective order under Rule 26(c) to prevent the disclosure of information protected under Rule 26(b)(4)(B)).

Moreover, Federal Rule 26(c) provides that where the information sought is “a trade secret or other confidential research, development or commercial information,” the court may order that the information “not be revealed, or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G). This rule “grants the Court the power to enter a protective order to restrict access to a trade secret or other confidential information.” Round Rock Research, LLC v. Dell Inc., No. 4:11-CV-332, 2012 WL 1848672, at *2 (E.D. Tex. Apr. 11, 2012).

It is for all of these reasons that Nortel here requests an order of protection directing that Rockstar not be permitted to review the “non-transferred” files contained in the relevant computers.

CONCLUSION

For all of the foregoing reasons, Nortel respectfully requests that the Court enter a protective order pursuant to Federal Rules of Civil Procedure 26(c) and 45(d)(3) prohibiting Rockstar from accessing any “non-transferred items” on the computers it acquired from Nortel or, in the alternative, ordering Google and Rockstar to work with Nortel in good faith to establish an appropriate mechanism for review of the documents at issue that sufficiently protects Nortel’s privileged and confidential documents.

Dated: September 13, 2014

THE DACUS FIRM

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 13th day of September, 2014.

/s/ Deron R. Dacus _____
Deron R. Dacus

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that counsel for Nortel has complied with the meet and confer requirement of Local Rule CV-7(h) and Federal Rule of Civil Procedure 26(c)(1). The relief sought in this motion is unopposed by Rockstar and NetStar. The personal conference required by Local Rule CV-7(h) was conducted on September 12, 2014 via telephone conferences with the following participants: Amanda Bonn of Susman Godfrey L.L.P for plaintiffs Rockstar and Nestar, David Perlson of Quinn Emmanuel Urquhart & Sullivan, LLP for defendant Google, and Jacob S. Pultman for Nortel. No agreement could be reached between Nortel and Google, and Google has indicated that it intends to oppose this motion.

/s/ Jacob S. Pultman _____
Jacob S. Pultman