SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

(ENDORSED)
FILED
MAY - 7 2015
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY
Jee Jee Vizconde

TO: Jon V. Swenson
Baker Botts LLP
1001 Page Mill Rd. Suite 200
Palo Alto, CA 94304

RE: Brightedge Technologies, Inc. vs G. Martinez
Case Nbr: 1-13-CV-256794

PROOF OF SERVICE

Order Re:
(1) Motion for Sanctions, and
(2) Motion to Seal

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

Parties/Attorneys of Record:

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DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 05/07/15. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Ann Vizconde, Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

BRIGHTEDGE TECHNOLOGIES, INC., Plaintiff vs. GABRIEL MARTINEZ, ET AL., Defendants.	Case No. 1-13-CV-256794 ORDER RE: (1) MOTION FOR SANCTIONS AND (2) MOTION TO SEAL

The following motions by plaintiff BrightEdge Technologies, Inc. ("BrightEdge") came on for hearing before the Honorable Maureen A. Folan on May 7, 2015 at 9:00 a.m. in Department 8: (1) a motion to impose sanctions against defendant Gabriel Martinez ("Martinez") for failure to comply with the Court's prior discovery orders and (2) a motion to file under seal papers associated with the motion for sanctions. The matters having been submitted, the Court rules as follows:

As an initial matter, both BrightEdge and Martinez discuss materials filed in connection with prior motions before this Court, but fail to provide copies of these materials for the Court's review. They are reminded to provide such documents to the Court in the future, whether in

connection with a declaration or a request for judicial notice. (See Cal. Rules of Court, rules 3.1113(l), 3.1306(c) [party requesting judicial notice of court records must provide the court and each party with a copy of the material at issue].)

I. Statement of Facts

Martinez left BrightEdge's employment to work for its competitor, Searchmetrics, Inc. ("Searchmetrics"). BrightEdge alleges that Martinez utilized an external drive to copy its confidential information and trade secrets, and used this information for Searchmetrics' benefit. It filed this action for breach of contract and trade secret misappropriation on November 26, 2014. On April 21, 2015, BrightEdge filed the operative First Amended Complaint, adding Searchmetrics and two other individuals as defendants.

II. Motion for Sanctions

A. Discovery Dispute

On August 22, 2014, BrightEdge served Martinez with a deposition notice. The notice incorporated a request for the production of any computer with which Martinez "reformatted" the external drive he allegedly used to misappropriate BrightEdge's information, along with other requests for production. At the time, Martinez acknowledged the existence of one such computer, his Searchmetrics-issued Apple laptop (the "Apple Laptop"). On October 24, 2014, BrightEdge filed a motion to compel Martinez to appear for his deposition and produce the items demanded in the deposition notice, including the Apple Laptop. Martinez opposed the motion on the ground that BrightEdge's trade secret designation was inadequate. On January 20, 2015, the Court (Hon. Manoukian) issued an order granting BrightEdge's motion and overruling Martinez's objections to the requests for production (most of which Martinez did not defend in his opposition papers).

After the January 20th order issued, a dispute arose concerning the scope of BrightEdge's examination of the Apple Laptop at the upcoming deposition. During discussions with Martinez's counsel, BrightEdge's counsel indicated that BrightEdge planned to make a complete forensic image of the laptop. Martinez gave Searchmetrics—then a third party—notice of

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BrightEdge's intentions pursuant to the Stipulated Confidentiality Order ("SCO") in this action, which addresses the exchange of third parties' confidential information.

Both Martinez and Searchmetrics opposed the forensic imaging of the Apple Laptop. On February 11, 2015, Martinez filed a motion for clarification of the January 20th order, which was ultimately denied by Judge Manoukian on March 16, 2015. On February 16-17, 2015, counsel for Searchmetrics exchanged meet and confer correspondence with counsel for BrightEdge and Martinez. Searchmetrics' counsel asserted that, insofar as BrightEdge's proposed review of the laptop would go beyond a review of the software and process used by Martinez to reformat his external drive, it would improperly include confidential Searchmetrics information. Searchmetrics proposed to stipulate to the laptop's inspection by a neutral third party expert, who would produce a report concerning the software and process used to reformat the external drive. However, BrightEdge's counsel rejected this proposal and asserted that any motion for a protective order by Searchmetrics would be untimely under the SCO.

On February 23, 2015, Searchmetrics filed a motion for a protective order limiting the scope of BrightEdge's examination of the Apple Laptop. On March 19, 2015, the Court denied Searchmentrics' motion, finding that it had failed to meet its initial burden to show that the Apple Laptop contained trade secrets and noting that the laptop could be designated "HIGHLY CONFIDENTIAL—ATTORNEYS' EYES ONLY" under the SCO to avoid the disclosure of any trade secrets to BrightEdge. Pursuant to the Court's order, Martinez produced the Apple Laptop at his March 19th deposition.

Meanwhile, on February 9, 2015, Martinez produced four documents responsive to the other requests for production in his deposition subpoena.[1] BrightEdge asserts that it knows of many additional responsive documents that Martinez did not produce. In addition, at his deposition, Martinez testified that he had used a second computer, a Searchmetrics-issued Asus laptop (the "Asus Laptop"), to either reformat or delete files from the external drive. (See Decl. of Karina A. Smith ISO Mot., Ex. 1, Martinez Depo. Trans., pp. 120:24-130:21 [initial testimony

[1] Martinez contends that he has produced nearly 4,000 pages of documents in this litigation, but does not dispute BrightEdge's characterization of his February 9th production.

that the Asus Laptop was used to reformat the drive], 201:16-205:22 [clarifying that Martinez believed he was deleting all the files from the drive without overwriting it].) Martinez did not bring the Asus Laptop to his deposition, and testified that he had returned it to Searchmetrics in 2013 when he received the Apple Laptop. (*Id.* at pp. 123:10-125:23.) Martinez also testified that he has had access to several additional computers and drives from 2013 to the present, but could not remember whether he used these devices to download BrightEdge information or erased them after he gave notice that he would leave BrightEdge. BrightEdge has demanded the production of these additional documents and devices, but Martinez and Searchmetrics have not produced them.

On March 26, 2015, BrightEdge filed the present motion for monetary and terminating sanctions, or for alternative sanctions such as issue or evidence sanctions.[2] On April 24, 2015, Martinez filed papers in opposition to BrightEdge's motion. On April 30, 2015, BrightEdge filed reply papers in support of its motion.

B. Legal Standard

If a responding party fails to obey an order compelling compliance with a deposition notice, the court may make those orders that are just, including the imposition of issue, evidence, or terminating sanctions. (Code Civ. Proc. ("CCP"), §§ 2023.030, subds. (b)-(d), 2025.450, subd. (h).) In lieu of or in addition to those sanctions, the court may impose a monetary sanction. (CCP, §§ 2023.030, subd. (a), 2025.450, subd. (h).)

Two facts are generally prerequisite to the imposition of non-monetary sanctions: (1) there must be a failure to comply with a court order and (2) the failure must be willful. (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102.) It is the moving party's burden to demonstrate the responding party's failure to obey the earlier discovery order. (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 37, superceded by statute on another ground as stated in *Union Bank v. Super.*

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[2] BrightEdge does not specify the type of issue or evidentiary sanctions it believes would be appropriate under the circumstances or support its alternative requests with a separate statement as required by the California Rules of Court. (See Cal. Rules of Court, rules 3.1112(d)(3) [a party must state the relief it requests in its moving papers], 3.1345(a)(7) [a motion for issue or evidentiary sanctions must be accompanied by a separate statement].)

Ct. (Demetry) (1995) 31 Cal.App.4th 573, 582-583.) If that burden is satisfied, the burden of proof then shifts to the responding party to prove its failure to comply was not willful. (*Cornwall v. Santa Monica Dairy Co.* (1977) 66 Cal.App.3d 250, 252-253, citing *Frates v. Treder* (1967) 249 Cal.App.2d 199, 204.)

Although a failure to obey a prior court order is generally required in order for a court to impose a nonmonetary sanction, some courts have made exceptions for sufficiently egregious misconduct. (See *New Albertsons, Inc. v. Super. Ct. (Shanahan)* (2008) 168 Cal.App.4th 1403, 1423, 1426 [requirement of a prior order "provides some assurance that such a potentially severe sanction will be reserved for those circumstances where the party's discovery obligation is clear and the failure to comply with that obligation is clearly apparent"; however, egregious discovery misconduct may justify the imposition of nonmonetary sanctions without a prior order]; see also *Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 76 [plaintiffs not entitled to evidence sanction absent violation of a court order "or other egregious misconduct"].) These courts have imposed nonmonetary sanctions where the sanctioned party cannot provide discovery it promised it would provide; the sanctioned party misrepresented the existence or availability of discovery; an order would be futile because discovery is unavailable, or was stolen or destroyed; the sanctioned party repeatedly and falsely assured the requesting party that all responsive discovery had been produced; or the sanctioned party's actions materially impaired the court's ability to ensure the orderly administration of justice. (*New Albertsons, supra,* 168 Cal.App.4th at pp. 1424-1431.)

C. Sanctions for Failure to Comply with the Court's Order

BrightEdge contends that Martinez disobeyed the Court's January 20th order by failing to produce the Asus Laptop and other computers in response to request no. 2 in his deposition notice and by withholding documents responsive to request nos. 3-7.[3] It seeks an order compelling Martinez to produce these items and provide a second day of deposition testimony

[3] BrightEdge occasionally states that Martinez also violated the Court's March 16th order denying his motion for clarification. As an initial matter, this motion pertained to the Apple Laptop, and BrightEdge does not contend that Martinez has failed to produce the Apple Laptop. More importantly, the March 16th order merely denied Martinez's motion for clarification, and did not itself order Martinez to produce anything. There is consequently no basis for the Court to find that Martinez violated the March 16th order.

about them. In addition, BrightEdge seeks terminating or alternative nonmonetary sanctions, as well as monetary sanctions.

1. Martinez's Compliance with the Court's Order

a. The Asus Laptop and Other Computers

Request no. 2 in the subpoena to Martinez sought "[a]ny computer used at any time to reformat the [external drive] that was connected to YOUR BrightEdge laptop." In its January 20th order, the Court overruled all of Martinez's objections to this request and ordered him to comply with it at his deposition.

BrightEdge contends that this request encompasses the Asus Laptop, which Martinez has failed to produce. As an initial matter, it is unclear whether the Asus Laptop was used to "reformat" Martinez's external drive, given Martinez's clarifying testimony on this point. (See Smith Decl., Ex. 1, Martinez Depo. Trans., pp. 120:24-130:21 [initial testimony that the Asus Laptop was used to reformat the drive], 201:16-205:22 [clarifying that Martinez believed he was deleting all the files from the drive without overwriting it].) More importantly, Martinez testified that he returned the Asus Laptop to Searchmetrics in 2013, long before his deposition notice was served. (*Id.* at pp. 123:10-125:23.) Consequently, even if request no. 2 would otherwise encompass the Asus Laptop, because it was not in Martinez's possession, custody, or control, the Court could not have ordered him to produce it.[4] Thus, BrightEdge has not established that Martinez violated the Court's order by failing to produce the Asus Laptop.[5]

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[4] Control is defined as the legal right to obtain items upon demand, and the party seeking production bears the burden of proving control. (*United States v. International Union of Petroleum & Industrial Workers* (9th Cir. 1989) 870 F.2d 1450, 1452 [addressing standard under Federal Rules of Civil Procedure].) Here, BrightEdge offers no evidence demonstrating that Martinez was in control of an employer-issued laptop he had returned to his employer. (See *Burton Mechanical Contractors, Inc. v. Foreman* (N.D. Ind. 1992) 148 F.R.D. 230, 236 ["The requisite control, moreover, is not apparent from Mr. Foreman's claimed status as an Isecki employee."].)

[5] BrightEdge further contends that Martinez had a duty to preserve the Asus Laptop, and returned it to Searchmetrics with the intent that it be reformatted in order to destroy evidence related to this action. This issue is addressed in section II(D) below.

BrightEdge also urges that additional computers should have been produced in response to request no. 2. The other computers used by Martinez were his current Searchmetrics laptop; the "Dell Tower," a home computer that Martinez sold on Craigslist in 2013; the "Dell PC Laptop," his wife's laptop that Martinez declares he cannot locate; a possible second computer belonging to Martinez's wife;[6] and an "Asus Netbook," apparently another old home computer.[7] BrightEdge provides no evidence that these devices were used to reformat Martinez's external drive. (See Mot., p. 11 [stating only that Martinez did not remember whether he used these devices to download BrightEdge data or erased them after giving notice to BrightEdge].) Consequently, it has not shown that they were encompassed by the Court's order or that Martinez violated the order by failing to produce them.

In light of the above, BrightEdge has not demonstrated that Martinez violated the Court's order by failing to produce the Asus Laptop or other devices discussed at his deposition. Consequently, the Court will not order the production of these items at this time, or award sanctions because Martinez did not produce them at his deposition.

b. Requests for Production Nos. 3-6

Request nos. 3-4 in Martinez's deposition notice sought Martinez's communications with BrightEdge customers after March 1, 2013 and related documents. Request nos. 5-6 called for the production of his communications with current or former BrightEdge employees during the same time, along with associated documents. The Court ordered Martinez to comply with these requests without objection; however, it limited request nos. 3-4 to encompass communications with customers Martinez knew to be BrightEdge's current, former, and prospective customers, or who were identified as such by information in his possession, custody, or control.

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[6] While BrightEdge refers to Martinez's wife's laptop and a Dell PC Laptop as if these are separate computers (see Mot., p. 7), it appears from Martinez's deposition testimony and declaration that these laptops may be one and the same.

[7] It is not entirely clear which computers BrightEdge actually contends should be produced. (See Mot., pp. 7-8 [arguing that Martinez should have produced the Asus Laptop only], 15 [stating that Martinez should be ordered to produce "all … computers he was already compelled to produce under the January 20 Order, including the Asus Laptop, the Dell PC Laptop, and the Dell Tower …"].)

BrightEdge contends that communications responsive to these requests that were not produced by Martinez in this action were produced by Searchmetrics in connection with related federal patent litigation. In addition, BrightEdge argues that Martinez "must have" additional documents related to these communications that he has not produced, including notes, communications with others at Searchmetrics, and marketing materials provided to BrightEdge customers. Martinez acknowledges that additional responsive documents—including his own emails—exist. However, he contends that these documents are not in his possession, custody, or control because they are stored on Searchmetrics' servers, and his confidentiality agreement with Searchmetrics forbids him from delivering them to others.

"A party having actual possession of documents must allow discovery even if the documents belong to someone else; legal ownership of the documents is not determinative." (*Allen v. Woodford* (E.D. Cal., Jan. 30, 2007) No. CV-F-05-1104 OWW LJO, 2007 U.S.Dist.LEXIS 11026, *5, citing *In re Bankers Trust Co.* (6th Cir. 1995) 61 F.3d 465, 470 [Federal Reserve regulations prohibiting disclosure of confidential documents in a party's possession were invalid where in conflict with a discovery order].) Similarly, an employee who has the practical ability to obtain documents within his or her normal day-to-day work has control over such documents. (See *id.*, citing *In re Flag Telecom Holdings, Ltd. Sec. Litig.* (S.D.N.Y. 2006) 236 F.R.D. 177, 181-182 [rejecting employee's argument that he could not produce documents in violation of a corporate confidentiality agreement; "employees are permitted to utilize the documents in the course of employment, as they must in order to perform their jobs, and therefore [defendant] … has the practical ability to obtain them"]; *Hageman v. Accenture, LLP* (D. Minn., Oct. 19, 2011) Civil No. 10-1759 (RHK/TNL), 2011 U.S.Dist.LEXIS 121511, *10 [although information was owned by third party and stored on its server, where responding party's employees could access the information "within [their] normal day-to-day work," the information was in the responding party's control].) Consequently, to the extent Martinez has actual possession of responsive documents or the ability to access such documents within his normal day-to-day work, he has not complied with the Court's order and must produce

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these documents.[8] Applying this standard, Martinez has clearly violated the Court's order with respect to his own emails and associated documents.

Finally, BrightEdge contends that Martinez exchanged text and voice mail messages with current and former BrightEdge employees using his personal telephone, and communicated with one former BrightEdge employee using the Internet calling service Skype. However, BrightEdge fails to provide evidence showing that Martinez exchanged voice mail messages using his personal telephone or failed to produce text or voice mail messages (see Mot., p. 9), and Martinez's counsel declares that text messages were produced. Martinez did testify that he communicated with a former BrightEdge employee on Skype. However, he indicates that the Skype data associated with this conversation, which is not directly readable or searchable, is available from the Apple Laptop.[9] Consequently, BrightEdge has not established that Martinez failed to produce responsive text messages, voicemail messages, or Skype data. To address BrightEdge's concerns, however, Martinez is ordered to produce any such documents that may exist.

c. Request for Production No. 7

Request no. 7 sought records of Martinez's use of any file hosting, storage, or synchronization service with respect to his work at BrightEdge or Searchmetrics from March 1, 2013 to present. The Court's January 20th order directed Martinez to respond to this request without objection.

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[8] Martinez cites *Graves v. Williams* (E.D. Cal., Dec. 23, 2008) No. Civ. S-07-0666-GEB-CMK P, 2008 WL 5397145, *1-2 (hereinafter, "*Graves*") for the proposition that employees who have access to their employer's records do not necessarily have the requisite possession, custody, or control over the records. The Court's ruling is not in conflict with this proposition, given that more than mere access is required for an employee to be deemed in possession or control of employer documents pursuant to the standard discussed above. In addition, the documents at issue in *Graves* were medical records from a prison and several hospitals, and it is not clear that the defendants or their actual employer, the California Department of Corrections and Rehabilitations, had possession, custody, or control over them. Similarly, in *People ex rel. Lockyer v. Super. Ct. (Cole Nat. Corp.)* (2004) 122 Cal.App.4th 1060, 1078, the court held that the People of the State of California do not have possession, custody or control over documents of any particular state agency.

[9] Martinez submits a declaration by his discovery vendor, who explains that because Skype data is stored in an encoded database, which is not directly readable or searchable, it is not typically within the scope of data that is isolated for industry-standard electronic discovery processing. Martinez indicates that, in light of BrightEdge's concerns, he will instruct the vendor to search for any additional responsive Skype data, and will produce any such data that may exist.

BrightEdge contends that Martinez produced a single document in response to this request, a Dropbox activity log. It argues that the log references several files that were not produced, and these files are responsive "records of [Martinez's] Dropbox use." Request no. 7, however, plainly did not call for the production of every file that was uploaded to a service like Dropbox. BrightEdge's strained reading of this request does not persuade the Court that the Dropbox files are responsive. BrightEdge also contends that it has evidence Martinez used Dropbox before the first date shown on the activity log. However, the evidence it cites (which was filed under seal in connection with a prior motion) is vague on this point. Furthermore, BrightEdge does not establish that a record of Martinez's earlier Dropbox use exists. Consequently, it does not show that Martinez failed to comply with the Court's order as to his Dropbox account. Nevertheless, Martinez does not address the issue of whether an earlier Dropbox log exists in his opposition papers, and he is ordered to produce any such document in his possession, custody, or control.

Martinez testified that, in addition to Dropbox, he had access to the storage services Box.net, MailChimp, Google Drive, and Own Cloud. Martinez declares that he cannot access records relating to his use of Box.net, which he refers to as Box.com, and in any event "it is [his] understanding" that there are no BrightEdge or Searchmetrics materials stored with that service provider. He states that he set up a MailChimp account but never used it. While Martinez does not address his Google Drive account in his opposition papers, he testified that this was a personal account that he did not use to store BrightEdge files. (See Smith Decl., Ex. 1, Martinez Depo. Trans., 178:13-179:17.) BrightEdge offers no evidence that Martinez used these accounts to store Searchmetrics or BrightEdge files, and consequently does not establish that he violated the Court's order by failing to produce records of his use thereof. Nevertheless, to ensure his full compliance with the Court's order, Martinez is ordered to produce any responsive documents relating to these accounts that are in his possession, custody, or control.

Martinez appears to acknowledge that responsive documents relating to his Own Cloud use exist, but argues that because this is a Searchmetrics application, he lacks the authority to access and produce information pertaining to his use of this account. As already discussed,

Martinez must produce any responsive Searchmetrics documents that he has the ability to access within his normal day-to-day work. To the extent that Martinez has such access to any records of his Own Cloud use, he must produce them at this time.

2. Willfulness

As demonstrated by the discussion above, Martinez failed to comply with the Court's order as to his Searchmetrics emails and related documents.

Martinez contends that, pursuant to meet and confer discussions during May-July of 2014, the parties agreed that information stored on Searchmetrics' email system and server should be produced by Searchmetrics rather than Martinez. Martinez does not provide direct evidence of this agreement, but notes that BrightEdge took off calendar a motion to compel further responses to requests for production to Martinez shortly before serving Searchmetrics with a subpoena, and suggests that BrightEdge did so because of the parties' understanding on this point. BrightEdge does not address these assertions in its reply papers, but contends that it first learned that Martinez would not produce any Searchmetrics documents when it received his opposition to the instant motion. BrightEdge submits a February 26, 2015 letter to Martinez's counsel, in which BrightEdge's counsel requests that the Searchmetrics documents be produced.

At the hearing on this matter, counsel for both parties acknowledged that the parties entered into a stipulation as described by Martinez. They agreed, however, that this stipulation was expressly limited to the context of their earlier discovery dispute. Consequently, the stipulation does not establish that Martinez's failure to produce Searchmetrics emails and documents in response to his deposition notice was justified.

Also during the hearing, Martinez's counsel argued that Martinez's conduct was substantially justified given his open and consistent position that Searchmetrics documents should be obtained from Searchmetrics, BrightEdge's agreement to this procedure during the parties' prior discovery dispute, and the scant California authority addressing the issue of employee control over employer documents. While the Court anticipates that the issue of Martinez's control over other Searchmetrics documents may prove to be more nuanced, Martinez was clearly obligated to produce his own emails and related documents, which were virtually the

only documents sought by requests that the Court expressly ordered him to respond to. While not a technical "waiver" of an "objection" as urged by BrightEdge, Martinez's failure to raise the control issue with the Court, whether in response to BrightEdge's motion to compel or via a motion for a protective order, is certainly relevant to the issue of willfulness—particularly since the Court found against Searchmetrics on this issue in its March 19th order. Given the Court's clear order that Martinez produce his communications and related documents, the lack of any agreement between the parties to the contrary, and Martinez's choice to simply withhold these documents over BrightEdge's objection rather than raising the issue with the Court, the Court finds that Martinez's failure to produce the Searchmetrics documents was willful. (See *Cornwall v. Santa Monica Dairy Co.* (1977) 66 Cal.App.3d 250, 252-253 [responding party has burden to prove noncompliance was not willful].)

3. Propriety of Sanctions

Even where a party has willfully failed to comply with a Court order, an award of sanctions is discretionary, and the court should consider a variety of factors in exercising this discretion. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796-797.) "The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he or she seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment." (*Motown Records Corp. v. Super. Ct. (Brockert)* (1984) 155 Cal.App.3d 482, 489, quoting *Caryl Richards, Inc. v. Super. Ct. (Klug)* (1961) 188 Cal.App.2d 300, 304.) The sanctions imposed must be tailored to "fit the crime." (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1293.)

Here, BrightEdge admittedly has already obtained many of the Searchmetrics documents, and does not argue that it has been seriously prejudiced by Martinez's failure to produce them for a second time. The Court consequently finds that BrightEdge's failure to produce the Searchmetrics documents does not warrant the imposition of nonmonetary sanctions. Nevertheless, additional responsive documents may exist, and BrightEdge may need to depose Martinez for a second time to obtain his testimony concerning any such documents. In addition, BrightEdge incurred fees and costs associated with this motion. Consequently, the Court will

order Martinez to provide an additional day of deposition testimony after producing the documents addressed herein (see CCP, § 2025.290, subd. (a) [court shall allow additional deposition time if needed to fairly examine the deponent or if the deponent impedes the examination]), and will award a monetary sanction against Martinez as discussed below.

D. Sanctions for Intentional Destruction of Evidence

BrightEdge also seeks nonmonetary sanctions for Martinez's asserted spoliation of evidence located on the Asus Laptop. In its moving papers, BrightEdge merely speculates that the Asus Laptop was reformatted when Martinez returned it to BrightEdge, permanently deleting any of BrightEdge's information that was copied to the Asus Laptop and any data concerning Martinez's use of the Asus Laptop to either delete or reformat his external hard drive. With its reply papers, BrightEdge submits newly-discovered evidence that indicates Martinez may have reformatted the Asus Laptop himself. On the day after BrightEdge filed its complaint, Martinez participated in an instant message exchange with another party as follows:

Martinez:	I got a new cpu yesterday
Third party:	Laptop?
Martinez:	yeah got a Macbook Pro
Martinez:	CEO told me to go out and get something nicer than what I have
Martinez:	my other laptop wasn't even that old but he wanted me to wipe it for fear of having any competitor info on it
Martinez:	plus it was heavy as hell
Other:	Wow…I wish my CEO gave me that option lol
Martinez:	lol
Martinez:	he's cool

This conversation deeply troubles the Court, and suggests misconduct that may ultimately justify the imposition of issue or evidence sanctions. Nevertheless, it would be premature to award nonmonetary sanctions at this juncture.

"[I]n most cases of purported spoliation[,] the facts should be decided and any appropriate inference should be made by the trier of fact after a full hearing at trial." (*New Albertsons, supra,* 168 Cal.App.4th at pp. 1431.) As discussed above, however, courts have awarded nonmonetary sanctions for egregious spoliation even where no prior order was violated, including where an order would have been futile because the requested discovery was destroyed.

(*Id.* at pp. 1424-1426, 1428-1429.) This rationale, however, does not apply in circumstances where a party was never under any obligation to produce the information at issue in the first place. (*Id.*, p. 1428.) Here, as already discussed, BrightEdge requested only computers used to "reformat" Martinez's hard drive, and it is not clear that the Asus Laptop was encompassed by this request. Furthermore, BrightEdge has not shown that the laptop was in Martinez's possession, custody, or control at the time BrightEdge propounded its request. Consequently, Martinez was never obligated to produce the Asus Laptop, and the futility rationale does not apply here.

Courts have also awarded nonmonetary sanctions where a party's destruction of evidence materially impairs the court's ability to ensure the orderly administration of justice. (See *New Albertsons, supra,* 168 Cal.App.4th at p. 1431.) However, to impose nonmonetary sanctions on this basis, the court must make factual findings regarding the evidence that existed as an initial matter, the evidence that was destroyed, and the prejudice to the party seeking sanctions. (*Id.* at pp. 1433-1434 [discussing the detailed factual findings required to support the award of nonmonetary sanctions in the absence of disobedience of a court order].) Where such findings are not supported, an award of nonmonetary sanctions would be improper. (See *id.* at p. 1434 ["Here, in contrast [to cases where nonmonetary sanctions were properly awarded], the trial court expressly did not find that there was or was not a bag of ice on the floor before the incident and made no finding whether a photograph of a bag of ice on the floor ever existed. Instead, the court found only that Albertsons destroyed the video recordings after receiving a notice to produce them and after reviewing them."].) Based on the information currently available to the Court, it is not clear whether BrightEdge information or data regarding Martinez's use of BrightEdge information was ever stored on the Asus Laptop, whether any such data was actually destroyed or still resides on the laptop in readable or recoverable form, and how the loss of such data would prejudice BrightEdge. Consequently, the Court will not award nonmonetary sanctions at this time.

The Court denies BrightEdge's request for nonmonetary sanctions without prejudice. BrightEdge may be able to develop a record to support the imposition of nonmonetary sanctions

at a later time. Martinez states that Searchmetrics has removed the Asus Laptop from circulation among its employees and is preserving it. Thus, BrightEdge may be able to obtain the laptop from Searchmetrics and analyze the data it contains. In addition, BrightEdge can question Martinez in more detail regarding this issue at his second deposition. If further investigation reveals that evidence was destroyed, BrightEdge may choose to bring another motion for nonmonetary sanctions.

E. Monetary Sanctions

BrightEdge makes a code-compliant request for $34,238.75 in monetary sanctions against Martinez pursuant to CCP section 2025.450, representing a portion of the attorneys' fees incurred in preparing its moving and reply papers. As discussed above, the Court finds that an award of monetary sanctions is appropriate given Martinez's failure to produce his Searchmetrics emails and other Searchmetrics documents in his possession, custody, or control.

BrightEdge's counsel Karina A. Smith, a third-year associate at Baker Botts L.L.P., declares that she spent in excess of 25 hours preparing BrightEdge's motion and 25 hours preparing its reply brief at a rate of $403.75 per hour. She states that Hopkins Guy, a partner at Baker Botts, spent in excess of 3 hours on the motion and 4 hours on the reply at a rate of $960 per hour. Another partner, Jon Swenson, spent in excess of 4.5 hours preparing the reply papers, at a billing rate of $637.50 per hour. In addition, Jennifer Nguyen, a paralegal, spent in excess of 14 hours on BrightEdge's motion and 7 hours on its reply at an hourly rate of $212.50.

The time spent by BrightEdge's counsel and paralegal on these tasks is generally reasonable. However, counsel does not provide any details concerning her and her colleagues' experience and background that would justify the hourly rates charged. Consequently, the Court will reduce these hourly rates by 25%. In addition, because BrightEdge's motion was only partially successful, the Court will further reduce the requested sanctions by half. (See *Mattco Forge v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1437 [reasonable to award one-fourth the amount of sanctions requested where discovery motion was four-fifths successful].) The Court will thus award $7,570.25 for Ms. Smith's time (25 hours x $302.81/hour = $7,570.25), $2,520 for Mr. Guy's time (3.5 hours x $720/hour = $2,520), $1,075.79 for Mr.

Swenson's time (2.25 hours x $478.13/hour = $1,075.79), and $1,673.49 for Ms. Nguyen's time (10.5 hours x 159.38/hour = $1,673.49), for a total of $12,839.53 in monetary sanctions.

F. Conclusion and Order

BrightEdge's motion for sanctions is GRANTED IN PART and DENIED IN PART as follows: The motion is GRANTED insofar as it seeks to compel Martinez to provide a second day of deposition testimony and to produce Searchmetrics documents responsive to request nos. 3-7 that are in his possession, custody, or control; additional text messages, voice mail messages, and Skype data responsive to request nos. 3-6; and additional storage service usage records responsive to request no. 7.[10] To the extent Martinez has already produced such documents by producing the Apple Laptop, he need not provide additional copies thereof. The motion is also GRANTED in the amount of $12,839.53 insofar as it seeks monetary sanctions. Martinez shall produce the specified documents and pay $12,839.53 to BrightEdge's counsel within 40 calendar days of the filing of this order. Thereafter, he shall appear for deposition at a date and time mutually agreed upon by the parties. BrightEdge's motion is DENIED WITHOUT PREJUDICE insofar as it seeks terminating or alternative nonmonetary sanctions.

III. Motion to Seal

BrightEdge also moves to seal documents filed in support of its motion for sanctions. BrightEdge's motion is unopposed.

California Rules of Court, rules 2.550 and 2.551 set forth specific criteria for permanently sealing court records. (See Cal. Rules of Court, rule 2.550(d) [stating that the court must make the following express factual findings before granting leave to file records under seal: (1) an overriding interest overcomes the public's presumptive right of access to court records, (2) that interest supports sealing the records, (3) a substantial probability exists that the overriding interest will be prejudiced if the records are not sealed, (4) the proposed sealing is narrowly

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[10] At the hearing on this matter, counsel for BrightEdge argued for the first time that Martinez must also produce documents in Searchmetrics' "Sugar" database. In light of the Court's order above, Martinez is obligated to produce such documents to the extent they are both encompassed by the requests for production at issue and within Martinez's possession, custody, or control; however, given that BrightEdge did not address the "Sugar" database in its moving papers, the Court makes no finding at this time regarding whether or not these circumstances are present.

tailored, and (5) no less restrictive means exist to achieve the overriding interest].) These criteria do not apply, however, to "discovery motions and records filed or lodged in connection with discovery motions or proceedings." (See Cal. Rules of Court, rule 2.550(a)(3).) Nonetheless, even in discovery proceedings, a party moving for leave to file records under seal must identify the specific information claimed to be entitled to confidentially and the nature of the harm threatened by disclosure. (See *H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894.)

Here, BrightEdge seeks to file under seal portions of its moving papers that reflect or refer to material designated as confidential under the SCO and the protective order in the federal patent action. BrightEdge explains that these materials were designated by Martinez or Searchmetrics under the operative protective orders, or else reflect BrightEdge's proprietary and confidential business information, the disclosure of which would harm its legitimate commercial interests. BrightEdge has thus established that the information at issue is entitled to confidentiality (see *H.B. Fuller Co. v. Doe*, *supra,* 151 Cal.App.4th at p. 893 [recognizing the need to permit parties to freely disclose information under protective orders without the need for laborious collateral litigation of motions to seal associated with discovery disputes]), and has furthermore filed appropriately redacted public versions of each document to which its motion pertains.

BrightEdge's motion to seal is accordingly GRANTED.

DATED: 5-7-15

MAUREEN A. FOLAN
JUDGE OF THE SUPERIOR COURT