

Exhibit B

Plaintiffs Rockstar Consortium US LP and
Netstar Technologies LLC's Briefing in
Support of Entry of a Protective Order

Exhibit B: Rockstar's Briefing on Disputed Protective Order Issues

Both parties agree that a protective order is appropriate in this case. Rockstar views the Court's Model Protective Order as adequate to protect each party's interests and confidential information while Defendant has asked for pages and pages of additional protections. Even though Rockstar is generally of the opinion that Defendant's additions to the Model Protective Order are unnecessary, in the spirit of compromise Rockstar has agreed to the majority of Defendant's demands. However, Rockstar cannot agree to all of the additional provisions that Defendant seeks. Not one of Defendant's additional requested provisions is found in the Court's Model Protective Order. Moreover, these disputed provisions will burden legitimate discovery efforts, increase the cost of this litigation, and engender additional motion practice.

In cases such as this, where the "parties to an action agree on entry of a protective order but differ on the order's terms, the party seeking to limit discovery bears the burden of demonstrating that good cause exists for the protection of that information." *Document Generation Corp. v. Allscripts, LLC*, No. 6:08-CV-479, 2009 WL 1766096, at *2 (E.D. Tex. June 23, 2009) (citations omitted). "The party attempting to establish good cause must demonstrate 'a clearly defined and serious injury to the party seeking closure.'" *Id.* (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)). Accordingly, because Defendant requests additional restrictions on discovery, it bears the burden to show good cause for each of the restrictions it seeks to impose.

1. Paragraph 10: In-house Access to Designated Materials.

The Model Protective Order provides for in-house attorneys and up to three additional designated representatives to have access to confidential information and for in-house attorneys who exercise no competitive decision-making authority to have access to RESTRICTED –

ATTORNEYS' EYES ONLY materials. Defendant seeks restrictions on access to designated materials far beyond those provided for in the Model Protective Order. Defendant requested (1) that there be no designated representatives that receive confidential materials, (2) that access to confidential materials be limited to a certain number of in-house attorneys, and (3) that no in-house attorneys have access to RESTRICTED – ATTORNEYS' EYES ONLY materials, as they would be entitled to under the Model . Rockstar agreed to the first two departures from the Model Protective Order, but cannot agree to the third.

Defendant suggests that Rockstar's in-house counsel should be denied access to RESTRICTED – ATTORNEYS' EYES ONLY materials because Rockstar has failed to provide Defendant with facts that would justify access. This is a half-truth. It is true that Rockstar has provided no such facts, however, Defendant never asked for any such facts. In fact, Defendant never once throughout the negotiation process made any indication that it was willing to compromise on in-house access to RESTRICTED – ATTORNEYS' EYES ONLY materials.

Defendant likewise fails to tell the Court the entire story when it contends that Rockstar would not have its in-house counsel commit to refrain from competitive decision making. The language quoted by Defendant pertained merely to CONFIDENTIAL materials and not RESTRICTED – ATTORNEYS' EYES ONLY materials. As mentioned above, Defendant was never willing to negotiate in-house access to attorney's eyes only materials. When defendant insisted that Rockstar's in-house counsel sign a document stating that they were not competitive decision makers in order to have access to CONFIDENTIAL material, Rockstar pointed out that the Model Protective Order provides access to such material without distinction as to decision-making status. At any rate, this concern must not have been too great, as Defendant eventually dropped its demand with respect to in-house counsel who see CONFIDENTIAL material. *See*

Paragraph 6(c) of the Proposed Protective Order. Notwithstanding Defendant's allegations to the contrary, Rockstar is and has always been willing to limit access in-house counsel to RESTRICTED – ATTORNEYS' EYES ONLY to attorneys who exercise no competitive decision-making authority. Indeed, Rockstar's proposed provision provides for exactly that. *See* Paragraph 10 of the Proposed Protective Order.

Rockstar recognizes that defendants need to protect their confidential information from their competitors, but in-house counsel with the responsibility of managing litigation need access to both CONFIDENTIAL and RESTRICTED – ATTORNEYS' EYES ONLY materials to effectively and efficiently participate in the action. The Model Protective Order balances these interests by allowing in-house attorneys responsible for the litigation to view RESTRICTED – ATTORNEYS' EYES ONLY materials only if they exercise no competitive decision-making authority on behalf of the client. This allows the parties to prosecute their case effectively while protecting the legitimate business interests of their adversary. Defendant cannot show that the Model Protective Order provisions are insufficient in this case.

2. Paragraph 11(a): Use of Laptops during Source Code Review

The Model Protective Order contains provisions sufficient to protect Defendant's source code. Nonetheless, Rockstar has agreed to nearly all of Defendant's additional burdensome precautionary measures. In return, Rockstar sought one concession from Defendants as to source code review—the ability to take notes on a laptop computer during the review. Defendant refused to compromise.

Defendant seeks to impose an impractical restriction on technical discovery by barring source code reviewers from bringing laptops into the source-code review room. Without laptop computers, source code reviewers cannot take adequate notes, search their own materials for

information, efficiently revise claim charts, and draft sections of reports. Courts in this District have rejected attempts to seek such a limitation on source code review on several occasions. *See Bluebonnet Telecomms. LLC v. Sony Ericsson Mobile Communications (USA) Inc.*, No. 2:13-cv-00505-JRG, Dkt. 224 (E.D. Tex., March 12, 2014) (rejecting defendant's demand for a prohibition on any electronics in the source code room); *MicroUnity v. Acer*, No. 2:10-cv-00091-TJW, Dkt 244-2, 244-3, Dkt 304 (E.D. Tex., Aug. 23, 2011) (adopting protective order without defendants' proposed restriction on laptops); *PersonalWeb Technologies, LLC v. NEC Corp. of America*, No. 6:11-CV-00655, Dkt 83, 87 (E.D. Tex., Aug. 7, 2012) (same).

Admittedly, Courts in this District have on two occasions denied a party the ability to use laptops inside the source code room. *See E-Contact Technologies, LLC v. Apple, Inc.*, No. 1:11-CV-00426, Dkt 344 (E.D. Tex., June 19, 2012); *see also Geotag Inc. v. Frontier Commc'ns Corp.*, Case No. 10-0570 (E.D. Tex. Jan. 8, 2013). The rationale supporting the Court's decision in *E-Contact*, however, is inapplicable in this case. In *E-Contact*, the court allowed the defendant to bar laptops from the source code room because the defendant would allow the plaintiff to "print the source code from the source code computer, take the printed pages to the laptop, and then prepare charts, notes, or other work product." *Id.* at *8. Likewise, in *Geotag*, the source code review computers were "connected to a printer or printers," allowing for on-demand printing of source code. *Geotag Inc. v. Frontier Commc'ns Corp.*, Case No. 10-0570, Dkt 593 (E.D. Tex. Jan. 18, 2013). Defendant in this case makes no such concession or accommodation. Moreover, the undisputed portions of paragraphs 11(c) and (g) of the Proposed Protective Order, which prevent on-demand printing of source code, make the *E-Contact* solution unworkable here. Further, Defendant in the present case produced source code in *PersonalWeb* and *Superspeed, LLC, v. Google, Inc.*, No. 4:12-cv-01688, Dkt 38 (S.D. Tex.,

January 10, 2013) under protective orders that allowed for the presence of a laptop in the source code room. Defendant is unable to demonstrate that doing so resulted in any harm.

Finally, Rockstar notes that even though Defendant has agreed to provide two source code review computers, those computers do not obviate an expert's need for a laptop. The source code review computers are non-networked and removable media is forbidden by the terms of the Protective Order. As such, the source code review computers are not useable for note taking and other tasks. Moreover, even if the source code review computers could be used for this purpose, doing so would require Rockstar's experts to produce privileged work product on computers within the control of opposing counsel. That is obviously untenable. Accordingly, the experts will be unable to use those computers for note taking and work product production.

In conclusion, Defendant's proposed prohibition on laptops will drive up expenses for all parties by forcing reviewers to spend more time taking handwritten notes with pen and paper. Such a limitation, if adopted, will inevitably lead to more requests for the producing party to print source code. By contrast, Rockstar's proposal protects the producing party by barring computers taken into the source code review room from being connected to any network and also blocking separate recording and storage devices.¹

3. Paragraph 11(g): Arbitrary Limit on Source Code Printing

Defendant proposes to limit Rockstar to printouts of source code of no more than 25 consecutive pages, and 500 total aggregate pages throughout the duration of this entire case. Defendant's demand is both unreasonable and arbitrary. This case involves seven patents and at least a dozen accused instrumentalities, each of which may reflect numerous sets and versions of source code. As Rockstar does not yet have access to any of Defendant's source code, it is

¹ The laptop will, of course, not be used for the copying of source code. Such copying is expressly forbidden by the terms of paragraph 11(c).

impossible to predict how many printed pages will be necessary for Rockstar to properly prepare its case.² Nonetheless, Defendant insists that the court impose a hard cap on the number of pages that may be printed. The Eastern District has rejected this demand on several occasions. *See Blue Calypso, Inc. v. Groupon*, No. 6:12-cv-486, Dkt. 157, at 3 (E.D. Tex., Oct. 24, 2013) ("Without knowing the length or volume of the Source Code Materials that Yelp will be required to produce, any page limitation that is chosen in a vacuum will be arbitrary."); *see also Bluebonnet Telecomms. L.L.C. v. Sony Ericsson Mobile Comms. (USA) Inc.*, No. 2:13-cv-505, Dkt. 34, at 2–3 (E.D. Tex., Mar. 12, 2014) (denying request for page limitations on source code printouts). The Court rejected these demands with good reason. An arbitrary cap will ensure only one thing: more motion practice over the production of additional printed pages of source code. Rockstar's proposal will allow source code discovery to proceed efficiently and securely. Moreover, the undisputed provisions of the protective order already limit Rockstar to printing a "reasonable" amount of code, and allow Defendant to challenge the printing of code (and withhold the pages in question), if they deem the printing to be unreasonable.

Finally, this Defendant has been subject to non-numerical source code printing limits in at least two other cases in this District. *See PersonalWeb Technologies, LLC v. NEC Corp. of America*, case 6:11-CV-00655, Dkt 89, slip op. at 9 (E.D. Tex., Aug. 9, 2012); *Eolas Techs. Inc. v. Adobe Sys. Inc.*, Case No. 6:09-cv-00446-LED, Dkt. No. 423, slip op. at 20-21 (E.D. Tex., Sept. 10, 2010). Defendant is unable to show that it was harmed in those cases and there is no reason to believe that it will be harmed in this case. Conversely, the imposition of Defendant's

² It is true that Defendant offered to allow Rockstar to cap the total number of pages at 500 and trade in pages that it no longer needed in exchange for additional pages. It is, however, not true that Rockstar rejected this offer. Rather, Rockstar stated that it lacked sufficient information to decide whether that offer was workable. In the hopes of determining whether the cap and trade proposal could work, Rockstar asked Defendant to provide Rockstar with an idea of how many lines of code would be produced with respect to each accused instrumentality so that an agreement could be reached. Defendant never responded.

arbitrary cap will likely both hinder Rockstar's legitimate discovery efforts and consume the Court's time and resources.

4. Paragraph 11(j): Responsibility for Source Code

The parties agree that paper copies of source code shall be allowed to be stored or viewed at the five locations listed in paragraph 11(j). The parties part ways when it comes to how the printed pages will be treated when moving between locations. There is no dispute that the printed pages of source code can and must be transported between these locations. In order for Rockstar's experts to perform their duties they will have to receive the source code pages at their offices. Given that under the Protective Order there will be only three copies of the printed source code pages and up to five experts plus outside counsel will need access to those pages, Rockstar team members will inevitably have to share sets of printed pages of source code.

In order for Rockstar and its experts to operate efficiently, they must be able to ship the source code pages between locations. Under Defendant's proposal, Rockstar's counsel or experts would have to transport the source code pages personally by hand between offices. Rockstar's counsel has neither the intention nor the ability to hand-deliver the printed pages to Rockstar's experts around the country each and every time additional printed pages are requested. Defendant's proposal would not only be outrageously expensive but also wildly impractical. Defendant suggests in its briefing—for the very first time—that it does not require hand-delivery by counsel, but that a courier will suffice. Indeed, the proposed language of paragraph 11(j) contains no such suggestion. At any rate, a hand-delivery courier service will likewise greatly increase the cost and difficulty to Rockstar as source code pages will likely need to be shipped numerous times over the course of this litigation due to the additional restrictions requested by Defendant mentioned above. Should the Court decide that a courier service is the

proper course of action, Rockstar suggests that Defendant bear the cost. This approach would both alleviate Defendant's concerns about control over source code pages and Rockstar's concerns regarding costs.³

Finally, while Defendant's source code—like every defendant's source code—is secret and valuable, Rockstar is not proposing to ship the entire set of source code. Rather, Rockstar merely asks that it be able to ship certain excerpted pages that it requires to prosecute its case. Rockstar's proposed language allows the transport of source code pages by conventional, secure, and trackable means and would limit the requirement of direct control by counsel or experts to situations where the source code is actually in their possession. This requirement, along with the other requirements of paragraph 11(j), is more than adequate to protect Defendant's source code. Defendant cannot show that the language proposed by Rockstar is unworkable. Nor can Defendant show good cause for burdening Rockstar with such impractical and expensive transportation requirements.

5. Paragraph 12: Third-Party Attorney Protective Order Refusal.

Defendant proposed to add this provision in order to prevent the disclosure of confidential information by certain third parties. Rockstar largely agrees to this provision, but objects on one narrow issue. In the event that an attorney representing a third party refuses to sign a protective order prior to a deposition at which confidential information is to be shown to the third party, Defendant seeks a provision forcing all parties to jointly seek a protective order prohibiting the attorney from disclosing protective information. Rockstar understands Defendant's need to protect its own protected information from disclosure just as Rockstar has a need to protect its own confidential information. However, Rockstar's proposed provision

³ That Defendant prefers to have its source code ferried in the back of a sedan or in a cyclist's backpack rather than shipped with FedEx tracking numbers that allow remote monitoring of the package's whereabouts confirms that its hand-delivery request is nothing more than an attempt to needlessly increase the cost of litigation.

adequately serves that need by allowing either party to seek a protective order from the Court prohibiting the attorney from disclosing the confidential information. By contrast, Defendant asks the Court to preemptively take away Rockstar's ability to oppose any such motion, regardless of its merit, and force Rockstar to join any such motion. In Rockstar's view, Defendant's proposal is not only inappropriate, but also prematurely decides issues that likely will not arise.

6. Paragraph 13: Overly Broad Prosecution Bar

The parties agree that there should be a patent prosecution bar, but disagree on the scope. Rockstar's proposed prosecution bar is faithful to the bar found in the Model Protective Order, but with a few additions. Rockstar's provision clarifies the prosecution bar's application to reexaminations and post-grant proceedings. This additional language merely makes express what this Court has already held—that the bar does not prohibit an attorney from assisting in reexaminations or post-grant proceedings, except that persons subject to the prosecution bar “may not directly or indirectly assist in drafting, amending or proposing for substitution patent claims in” reexamination or any post-grant proceedings. *Achates Reference Publ'g, Inc. v. Symantec Corp.*, No. 2:11-cv-294 (RSP), Dkt. 447, at 1–2 (E.D. Tex. Aug. 20, 2013). The addition of this language will serve to prevent future disputes between the parties should Defendant choose to institute a reexamination or post-grant proceeding.

Defendant seeks a prosecution bar with restrictions that far exceed both those provided in the Model Protective Order and what is necessary to protect Defendant's interests. Both the Model Protective Order and Rockstar's proposed provision limit the prosecution bar to prosecution activity done on behalf of the receiving party or its successor or other affiliate. Defendant's proposal is not so limited.

Defendant proposes that the prosecution bar apply to broad range of activity done on behalf of any patentee for any patent including providing advice, counsel, or suggestions regarding, or in any other way influencing claim scope and/or language so long as the patent involves technology related to the patents-in-suit. Thus, under Defendant's provision, the prosecution bar would prevent an attorney from advising an unrelated client on an unrelated matter against an unrelated defendant so long as that matter involved technology similar to that of the patents-in-suit. Defendant has not proposed that its prosecution bar apply to those cases where Defendant is a current or potential defendant, but rather seeks to prevent Rockstar's attorneys from advising in unrelated cases against unrelated defendants.

There is no justification for such a restrictive provision, and Defendant cannot show otherwise. Defendant's concern in how its confidential material will be used is of course legitimate. What is not legitimate, however, is Defendant's attempt to prevent Rockstar's attorneys from working on unrelated cases against unrelated defendants in unrelated matters simply because there may be an overlap in technology.

Finally, it bears mention that Rockstar is bound by law to "not use [Defendant]'s confidential information for any purpose other than this litigation." *Achates*, No. 2:11-cv-294, Dkt. 447, at 2. Defendant's unjustified concern that the Protective Order will be violated is not sufficient to hinder Rockstar's counsel's ability to work on other unrelated matters. Rockstar's proposed provision, like that of the Model Protective Order, properly balances Defendant's interest in not having its confidential information used against itself while protecting the rights of those attorneys subject to the prosecution bar. Defendant's provision protects only itself.

7. Paragraph 14: Unwarranted Acquisition Bar

Defendant seeks to impose a so-called "acquisition bar." This acquisition bar does not

serve the same purposes or share the justification of a prosecution bar as it does not prevent any potential harm to the producing party with respect to new patent rights. To the contrary, the proposed acquisition bar is merely an attempt by the Defendant to escape potential infringement allegations with respect to pre-existing property rights. Defendant has no legitimate interest in continued infringement of these rights.

Moreover, just like any other purchaser of intellectual property, Defendant has the ability to avoid the infringement of pre-existing patent rights by purchasing or licensing any patents they infringe or practice. In fact, Defendant placed a competing bid for the very patent portfolio from which the patents-in-suit originated. The proposed acquisition bar would serve only to create a court-sanctioned prohibition against competing with Defendant in the market for patents. As Defendant has no legitimate interest in infringing existing patent rights or in the stifling of competition in the market for patents, Defendant cannot show good cause for the acquisition bar request, and it should not be included in the protective order.

8. Paragraph 33 (and 6(f)): The Ability to Conduct a Mock Trial

Defendant sought and received from Rockstar protections for its confidential information far beyond those provided for in the Model Protective Order. In return, Rockstar asked for the ability to conduct a mock trial—subject to extensive measures to protect Defendant’s information. Defendant flatly refused.

In the experience of Rockstar’s counsel, mock jury trials not only assist in preparation for trial, but also promote settlement by allowing the parties to evaluate their case. With this in mind, Rockstar proposes the mock jury provision to the Protective Order. Rockstar is, of course, cognizant of the need to protect Defendant’s designated material from disclosure and Rockstar’s proposed provision takes extraordinary steps to do so while still allowing Rockstar to prepare its

case. In fact, Rockstar's proposal expressly prohibits the viewing or receipt of any of Defendant's designated materials, and in no event will mock jurors see Source Code Material. This will ensure that Defendant's materials are protected. Rockstar merely requests that it be able to show mock jurors presentations, summaries or documents derived from designated materials. Without the ability to show these derivative materials, it will be completely impossible for Rockstar to conduct a mock trial.

Rockstar will also provide Defendant's designated material with further protections such as excluding any potential mock juror affiliated with a party or their direct competitor and requiring that mock jurors agree in writing to be bound by confidentiality and not to disclose the content or substance of any such derivative materials to any other person outside the mock trial exercise. These extensive security measures are more than sufficient to protect Defendant's designated materials. Finally, Defendant has in the past agreed to a similar, yet even less protective provision, which allowed for the use of actual confidential information in a mock trial exercise. *See PersonalWeb Technologies, LLC v. NEC Corp. of America*, case 6:11-CV-00655, Dkt 89, slip op. at 6 (E.D. Tex., Aug. 9, 2012) (allowing mock jurors to view confidential information). Defendant cannot show why the even more protective provision suggested in this case is insufficient to protect its designated material.