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

REPLY IN FURTHER SUPPORT OF NORTEL NETWORKS CORPORATION AND NORTEL NETWORKS LIMITED'S MOTION 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 Reply in further support of its motion for a protective order under Federal Rules of Civil Procedure 26(c) and 45(d)(3), and in response to the opposition filed by Google Inc. ("Google") on September 29, 2014.

PRELIMINARY STATEMENT

Nortel, a non-party to this litigation, demonstrated in its opening brief that a protective order is necessary to prevent the wrongful disclosure of Nortel's privileged and confidential documents that are, but should not be, in the possession of Rockstar Consortium US LLP ("Rockstar"). Permitting Rockstar to access the non-transferred items at issue would expose Nortel to an invasion of its privileges as well as potential liability for breaching confidentiality provisions in its agreements with third-parties, including bidders and contractual counter-parties. The relief requested by Nortel would provide necessary protection from these harms while minimizing the disruption to the schedule in the litigation between Rockstar and Google.

Google's opposition provides no meaningful response to Nortel's showing. Google's opposition is instead focused, in large part, on launching attacks on Rockstar and accusing Rockstar of attempting to delay the production of discovery. But Google provides no reason why Nortel should be punished for the supposed sins of Rockstar. Nortel, as a non-party, is concerned only with protecting the privileges of the non-transferred documents that should not be in Rockstar's possession in the first place. Because a protective order is the only way to prevent the invasion of Nortel's privileges, Nortel's motion for a protective order should be granted.

ARGUMENT

I. Granting The Relief Sought By Nortel Would Not Prejudice Google

Google mischaracterizes the relief sought by Nortel, wrongly arguing that Nortel is asking the Court to "uproot the case schedule" and "preclude Plaintiff Rockstar from producing documents that Rockstar was already required to have 'substantially' produced to Google . . . ." Opposition at 1. Google further argues, in wholly conclusory fashion, that it would suffer "extreme" prejudice if the Court grants relief to Nortel because such relief would supposedly delay Google's access to materials needed to build its case. Google's positions are without merit.

First, as Nortel plainly stated in its opening papers, Nortel does not seek to impose any restrictions on the production of materials relating to transferred files. Rather, Nortel merely seeks to prevent Rockstar from accessing the non-transferred files contained on the computers at issue – files that do not belong to Rockstar and contain Nortel's privileged and confidential information.

The Court need look no further than the Transition Services Agreement between Nortel and Rockstar (the "TSA"), which was produced to Google, to see that only the transferred files

are likely to contain information that is relevant to the litigation between Google and Rockstar. The non-transferred files, by contractual definition, are unrelated to the patents that Rockstar acquired from Nortel, and are thus unrelated to the subject matter of this litigation. Specifically, Section 4(i) of the TSA describes "non-transferred items" as "information, application or data . . . not included in the Assets purchased under the ASA or licensed to the Purchaser." Given that the non-transferred files over which Nortel seeks protection are unrelated to the patents at issue in this litigation, those files are unlikely to contain any information that Google needs to build its case.

In sum, Google's assertion that granting the relief sought by Nortel would create delays in the litigation calendar and prejudice Google's discovery rights is premised on the false assumption that the non-transferred files contain information that Google needs to build its case. As the relief sought by Nortel is limited to preventing Rockstar from accessing material that is unlikely to contain information that is relevant to the litigation between Rockstar and Google, Google's complaints about "extreme" prejudice and delay ring hollow.

II. Nortel Acted Diligently In Seeking To Resolve The Discovery Issues, And Google's Complaints About Rockstar's Alleged Conduct Are Irrelevant

Google spends much of its opposition airing grievances about the alleged conduct of Rockstar in responding to discovery in this case. But there is certainly no basis to punish Nortel, an innocent non-party, for the alleged shortcomings in Rockstar's responses to Google's discovery requests. Google's complaints about Rockstar's conduct are entirely irrelevant to this motion.

What cannot reasonably be disputed is that Nortel acted diligently in seeking to resolve the discovery issues raised by this motion. Nortel was informed by Rockstar less than two months ago that Rockstar had not deleted the non-transferred files from the computers that it acquired from Nortel, and that Rockstar planned to search such computers in response to

Google's discovery requests in this case. Nortel and Rockstar then engaged in discussions for the next several weeks in an effort to develop a protocol that would permit Rockstar to search the computers in its possession for documents responsive to Google's discovery requests without accessing the privileged and confidential information owned by Nortel. After Rockstar notified Nortel that it could not continue these discussions in light of its document production deadline, Nortel promptly filed its motion seeking protective relief from this Court.

III. Google's Attempt To Cast Aspersions On Nortel's Interests In Protecting Its Privileged And Confidential Information Is Baseless

Google's attempt to casually brush aside non-party Nortel's interests in protecting the attorney-client privilege and honoring contractual non-disclosure obligations is alarming and baseless. Google's suggestion that these interests are somehow diminished because Nortel is in Chapter 11 proceedings, Opposition at 10, is entirely unsupported.

Google's suggested "claw back" arrangement would hardly suffice to protect Nortel's interests. Claw back arrangements may provide adequate protection in the limited context of inadvertent disclosures, but what Google is suggesting here is that Nortel's privileged and confidential information be intentionally disclosed to Rockstar and then to Google. Non-party Nortel should not be required to submit to such careless treatment of its privileged and confidential documents, particularly in light of the fact that such documents are unlikely to contain relevant information.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in its opening papers, Nortel respectfully requests that the Court enter a protective order prohibiting Rockstar from accessing any "non-transferred items" on the computers it acquired from Nortel.

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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 3rd day of October, 2014.

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