

**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-RSP

**NON-PARTY NORTEL NETWORKS INC.'S REPLY BRIEF
IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER**

Nortel Networks Inc. (“NNI”) is seeking the protection of this Court with respect to privileged and confidential information that may remain on certain computers that Rockstar Consortium US LP (“Rockstar”) acquired in connection with the purchase of Nortel patents by a Rockstar affiliate. In its opposition, Google Inc. (“Google”) focuses more on its discovery disputes with Rockstar than on NNI’s valid concern over the disclosure of sensitive information that may have little or nothing to do with the issues in this case. However, Google’s alleged difficulties obtaining documents from Rockstar do not justify trampling NNI’s legitimate privilege and confidentiality interests.

I. NNI Was Diligent in Seeking to Protect Its Privileged and Confidential Information, and Bears No Responsibility for Any Alleged Discovery Delays by Rockstar

Notwithstanding Google’s repeated complaints about the evidentiary support for NNI’s motion, the responses filed by Rockstar and Google confirm that the basic facts are undisputed:

- In connection with Rockstar’s purchase of thousands of Nortel patents (including the 7 patents-in-suit), Rockstar took possession of 26 personal computers that were being used by Nortel employees who transitioned to

Rockstar as part of the transaction. Transition Services Agreement, Sched. 1, Para. 7.1 (“TSA”).¹ Nearly all of the transferred employees were attorneys or other professionals who worked in Nortel’s Legal Department. *See* Email from M. Supko to A. Roberts, 09/26/14 (associating names with transferred computers) (Ex. Q to Opp’n Br.); Rockstar’s Initial Disclosures, 2-7 (providing titles of persons with knowledge) (Ex. H to Opp’n Br.); Email from S. Blackburn to A. Roberts, 07/31/14 (providing titles of custodians) (Ex. I to Opp’n Br.).

- Rockstar had the option of keeping the computers, but it was not permitted to “use any information, application or data (including software) loaded or embedded in the PC if such item is not included in the Assets purchased under the [Asset Sale Agreement] or licensed to the Purchaser” TSA at Paragraph 4(i). Rockstar was also required to “delete all such non-transferred items from any PCs purchased under a Work Order on which it is installed” *Id.*
- In early August of 2014, Rockstar informed NNI that it planned to search the computers it had acquired from Nortel for documents responsive to Google’s discovery requests, and that some or all of those computers may still include “non-transferred items.” Rockstar explained that it had not deleted any information from the computers because of litigation hold concerns. Pls.’ Resp. to Mots. for Protective Order by Nortel Entities, 1 (Dkt. No. 176).
- For the next several weeks, Rockstar and NNI attempted to negotiate a procedure that would enable Rockstar to search the computers for relevant documents properly within its possession, but without accessing or disclosing any of Nortel’s privileged and confidential information that may still remain on the computers. *See id.* When Rockstar ultimately informed NNI that it could not negotiate any longer because of an impending production deadline, NNI promptly moved this Court for a protective order.

This sequence of events confirms that, from the time less than two months ago that NNI became aware of this issue, NNI has been diligent in seeking to protect its privileged and confidential information. NNI cannot reasonably be held responsible for any alleged lack of diligence or thoroughness *by Rockstar* in producing documents to Google, a subject to which Google devotes the bulk of its opposition brief. *See* Opp’n Br. at 3-10.

¹ Google filed a copy of the TSA under seal as Exhibit N to its Opposition Brief.

II. The Documents NNI Is Seeking to Protect Are By Definition Unrelated to the Patents-in-Suit, and Thus Are Unlikely to Be Relevant to the Issues in this Case

Contrary to Google's inflammatory and unfounded accusation, NNI is *not* seeking to stop Rockstar from searching the computers at issue for any "transferred items," *i.e.*, documents that fairly relate to the 7 patents-in-suit (or, for that matter, documents that relate to any of the thousands of patents that Rockstar acquired from Nortel). Rather, NNI is merely asking this Court to preclude Rockstar from accessing any "non-transferred items" on those computers. *See* NNI's Mot. for Protective Order, 6 (Dkt. No. 150). By definition, such documents do *not* relate to the patents Rockstar purchased from Nortel. *See* TSA at Para. 4(i) (using term "such non-transferred items" to refer to items "*not* included in the Assets purchased under the ASA or licensed to the Purchaser") (emphasis added).²

NNI has not had access to the computers at issue since they were transitioned to Rockstar more than 3 years ago, and thus NNI does not know what documents in fact reside on them. However, given that the documents sought to be protected do not relate to the patents-in-suit, it is very unlikely that those documents have any direct relevance to the infringement dispute between Rockstar and Google. To the extent Google believes the computers may contain relevant NNI documents *unrelated* to the patents purchased by Rockstar (Google suggests that documents reflecting Nortel's licensing policies are one possibility), such documents almost surely are the subject of the extraordinarily voluminous third-party discovery requests that Google served on NNI (and numerous former employees, legal advisors, and business advisors).

² The "Assets purchased under the ASA" expressly included a comprehensive collection of "Patent Related Documentation," including but not limited to patent prosecution files, litigation files, license agreements, infringement claim charts, the contents of an electronic "data room" made available to bidders during the auction of the Nortel patent portfolio, and assignment agreements. Excerpt from Asset Sale Agreement (Ex. A hereto).

See Decl. of T. Ross, 09/18/14, ¶¶ 2-7 (Ex. C to NNI's Notice of Filings in Bankruptcy Proceeding (Dkt. No. 177-3)).

In an apparent effort to divert attention from NNI's legitimate privilege and confidentiality concerns, Google complains about NNI's response to Google's subpoena. See Opp'n Br. at 12. Such complaints, however, are not ripe for consideration by this Court. Google has not filed a motion to compel, and Google and NNI are continuing to negotiate the scope of NNI's document production in response to the subpoena.

Moreover, as NNI has informed the Court, NNI is seeking more global relief from the Delaware Bankruptcy Court in view of the extraordinary burden and expense to which NNI is being subjected by a raft of third-party discovery requests in various litigations involving patents sold to Rockstar, including but not limited to *sixteen* subpoenas served by Google. See Debtor's Mot. for [Specified Relief] (Ex. B to NNI's Notice of Filings in Bankruptcy Proceeding (Dkt. No. 177-2)). The issues raised by that motion go well beyond those in this or any other single litigation, and thus NNI believes the Delaware Bankruptcy Court is the most appropriate forum to resolve those issues. *Id.* at 32-44 (citing authority).

III. Google's Contention that NNI Will Not Be Harmed by the Unauthorized Disclosure of Its Privileged and Confidential Information Is Disingenuous

Adopting a strikingly cavalier attitude towards the attorney-client privilege and contractual obligations, Google suggests that NNI's concerns over the unauthorized disclosure of its sensitive information should be discounted because NNI can simply "claw back" any inadvertently disclosed documents. Opp'n Br. at 14-15. But this is far from a typical "inadvertent disclosure" situation, where a producing party's counsel might accidentally miss a stray privileged document in a large production. To the contrary, Google is proposing that NNI's privileged and confidential information *purposely* be disclosed to Rockstar, in whose

possession those documents currently reside, and then to Google. Google surely would not countenance such casual treatment of its own privileged and confidential information.

IV. Conclusion

For the reasons set forth above and in its opening papers, NNI respectfully requests that the Court enter a protective order prohibiting Rockstar from accessing any “non-transferred items” on the computers it acquired from Nortel. NNI has no interest in impeding Google’s efforts to obtain the discovery from Rockstar to which it is entitled, but NNI’s legitimate privilege and confidentiality interests in Nortel documents that Rockstar should not even have in its possession cannot simply be brushed aside in the interest of expediency.

Respectfully submitted,

October 3, 2014

/s/ Mark M. Supko
Mark M. Supko
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
202.624.2500 (phone)
202.628.5116 (fax)
msupko@crowell.com

Attorneys for Nortel Networks Inc.

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 3rd day of October, 2014.

/s/ Mark M. Supko
Mark M. Supko