IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re SEARCHMETRICS INC., Debtor.[1]	Chapter 11 Case No. 17-11032 (CSS) **Hearing Date:** **June 29, 2017, at 10:00 a.m. (ET)** **Objections Due:** **June 21, 2017 at 4:00 p.m. (ET)**

MOTION OF BRIGHTEDGE TECHNOLOGIES, INC. FOR ENTRY OF AN ORDER (I) DISMISSING THE DEBTOR'S CHAPTER 11 CASE; OR (II) IN THE ALTERNATIVE, LIFTING THE AUTOMATIC STAY TO ALLOW CERTAIN LITIGATION TO PROCEED IN NON-BANKRUPTCY FORUMS

BrightEdge Technologies, Inc. ("BrightEdge"), by and through its undersigned counsel, file this motion (this "Motion") for entry of an order, substantially in the form attached hereto as **Exhibit A**, (I) dismissing the above-captioned chapter 11 case of Searchmetrics Inc. ("Searchmetrics," or the "Debtor") pursuant to section 1112(b) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), or (II) in the alternative, lifting the automatic stay pursuant to 11 U.S.C. § 362(d) to allow litigation between BrightEdge and the Debtor to proceed in the non-bankruptcy forums in which it is currently pending. In support of the Motion, the BrightEdge respectfully represents as follows:

PRELIMINARY STATEMENT

The Debtor and its parent Searchmetrics GmbH ("GmbH") filed this chapter 11 case and the related to adversary proceeding for one purpose: to gain a litigation advantage over BrightEdge after being ordered to produce a customer database critical to the long-running litigation between the parties – the event GmbH has sought to avoid for years. To escape the

[1] The Debtor in this chapter 11 case, along with the last four digits of the Debtor's federal tax identification number, is: Searchmetrics, Inc. (1635). The mailing address for the Debtor, solely for purposes of notices and communications, is c/o EisnerAmper LLP, 750 Third Avenue, New York, New York 10017, Attn: Wayne P. Weitz.

consequences of that outcome, in the months leading up to the bankruptcy date of this Chapter 11 case, the Debtor and GmbH employed every possible artifice to improve GmbH's position and salvage its investment at the expense of the Debtor's only other material stakeholder, BrightEdge. Specifically, [redacted] Moreover, the Debtor and GmbH then brought in Wayne Weitz of EisnerAmper purportedly as the chief restructuring officer to bless these transactions [redacted] The goal has been to create the illusion of a true restructuring where, [redacted]. No true restructuring will take place in this case, only enrichment of GmbH and an end-run around BrightEdge's due process and other rights.

The Debtor and GmbH followed up these pre-petition tactics with more of the same after commencement of the Chapter 11 case. The Debtor and GmbH (i) commenced an adversary proceeding in this court that replicated the long-standing actions pending between the parties in the state and federal courts, but intended to deprive BrightEdge of its rights to discover the information in the SugarCRM customer database at the heart of the litigation; (ii) filed a fast-track plan and disclosure statement that would artificially limit BrightEdge's claims, but would grant broad releases to the Debtor and GmbH; and (iii) moved immediately to assume the Non-Exclusive Distributor Agreement between the Debtor and GmbH to lock in the fraudulent transfer of assets from the Debtor to GmbH, but without any investigation or reconciliation of the

assets in question or their ownership, or any disclosure to this Court and the parties about the substance of what was being assumed.

When these facts and circumstances are considered in the context of the relevant case law in this Circuit, this Court can only conclude that the Debtor and GmbH have acted in bad faith in filing the Chapter 11 case and therefore, cause exists under Section 1112(b) to dismiss the case. Alternatively, these same facts constitute cause under Section 362(d)(1) of the Bankruptcy Code to lift the automatic stay to permit the two matters pending in state and federal courts in California to proceed to judgment given the nature of the claims, extent of the proceedings to date, and the pivotal points reached in those actions. As noted above, after a number of years of proceedings, the California state court ordered Debtor to produce the SugarCRM customer database by June 2, 2017. Similarly, the California federal court opened up the patent litigation case for all purposes, including discovery of the SugarCRM customer database, on May 4, 2017. Knowing that it would otherwise have to produce the customer database, GmbH caused the Debtor to file this bankruptcy staying the underlying lawsuits. The Debtor then effectively asked this Court to permit a "do-over" of that California litigation here by commencing the adversary proceeding against BrightEdge. The Debtor and GmbH brought all the same claims from the state and federal court actions into the adversary proceeding and even took the liberty of pleading BrightEdge's claims against BrightEdge in the form of declaratory judgment claims (seeking declarations of no liability).

Accordingly, there is more than sufficient "cause" to lift the automatic stay within the meaning of that term under 11 U.S.C. § 362(d). The claims have been, and can be, adjudicated effectively and fairly outside of bankruptcy and at least the state law claims of BrightEdge and the Debtor meet the criteria for abstention under 28 U.S.C. § 1334(c)(1) and (2). Therefore,

there is no reason to permit the Debtor and GmbH to forum shop and have this Court re-start all of that litigation from scratch especially in a manner that would prejudice the rights of BrightEdge as the Debtor and GmbH would like.

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. The Court has authority to consider this Motion under 28 U.S.C. § 157(b)(1) and (2).

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are 11 U.S.C. § 362(d) and 1112(b) and 28 U.S.C. § 1334(c).

BACKGROUND

4. The Debtor is wholly owned and controlled by GmbH. On May 8, 2017, GmbH caused the Debtor to file a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

5. No trustee, examiner or official committee of unsecured creditors has been appointed in this Chapter 11 case.

6. BrightEdge is a leading provider of Search Engine Optimization ("SEO") software to customers. BrightEdge's SEO software allows large business or enterprise customers to optimize their websites to drive traffic, conversions, and revenue from their largest marketing channel—organic search (*i.e.*, *non-paid* search engine results). It has multiple U.S. and foreign patents on SEO technology. BrightEdge sells its Software-as-a-Service ("SaaS") products to customers who want to gain critical advantages in their on-line marketing campaigns.

7. The identities and specific contact persons for its customers and prospective customers are integral to BrightEdge's business, and the secrecy of that information is critical. Locating and bringing on new customers requires significant time and effort. This multi-step

sales process includes: (1) identifying target customers of SEO services; (2) cold-calling those customers and finding the appropriate contact information of the SEO marketing specialist; (3) setting up and conducting a live demonstration of the software platform; (4) negotiating and closing a sale; (5) providing customer support; and (6) finally, and most critically, renewing the contract for the SEO software services when it expires (typically after one year). The sales process is so involved and expensive that it typically costs equivalent to the entire first year subscription value of a new customer. Thus, profits are driven by renewals of existing customers in the SEO SaaS software business and therefore, customer information and renewal dates have enormous value to a competitor.

8. BrightEdge relies on its current customers to renew their subscriptions as a focus of its business model. BrightEdge maintains this compilation of customer information in a customer relationship database, and requires its employees to enter into Proprietary Information and Inventions Agreements, whereby they agree not to disclose any of BrightEdge's proprietary information.

9. All of BrightEdge's sales teams' activities are tracked and documented in BrightEdge's Salesforce database (the corollary to the Debtor's SugarCRM database), which tracks all customer contact information, all contacts with the customer (including emails and phone calls), the status of negotiations, pricing, contract information, and other much more detailed information.

A. The BrightEdge State Court Claims

10. BrightEdge and the Debtor are competitors in the SEO market. The Debtor has hired at least five former BrightEdge employees to perform services nearly identical to those they performed at BrightEdge. Gabriel Martinez and Cullen McAlpine, the Debtor's co-defendants in the state court case, were two such employees. The Debtor was particularly

interested in recruiting Martinez because, as a current BrightEdge sales employee with access to BrightEdge's trade secret information, [redacted] *See* Exhibit 1.[2] Martinez gathered up as much of BrightEdge's trade secret information as he could for his (and the Debtor's) later use. *See* Exh. 2. Indeed, Martinez's use of BrightEdge's Salesforce database had skyrocketed, *see id*. ¶ 22, and he eventually sent information he had gathered to Shaun Siler of the Debtor. In discovery, Martinez produced multiple spreadsheets containing exports of incredible amounts of data from BrightEdge's Salesforce database, which provided customer names, contact information, and notes entered by BrightEdge employees about sales strategy. Voluminous data has been produced in the litigation showing Martinez's use of the vast amount trade secret information that he stole from BrightEdge, and then used for both his and Searchmetrics's benefit.

11. The Debtor also hired Cullen McAlpine, another former BrightEdge sales employee who sent to Siler a spreadsheet that McAlpine had exported from BrightEdge's Salesforce database and which contained a confidential list of 264 BrightEdge customers. Upon discovering Martinez's behavior, BrightEdge initiated an action for trade secret misappropriation and breach of contract against him on November 26, 2013 in the Superior Court of California for the County of Santa Clara (the "State Court Litigation"). *See* Exh. 3. After learning about the further misappropriation by the Debtor, Mr. McAlpine, and Mr. Siler, BrightEdge filed a First Amended Complaint on April 21, 2015 to include them as defendants. *See* Exh. 4. BrightEdge alleged multiple claims among the various defendants including trade secret misappropriation,

[2] All exhibits referenced in this Motion are exhibits to the *Declaration of Jon Swenson in Support of BrightEdge Technologies, Inc.'s Motion for Entry for an Order (I) Dismissing the Debtor's Chapter 11 Case; or (II) In the Alternative, Lifting the Automatic Stay to Allow BrightEdge Litigation to Proceed In Non-Bankruptcy Forums* filed contemporaneously with this Motion.

breach of contract, civil conspiracy to commit misappropriation of trade secrets and other tortious acts (collectively, the "Misappropriation Claims"). (*Id.*) The Debtor and Messrs. Martinez, McAlpine and Siler denied the claims First Amended Complaint.

12. On May 26, 2015, the Debtor filed both a demurrer to BrightEdge's First Amended Complaint, *see* Exh. 5, and a Cross-Complaint alleging that BrightEdge and two of its executives, Jim Yu and Tom Ziola, committed trade libel, interference with prospective economic advantage, unfair competition, and false advertising by exaggerating the capabilities of BrightEdge's technology and misrepresenting the capabilities of the Debtor (the "State Law Counterclaims" and, together with the Misappropriation Claims, the "State Law Claims"). *See* Exh. 6. Mr. Martinez, Mr. McAlpine, and Mr. Siler also demurred to BrightEdge's First Amended Complaint. *See* Exhs. 7, 8 and 9. On July 15, 2015, BrightEdge demurred with respect to the Debtor's cross-complaint *See* Exh. 10, and cross-complaint defendants Mr. Yu and Mr. Ziola filed a special motion to strike the cross-complaint as to them based on California's law against strategic lawsuits against public participation (*i.e.*, an anti-SLAPP motion). *See* Exh. 11.

13. The court eventually stayed discovery in the entire action at the Debtor's request. *See* Exh. 12. The discovery stay remained in effect for 10 months, and thus BrightEdge could not continue to pursue the Misappropriation Claims until May 17, 2016.

14. In the State Court Litigation, BrightEdge sought compensatory damages for its actual loss and the Debtor's unjust enrichment from the misappropriation. Cal. Civ. Code § 3426.3(a). BrightEdge's actual losses include: (1) the lost profits from sales diverted to the Debtor though use of BrightEdge's trade secrets; (2) price erosion due to the Debtor's theft in cases where BrightEdge had to lower its prices to retain customers; and (3) the increased costs of

BrightEdge due to efforts to counter the effects of the Debtor's theft, such as advertising campaigns designed to recoup its stolen market share. The Debtor's unjust enrichment includes profits obtained from use of BrightEdge's trade secrets and from the reduced costs by not having to independently develop the stolen trade secrets. BrightEdge may also recover attorney's fees and obtain punitive damages up to twice the amount of the compensatory damages due to the willfulness and maliciousness of the Debtor's misappropriation. Cal. Civ. Code §§ 3426.3(c) (punitive damages), 3426.4 (attorneys' fees). Although it needs additional discovery on the evidence it has to date, BrightEdge estimates its damages amount to a minimum of approximately $34 million.

B. The BrightEdge Patent Claims

15. The Debtor has infringed and continues to infringe upon BrightEdge's patents via its SEO software. On March 4, 2014, BrightEdge filed a patent infringement lawsuit in the Northern District of California (the "Patent Litigation") asserting four patents related to various SEO technologies against the Debtor. *See* Exh. 13 The Complaint was later amended to include a fifth patent. *See* Exh. 14. In all, BrightEdge alleges that the Debtor is infringing five of BrightEdge's patents leading to a total of 66 claims (the "Patent Claims"). After the defendants in the Patent Litigation including the Debtor answered, the Court ordered that the case to be stayed on November 21, 2014. *See* Exh. 15. In the same order, the Court granted BrightEdge leave to assert a claim of willful infringement as to one of the patents. *Id.*

16. In the two and a half years between November 21, 2014, when the stay went into effect, and May 2, 2017 when the stay was lifted, the Debtor sought continuation of the stay multiple times. *See* Exhs. 16, 17. The Debtor (not BrightEdge) requested that the District Court lift the stay, but only for limited purposes. *See* Exh. 18. Finally, over the Debtor's objections, the Court lifted the stay for all purposes on May 2, 2017, allowing discovery to finally resume

and effectively making the production of the SugarCRM database imminent. *See* Exh. 19.

C. GmbH's Historic Relationship with the Debtor

17. From the Debtor's inception in 2010 until February 28, 2017, the Debtor was entirely funded by GmbH and had no secured debt. Weitz Decl. ¶ 25-26.[3] Notwithstanding whatever revenue it may have generated from operations, the Debtor never generated a profit. Weitz Dec. ¶ 20. [redacted] *See* Exh. 20. For example, [redacted] *Id*. § 3.2. [redacted]

18. Historically, GmbH also contributed its technology and products to the Debtor through a short, open-ended Framework Purchase Agreement, dated July 5, 2010 (the "FPA"). Weitz Declaration ¶ 18. "Under the FPA, the Debtor purchased access to the SEO Platform from GmbH, which the Debtor in turn sold to customers in its designated markets." Weitz Decl. ¶ 19. [redacted]

[3] References to the Weitz Declaration or First Day Declaration refer to the *Declaration of Wayne P. Weitz in Support of Chapter 11 Petition and First Day Pleadings* filed May 8, 2017 (D.I. 3).

[redacted] Exh. 21 at 76:17-76:20. [redacted]

[redacted] *Id*. at 77:8-79:16.

D. GmbH's Improvement of its Legal Position in Anticipation of the Debtor's Chapter 11 Case

19. In late 2016 or early 2017, GmbH decided to restructure its relationships with the Debtor in contemplation of a chapter 11 filing and to gain priority over any result in favor of BrightEdge. [redacted] This would put GmbH in the best possible position in its subsidiary's bankruptcy, while leaving creditors like BrightEdge with limited avenues for recovery. [redacted]

20. GmbH's first step in its accomplishing its restructuring goals was to ensure the loyalty of the Debtor's counsel DLA Piper LLP ("DLA"). In this regard, GmbH agreed to guarantee payment of the Debtor's fees and expenses owing to DLA on December 14, 2016.[4] By the Petition Date, the fees and expenses grew to more than $1,000,000 making DLA the largest unsecured creditors of the Debtor apart from BrightEdge. *Id*.

21. To bolster the charade of the Debtor's independence, GmbH's CFO, Dirk Wolf,

[4] *See Application of the Debtor for Entry of Order Authorizing the Retention and Employment of DLA Piper LLP (US) as Special Litigation Counsel Nunc Pro Tunc to the Petition Date*, filed May 11, 2017 [D.I. 49].

signed an engagement letter with Chipman Brown Cicero & Cole, LLP ("Chipman") on the Debtor's behalf on January 10, 2017, but kept DLA as co-counsel.

22. [redacted] Ex. 21 at 110:23-111:10 [redacted] *See generally* Exh. 22 at 32:13-40:10, 45:5-45:15, 46:2-47:20, 54:4-54:7.[5] [redacted] Ex. 22 at 78:11-78:79:6.[6] [redacted] Ex. 22 at 73:13-73:21.

23. [redacted] Ex. 21 at 71:8-72:20. [redacted]

[5] [redacted] Exh. 22 at 54:8-57:8.

[6] Only in May, did the Debtor and GmbH apparently formally authorize EisnerAmper to "provide certain consulting services to assist with the restructuring of the company." In the engagement letter, it was agreed that "EisnerAmper will provide the services of Wayne P. Weitz ('Mr. Weitz') to serve as a temporary consultant with the title, 'Chief Restructuring Officer' (the 'CRO'), reporting directly to the Company's Board of Directors (the 'Board')." Mr. Weitz was not technically appointed to the position of CRO until May 4, 2017, effective as of May 2, 2017. *See Action by Written Consent of the Sole Shareholder of Searchmetrics, Inc.,* dated May 4, 2017, attached to the Debtor's chapter 11 petition, as well as the included acknowledgement of Mr. Weitz, which states that: "I, Wayne P. Weitz, hereby accept my appointment as the Chief Restructuring Officer of Searchmetrics, Inc., a Delaware corporation, with effect from May 2, 2017."

[redacted] Exh. 21 93:15-22; Exh. 22 274:16-275:5, 279:17-280:8.

24. [redacted] Exh. 21 at 133:24-134:4, 151:18-151:22, 164:2-164:5. [redacted] Exh. 22 at 89:20-90:8. [redacted] *Id*. at 94:22-95:18, 96:16-96:22. [redacted] *Id*. at

331:17-20. [redacted] *Id*. at 273:10-274:24, 279:17-280:8, 295:2-296:24.

E. The Adversary Complaint and Motion to Expedite

25. The Debtor and GmbH, commenced the adversary proceeding as part of the Chapter 11 case (this "Adversary Proceeding") against BrightEdge on the petition date by filing the *Complaint and Claim Objection* (A.D.I. 1) (the "Adversary Complaint"). The Adversary Complaint contains 29 counts, all but three of which seek to adjudicate claims or defenses at issue in the BrightEdge Litigation.

- Causes of Action 1 through 8 assert the Debtor's State Law Counterclaims from the State Law Litigation.
- Causes of Action 9 through 13 restate all of the Misappropriation Claims and recharacterize them as seeking declaratory relief claims on its behalf.
- Finally, Causes of Action 14 through 26 restate the Patent Claims but, again, in the form of declaratory relief on its behalf and then repeat the Debtor's asserted defenses to the Patent Claims.

The remaining three counts object to and seek disallowance of BrightEdge's yet to be asserted claims, seek to estimate these claims at $75,000 for all purposes, including voting and plan distributions, under 11 U.S.C. § 502(c) and seek setoff.

26. On May 24, 2017, the Debtor filed a *Motion to Expedite Adversary Proceeding* (A.D.I. 11) (the "Motion to Expedite"). The Motion to Expedite asks the Court to set a schedule for the Adversary Complaint, including a briefing schedule with respect to a separate motion for judgment on the pleadings before BrightEdge's answer is even due purportedly based on the

Supreme Court's *Alice* decision and a discovery and hearing schedule for estimation of the State Law Claims. The only discovery the Motion to Expedite permits is the Debtor's discovery from BrightEdge with respect to BrightEdge's Misappropriation Claims damages. Motion to Expedite ¶ 15. The Motion to Expedite seeks to set a hearing on the Patent Claims, apparently without any further discovery, for July and a hearing on estimating the State Law Claims for August. *Id*. ¶ 22.

F. The Debtor's "New Value" Plan and its Proposed Broad Releases for GmbH

27. On the petition date, the Debtor also filed the Debtor's Chapter 11 Plan of Reorganization (D.I. 19) (the "Plan")[7] and an accompanying Disclosure Statement (D.I. 32) (the "Disclosure Statement"). Under the Plan, unsecured creditors take a *pro rata* share of an unspecified amount while GmbH retains all of its equity and receives other benefits unless BrightEdge's claims are estimated at or below $250,000. GmbH's benefits under the Plan also include, among others, broad third-party releases that would insulate GmbH from any avoidance actions, including causes of action related to the various agreements pursuant to which GmbH improved its position in the months leading up to the bankruptcy. As a result, there would be no inquiry into the pre-petition transfer of the Debtor's intellectual property, technology, and other assets to GmbH (and pledged all assets to GmbH) or the pre-petition conversion of GmbH's equity position into secured debt.

28. Furthermore, in exchange for its retention of the Debtor's equity, GmbH purportedly agrees to fund a "Claims Pool" in an unspecified amount that will be split between general unsecured creditors (including GmbH) in its capacity as a creditor and BrightEdge on account of its litigation claims. Plan §§ 1.27, 4.7, 4.8, 4.9. Notwithstanding that the "new value"

[7] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Plan.

is unspecified, the Debtor has preordained this to be new value sufficient to retain its equity interests and circumvent the absolute priority rule. The Plan also provides that GmbH, on account of its lender status, will receive "equity in the Reorganized Debtor in consideration for the Releases granted to the Released Party under the Plan." *Id*. § II(a), 4.3(b). It is unclear how the reinstatement of GmbH's existing equity interests and issuance of the equity interests in the Reorganized Debtors to GmbH are harmonized, but the net effect is to ensure that GmbH does not lose any of its equity interests. GmbH will also apparently receive payment in cash, or reinstatement of its claims under the DIP Agreement. *Id*. § 4.3(b).

29. Unsecured creditors, including BrightEdge, do not fair nearly as well. If BrightEdge's claims turn out to be relatively *de minimis*, then unsecured creditors are paid in full. *Id*. §§ 4.4, 4.5. However, if BrightEdge's claims are estimated or fixed at greater than $250,000, unsecured creditors will receive only their ratable share of GmbH's capped "new value" contribution which does not materially increase with size of the claims pool. *Id*. §§ 1.4, 4.7, 4.8. Moreover, it appears that the pool of claims with which that unspecified amount will be shared includes GmbH's own claim against the Debtor, which is alleged to be over €14 million, assuming that claim is not recharacterized, a near certainty if the Debtor and GmbH remain in control of its chapter 11 case.

30. The Plan's release provisions (the "Releases") explicitly include GmbH and its management and affiliates. *Id*. §§ 1.90, 4.6(a)-(b). As a result, GmbH obtains a release from the Debtor from all potential claims against it, including claims to avoid prepetition security interests, for lender liability and for breaches of fiduciary duty. However, more importantly, GmbH is being released from "all claims, demands, debts, rights, causes of action or liabilities"

by "all Holders of Claims and Equity Interests."[8] *Id*. § 8.6(b). Therefore, not only would the Debtor receive the benefit of having BrightEdge's claims summarily adjudicated in Bankruptcy Court, GmbH would be able to have its liability assessed and then satisfied through a reduced payment in an unspecified amount.

RELIEF REQUESTED

31. BrightEdge seeks entry of an order, substantially in the form as Exhibit A hereto, (a) dismissing this chapter 11 case pursuant to section 1112(b) of the Bankruptcy Code, or (b) in the alternative, lifting the automatic stay to allow the BrightEdge Litigation to proceed before the state and federal courts in which they are pending pursuant to 11 U.S.C. § 362(d).

ARGUMENT

32. The Debtor's bankruptcy case should be dismissed for cause under section 1112(b) of the Bankruptcy Code because it was filed in bad faith. The Debtor and GmbH filed this bankruptcy solely to seek a litigation advantage in a two-party dispute. The Debtor and GmbH, [redacted] while simultaneously evading production of key evidence in the California courts. The Debtor fought for years to avoid producing the SugarCRM customer database that would have showed the extent of the Debtor's misappropriation of BrightEdge's trade secrets, but lost that battle just prior to the bankruptcy filing.

33. Rather than face its day of reckoning (i.e. turnover the SugarCRM), the Debtor and GmbH filed this carefully planned chapter 11 case and Adversary Proceeding. [redacted]

[8] The term "Releasing Parties" is defined in the Plan in a much more restrictive manner to include only the Debtor and unimpaired creditors but then is not used in any of the operative release sections, apparently dropped in favor of much broader third party releases to which all impaired creditors are "deemed to have consented to." Plan §§ 1.91, 4.6(b).

[redacted]

34. These are not valid purposes for extending the protections afforded to debtors under the Bankruptcy Code. Bankruptcy cases, such as this one, that are filed to obtain a tactical advantage in litigation or to benefit an insider at the expense of creditors, are filed in bad faith and subject to dismissal for cause pursuant to section 1112(b) of the Bankruptcy Code.

35. Moreover, the Debtor has made clear that entire purpose of this Chapter 11 Case was to resolve the BrightEdge Litigation before this Court on an expedited basis with limited discovery, and upon its resolution, discharge the claims for some unknown and limited distribution. But, under 28 U.S.C. §§ 1334 and 157, this Court lacks the power to enter a final order in this Adversary Proceeding without BrightEdge's consent. Accordingly, the Debtor and GmbH cannot achieve their self-serving litigation strategy within their rushed timeframe. As a result, there is little or no purpose continuing this Chapter 11 case.

36. If the Court does not dismiss this bankruptcy case, it should grant BrightEdge relief from the automatic stay pursuant to section 362(a) of the Bankruptcy Code to permit the

BrightEdge Litigation to proceed in the California courts. Indeed, the Bankruptcy Code provides for relief from the automatic stay in just this circumstance. Substantial activity over several years has taken place in both actions and both courts have substantial experience in the matters before them. Furthermore, BrightEdge has a strong probability of success on the merits with respect to the Patent Claims and the State Law Claims. Finally, BrightEdge would face substantial prejudice if forced to litigate in the manner that the Debtor and GmbH proposes. This constitutes cause sufficient to lift the stay.

I. The Debtor's Chapter 11 Case Should be Dismissed for Cause as a Bad Faith Filing

37. Section 1112(b) of the Bankruptcy Code authorizes courts to dismiss or convert Chapter 11 cases "for cause" if dismissal or conversion "is in the best interests of creditors and the estate." 11 U.S.C. § 1112(b)(1). Section 1112(b)(4) identifies several illustrative examples of what may constitute "cause." These examples, however, are not exhaustive. *In re Am. Cap. Equip., LLC*, 688 F.3d 145, 161–62 (3d Cir. 2012). Rather, the Third Circuit has consistently held that "[a] Chapter 11 petition is subject to dismissal for 'cause' under 11 U.S.C. §1112(b) unless it is filed in good faith." *In re SGL Carbon Corp.*, 200 F.3d 154, 162 (3d Cir. 1999); *see also Santa Fe Minerals, Inc. v. BEPCO, L.P. (In re 15375 Memorial Corp.)*, 589 F.3d 605, 618 (3d Cir. 2009); *NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)*, 384 F.3d 108, 118 (3d Cir. 2004).

38. The Third Circuit identified two inquiries particularly relevant to the good faith question: "(1) whether the petition serves a valid bankruptcy purpose, e.g., by preserving a going concern or maximizing the value of the debtor's estate, and (2) whether the petition is filed merely to obtain a tactical advantage." *Integrated Telecom*, 384 F.3d at 119–20. In other words, "[i]n making a determination of good faith, courts consider various factors that indicate whether the case has been filed for a legitimate reorganization purpose or only as a litigation tactic or for

some other improper purpose." *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 298 (Bankr. D. Del. 2011). Now that BrightEdge has raised the issue, the Debtor must establish that its petition was filed in good faith. *See SGL Carbon*, 200 F.3d at 162 n. 10.

39. In making these "fact intensive" inquiries, the Court "must examine 'the totality of facts and circumstances' and determine where a 'petition falls along the spectrum ranging from the clearly acceptable to the patently abusive.'" *Id*. at 118 (quoting *SGL Carbon*, 200 F.3d at 162). The subjective intent of the debtor (or those in control if it) is a relevant consideration in the "totality of the circumstances" analysis. *15375 Mem'l Corp.*, 589 F.3d at 618 n.8. This is especially true when the person controlling the debtor is conflicted and acting for tactical advantage to benefit someone besides the debtor. *Id*. at 624–25 (emphasizing that debtors' representative was acting to protect parent company in finding bad faith filing). However, courts may also look at the plan and the other proposed effects of a bankruptcy case in judging the good faith of a filing. *SGL Carbon*, 200 F.3d at 167 n. 17 ("[T]his sort of *posteriori* inquiry permits courts to work backwards from effect to cause–to reason, that is, that if the probable effect of a reorganization plan is to treat unfairly of creditors, then the probable cause of the filing was bad faith.") (quoting *In re Khan,* 34 B.R. 574, 575 (Bankr. W.D. Ky. 1983)).

40. The apparent purpose of the Debtor's bankruptcy case is to preserve all of the Debtor's value for GmbH and to protect GmbH from liability, including from BrightEdge. Courts in this Circuit have not permitted such cynical tactics and abuse of process and, therefore, the Debtor's case must be dismissed.

A. The Debtor and GmbH Commenced this Chapter 11 Case Primarily to Obtain a Tactical Litigation Advantage

41. A Chapter 11 case is subject to dismissal if it was commenced primarily to obtain a tactical litigation advantage. *See 15375 Mem'l Corp.*, 589 F.3d at 619; *SGL Carbon*, 200 F.3d

at 165. Filing a Chapter 11 case as a negotiation tactic is "antithetical to the basic purposes of bankruptcy." *See Integrated Telecom Express, Inc.*, 384 F.3d at 119.

42. The Debtor's stated reason for its filing was to force an expedited conclusion to its litigation with BrightEdge without affording BrightEdge the discovery it needs to prosecute its claims effectively. In the Debtor's own words, "GmbH has made a determination to restructure the Debtor" and has caused the Debtor to commence this chapter 11 case to "estimate all claims asserted and that could have been asserted by BrightEdge so that the Debtor may successfully reorganize and operate unencumbered by the onus of the BE Litigation." Weitz Dec., ¶¶ 5 & 66.

43. The Third Circuit is clear that the desire to resolve pending litigation is not, without more, a valid basis for a chapter 11 filing. *See 15375 Memorial*, 589 F.3d at 622 ("The mere fact that the Bankruptcy Court provided a forum to adjudicate the dispute between BEPCO and the Debtors is not a benefit of bankruptcy . . . "); *Integrated Telecom*, 384 F.3d at 124-25 (rejecting debtor's contention that its bankruptcy case served a valid purpose by providing a "framework" for the debtor to resolve significant securities class action exposure); *SGL Carbon*, 200 F.3d at 169 (recognizing that "companies that face massive potential liability and litigation costs continue to seek ways to rapidly conclude litigation to enable a continuation of their business and to maintain access to the capital markets," but holding that an independent bankruptcy purpose is required because of "the possibility of abuse which must be guarded against to protect the integrity of the bankruptcy system and the rights of all involved in such proceedings"). The Debtor's sole board member and CEO, Marcus Tober, indicated publicly in response to inquiries regarding the Chapter 11 case that it was intended to pressure BrightEdge to settle on more favorable terms. *See* Exh. 32, 33.

44. Moreover, the Debtor did not file its petition merely to minimize costs of the BrightEdge Litigation. [redacted] the Debtor filed the bankruptcy to avoid the adverse rulings from the California state and federal courts. First, shortly before the bankruptcy filing, the Debtor asked the U.S. District Court in California to stay discovery in the Patent Litigation while it pursued a challenge to the five BrightEdge patents at issue under *Alice Corp. Pty. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014). The District Court ruled that, although the Debtor could proceed with its *Alice* challenge, discovery would continue contemporaneously, requiring the Debtor to produce the SugarCRM database. Similarly, the State Court also ordered that the Debtor (or GmbH) produce the 2015 version of its Sugar CRM database, crucial evidence of BrightEdge's claims and damages. These rulings clearly did not advance the Debtor's and GmbH's litigation strategy and led the Debtor and GmbH to stage its litigation do-over in the Bankruptcy Court.

45. Tellingly, the Debtor did not remove the State Court Litigation to federal court and then seek to transfer those cases to the District of Delaware, because doing so would have potentially bound them to the rulings of the non-bankruptcy courts which the Debtor and GmbH could ill-afford.[9] Removal would have left the Debtor and GmbH immediately on the defensive, rather than the offensive. The new lawsuit in the Adversary Proceeding, on the other hand, enabled the Debtor and GmbH to recast BrightEdge's claims as its own claims for declaratory relief and become the plaintiffs rather than the defendant.

46. Driven by the looming June 2, 2017 deadline to produce the SugarCRM customer database and respond to discovery requests in the Patent Case, the timing of the filing of the

[9] The Debtor also would have been required to show that transferring venue was in the "interest of justice" or for the "convenience of the parties" consistent with 28 U.S.C. § 1412 or defend its removal against abstention pursuant to 28 U.S.C. § 1334(c), either of which it would likely have failed to succeed on.

Chapter 11 case alone evinces bad faith. Indeed, courts in this Circuit have noted timing is a "key element" in determining whether the "primary, if not sole, purpose of the filing was a litigation tactic." *15375 Mem'l Corp.*, 400 B.R. at 427 (quoting *SGL Carbon*, 200 F.3d at 165). Here, the Debtor's and GmbH's primary and immediate purpose was to utilize the automatic stay to avoid ordered production obligations. It certainly was not to seek a respite from litigation given the number of the Debtor's litigation filings made immediately upon the commencement of the bankruptcy case. The desire to invoke the automatic stay in this manner is not itself sufficient to sustain a bankruptcy filing as made in good faith. *See Integrated Telecom*, 384 F.3d at 128 ("A perceived need for the automatic stay, without more, cannot convert a bad faith filing to a good faith one.") (quoting *In re HBA East, Inc.*, 87 B.R. 248, 262 (Bankr. E.D.N.Y. 1988)).

47. Finally, the Debtor's case must be dismissed because it was filed with the improper purpose of seeking a more advantageous forum that has very little nexus to the Debtor or the BrightEdge Litigation. The Debtor and GmbH have tried, through stays, non-compliance with discovery requests and rulings, and other means, to avoid their litigation obligations in the California courts. Frustrated with their series of losses, they now seek a more sympathetic ear in this Court. This sort of forum-shopping is exactly the kind of litigation tactic that does not serve the intended purposes of Chapter 11.

48. The bankruptcy court in *In re Argus Group 1700, Inc.* faced a strikingly similar attempt to sidestep litigation through a Chapter 11 filing. *See* 206 B.R. 737 (Bankr. E.D. Pa. 1996). There, an entity that owned a Philadelphia office building in Philadelphia and its sole general partner (together, the "Argus Debtors") filed voluntary Chapter 11 petitions after being embroiled in multi-year litigation. The parallels with this case are uncanny:

- The Argus Debtors maintained that "it was the mounting costs of litigation being waged by and against Steinman in both state and federal court that

> drove [the Argus Debtors] to file for bankruptcy, and it is that same litigation that is the crux of their bankruptcy case." *Id.* at 743.

- The litigation had not proceeded to trial, largely because of discovery and other disputes instigated by the defendants (included the debtors). *See id.,* at 742.

- The Argus Debtors filed bankruptcy to avoid compliance with court orders. *Id.* (noting that bankruptcy cases were filed the day after defendants' appeal order imposing monetary sanctions and to show cause why defendants should not be held in contempt was dismissed).

- The Argus Debtors' largest scheduled non-equity holder unsecured creditor was its litigation counsel. *Id.* at 743.

- The Argus Debtors had few material non-insider unsecured creditors. *Id.*

- And, the Argus Debtors attempted to throttle their litigation opponent by filing a Chapter 11 plan that would preserve equity's ownership stake and extinguish the litigation creditor's claims. *In re Argus Grp. 1700, Inc.*, 199 B.R. 525, 526 (Bankr. D. Del. 1996) (related decision on retention of counsel).

The Court dismissed the case as a bad faith filing, ultimately determining that the case was filed primarily to obtain a different forum to litigate a two-party dispute. *Argus Grp.*, 206 B.R. at 756. This Court should similarly dismiss the Debtor's case on the same basis.

B. The Debtor's Chapter 11 Case Does Not Serve a Valid Bankruptcy Purpose

49. A bankruptcy filing must "further a valid reorganizational purpose," and the Debtor has made no such showing. *SGL Carbon*, 200 F.3d at 165. As the Third Circuit has explained:

> Chapter 11 vests petitioners with considerable powers−the automatic stay, the exclusive right to propose a reorganization plan, the discharge of debts, etc.−that can impose significant hardship on particular creditors. When financially troubled petitioners seek a chance to remain in business, the exercise of those powers is justified. But this is not so when a petitioner's aims lie outside those of the Bankruptcy Code.

SGL Carbon, 200 F.3d at 165–66. The Supreme Court identified two of the basic purposes of

Chapter 11 as (1) "preserving going concerns" and (2) "maximizing property available to satisfy creditors." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999); *see also Integrated Telecom Express*, 384 F.3d at 119.

50. Here, the Debtor's chapter 11 serves neither the preservation of a going concern or the maximization of the Debtor's property for the satisfaction of creditors. The Debtor's financial history belies any stated going concern goal. [redacted] The Debtor concedes that it has "never operated profitably." Weitz Decl. ¶ 20. [redacted] As such, there is not much of a going concern to preserve and the Debtor is doing nothing to attempt to restructure the Debtor's operations so that it can be profitable.

51. Additionally, the Chapter 11 case as currently structured does not preserve any value for its creditors. Instead, it has existed and would only continue to exist for the benefit of GmbH. The Third Circuit has held that a valid reorganization purpose can only be one designed to "create or preserve some value that would be lost—not merely distributed to a different stakeholder—outside of bankruptcy." *Integrated Telecom Express*, 384 F.3d at 129; *see also 15375 Mem'l*, 589 F.3d at 620 (rejecting debtor's assertion that its bankruptcy filing was designed to maximize value because "the purported benefits identified did not add or preserve value that would otherwise be unavailable to creditors outside of bankruptcy"). The Debtor, although complaining of the BrightEdge Litigation cost, has spent substantial sums immediately

upon commencement of the Chapter 11 case. In just the first few weeks of this case, the Debtor depleted resources by filing more than twenty motions, applications and pleadings, its Plan and Disclosure Statement, the Adversary Complaint and additional substantive motions in the Adversary Proceeding. The intended effect of this strategy is to lock in GmbH's position through Court-approved funding, while diminishing if not eliminating any chance for recovery by other stakeholders. The Debtor's strategic diversion of assets and funds to GmbH and the Debtor's and GmbH's professionals does not comport with preserving value for the Debtor's stakeholders.

52. Protecting GmbH's investment in the Debtor, while prejudicing BrightEdge and unduly limiting its recovery, is the clear goal of this bankruptcy. The Plan affirmatively protects GmbH's claims and the customer relationships it stole from BrightEdge. More importantly, it permits GmbH to continue its domination and control of the Debtor, allowing it recoup its purported intercompany debt. Preserving value for a debtor's parent at creditors' expense is plainly not a valid bankruptcy purpose. *See 15375 Mem'l Corp.,* 589 F.2d at 624-25 (affirming dismissal where debtor's principal decision maker had been primarily concerned with protecting parent and advancing its interests); *SGL Carbon*, 200 F.3d at 157 (dismissing Chapter 11 filed at German parent's direction with purposes of "protecting itself against excessive demands made by plaintiffs in civil antitrust litigation and in order to achieve an expeditious resolution of the claims against it" where plan would impair litigation creditors but grant the parent broad releases and payment in full in cash). Accordingly, the Debtor's petition and bankruptcy case should be dismissed as filed in bad faith.

C. The Chapter 11 Case is the Adversary Proceeding, which Cannot be Resolved by This Court[10]

53. The Adversary Proceeding raises for litigation the very same issues that are the subjects of the underlying BrightEdge Litigation. However, those issues cannot be litigated to judgment in this Court.

54. First, the State Court Claims, and consequently the causes of action in the Adversary Proceeding that mirror them, are subject to mandatory and permissive abstention pursuant to 28 U.S.C. § 1334(c). Second, all of the substantive claims in the Adversary Proceeding are non-core claims, and this Court may therefore only "submit proposed findings of fact and conclusions of law to the district court," with any final order or judgment entered by the district court, not the bankruptcy court. 28 U.S.C. § 157(c)(1). BrightEdge has also preserved its jury trial right in the State Court Litigation and Patent Litigation, and this Court cannot conduct a jury trial without the parties' express consent. 28 U.S.C. § 157(e). BrightEdge does not intend to burden this Court and consent to adjudication here well after these lawsuits have proceeded at some length in the state and federal courts in which they were brought. Accordingly, this Court can only play a limited role in Adversary Proceeding.

1. *The State Law Claims are Subject to Mandatory Abstention Pursuant to 28 U.S.C. § 1334(c)(2)*

55. 28 U.S.C. § 1334 governs federal courts' jurisdiction over claims that are "related to" a bankruptcy case. It provides:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United

[10] BrightEdge intends to file a motion to dismiss the complaint in the Adversary Proceeding based on the grounds set forth herein and others to be added to its motion and requests that this Court take judicial notice of this motion in that context.

> States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2).

56. Under section 1334(c)(2), this Court has held that six separate elements must be satisfied: (1) the motion to abstain was timely brought; (2) the underlying action or proceeding pending in federal court is based upon a state law claim or cause of action; (3) the matter is non-core, such that it is related to a bankruptcy proceeding, but neither arises under title 11 nor in a case under title 11; (4) section 1334 is the sole basis for federal jurisdiction; (5) an action is commenced in state court; and (6) the action can be timely adjudicated in state court. *New Jersey Dep't of Envtl. Prot. v. Occidental Chem. Corp. (In re Maxus Energy Corp.)*, 560 B.R. 111, 120 (Bankr. D. Del. 2016); *In re Longview Power, LLC*, 516 B.R. 282, 293-94 (Bankr. D. Del. 2014); *In re Mobile Tool Int'l*, 320 B.R. 552, 556 (Bankr. D. Del. 2005). Each of these elements is present with respect to the State Law Claims.

57. First, this Motion has been filed less than thirty days into this case. There has been no activity in the Adversary Proceeding other than the Debtor's multiplicity of filings solely intended to defeat a potential abstention claim. Second, the State Law Claims arise solely under California state law. Specifically, the State Law Claims allege and set forth the misappropriation of trade secrets under the California Uniform Trade Secrets Act, breach of contract or conspiracy, all governed by California law.

58. Third, the Adversary Proceeding involves non-core claims. This Court has applied a two-step test to determine whether a claim is a core proceeding. *See In re Allied Sys. Holdings, Inc.*, 524 B.R. 598, 605 (Bankr. D. Del. 2017). First, a court must consult the illustrative list of core proceedings in § 157(b) to determine whether the pleaded causes of action

come within that ambit. *Id*. Even if one or more of the claims fall within this list, the court must then determine whether the proceeding "invokes a substantive right provided by title 11 or . . . that by its nature, could arise only in the context of a bankruptcy case." *Id*. "The mere fact that a non-core claim is filed with a core claim will not mean the second claim becomes 'core.'" *Id*. (quoting (*Shubert v. Lucent Techs. (In re Winstar Communs., Inc.)*, 554 F.3d 382, 405 (3d Cir. 2009)). Courts "must engage in a claim-by-claim analysis to determine whether a proceeding is core." *In re Exide Techs.*, 544 F.3d 196, 220 (3d Cir. 2008).

59. The Debtor, through the Adversary Complaint, asserts claims for declaratory judgment so as to recast the claims in the BrightEdge Litigation as its own. Nevertheless, when more closely examined, those claims that can be grouped as followed:

> Misappropriation Claims: The Misappropriation Claims were brought by BrightEdge against the Debtor under state law for misappropriation of trade secrets, conspiracy and breach of contract and seek damages and disgorgement of profits.
>
> State Law Counterclaims: The State Law Counterclaims were brought by the Debtor against BrightEdge and certain other non-parties under state law for trade libel and interference with prospective enrichment and seek damages and injunctive relief.
>
> Patent Law Claims: The Patent Law Claims fall into two classes of federal law patent infringement claims: claims for damages stemming from the Debtor's infringement and a claim for a permanent injunction to stop the infringement.
>
> Patent Counterclaims: The Debtor has brought federal law claims to invalidate five of BrightEdge's patents.

60. On their face, none of the claims would appear to be core. First, they are not on the list enumerated as core claims under 28 U.S.C. § 157(b)(2). Rather, they invoke state law and non-bankruptcy federal law rights and arise, and in fact were brought, outside the context of this bankruptcy case. 28 U.S.C. § 157(b)(2) does provide that "allowance and disallowance of claims against the estate . . . and estimation claims and interests for purposes of confirming a plan" are core matters. However, BrightEdge has not filed a proof of claim and its deadline to do

so is not until July 31, 2017. Hence, there are no core claims in the Adversary Proceeding. *See, e.g., In re Carriage House Condominiums*, L.P., 415 B.R. 133, 142 (Bankr. E.D. Pa. 2009) (finding state law claims against debtor non-core where claimant had "not filed a proof of claim but [had], instead, promptly moved for remand").

61. As all of the claims in the Adversary Proceeding are non-core, the third factor for mandatory abstention is satisfied. Even if BrightEdge does file a proof of claim, the State Law Counterclaims are still non-core notwithstanding 28 U.S.C. § 157(b)(2)(C). *See Stern v. Marshall*, 564 U.S. 462, 487 (2011) (finding court did not have power to finally adjudicate state law counterclaim "independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy."). Specifically, the Misappropriation Claims have a wholly separate factual underpinning from the State Law Counterclaims. Moreover, the Adversary Proceeding includes Patent Law Claims that BrightEdge holds against GmbH, which are not "claims against the estate." *See Exide*, 544 F.3d at 220-21 (rejecting debtor's asserting that claims against non-debtor affiliate should be core because claimant filed proof of claim against debtor with whom the non-debtor had a close-knit indemnitor and subsidiary relationship).

62. Fourth, the State Law Claims could not have been commenced in a court of the United States absent jurisdiction in connection with the bankruptcy case. A federal court does not have federal question jurisdiction over the State Law Claims because they "do not arise under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Nor is there complete diversity between the parties such as would provide federal diversity jurisdiction under 28 U.S.C. § 1332. The "nerve center" for each of BrightEdge and the Debtor is in California and both are Delaware corporations. *See Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010). The State

Law Claims therefore lack a federal jurisdictional predicate that would have allowed them to be brought in federal court absent this Chapter 11 case.

63. Fifth, as made plain throughout this Motion, the State Law Claims are the subject of the State Court Litigation, an action commenced in the Superior Court of California and pending there.

64. Finally, the State Court Claims can be timely adjudicated in the Superior Court of California. BrightEdge believes that all discovery can be completed by November 2017 and a trial scheduled for January 2018. Although the case has been pending as to the Debtor for just over two years, much of that time has been consumed by a 10-month stay and the Debtor's serial filings to resist discovery. However, it appears that the Debtor has exhausted its delay options now that it has been ordered to produce the SugarCRM database. Assuming the Debtor does not obtain further delays, the case should be able to proceed as follows:

- Fact discovery completed by October 2017;
- Expert discovery completed by November 2017;
- Trial on Misappropriation Claims set for no later than January 2018; and
- Trial on State Law Counterclaims set for March 2018.

BrightEdge submits that under the circumstances, where the Debtor's proposed new value plan appears unlikely to be considered soon, this Chapter 11 case will not be significantly delayed by allowing the State Law Litigation to proceed. *See Stoe v. Flaherty*, 436 F.3d 209, 219 (3d Cir. 2006), *as amended* (Mar. 17, 2006) ("[T]imeliness in this context must be determined with respect to needs of the title 11 case and not solely by reference to the relative alacrity with which the state and federal court can be expected to proceed.").

65. As the State Law Claims satisfy the six parts of 28 U.S.C. § 1334(c)(2), they are

subject to mandatory abstention and should be dismissed from the Adversary Proceeding.

2. *The Court Should Abstain from Hearing the State Law Claims in its Discretion Pursuant to 28 U.S.C. § 1334(c)(1)*

66. Separately, 28 U.S.C. § 1334(c)(1) provides an additional basis for abstention:

> Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1).

67. "Discretionary abstention is appropriate when it would best serve the interest of justice or in the interest of comity or respect for state law." *In re Wentworth*, 1988 WL 1014966, at *2 (Bankr. D.N.D. June 13, 1988). "[W]hen most or all but one of the requirements for mandatory abstention are met, careful consideration should be given to whether it would be appropriate to exercise discretionary abstention under § 1334(c)(1)." *Argus Grp.*, 206 B.R. at 741.

68. Courts evaluate twelve factors for permissive abstention:

(1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention;

(2) the extent to which state law issues predominate over bankruptcy issues;

(3) the difficulty or unsettled nature of the applicable law;

(4) the presence of a related proceeding commenced in state court or other non-bankruptcy court;

(5) the jurisdictional basis, if any, other than 28 U.S.C. §1334;

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;

(7) the substance rather than form of an asserted "core" proceeding;

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;

(9) the burden of (the bankruptcy court's) docket;

(10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;

(11) the existence of a right to a jury trial; and

(12) the presence in the proceeding of non-debtor parties.

In re Integrated Health Servs., 291 BR 615, 619 (Bankr. D. Del. 2003). Courts have held that "evaluating the twelve factors is not a mathematical formula" but when the majority of factors favor abstention, the court should abstain. *In re LaRoche*, 312 BR 249, 255 (Bankr. D. Del. 2004). A consideration of the factors with respect to the State Law Claims supports discretionary abstention.

i. Effect on Administration of the Estate: BrightEdge is not seeking to proceed in state court to delay administration of the case. BrightEdge believes that the State Court Litigation can proceed to trial by early 2018. Proceeding in the state court on a deliberate schedule that fully preserves all parties' due process rights and that does not materially delay the administration of this Chapter 11 case should weigh in favor of permissive abstention.

ii. Predominance of State Law Issues: California law issues predominate in the State Law Claims. In fact, state law issues are the *only* issues in the action and certain claims are unique to California law. This factor therefore also favors abstention.

iii. Difficulty and Unsettled Nature of State Law: The State Law Claim for misappropriation of trade secrets is in fact a complex creature of California law. For example, the Debtor asserts that BrightEdge's disclosure of a small handful of customer names establishes that none of BrightEdge's customer information can be a trade secret as a matter of

California law. *See* Exh. 5; *see also* Weitz Decl., ¶¶ 44–45. The Debtor stole and used BrightEdge's detailed customer lists, with information on over one-hundred thousand BrightEdge accounts including company name, level of SEO sophistication, feedback on pricing proposals, notes made by BrightEdge representatives, and BrightEdge's plans regarding the customer. The Debtor has repeatedly claimed that these enormous and detailed lists do not satisfy the definition of a trade secret under California law. Consequently, resolution of this issue implicates the definition of a trade secret under California case law, as well as a plethora of decisions of the California courts regarding the application of the California Uniform Trade Secrets Act (Cal. Civ. C. § 3426 et seq.) to customer lists. *See, e.g.*, *Courtesy Temp. Serv., Inc. v. Camacho*, 222 Cal. App. 3d 1278, 1291 (1990) (contrasting application of California law to "sophisticated, detailed customer information" and "innocuous and readily ascertainable information").

Courts in this district have held "even" if a matter does not involve unsettled issues of state law, where the state law issues so predominate the proceeding, as they do in this case, this factor weighs in favor of having the state court decide it." *Integrated Heath Servs.*, 291 B.R. at 620-21. Accordingly, this factor further favors abstention in this matter.

iv. Related State Court Proceeding: The State Law Claims include claims that BrightEdge may assert in the Debtor's bankruptcy case. But the State Law Litigation also involves the Debtor's claims against BrightEdge, which are not required to be determined in connection with the Debtor's Chapter 11 case.

v. Federal Jurisdictional Basis: As set forth above, there is no independent basis for federal jurisdiction over the State Law Claims other than the Chapter 11 case, and so this factor also favors abstention.

vi. Relatedness to Main Bankruptcy Case: The State Law Claims are related to this Chapter 11 case only in so much as they need to be resolved to establish the amount of BrightEdge's claim before pro rata distributions can be made to unsecured creditors under a plan of reorganization.

vii. Core v. Non-Core: As set forth above, because BrightEdge has not filed a proof of claim, all of the State Law Claims are non-core and therefore, this also weighs in favor of abstention.

viii. Severability from Core Matters: As set forth above, the claims are all, as of now, non-core. Even if BrightEdge files a proof of claim, and its claims against the Debtor become core, the State Law Counterclaims would remain non-core and could be separately adjudicated. As a result, abstention should be preferred on this basis as well.

ix. Burden on Court Docket: Abstention will lessen the burden on this Court's docket. The California Superior Court has been accommodating this case for years with the assistance of a discovery referee to make recommendations to the extent discovery disputes arise. Conversely, the Debtor apparently desires to burden this Court's docket needlessly with this Chapter 11 case and Adversary Proceeding in an artificially compressed timeframe serving no apparent purpose other than to prejudice BrightEdge, the only material stakeholder in this Chapter 11 case other than GmbH. This factor therefore weighs in favor of abstention.

x. Likelihood of Forum Shopping: Bringing the complex State Law Claims and the Patent Claims to this Court for adjudication in a fresh Adversary Proceeding, was a patent act of forum shopping. The Debtor not only admits in its First Day Affidavit that its sole goal in the bankruptcy filing was to stop the BrightEdge Litigation and resolve it in this forum, Weitz Decl. ¶¶ 7, 70-71, but omits that its filing occurred just days before its deadline to produce the

SugarCRM database under a court order. The Debtor had vigorously resisted this production, including by opposing a motion to compel, appealing the order granting that motion, refusing to comply with the order, and then opposing a subsequent motion to compel regarding its non-compliance. The Debtor's filing is yet another attempt to find another forum to resist this discovery and therefore, this factor also favors abstention.

xi. Right to Jury Trial: BrightEdge has exercised its right to a jury trial in the State Law Action. Cal. Const. art. I, § 16; *see Rincon EV Realty LLC v. CP III Rincon Towers, Inc.*, 8 Cal. App. 5th 1, 21 (2017) (recognizing right to jury trial for damages in misappropriation of trade secrets action); Cal. Civ. Proc. Code § 592 (establishing right to jury in breach of contract action). Moreover, the Misappropriation Claims and the Patent Claims seek monetary damages and therefore, constitute lawsuits seeking the adjudication of "legal rights" for which a trial by jury is guaranteed by the Seventh Amendment to the Constitution. *See, e.g., In re G-1 Holdings, Inc.*, 323 B.R. 583, 602 (Bankr. D.N.J. 2005). The Court cannot hold a jury trial without the parties' express consent. 28 U.S.C. § 157(e). This factor therefore favors abstention.

xii. Non-Debtor Parties: The State Law Action involved non-debtor parties, specifically Misappropriation Claim defendants Gabriel Martinez, Cullen McAlpine and Shaun Siler, Counterclaim defendants Jim Yu and Tom Ziola and, for the Patent Claims, GmbH. This last consideration therefore favors abstention like the others.

69. Given that the twelve factors overwhelmingly and uniformly favor abstention and, indeed, as set forth above, abstention is also mandatory, this Court should abstain from hearing the State Law Claims and dismiss Claims 1 through 13 of the Adversary Complaint. *In re Wright*, 231 B.R. 597, 601 (Bankr. W.D. Tex. 1999) ("When a court *abstains* from hearing a

case, it declines to exercise its jurisdiction, which in the usual case means that the case is dismissed.") (emphasis in original); *In re Dakota Grain Sys., Inc.*, 41 B.R. 749 (Bankr. D.N.D. 1984). As the Adversary Proceeding is the sole focus of this Chapter 11 case, there is no reason to allow it to continue under these circumstances. Dismissal, therefore, is in the best interests of the stakeholders and the Court.

3. *This Court Cannot Enter a Final Judgment on Non-Core Claims*

70. As discussed above, a number of the claims in the Adversary Complaint are non-core claims. This Court lacks the judicial power to enter a final judgment on non-core claims and instead is limited to issuing proposed findings of fact and conclusions of law that are subject to *de novo* review. *See Allied Sys.*, 524 B.R. at 598 (citing *Stern v. Marshall*, 131 S.Ct. at 2604). The Court will thus not be able to provide a final judgment on all of the claims.

71. While the Court has the authority to estimate a contingent or unliquidated claim that would unduly delay the administration of the case under 11 U.S.C. § 502(c), "before a court orders an estimation proceeding, an initial determination must be made that liquidating the claim or claims would unduly delay the bankruptcy case." *G-1 Holdings*, 323 B.R. at 599. The Debtor's relentless efforts to prolong the State Court Litigation and Patent Litigation through discovery resistance should not now benefit the Debtor in this Court when it comes to utilizing tools that may be available under the Bankruptcy Code. It would be unjust to permit the Debtor to proceed now in summary fashion and prejudice BrightEdge after the Debtor delayed at every turn in the state and federal courts. Moreover, the Court does not have the power to estimate BrightEdge's claims against GmbH that the Debtor and GmbH have re-cast as requests for declaratory relief. *See, e.g., In re Residential Cap., LLC*, 489 B.R. 36, 49 (Bankr. S.D.N.Y. 2013) (noting "streamlined [estimation] procedures are not available for adjudicating lawsuits against non-debtor defendants."). The complexity of the claims and the parties here do not make

these claims amenable to estimation.

72. Given the Court's limited ability to adjudicate the Adversary Proceeding, continuing this Chapter 11 case makes little sense. By the Debtor's own admission, the Chapter 11 case's sole purpose is to "estimate all claims asserted and that could have been asserted by BrightEdge so that the Debtor may successfully reorganize and operate unencumbered by the onus of the BE Litigation." Weitz Decl. ¶ 66. As it is impossible to fulfill that goal in this Court on the Debtor's and GmbH's timeline, the Chapter 11 case will not further any reorganizational purpose. This represents further cause to dismiss the case under 11 U.S.C. § 1112(b).

II. Alternatively, Cause Exists to Lift the Automatic Stay Under 11 U.S.C. § 362(d)

73. It is well-established that, although broad, the automatic stay is not absolute and that relief from the stay should be granted when appropriate. *Wedgewood Inv. Fund, Ltd. v. Wedgewood Realty Grp., Ltd. (In re Wedgewood)*, 878 F.2d 693, 697 (3d Cir. 1989); *In re ABC Learning Centers Ltd.*, 445 B.R. 318, 336 (Bankr. D. Del. 2010). This Court has noted that legislative history clearly states that "it will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere." *Izzarelli v. Rexene Products Co. (In re Rexene Prods. Co.)*, 141 B.R. 574, 576 (Bankr. D. Del. 1992) (quoting H.R. Rep. No. 595 95th Cong., 1st Sess., 341 (1977)).

74. With that in mind, section 362(d)(1) of the Bankruptcy Code provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—for cause . . .

"Cause" is a flexible, fact-intensive concept determined on a case-by-case basis upon

consideration of the totality of the circumstances. *In re Tribune Co.*, 418 B.R. 116, 126 (Bankr. D. Del. 2009); *In re SCO Grp., Inc.*, 395 B.R. 852, 856 (Bankr. D. Del. 2007); *see also Baldino v. Wilson (In re Wilson)*, 116 F.3d 87, 90 (3d Cir. 1997).

75. Courts consider the policies underlying the automatic stay in determining cause. *See In re The Fairchild Corp.*, No. 09-10899 CSS, 2009 WL 4546581, at *5 (Bankr. D. Del. Dec. 1, 2009). In *Rexene Products*, this Court noted that the stay's purpose is (1) to prevent certain creditors from gaining a preference for their claims, (2) to forestall depletion of the debtor's assets due to legal costs, and (3), in general, to avoid interference with the debtor's orderly liquidation or rehabilitation. 141 B.R. at 576 (citing *Borman v. Raymark Ind., Inc.*, 946 F.2d 1031, 1036 (3d Cir. 1991)).

76. When considering a motion for relief from the automatic stay, other than on the issue of the debtor's equity, "the party opposing such relief has the burden of proof on all other issues." 11 U.S.C. § 362(g); *see also In re Abeinsa Holding, Inc.*, No. 16-10790 (KJC), 2016 WL 5867039, at *3 (Bankr. D. Del. Oct. 6, 2016) ("Curiously, the cases considering such requests for relief tend toward asking the question: 'Why should the court lift the stay?' The statute, by its burden shifting, seems almost instead to ask, 'why shouldn't the stay be lifted?'").

77. This court has applied a three prong balancing test from *Rexene Products* when a party seeks relief from the automatic stay to continue prepetition litigation:

(i) Whether any great prejudice to either the bankruptcy estate or the debtor will result from continuation of the civil suit;

(ii) Whether the hardship to the non-bankruptcy party by maintenance of the stay considerably outweighs the hardship to the debtor; and

(iii) Whether the creditor has a probability of prevailing on the merits.

141 B.R. at 576.

78. The *Rexene Products* factors weigh in favor of lifting the stay. No prejudice to the estate or the Debtor results from allowing the BrightEdge Litigation to proceed. It merely prevents forum-shopping while promoting judicial economy. The hardship that the Debtor seeks to impose on BrightEdge, on the other hand, is palpable. Finally, given the strength of BrightEdge's contentions with respect to the claims at issue, there is cause to lift the stay to allow the BrightEdge Litigation to proceed in its non-bankruptcy forums.

A. Allowing the BrightEdge Litigation to Proceed Outside Bankruptcy Will Not Result in Prejudice to the Bankruptcy Estate or the Debtor

79. The Debtor filed the Adversary Proceeding to obtain a determination on the exact same issues at stake in the BrightEdge Litigation. Accordingly, the Debtor is not prejudiced by the BrightEdge Litigation proceeding during the pendency of the bankruptcy case. *See, e.g., Save Power Limited v. Pursuit Athletic Footwear, Inc. (In re Pursuit Athletic Footwear, Inc.)*, 193 B.R. 713, 719 (Bankr. D. Del. 1996) ("The debtor is obviously not concerned with the spectre of simultaneously pursuing [the litigation] while proceeding with its reorganization[, which is] sufficient to conclude that no prejudice will result from continuation of the [non-bankruptcy proceeding]"). The Debtor has separate litigation counsel that purportedly has no other role in the Chapter 11 case, so continuation of the BrightEdge Litigation should not hamper case administration. *See SCO Grp.*, 395 B.R. at 858 (noting present of separate litigation counsel).

80. Failure to comply with the Debtor's artificial timeline for the Chapter 11 case should not constitute prejudice in this instance. [redacted] No third party creditors or customers are harmed or have been harmed by the litigation to date. Further discovery, whether in the bankruptcy proceeding or through the pending non-bankruptcy

proceedings, will take place and the parties have already engaged in extensive discovery in the BrightEdge Litigation. Accordingly, proceeding in the non-bankruptcy forums is unlikely to alter the timeline.

81. Second, the conclusion of this bankruptcy case is unlikely to come quickly, regardless of when the BrightEdge Litigation claims are fixed. The Debtor's Plan is premised on GmbH retaining equity on account of a "new value" contribution. However, the amount of new value has not been disclosed, nor has the Debtor proposed any process for exposing the new value to the market, as is clearly required under United States Supreme Court precedent. *See generally 203 North LaSalle*, 526 U.S. at 457. Even if the Debtor can overcome the absolute priority rule, there are additional challenges likely, including to the broad releases afforded to GmbH. Moreover, GmbH's purported claims against the Debtor are likely to be challenged on a number of grounds. [redacted] support recharacterization under this Court's holding in *In re Friedman's Inc.*, 452 B.R. 512 (Bankr. D. Del. 2011). [redacted] support a colorable claim for equitable subordination under this Court's precedent in *In re USDigital, Inc.*, 443 B.R. 22, 50 (Bankr. D. Del. 2011). There may be additional claim issues to sort out, such as whether DLA's scheduled claim was incurred exclusively in service of the Debtor, given its contemporaneous representation of GmbH and GmbH's guaranty. In sum, there are a myriad of issues outside of the BrightEdge Litigation that render the Debtor's and GmbH's timeline unrealistic.

82. Third, there are only a limited number of creditors in the case and, other than BrightEdge and GmbH, their claims are all relatively modest. Outside of their professionals or

vendors associated with the BrightEdge Litigation, no creditor has a claim of over $8,000. *See* (D.I. 1). Accordingly, no trade creditors would be significantly prejudiced by any modest delay in the resolution of this Chapter 11 case that may be caused by resolution of the BrightEdge Litigation outside bankruptcy.

B. Maintenance of the Automatic Stay Would Cause Severe Hardship to BrightEdge

83. BrightEdge has diligently sought to litigate its claims against the Debtor before both state and federal courts in California and has been met with relentless resistance from the Debtor at every step. Following lengthy stays of both the State Law Litigation and Patent Litigation imposed at the Debtor's request, BrightEdge finally gained the opportunity to pursue its claims shortly before the Debtor filed this Chapter 11 case. Proceeding in this Court in the manner the Debtor and GmbH has proposed is not only inequitable but would also severely prejudice BrightEdge.

84. BrightEdge requires the discovery from the Debtor as ordered to adequately prosecute its claims. Production of the SugarCRM database is critical to allowing BrightEdge to assess the Debtor's misappropriation of BrightEdge's trade secrets and the Patent Claims. The Debtor seeks only to re-argue that point here hoping to convince this Court despite its earlier failures in the BrightEdge Litigation that has already complied by producing some documents and source code. As those courts determined, those responses were incomplete and insufficient to allow BrightEdge to prosecute its claims.

85. Further, the maintenance of the automatic stay would pull BrightEdge out of the forums best-suited for hearing the BrightEdge Litigation. The state court has already made several rulings and is intimately familiar with the facts of the State Court Claims and the application of California law. More importantly, the state court is familiar with the evidence that

the parties are likely to utilize at trial. Starting all over from scratch in this Court is simply inefficient. Importantly, the State Court is well-versed in the Debtor's discovery recalcitrance. *See* Exh. 23. *See SCO Grp.*, 395 B.R. at 859 (lifting stay where it was "unreasonable to expect this Court to spend a significant amount of time learning a resolving [relevant] issues when the District Court already has the knowledge required to adjudicate" them).

86. Similarly, the federal district court in California is well-versed in the parties' contentions and the relevant evidentiary issues in the Patent Litigation. More significantly, the District Court in California frequently deals with the technical aspects of patent law related to computer technology, making them uniquely qualified to deal with this case. *SCO Grp.*, 395 B.R. at 859 (noting District Court's mastery of highly technical issues in granting relief from stay). Furthermore, the Northern District of California has adopted local patent rules specifically tailored to cases like the Patent Litigation, ensuring the claims will be resolved in a thorough and systematic manner.

87. Conversely, estimation of BrightEdge's claims at this juncture would impose significant restrictions on BrightEdge's ability to demonstrate the extent of the Debtor's patent infringement and damages with respect to both the Patent Claims and the State Law Claims. Proceeding with the BrightEdge Litigation in the original forums will alleviate these issues and avoid inefficiencies that arise when any new court is expected to come up to speed in a multi-year and highly technical case. *SCO Grp.*, 395 B.R. at 859 (noting that "interests of judicial economy" were served by allowing court presiding over case for years to adjudicate claims). It will also provide a full and global resolution of the BrightEdge Litigation, something that cannot be accomplished in this bankruptcy for the reasons noted above.[11]

[11] Even if the relief from the stay is not granted with respect to the claims against the Debtor, this Court should modify the stay to clarify that BrightEdge is allowed to proceed against GmbH on its Patent Claims. *See Fairchild*

C. It is Probable that BrightEdge Will Succeed on the Merits of the Litigation

88. While this court has previously held that "[e]ven a slight probability of success on the merits may be sufficient to support lifting an automatic stay in an appropriate case" (*In re Continental Airlines, Inc.,* 152 B.R. 420, 426 (Bankr. D. Del. 1993)), BrightEdge's claims surpass this minimal threshold. The proceedings to date demonstrate that BrightEdge's assertions are meritorious while the Debtor's defenses and counterclaims lack evidentiary and legal support.

1. *Probability of Success with Respect to Patent Claims*

89. BrightEdge has a high probability of succeeding on its Patent Claims. The Debtor is infringing upon five of BrightEdge's SEO patents resulting in a total of sixty-six claims. The Debtor does not seriously dispute infringement—its founder and chief technology officer, Marcus Tober, admitted that the accused instrumentalities (Searchmetrics Suite and Searchmetrics Essentials) "had these features[.]" *See* Exh. 24.

90. Instead, the Debtor contends that BrightEdge's patents are invalid. Patents, however, are entitled to a presumption of validity, *see* 35 U.S.C. § 282, and the Debtor must prove invalidity in the Patent Litigation by the exacting "clear and convincing evidence" standard. *See, e.g.*, *Microsoft Corp. v. i4i Ltd. P'ship*, 563 U.S. 91 (2011). Notwithstanding the case laid out in the First Day Declaration by the CRO, who upon information and belief has no patent expertise whatsoever, BrightEdge's patents are valid and the Debtor's arguments with respect to their invalidity have no merit.

91. In fact, the Debtor has already challenged three of BrightEdge's patents using its best prior art by filing petitions for Inter Partes Review ("IPR") with the Patent Trial and Appeal

---

Grp., 2009 WL 4546581, at *6 (lifting automatic stay solely as to allow litigation counter-party to proceed against non-debtors).

Board ("PTAB"). The PTAB's IPR decisions determine invalidity based on a lower "preponderance of the evidence" standard, rather than the exacting "clear and convincing evidence" standard. *See* 35 U.S.C. § 316(e). Even so, the PTAB still refused to institute IPR based on any of the petitions. The PTAB explicitly found that the Debtor failed to present evidence in its petitions that even "demonstrate[d] that there is a reasonable likelihood" that it would prevail in its invalidity challenges. *See* Exhs. 25, 26 and 27.

92. The Debtor's two remaining invalidity challenges, one based on the Supreme Court's decision in *Alice v. CLS Bank* and the other based on alleged prior use, also have no merit. The Debtor had five months between the Supreme Court's issuance of its *Alice* decision and the stay of the Patent Litigation to file an *Alice*-based motion, but failed to do so. Moreover, the Debtor specifically avoided having the PTAB reject any of its arguments that BrightEdge's patents were invalid under *Alice* by filing IPR petitions where such arguments cannot be considered by the PTAB instead of choosing to file petitions for Covered Business Method Review petitions where the PTAB could have made these adverse rulings against Searchmetrics. Indeed, the patent claims at issue are not directed to abstract ideas, and—even if they were—the claims contain inventive concepts (as indicated by the PTAB's IPR decisions). Accordingly, *Alice* is not applicable.

93. Further, the Debtor has presented no evidence to date of actual prior use in respect of the asserted claims. *See* 35 U.S.C. § 102 (pre-AIA). It cannot rely on testimony alone to prove prior use; it must provide yet-to-be-seen corroborating evidence. *See, e.g.*, *Juicy Whip, Inc. v. Orange Bang, Inc.*, 292 F.3d 728, 737–38 (Fed. Cir. 2002). And, even if the Debtor could provide satisfactory evidence of prior use of some system, it still must prove that the system either anticipated or invalidated the asserted claims, and must do so by clear and convincing

evidence. *See, e.g.*, *Zenith Elecs. Corp. v. PDI Comm'n Sys., Inc.*, 522 F.3d 1348, 1356 (Fed. Cir. 2008) ("Determining whether a patent claim is invalid for prior public use . . . requires comparing the claim to the alleged public use."). The Debtor cannot do so, particularly with the scant evidence that it served with its invalidity contentions in the District Court case. *See* Exh. 28 (requiring a party to produce with its invalidity contentions "[a] copy or sample of the prior art identified"). These are all complex issues that have been raised and should ultimately be adjudicated in the Patent Litigation, not this Court.

2. *Probability of Success with Respect to Misappropriation Claims*

94. BrightEdge has a high probability of success with respect to the Misappropriation Claims as well. The Debtor no longer disputes that Martinez or McAlpine stole BrightEdge's customer lists (and other valuable compilations of customer-specific information). As described in BrightEdge's First Amended Complaint, Martinez stole a list of 517 customers (along with a wealth of other customer-specific information) and McAlpine stole a list of 264 customers. *See* Exh. 4, ¶¶ 31–36 (Martinez), 44–34 (McAlpine). Once Martinez finally provided discovery (after being sanctioned for violating the Court's order to do so, *see* Ex. 29 at 11:4–12:11, BrightEdge identified additional lists that had been exported from its Salesforce database and that contained hundreds of thousands of rows of detailed information about BrightEdge's potential and actual customers.

95. Instead of disputing theft, the Debtor argues that (1) BrightEdge's customer lists and other customer-specific compilations are not "trade secrets," and (2) BrightEdge suffered *de minimis* damages. Neither argument has merit. The Debtor challenged whether BrightEdge was actually asserting trade secrets at the demurrer stage, and lost. Indeed, the Court recognized that "the alleged trade secret is not simply the identities and contact information of some of Plaintiff's clients, but ***the compilation of that information*** along with information about sales

and contracts." Exh. 12 at 8:19–22 (emphasis added). Despite this clear indication from the Court, and the wealth of California case law supporting it, the Debtor continues to challenge the trade secret status of this information by looking at individual public disclosures of customer identities and pointing out irrelevant, unverified information about BrightEdge's customers that is allegedly *currently* available (with no discussion of 2013, 2014, or even 2015) via certain websites. The Debtor's arguments that Martinez and McAlpine stole non-trade-secret information have already been rejected by the Court, and cannot succeed.

96. Second, the Debtor argues that BrightEdge has suffered *de minimis* damages. This is not the case. After Martinez and McAlpine stole BrightEdge's trade secrets, BrightEdge observed a spike in the Debtor's competition with the customers BrightEdge had previously identified in its Salesforce database as potential or actual customers. This increased competition caused BrightEdge actual damages in the form of lost profits and price erosion. Further, Searchmetrics was unjustly enriched. BrightEdge has been trying for years to obtain the information necessary to prove the full extent of its damages−specifically, communications with customers and potential customers that were identified by BrightEdge and a copy of the Sugar CRM−and was on the verge of doing so before Searchmetrics filed for bankruptcy. The Court reaffirmed its prior order that Searchmetrics was required to provide all of its communications with customers and potential customers that were specifically identified by BrightEdge. *See* Exh. 23 at 6:23-7:10, 8:8-9:3, Exh. 30 at 3:10–4:9, 6:24–7:9; Exh. 31 at 1:3-5. This information will show the Debtor's use of BrightEdge's trade secrets and BrightEdge's damages. With the information currently available, however, BrightEdge has estimated that it is entitled to at least $34 million in damages.

3. *Probability of Success with Respect to State Law Counterclaims*

97. BrightEdge has a high probability of success of defeating the Debtor's State Law

Counterclaims in their entirety on the merits. All four of the claims require that BrightEdge made false statements about its own technology or the Debtor's, and that these false statements caused the Debtor harm. *See* Ex. 6. The Debtor has not produced or uncovered evidence establishing that BrightEdge, Yu or Ziola knew any statements it made were false in any way or that they acted with reckless disregard to the truth. Further, the Debtor has not proven that these statements were actually false. BrightEdge believes that these claims are a red herring, designed to cast a shadow of impropriety on BrightEdge's business activities.

98. In sum, all of the factors of the applicable balancing test support the existence of cause to lift the stay to proceed with the BrightEdge Litigation.

NOTICE

99. Notice of this Motion has been provided to the Debtor, GmbH, the U.S. Trustee and all other parties who have filed an appearance in this chapter 11 case. BrightEdge submits that such notice is sufficient and no other and further notice need be provided.

NO PRIOR REQUEST

100. No prior request for relief sought in this Motion has been made by BrightEdge to this or any other Court.

WHEREFORE, BrightEdge respectfully requests that the Court enter an order, (a) dismissing the Debtor's above-captioned chapter 11 case pursuant to section 1112(b) of the Bankruptcy Code, or (b) in the alternative, lifting the automatic stay to allow BrightEdge to proceed with the BrightEdge Litigation in the non-bankruptcy forums in which it is currently pending, and grant such other relief as is just and proper.

Dated: June 7, 2017
Wilmington, DE

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Matthew B. Harvey
Robert J. Dehney (No. 3578)
Gregory W. Werkheiser (No. 3553)
Matthew B. Harvey (No. 5186)
1201 North Market Street, 16th Floor
P.O. Box 1347
Wilmington, Delaware 19899
Telephone: (302) 658-9200
Facsimile: (302) 658-3989
rdehney@mnat.com
gwerkheiser@mnat.com
mharvey@mnat.com

-and-

BAKER BOTTS LLP
Emanuel Grillo (*pro hac vice*)
30 Rockefeller Plaza
New York, New York 10112
Telephone: (212) 408-2500
Facsimile: (212) 408-2501
emanuel.grillo@bakerbotts.com

-and-

Omar J. Alaniz (*pro hac vice*)
2001 Ross Avenue
Dallas, Texas 75201
Telephone: (214) 953-6500
Facsimile: (214) 953-6503
omar.alaniz@bakerbotts.com

-and-

Jon V. Swenson (*pro hac vice*)
G. Hopkins Guy III (*pro hac vice*)
1001 Page Mill Road Building One, Suite 200
Palo Alto, California 94304
Telephone: (650) 739-7500
Facsimile: (650) 739-7699
jon.swenson@bakerbotts.com
hop.guy@bakerbotts.com

Counsel for BrightEdge Technologies, Inc.