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Issue Date: 09 September 2011

CASE NO. 2010-SOX-00031

In the Matter of:

RICHARD BARRETT,
Complainant,

v.

E-SMART TECHNOLOGIES, INC.,
Respondent.

DECISION AND ORDER

Appearances: Patricia Douglass, Esq.,
for Complainant

Michael T. Stoller, Esq.,
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

Introduction and Procedural History

This is a whistleblower claim under the Sarbanes-Oxley Act ("the Act"), 18 U.S.C. § 1514A (2006). Complainant Richard Barrett alleges that his employer e-Smart Technologies, Inc., constructively discharged him from employment because he opposed its preparation of a false and misleading 10-K annual report for filing with the Securities and Exchange Commission. He asserts that e-Smart's filing of the report would have violated the Securities Exchange Act of 1934 and Commission rules. E-Smart denies that it terminated Complainant's employment, was preparing a false or misleading 10-K, or retaliated against Complainant for his activity related to the 10-K. It asserts certain other defenses.

Complainant filed an administrative complaint with the Occupational Safety and Health Administration (OSHA).[1] OSHA investigated, found that e-Smart had violated the Act, and

[1] The parties dispute the effective filing date of the administrative complaint. *See* discussion in the text below.

ordered it to reinstate Complainant immediately with back wages and to pay him a bonus of $565,500 in compensatory damages. OSHA Findings at 5. Respondent timely requested a hearing before an administrative law judge, but it never reinstated Complainant's employment. Resp. Objections to Findings at 1; Tr. 6-7.

I held a duly noticed hearing over four days, from August 30 through September 2, 2010. The parties were represented by their respective counsel of record. Complainant testified on his own behalf. Respondent called two witnesses: engineers Ananth Krishnan and Marcello Soliven.[2] Both were e-Smart employees at some, but not all, times relevant to the claim. I admitted numerous exhibits.[3] At the trial's end, I closed the record for new evidence, except for a possible

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[2] Respondent made a late and abortive attempt to offer the testimony of a third witness, Tamio Saito, e-Smart's Chief Technology Officer. Less than a week before trial, Respondent moved for a continuance in part based on an unfounded assertion that Mr. Saito was unavailable on the dates scheduled for hearing. I denied the continuance. I found that Mr. Saito had just been in San Francisco (the site of the hearing) shortly before trial; that e-Smart had sent him out of the country and then claimed that he was unavailable because it was too difficult for him to travel; that, despite e-Smart's protestations, Mr. Saito had been able to travel from Asia to San Francisco for a required appearance in the district court two weeks earlier despite his assertion there of the same medical restrictions (that the district court rejected) and thus could have returned for the hearing in this case; and that e-Smart could have taken a perpetuation deposition of Mr. Saito while he was in San Francisco but didn't. I found e-Smart's request for a continuance to be part of a pattern of bad faith delay.

Nonetheless, in an effort to accommodate e-Smart, I allowed it to arrange for Mr. Saito to testify at the hearing by telephone from Japan. As it turned out, Mr. Saito's proficiency in spoken English was severely limited, and e-Smart had neither requested nor arranged for a Japanese-language interpreter. There were also repeated technical difficulties with the international telephone connection.

To accommodate e-Smart yet further, I allowed it 45 days following the conclusion of the hearing to obtain Mr. Saito's testimony by deposition so long as it paid Complainant's counsel's international travel expenses. As e-Smart could have taken Mr. Saito's deposition while he was in San Francisco prior to the hearing and knew about his supposed travel restrictions, the Company was responsible for any cost of foreign travel for a post-hearing deposition. Tr. 1030-31.

E-Smart allowed the 45 days to lapse and did not go forward with the deposition. Remarkably, however, some six weeks after the deadline ran, on November 30, 2010, e-Smart moved to re-open the record to take the deposition. It offered no excuse for its failure to depose Mr. Saito timely. This was yet another delay tactic, and I denied it. E-Smart had more than ample opportunity to offer Mr. Saito's testimony. It simply never did.

I cannot consider the brief testimony that Mr. Saito gave over the telephone and must strike it. That testimony concluded before Complainant was allowed to cross-examine; to consider it would deny due process to Complainant. From Mr. Saito's incomplete and brief telephonic testimony, it also appears that he might have had such a propensity to exaggerate that he was not credible. *See, e.g.*, Tr. 965 ("I founded the world's first PC company in United States, under Nippon Steel Corporation, in 1990."); Tr. 966 ("And everybody knows, in the world of computer, knows me. That I am a really professional. And even, you know, U.S. Government agency knows me. And many people ask me questions at that moment.") Tr. 962 (at General Electric and Honeywell, "I was responsible for all technology development, as I was [the] only one person, as a representative of Toshiba, to develop this very advanced technology."); Tr. 963-64 (claiming to have filed the first patent for a biometric identification method in 1983 and that all smart cards are derived from his technology).

[3] I admitted Complainant's Exhibits ("C.Ex.") 1-86, 88-120, 126-128, 130-132, 134-138, 140, 142-144, 146-150, 157-163, and 165-168. Complainant's Exhibit 87 was admitted for reference only but not as evidence. Tr. 789. I also admitted Respondent's Exhibits ("R.Ex.") A, C-Q, T, and V. I admitted Respondent's Exhibit S for the limited purpose of showing that Complainant had had certain conversations with Respondent's counsel about e-Smart's litigation in the Northern District of California. Tr. 1021. I initially admitted Respondent's Exhibit B but later struck it as irrelevant. Tr. 933-34. I admitted Respondent's Exhibit K, provided that any party submit sufficient

post-hearing deposition that never went forward. *See* fn. 2 above. There were several post-trial motions to amplify the record. Except to receive a copy from OSHA of the envelope in which Complainant mailed his administrative complaint, I denied these motions.[4]

identifying evidence. As no party submitted such evidence, I accord Exhibit K no weight. Respondent eventually withdrew its Exhibit J, which never had been sufficiently authenticated.

[4] As the date on which Complainant filed his OSHA complaint is disputed, I requested that OSHA submit the postmarked envelope in which it received the complaint. E-Smart objected that it was Complainant's obligation to submit the envelope, that he offered no excuse for failing to do it, and that its admission would prejudice e-Smart because it didn't have an opportunity to examine Complainant about the envelope.

I admit the envelope as ALJ Exhibit 1 over e-Smart's objections. E-Smart didn't dispute the identification or the authenticity of the envelope or the postmark on it. The envelope and postmark speak for themselves; nothing Complainant could say would amplify or clarify the notations that the Post Office put on the envelope. Really, e-Smart doesn't dispute that Complainant mailed the complaint on the postmark date (January 15, 2008), and other evidence shows the same date. *See* discussion below. Nothing stopped e-Smart from cross-examining Complainant at trial about the date on which he mailed the complaint (even if e-Smart didn't have the postmarked envelope until later), and nothing stopped e-Smart from requesting the envelope from the Occupational Safety & Health Administration on its own. Admission of the exhibit does not unfairly prejudice e-Smart.

On May 17, 2011, Complainant requested that I take official notice of allegations that the Securities and Exchange Commission raised against e-Smart in an action filed in a district court. *See U.S. Securities and Exchange Commission v. e-Smart Technologies, Inc., et al*., 1:11-cv-00895-JEB (D.D.C. May 13, 2011). As the complaint contains only allegations, and Complainant offered nothing to show the relevance of mere allegations, I found the matter irrelevant and denied official notice.

Respondent included in its closing brief, filed more than three months after trial, a motion to re-open the record: (1) to add the transcript of a deposition that Complainant gave three years earlier (in January 2008) in a different case; and (2) to resume the hearing to cross-examine Complainant about that deposition testimony. The motion is denied as untimely and without foundation.

Respondent does not suggest that it offered this long pre-existing evidence at trial; rather, it contends the deposition transcript was unavailable at that time. It blames Complainant, who produced some 400 pages – but not all – of the transcript in discovery. It argues that it couldn't get a full copy in time for trial.

What this neglects is that, unlike Complainant, e-Smart was a party to the action in which the deposition was taken. E-Smart knew about the deposition: (1) its counsel was present at the deposition, and (2) as e-Smart states, Complainant produced significant portions of the transcript during discovery in the present case, thus reminding e-Smart that the deposition had occurred. As a party in the other case, e-Smart could have obtained a copy of the transcript at any time from the court reporter who transcribed it. E-Smart also could have made a discovery demand on Complainant for the remainder of the transcript; if there was a basis and if necessary, e-Smart could have moved to compel. E-Smart did none of this. If the transcript was unavailable to e-Smart, it was only because e-Smart did nothing to get a copy despite knowing about it.

Finally, were I to consider the proffered deposition testimony, it would work against e-Smart anyway. I discuss this below in connection with e-Smart's contention that it did not constructively discharge Complainant. According to e-Smart, the evidence from the deposition would show that Complainant knew that the Company sometimes didn't pay its contractors and that, in fact, when Complainant worked as a contractor for e-Smart, he stopped working when e-Smart failed to pay him. E-Smart argues that Complainant thus shouldn't have inferred from the Company's later failure to pay him employee wages that it was firing him.

But this neglects that, if Grace and the Company knew that a failure to pay Complainant would lead to his stopping work, and if she and the Company repeatedly failed to pay his salary knowing this, it implies an intent to have Complainant stop working and for the employment to end; if anything, it is consistent with Complainant's constructive discharge theory.

Most curious about the trial was the absence of the obviously relevant defense witnesses. Complainant performed his work on the 10-K at the behest of Mary Grace, who was both e-Smart's Chief Executive Officer and its Chief Financial Officer. He worked on the 10-K with e-Smart's outside counsel Maranda Fritz and its in-house accountant Tony Russo. Yet e-Smart called none of these principal actors as witnesses.

Grace and Russo were also the persons who knew the most about Complainant's allegations of constructive discharge. Complainant reported directly to Grace. He asserts that, in retaliation for his opposition to a false 10-K, Grace took his most central work assignment from him without notice or consultation, ostracized him, and failed to correct the Company's repeated non-payment of wages to him (despite Complainant's having notified her). Grace would be an expected witness on these allegations. To the extent that e-Smart would maintain that it wasn't singling Complainant out for non-payment of wages but was having financial problems that led to its non-payment of several employees of whom Complainant was merely one, Grace (as Chief Financial Officer) and Russo (as accountant) would know about this. Again, neither testified.

Instead of calling as witnesses the people who could respond substantively to Complainant's allegations, e-Smart offered only the testimony of two engineers who worked on the Company's technology development. Their involvement was so tangential that e-Smart didn't so much as mention either of them in its closing brief.

Once a complainant establishes that retaliation for a protected activity contributed to an employer's adverse actions, the burden shifts to the employer to show *by clear and convincing evidence* that it would have taken the same actions irrespective of the employee's protected activity. With e-Smart's failure to present *any* testimony from the people most knowledgeable, it would require a considerable leap for e-Smart to meet this heightened evidentiary burden. Here, it failed to meet that burden.

Findings of Fact

Parties. E-Smart doesn't dispute that it is a publicly traded company within the ambit of Sarbanes-Oxley's whistleblower protection provision. *See* 18 U.S.C. §1514A(a).[5] The Company is engaged in the development of a smart card that can verify its user's identity through fingerprints. C.Ex. 27 at 4; Tr. 44, 60. Its Chief Executive Officer and Chief Financial Officer is Mary Grace. Tr. 5-7, 45.[6]

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[5] Incorporated in Nevada in 2002, e-Smart has a class of securities registered under section 12 of the Securities Exchange Act of 1934. Tr. 5-7; C.Ex. 27 at 4.

[6] E-Smart's corporate parent is IVI Smart. That company was a party to a severance agreement with Complainant as a part of his employment package at e-Smart. Complainant argues that IVI Smart and e-Smart, taken together, amount to an "integrated employer" and share liability under the Act. C.Ex. 2; C.Ex. 61 at 9. But IVI Smart is not a party to this action, and no award can be ordered against it. Complainant initially moved to join IVI Smart as a party respondent, but he withdrew the motion before I ruled on it. Having withdrawn the motion, Complainant cannot contend now that IVI Smart is necessary or indispensible, and I find in any event that it is not. For reasons I discuss below, any severance from IVI Smart would be duplicative of remedies that I will award Complainant and is not available. *See infra*, n. 9.

Complainant has a bachelor's and a master's degree in electrical engineering from Rice University. Tr. 40. He has worked at large companies – including General Dynamics and Walt Disney Technologies – as well as emerging high tech companies. *Id.* He has experience writing software and designing integrated circuits as well as supervising hardware and software design teams. *Id.* He has overseen the design and manufacture of disc drives. *Id.* at 40-41. He has considerable management experience as a chief executive officer, president, vice-president of sales and marketing, and vice-president of development. *Id.* at 41-42.

Complainant's work as a litigation consultant. On September 11, 2006, prior to any contact with Complainant, e-Smart sued two of its founders, Wayne Drizin and Michael Gardiner, who had left the business and started a competing firm. *See E-Smart Technologies, Inc., et al. v. Drizin, Gardiner, et al.*, Case No. C-06-05528 MHP (N.D. Cal.) ("the *Drizin* litigation").[7] E-Smart alleged that when Drizin and Gardiner left the business, they stole certain e-Smart trade secrets and later infringed its patents.

In theory e-Smart was still developing a smart card despite the alleged theft. But by November 2006 (two months after filing the lawsuit), e-Smart had no technical employees on staff. Tr. 43-45; 349. The lack of internal technical expertise led Grace to engage Complainant as a litigation

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[7] On May 24, 2011, Hon. Marilyn Hall Patel (N.D. Cal.), the district judge assigned to the *Drizin* litigation, dismissed the case as a contempt sanction against e-Smart and Grace personally. When the contempt issue arose, it was assigned to another judge, Hon. William B. Shubb (E.D. Cal.), for hearing. In an order filed on May 18, 2011, Judge Shubb found e-Smart and Grace in civil contempt. He referred the matter back to Judge Patel to impose sanctions.

Judge Patel noted that a Special Prosecutor had established to Judge Shubb's satisfaction by clear and convincing evidence that Grace had stolen defendants' proprietary smart card at a court-ordered settlement conference. Judge Shubb had observed that e-Smart was "a sham company"; he was not persuaded that "'Grace's concern for its shareholders extends beyond the financial gain they bring her.'" He concluded that Grace used litigation as a business tool, not as an avenue for dispute resolution.

In her rationale for dismissing the case, Judge Patel agreed that e-Smart and Grace were using the litigation as a business tool, which she viewed as "an abuse of the judicial process [that] essentially amounts to an unfair business practice." She noted that e-Smart had been recalcitrant about identifying precisely what trade secrets had been stolen, and when it finally identified some, a Special Master knowledgeable about the technology concluded that many were not trade secrets. Judge Patel found that the litigation "smacks of bad faith and has been conducted by plaintiff in that fashion." She therefore dismissed e-Smart's case.

E-Smart's appeal is pending before the Ninth Circuit. *See* Case No. 11-16345 (9th Cir.).

During the present litigation, I took official notice of certain procedural facts of the *Drizin* litigation. In particular, I noted when e-Smart moved here for a continuance on the eve of trial because of a change in counsel that Judge Patel had found that e-Smart routinely changed counsel on the eve of deadlines so as to delay and extend the litigation. Similarly, when e-Smart argued that it needed a continuance because Mr. Saito could not travel to the hearing, I took notice that e-Smart shortly before had argued to Judge Patel that Mr. Saito could not travel to San Francisco; she'd rejected the argument; and Mr. Saito had appeared as required. I also noted that this meant he'd been in San Francisco days before the hearing in the present matter; could have remained in San Francisco for the hearing if return travel would pose difficulties; could have given a perpetuation deposition while he was in this country; and yet e-Smart sent him back to Asia without steps to preserve his testimony or make him available at trial.

Beyond these limited instances related to scheduling and discovery, however, I have not taken official notice of the *Drizin* litigation. I have reached separate findings and credibility determinations based solely on the record before me as the parties developed it and irrespective of Judge Patel's findings. Judge Patel never made factual findings on the merits in the *Drizin* litigation.

consultant in November 2006. *Id.* Complainant was to collect evidence about the development of e-Smart's technology and to help prepare court filings. Tr. 262-64. He was to work closely with Grace and the Company's outside counsel, Maranda Fritz. Tr. 286-87.

Complainant set out to learn what technology e-Smart currently had and to look for evidence that its technology had been stolen. Tr. 264. When he discovered that e-Smart had no engineers on staff, he concluded that there was no ongoing development. Tr. 44-45. He thought it "very peculiar and very risky that a development company had no engineers working for it." Tr. 349.

Complainant was in frequent communication with Grace and Fritz. *Id.* He raised the lack of engineers with Grace but found her response unclear. Tr. 350-51. She referred him to a former Company network systems engineer, whom Complainant interviewed. Tr. 265. As this was the only contact Grace suggested, Complainant didn't interview anyone else. *Id.* He did ask Grace to see one of the smart cards, but she didn't arrange it. Tr. 44.

When Complainant turned to Fritz, she gave him some disk drives and records, but they contained nothing significant about the design of a smart card. Tr. 264, 281. Much of what had been on the disks had been erased, leaving only a few software and programming files. Tr. 265, 272-73. The erasures reflected a pattern of large numbers of files being deleted in a few operations; to Complainant this was inconsistent with normal use. Tr. 272-73. The limited recoverable data related to circuit design for the card, not software. Tr. 277-78.

In December 2006, at Grace's direction Complainant visited the San Diego offices of a company called NexGen. Tr. 303-04; Tr. 308. Grace told him that NexGen had manufactured smart cards for e-Smart, and that they might have e-Smart technology or documentation. Tr. 303; Tr. 306-07. Complainant met with a couple of NexGen representatives. But because NexGen and e-Smart were in an ongoing billing dispute, the NexGen personnel refused to tell Complainant whether NexGen had any e-Smart information or technology. Tr. 304. Complainant told Grace what happened; her response was that e-Smart would sue NexGen. Tr. 311. At no point, either as a contractor or later as an employee, did Complainant find any e-Smart technology through NexGen. Tr. 311-12.

In all, Complainant concluded that e-Smart had no functioning smart card.[8]

Complainant also noticed signs of financial weakness. On occasion, the Company paid him and other contractors late. Tr. 283-86. In December 2006, he reviewed the Company's annual 10-K report for 2005. Tr. 282. He read it to show that the Company was still developing a product for future sale and wasn't making any money. *Id*. This, of course, was consistent with his not finding a functioning smart card.

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[8] It seems that the Company exhibited some kind of demonstration smart cart at a show in Bussan in 2005 (and perhaps also in Paris and Singapore, although the record falls short of establishing these). Tr. 808, 882. Complainant was told about the shows by the summer of 2007 but felt they were irrelevant to developing a smart card for the Company's present use. Tr. 533. (Although Company witness Soliven refers to shows in late 2007 and in 2008, it is unclear whether the cards he mentions all were e-Smart cards. *See* Tr. 850-51. In any event, this occurred too late to have influenced Complainant's drafting on the 10-K discussed below.)

In March or April 2007, Grace told Complainant that e-Smart's former chief technology officer, Tamio Saito, was returning. Tr. 351. Two other engineers, Kazyuo Sato and Kuniaki Kudo, resumed working on e-Smart projects at that time. Tr. 354-55.

Complainant's hire and initial work as an e-Smart employee. On May 1, 2007, about six months after she retained Complainant as a consultant, Grace hired him as e-Smart's Chief Operating Officer, reporting directly to her. Tr. 5-7; 47-48. Grace (acting for e-Smart) and Complainant entered into a written employment agreement.[9] *See* C.Ex. 1 at 3. It provides for a formal job description to follow, but none ever did.[10] *Id*. 1 at 1; Tr. 54-55. The compensation package consists of a base salary of $377,000 with performance bonuses up to 150 percent of that, stock options, and benefits. C.Ex. 1 at 2-3. The agreement provides for employment at will and has a merger and integration provision, which states that it is the entire agreement "between the parties" to it. *Id.* at 4.[11]

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[9] In addition to the employment agreement, there is also an offer letter from e-Smart and a severance agreement with IVI Smart, C.Ex. 2, 3. I find these two other documents irrelevant.

The offer letter sets out an abbreviated version of the terms in the employment agreement. Under the employment agreement's merger and integration clause, the offer letter is merged into the final agreement. *See* Cal. Code Civ. Proc. §1856(a) ("Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.")

The severance agreement presents more complex questions. Complainant seeks an award of damages under this agreement. The agreement provides that if e-Smart terminates the "employment for any reason other than for Cause," IVI-Smart will pay Complainant a year's base salary plus whatever bonus he got paid in the preceding year. C.Ex. 2. Of course, e-Smart contends that it never terminated Complainant's employment. If, however, it did terminate the employment, e-Smart doesn't dispute that it was without cause as that term is defined in the severance agreement.

The merger and integration clause in the employment agreement does not affect the severance agreement. The clause, by its express language, merges and integrates only agreements between the parties to the employment agreement. That would extend to Complainant and e-Smart only; it does not extend to an agreement such as the severance agreement, to which e-Smart is a stranger and IVI Smart is a party.

But Complainant cannot benefit from the severance agreement in the present action for two reasons. First, IVI Smart is not a party; no remedy can be awarded against it. Second, if Complainant prevails, an award of back wages, interest, and reinstatement will make him whole: It will put him in the position he would have been in had the employment not been terminated. (Under certain circumstances, front pay in lieu of reinstatement might be a required option to address future anticipated losses.) That is the extent of the remedy the Act provides. *See* 18 U.S.C. §1514A(c)(1). Having been put in the economic position he'd have been in had he remained employed, Complainant cannot also get severance to compensate him for the loss of those same wages. To allow severance plus lost wages would be duplicative and provide a windfall to Complainant; it would exceed make whole relief.

[10] Complainant said he was comfortable without a job description: he felt that he understood the job from prior work as a chief operating officer. *Id.* Of course, that does not mean his understanding of the job was the same as Grace's.

[11] There is no dispute and no question that Complainant's status was to be that of an employee, not a contractor. Grace's initial draft of the employment agreement provided that e-Smart wouldn't withhold payroll taxes; Complainant was to pay his taxes directly. Consistent with his status as an employee, Complainant rejected this and required that he be paid as an ordinary W-2 employee with routine payroll withholding taxes. Grace agreed to this. *See* C.Ex. 1 at 5; C.Ex. 4; Tr. 49-51.

E-Smart authorized Complainant to open a Company bank account into which Grace transferred funds from various IVI-Smart accounts.[12] Tr. 78-79. Complainant requested the account because he was concerned that, without an account he could control directly, he could not be confident that he'd be able to pay timely the contractors he engaged on behalf of e-Smart. Tr. 318. Complainant used this account to pay expenses for technology development; he also used it to issue e-Smart paychecks to himself and certain other e-Smart employees. Tr. 491-93. Grace often failed to deposit enough money in the account on time to meet expenses. Tr. 321-22; Tr. 492. But even then, Complainant was never late paying employee wages; he viewed that as a Company's first priority. Tr. 493-94.

Among his initial tasks as Chief Operating Office, Complainant began to prepare an operating budget. Tr. 324-26. He asked Grace, Fritz, and accountants Tony Russo and Lily Li for information about income and expenses. Tr. 326-28. He got some information from the accountants but none from Grace or Fritz. Tr. 343.

Complainant also continued to assess the Company's technology. Tr. 55-56. With Saito having recently returned, Grace told Complainant that e-Smart had a history of contracting out technology development to Saito's company, Big Bang Technologies.[13] Tr. 56-59. Complainant went to Big Bang Technologies' San Jose facility in May and June 2008 and met with Saito and three engineers who were working there on e-Smart's smart card: Ananth Krishnan, Kazyuo Sato, and Kuniaki Kudo. Tr. 56, 58-59. The record is thoroughly conflicted about what company employed these engineers at what time; it appears that even the engineers themselves were often uncertain who their employer was.[14]

[12] Grace's using IVI Smart funds to pay e-Smart expenses brings into question the degree to which these companies complied with corporate formalities and operated as distinct and separate entities. Other evidence raises the same question. For example, some employees were unable to determine which entity employed them. *See infra* note 14. But, again, since IVI Smart isn't a party, I do not reach this question.

[13] It was not altogether clear whether Grace was resuming an earlier relationship with Big Bang Technologies, whether an earlier relationship had been continuing, or whether this was largely a new relationship.

[14] For example, there is conflicting evidence about whether these engineers were working for Big Bang Technologies or for e-Smart at this time. *Compare* Tr. 59 (Complainant understood they "were billing hours to e-Smart, [and] were simultaneously working on other products for Big Bang Technology"); Tr. 875-77 (Krishnan indicates that he was working for Big Bang Technologies at this time); C.Ex. 67 (unsigned employment offer letters indicate that the three were working for either e-Smart, IVI Smart, or BioSensor (another IVI entity)); Tr. 946-47 (after signing the offer letter, Krishnan thought he was working for e-Smart, but his paychecks continued to come from Big Bang Technologies until April 2008); Tr. 302 (Kudo also worked full time for Apple during this time); Tr. 403-04 (Complainant understood that Sato was a Big Bang Technologies employee and that Kudo was a contractor for e-Smart).

Krishnan had been working on a smart card for an IVI-related company as early as 2005. Tr. 868. He'd left in August 2006 because he'd felt the Company wasn't adequately funding the card development. Tr. 872. He went to Saito's company, Big Bang Technologies, and continued to work there on a smart card. *Id.* In his testimony, he was confused about who his employer was at various times; the constant for him was the work – developing a smart card – and his connection to Saito, not any relationship with particular companies. Tr. 874. As Krishnan testified, he followed Saito irrespective of who the employer might be. *Id.*; Tr. 877-78; Tr. 898 ("So, I don't know whether e-Smart was here and ID Smart was here, you know. I mean those kinds of confusions. So, I'm at a lower level, so I didn't care about [it]. I mean, I was just following my manager [Saito] and trusting him."). Krishnan testified that when he began working at Big Bang Technologies in 2006, he thought he was being paid by Michael Gardiner, but actually e-Smart was suing Gardiner at the time in the *Drizin* litigation; Gardiner had left e-Smart, and if Krishnan

Complainant asked to see prototypes of the smart card and documentation. There was no functioning prototype, nor was there any documentation of a kind Complainant would have expected, given that e-Smart had been working on a card, as he understood it, since 2000.[15] Tr. 57-58, 408, 654. Complainant found Big Bang Technologies dysfunctional and its engineers marginally productive. Tr. 74-75.[16]

That conclusion, together with concerns about e-Smart's finances, led Complainant to restructure the engineers' compensation. He cut their base salaries but allowed them to earn back the cut pay for performance; it became incentive pay. Complainant did the same for himself, reducing his own base salary from $377,000 to $245,000, with e-Smart to pay the difference if the team met certain goals. Tr. 389-90; R.Ex. T.

Complainant told Grace about the changes, and she approved them. *Id.* Complainant understood that he would still be eligible under the employment contract to a performance bonus up to 150% of his base salary. Tr. 391. The salary cuts took effect in mid-June 2007. Tr. 390; R.Ex. T.

With the incentive plan in place, Complainant began to manage the engineers closely. He met weekly with Saito, Krishnan, Kudo, and Sato; they set weekly goals, such as to produce particular software. Tr. 894. But Complainant observed little improvement over the next four or five weeks. *Id.*

By late June 2007, Complainant concluded that Big Bang Technologies lacked the capacity to move the project forward. He told Grace that he intended to end the contract with Big Bang Technologies. Tr. 74-75. Grace approved. *Id.* The result was that Saito and Krishnan continued working on the e-Smart smart card, but Kudo and Sato did not. Saito and Krishnan thought that changing staff mid-project was inefficient; Complainant believed it freed up resources for more productive use. Tr. 405.

During in the next two or three months, e-Smart hired two engineers: Marcello Soliven and Sinichi Kato.[17] Soliven had worked for e-Smart as a contractor as early as 2003. Tr. 803-04. He specialized in circuit design and primarily worked on the card's wireless communication and power management functions. Tr. 796-800. Kato appears to have picked up at least some of the job duties of Kudo and Sato, though his exact area of expertise is unclear. Tr. 823.

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was working for him, he was working for e-Smart's competitor, not e-Smart. Tr. 905. As of the time he met Complainant, Krishnan thought he was working for Big Bang Technologies on a smart card for e-Smart.

[15] Big Bang Technologies' computer server wasn't functioning, which made it more difficult to determine what Big Bang Technologies had done. Tr. 654.

[16] According to Sato, Saito told his engineers not to work on e-Smart projects. Tr. 654-55.

[17] The precise dates of hire are uncertain on this record. *See* Tr. 823 (Kato worked with e-Smart sometime after Kudo and Sato left); C.Ex. 171 (September 2, 2007 email from Soliven to Kato encouraging him to come work for e-Smart); Tr. 165 (Soliven became an e-Smart employee on August 20th or 21st); Tr. 817-18 (Soliven is unable to recall when he became an employee, though it was in the "mid to latter half" of 2007).

Grace enthusiastically supported these staffing changes. Tr. 74-75. In early July 2007, she wrote Complainant the following effusive email:

> I want to thank you for all you have done. Richard, you are one of the finest and most outstanding people I have ever met. You are so highly intelligent, multi-talented, innovative and creative, and such a gracious, noble and diplomatic gentleman. I thanked God today for the gift of you, for I believe it was the will of God that put us together. It is and will continue to be a honor and privilege know you and to work with you. [¶] I think we have an amazing and exciting purpose and journey ahead. I believe with all my heart it will be a monumental success.

C.Ex. 35 [sic]. Grace compliments Complainant's competence in other emails as well. When she asked him to prepare an executive summary description of IVI Smart Technologies, she wrote: "I know you can do this much better than I." C.Ex. 126. Grace and Complainant were in frequent telephone and email contact, often speaking several times per week. Tr. 286.

Moving technological operations to Korea. At the end of June 2007, Complainant concluded that e-Smart should transfer its technical development operations to its Korean subsidiary, e-Smart Korea. Tr. 73-75. While e-Smart Korea previously had been engaged only in sales and marketing, Complainant believed that Korea was a good environment for technology development because of the many other high-tech companies there. *Id.* Complainant began to work closely with e-Smart Korea country manager Richard Kim to transfer the work from Big Bang Technologies. *Id.* Saito closed Big Bang Technologies' offices; some of e-Smart's property at Big Bang Technologies was stored in a barn that Complainant owned until it could be shipped to Korea.[18]

In early July 2007, Complainant went on a month-long trip to Korea. He worked closely with Kim and Saito to set up development and manufacturing operations there. Tr. 393. They secured a 3,000 square foot office space. Tr. 401. E-Smart retained Brightside International at this time to consult on finding potential investors, developing business and marketing plans, and exploring collaboration with other companies. C.Ex. 135 at 1-2. Complainant worked with Brightside and prepared a presentation for them with Mr. Kim. He also continued to work from Korea with Fritz on the *Drizin* litigation and with e-Smart's outside patent counsel Charles Brainard on patent filings. Tr. 392-93.

While in Korea, Complainant saw a working prototype of an e-Smart card for the first time. The card had a sensor that could read a fingerprint, compare it to a database, and indicate a match with a green light or a failure with a red one. Tr. 59-60. But the card was not marketable. For example, it couldn't interact with a card reader and remote systems. Without this, it couldn't link to the cardholder's bank account to make purchases. Another inadequacy was that the fingerprint scanner was made of brittle silicone glass that would break in a person's pocket; it wasn't durable enough for use.

[18] The items stored in the barn included various computer components, files, and records. Tr. 203-04; Tr. 935. At least some of the things stored in the barn seem to have been obsolete or useless, though possibly not all of it. Tr. 203-04; Tr. 935-36. At some point, Krishnan, Soliven and Saito went to the barn to decide what needed to be shipped to Korea right away and what could wait. Tr. 935.

After his return to the United States, Complainant still could not find a Company plan for technology development. He began to write what he believed to be – and what apparently was – the Company's first plan of that kind.[19] He set particularized goals for steps that would lead to a marketable product.[20] E-Smart had developed very little of the needed technology by that time. Tr. 396.

Complainant's work on the *Drizin* litigation was then focused on settlement negotiations. Tr. 602. At Grace and Fritz's direction, he traveled to San Diego in August 2007 and met with Gardiner to discuss settlement. Tr. 569. There was some thought that, if the lawsuit could be settled, perhaps Gardiner would return to e-Smart, where his expertise could be useful. Tr. 76-77. But Grace soon cut off the talks. *Id.*; Tr. 569-70.

Complainant's edits to the 10-K. On July 30, 2007, while Complainant was still in Korea, Grace asked him to re-write a portion of e-Smart's draft 10-K annual report for 2006 for filing with the Securities and Exchange Commission. He was to edit the sections on technology, product development, and other recent developments.[21] C.Ex. 5.

Grace had known since at least July 10, 2007 that the Securities and Exchange Commission was interviewing e-Smart investors and consultants about the Company's compliance with securities regulations. Tr. 5-7. By the time Grace involved Complainant in the drafting, the Company was already more than three months late on the filing deadline for the 10-K report for calendar 2006. *See* 17 C.F.R. § 249.310b (deadline 90 days after end of calendar year); Tr. 5-7. Bringing Complainant into the compliance effort, Grace wrote to him:

> Tony Russo needs for us to rewrite and update these. Both he and Maranda [Fritz] think that there is too much wordy information in the text section of the 10-K. I think you would do the best job on writing and looking at the text in last years' 10-K and doing a good edit cutting out all of the extraneous information. I will look forward to seeing what you come up with. I know it will make it better. . . . We will be able to start the listing process for Nasdaq or AmEx once it is filed. It is also important for the funding transaction and to be in good standing with the SEC to get it filed as soon as possible.

C.Ex. 5. Grace copied Fritz and Russo on the email. *Id.*

[19] Brightside consultant Clisham reported to Brightside on September 8, 2007: "They are moving ahead blindly without a plan in place. . . . This company really needs to have a proper plan, not just something written on the back of a napkin." C.Ex. 19.

[20] The goals included designing a printed circuit board; choosing, obtaining, and testing components; developing fingerprint recognition software and software for communication between the card and a reader; developing assembly processes; and designing quality control testing. Tr. 329-30. The plan provided for the development of a more durable card, different types of fingerprint sensors, and a secure channel to a card reader. Tr. 395-96.

[21] The form is actually a 10-KSB, which is a 10-K for small businesses. The parties have referred to it as a 10-K, and for ease and clarity, I will do the same. For this case there is no material difference.

On August 1, 2007, Russo provided Complainant with the most updated draft 10-K; it substantially followed the 10-K for 2005. Tr. 5-7; 426-27; C.Ex. 5. Considering Grace's emphasis on the relationship between the 10-K on the one hand, and on the other hand getting funding and getting the Company's stock listed on national exchanges, Complainant understood that investors might rely on the 10-K when making investment decisions. Tr. 109, 169.

Complainant felt qualified to edit the assigned sections of the draft 10-K. Tr. 103-04. He felt that his investigation into the Company's technology and his completion of the technology development plan gave him what he needed to know to edit these sections.[22] *Id.*; Tr. 135-36.

There were troubling facts that required disclosure on the 10-K. For example, e-Smart had no history of significant income and had sustained a $74 million operating loss since its founding in 2000. Tr. 108-09; Ex. 6 at 32. Complainant emailed Russo to discuss questions about the 10-K, but, other than to confirm that it covered calendar 2006, Russo didn't respond. C.Ex. 101; Tr. 109.

After reviewing the draft that Grace provided, Complainant made extensive edits to the sections on e-Smart's history, technology, corporate structure, and competition. He added sections on the company's recent move to Korea and on its marketing plan. C.Ex. 6 at 4-6, 8-9, 17. He de-emphasized some potentially negative information – not by deleting it – but by moving it to less prominent positions in the report.[23]

Most of Complainant's edits were about e-Smart's technology and competition. Complainant believed these edits to be necessary because:

> The document contained significant misrepresentations and falsehoods regarding the state of maturity of the technology, regarding features of the products, regarding the company's manufacturing capability and production capability, regarding systems level capability of the company, regarding the competition, and regarding the company's intellectual property. Tr. 118.

For instances where e-Smart didn't have a technology but planned to develop it, Complainant changed the wording in the 10-K to indicate that it was an anticipated future development. Tr. 135. But if something neither existed nor was planned, Complainant deleted it. *Id.* His edits to the draft 10-K included:

- Complainant deleted a section on "Products" that he felt was largely inaccurate. Tr. 133-39. For example, it contained "particularly egregious false claims" about the prototype card's capabilities. Tr. 133-34.

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[22] Complainant did not find reason to discuss the edits with Saito. He understood that Saito knew a lot about the technology, but he felt that Saito's limited English proficiency made him a poor candidate to edit the 10-K. Tr. 103-04. Grace had not copied Saito on the emails about editing the 10-K and did not ask Complainant to talk to Saito about it. Complainant was aware of Saito's work through their weekly engineering team meetings in May and June and their discussions about setting up the operations in Korea. Tr. 74, 407-08.

[23] For example, Complainant thought the Company's founding through a reverse merger with a Nevada corporation might raise concerns; he moved the disclosure about it to a footnote later in the document. C.Ex. 6 at 3; Tr. 126.

- He deleted reference to a claimed system that would allow the card to communicate with many types of normally incompatible databases. The Company had no such system, was not working on one, and had no plan for one. C.Ex. 6 at 11, 14. Tr. 135, 137.
- He deleted a claim that the sensor on e-Smart's card was "unique." Other companies had smart cards that could compare a fingerprint (read by an onboard sensor) with a database and indicate whether there was a match. Tr. 136, 433; C.Ex. 6 at 12.[24]
- He deleted a claim that the card could run multiple applications at once and could support applications for multiple government agencies. E-Smart did not have a card that could do either of these. C.Ex. 6 at 12-13; Tr. 136-37.
- He deleted a claim that the card tested fingerprints with very few false positives and very few false negatives (a "zero-zero system"). C.Ex. 6 at 13-14; Tr. 136-37. There was no data to support this claim. Tr. 136-37.
- He deleted details of card readers that the Company "intended" to offer. C.Ex. 6 at 14. E-Smart hadn't developed any card readers; its only plan was to outsource them. Tr. 137.
- He deleted a description of "presto chango" card encryption: It didn't exist and there was no plan to develop it. C.Ex. 6 at 14; Tr. 137.
- He deleted statements about e-Smart subsidiary Homeland Defense, Inc., because it no longer existed; the representations about its marketing to the U.S. Government were false. C.Ex. 6 at 15; Tr. 138-39.
- He edited the section on patents and licenses to reflect his understanding of the Company's actual proprietary interests based on his personal work on the patent applications and his conversations with Grace about the licenses. C.Ex. 6 at 16; Tr. 139.
- He deleted statements that there were no competitors with comparable technology; he believed this to be untrue and planned to buy some technology from the competition for e-Smart's use. C.Ex. 6 at 16; Tr. 139-40.

Complainant sent his edits to Grace and Russo on August 12, 2007. C.Ex. 103. Grace never discussed Complainant's draft edits with him.[25] Tr. 151.

Two days after Complainant submitted his edits, Fritz emailed him, Russo, and Grace a new draft. C.Ex. 7. She commented:

> I think we should discuss the fact that this is such an entirely new and different document . . . . [D]o we want to make all of these changes at once? Are we ready for the impact that it would have amongst readers?

[24] One competing card used a different onboard sensor to achieve this result, but the card's functionality was substantially the same. Tr. 433.

[25] There was a conference call arranged for August 15, 2007. Complainant, Russo, and Fritz were present, but Grace didn't get on the call. Tr. 147-48. Grace got on a later call but only to exit immediately, stating that she had to go to a meeting. Tr. 151.

Id.

Complainant understood Fritz's concern about "readers" to be about investors. Tr. 143. He told her that his edits were factual, not stylistic, and that they were necessary if the 10-K was to be accurate. *Id.* Fritz was reluctant to make the edits because investors might think e-Smart had lied in past 10-K filings. *Id.* On August 14, 2007, Complainant wrote Fritz:

> Re. 10-K. You are the expert here. I've never been affiliated with a company on the pink sheets with such a checkered history and such a fabulous (as fables) public disclosure document. I have to follow you[r] lead as to how we begin to tell the truth.

C.Ex. 8.

In a phone call on August 14, 2007, Fritz told Complainant that she wanted to include his proposed edits but that Grace was unwilling. Tr. 149, 699-700. She said that Grace was planning to show the 10-K to Brightside partner Gerard Casale. *Id.*

The next day, Fritz advised Grace, Russo, and Complainant not to disseminate the draft. C.Ex. 51. Complainant responded that he wanted his name removed from future drafts. C.Ex. 9. He did not want his name attached to a report that would be "significantly misleading, if not fraudulent." Tr. 153-54.

On August 16, 2007, Fritz emailed yet another draft to Grace, Russo, and Complainant and requested that they "review it, line by line, as a new document." C.Ex. 10. She asked Complainant to focus on the technology section. She said the document might be sent to Gerard Casale before the end of the day. *Id.* She wrote, "Please understand that I want to address any issue regarding any inaccuracy in any of the language." *Id.*

The new draft still contained much of the text that Complainant had deleted in his edits. Tr. 156-59; C.Ex. 12. With his deleted language reinserted, Complainant gave up on most of his edits and suggested only two significant changes in the technology section. Tr. 156-59; C.Ex. 12 at 5-6. First, he edited claims about the card's "multi-application system"; he added language to show that this was planned for future development but not something that presently existed. C.Ex. 12 at 6; Tr. 158. Second, he again deleted the claims about the "zero/zero" false acceptance/rejection rate. C.Ex. 12 at 6; Tr. 158-59. He reminded Fritz that e-Smart hadn't measured the card's accuracy and had no data to support such claims. C.Ex. 12 at 6. That afternoon, Complainant sent these limited edits to Grace, Fritz, and Russo, along with a disclaimer about the limits of what he knew about the corporate history, structure, and past financial status. C.Ex. 11.

This concluded Complainant's involvement in the drafting of the 10-K. Tr. 164. Less than a week later, Grace abruptly began a series of actions that led in two months' time to the end of Complainant's employment with e-Smart.

Alleged Retaliation. Complainant returned from Korea to his normal duties. Tr. 164. He worked on the *Drizin* litigation, patent applications, business plans, and some financial forecasting. He began to plan a return trip to Korea. Tr. 164, 179.

Complainant met with the engineering team around August 20, 2007. Tr. 164-65; C.Ex. 15 at 2. Allister Clisham and Gerard Casale, two people associated with Brightside, joined the meeting. C.Ex. 15 at 2. Casale was a Brightside partner; Complainant understood Clisham to be an independent technology expert whom Brightside brought in to assess e-Smart's technology. Tr. 165-66. It turned out, however, that Clisham's role was to be much more.

On August 22, 2007, Grace announced staffing changes. C.Ex. 15. To Complainant's surprise, Clisham was brought in as Chief Operating Officer of IVI Smart, in charge of "the development, production, manufacturing, delivery and implementation, with Tamio [Saito], of all the company's [intellectual property]."[26] *Id.* This included all of the technology-related work Complainant had been doing; all of that was taken from him and assigned to Clisham. As Grace stated:

> Richard's [*i.e.*, Complainant's] position as COO of e-Smart will change from technology development, production, manufacturing and delivery, which he will transfer to Allister/IVI to working on the funding and building of e-Smart and on the NASDAQ listing requirements in order to list the Company as soon as possible. Tasks to accomplish this include Richard completing a th[o]rough and comprehensive Business Plan; working with Tony [Russo] to combine the cash flows Tony has prepared for the funding; providing the support and completing all that is necessary and required by our financing partners and for listing . . . in order to facilitate the financing and release of funds on a schedule to accelerate the Company's growth. Richard will work with [outside counsel] Charles [Brainard] and Philip to complete all of the paperwork related to all patent filing . . . . Richard will continue to work with Maranda [Fritz] and Charles [Brainard] on all paperwork necessary to conclude the current litigation.

C.Ex. 15. It was now Clisham who was to travel with Saito on the next trip to Korea. Id. Complainant would join Grace and go there with her a week or two later, after they completed some funding-related tasks – a trip that never occurred.[27] *Id.*; Tr. 172.

Grace gave Complainant no advance notice of these changes. Tr. 168-69, 171. Only ten days earlier, she'd told him that he "must concentrate [his] efforts and those of the engineers in Korea . . . on producing the card" and not to worry about litigation related to BioSensor because, "The most important thing is to get Korea and the cards in production." *Id.*; C.Ex. 165. After Grace's announcement, Complainant made several attempts to contact her, but she didn't take his calls. *See* C.Ex. 15; Tr. 171.

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[26] It appears that Clisham was surprised by this announcement and never considered himself to be an e-Smart employee; he understood himself to be a Brightside employee working on e-Smart projects. *See* C.Ex. 32 ¶ 2, 9.

[27] Complainant doubted that getting listed on the NASDAQ was realistic. Tr. 169.

On the same day that Grace announced the staffing changes, Russo directed Complainant to close the e-Smart bank account he'd been using. C.Ex. 14; Tr. 172-73. Grace had recently mentioned that the account might have to be closed because of legal concerns about allowing a chief operating officer – as opposed to the Company's accountant – to control a bank account. [28] C.Ex. 165. When he directed Complainant to close the account, Russo explained that Grace had ordered that the e-Smart's financial operations be consolidated with those of IVI Smart. C.Ex 14. Complainant was concerned that closing the account ended one of his management functions, but he got the account closed within a day or two. Tr. 173, 625-26.[29]

Rather than respond to Complainant's phone calls or engage with him on those of his duties that were to continue under the reorganization, for the most part Grace limited her contact with Complainant to ministerial and clerical tasks. For example, on August 24, 2007, she asked Complainant about parts orders for sensors and regulators. C.Ex. 46 (email of August 24, 2007, re parts orders for sensors and regulators); *see* Tr. 177. This was ministerial and now Clisham's staff's responsibility, not Complainant's.[30] Tr. 177, 179. She contacted Complainant about some payroll questions. C.Ex. 22, 37, 38. She did email him once about the business plan (C.Ex. 21), but this fell far short of the frequent phone calls and emails Grace and Complainant exchanged prior to his work on the 10-K.

Complainant tried to reestablish more effective communication with Grace. Tr. 179. On September 13, 2007, he wrote:

> We haven't been working together very effectively for awhile now, in my opinion. I believe I can be much more productive and be a much stronger team contributor as you and I begin communicating together better. You have not called me or responded to my calls since August 18, when we had the brief conference call with Maranda.[31] If you find it too difficult to communicate with me orally, I am disappointed, but I understand and accept your decision. Either way, I will continue to work for the success of e-Smart.

C.Ex. 52. In this email, Complainant also addressed a plan for listing e-Smart on the NASDAQ and KOSDAQ, work that he and Grace were to be doing together. But Grace never responded either on the communications issue or on the exchange listings. Tr. 181.

Grace had not criticized Complainant's performance and didn't do so at this time. Tr. 181; Tr. 510-11. On the contrary, when Complainant sent Grace an updated business plan later in

[28] The Company's allowing Complainant to pay his own salary out of this e-Smart account is irregular. Of course, it also appears irregular that the funds e-Smart used to pay its obligations out of this account originated from IVI Smart. But these irregularities appear to be irrelevant, and I draw no inferences based on them.

[29] Grace also told the Company's travel agent at this time that she would no longer authorize Complainant's use of a Company credit card for travel. Tr. 174-76. Nothing suggests that Complainant knew this at any time before he stopped working at e-Smart.

[30] Grace eventually redirected the ordering of components such as these to engineer Krishnan. C.Ex. 22.

[31] This call about the *Drizin* litigation pre-dated Grace's redefining Complainant's job duties. Grace was on the call only briefly. She told Complainant to take direction from Fritz on any settlement negotiations. Tr. 180-81.

September 2007, she responded: "This is a very good business plan draft. Good job! I am very impressed. It will be most helpful to me." C.Ex. 21; Tr. 181; Tr. 514-15. On September 30, 2007, she reiterated that Complainant would continue to work with her and Fritz on the ongoing litigation and on getting e-Smart listed on stock exchanges. C.Ex. 22.

Meanwhile, much else was happening. E-Smart learned by mid-September 2007 that the Securities and Exchange Commission had begun a non-public investigation of the Company. Tr. 5-7. At the same time, Complainant started to encounter problems getting paid. While he was allowed to pay himself out of the e-Smart bank account, he'd paid himself twice monthly, on the first and fifteenth of the month, keeping an e-Smart accountant informed of each payment. Tr. 491-92. When the Company required him to close the account, he had to rely on Grace and Russo to pay him.

The first paycheck following his closing of the bank account was due on September 1, 2007. It came a few days late. Tr. 182. When the September 15, 2007 deposit was overdue, Complainant wrote to Grace, but e-Smart didn't pay Complainant until September 24, 2007 – at least a week late. *Id.*; C.Ex. 53; Tr. 182.

When the October 1, 2007 deposit did not appear in his account that day, Complainant emailed Grace the next day, October 2, 2007. C.Ex. 38. Grace fabricated an excuse that e-Smart had deposited the pay to some other of Complainant's accounts; in fact, there had been no deposit. Tr. 182-84; C.Ex. 54. On October 4, 2007, Complainant wrote to Grace:

> Over the past few weeks you have continued to reduce the scope of my activities and have avoided all personal telephone communication with me. . . . [B]ased on your actions, it may make sense for us to discuss a separation. I do not want to stand in the way of your success with e-Smart, so I'm willing to discuss a separation if that is your preference.

C.Ex. 39. Complainant copied Fritz and asked for her help to rebuild the relationship with Grace. Tr. 186-87; Tr. 588-93; C.Ex. 130.

Two days later, on a Saturday, October 6, 2007, Grace responded:

> Dear Richard,
>
> I will try to reach you over the weekend. [¶] I have just had assigned to Ananth [Krishnan] menial administrative tasks so he can start doing them so we can start on everything we have to do to list the company. This is only waiting on the auditors to finish the audit and the 10K so we can start. I thought that would be done last week, but I expect it to be done this week. Also, I spoke to Maranda and she said we have to prepare [for] the [*Drizin*] depositions related to the deleted files and she has to work with you on this. In all my e-mails I said these were the most important, besides the financing which I am also doing in parallel. After we finish these you and I will work together to build the structure and organization of the company. Then it will get interesting. I know the first few

> months have been hard. You were serving as an engineering manager and not COO. However, we were in the transition process of moving the company from an R&D company to a company that delivers product, and we had the complication related to the lawsuit hindering our moving forward as fast as we would like. I think while we wait, the first thing to do is to coordinate with Maranda on what needs to be done on the depositions and the lawsuit, and also the BioSensor lawsuit which is connected. I believe if we can put the pressure of a second lawsuit on both Gardiner and Drizin that we can resolve both suits expediently. Have you read the BioSensor Complaint? If not, I will send it so you can and will introduce you to Judge Klein so you can take over what needs to be done. As soon as the audit is done, then I want you to start working with the investment banker on all that needs to be done to list. I am sorry I missed your call. I received no message from you.
>
> Please leave a message on my . . . voicemail if you call and I will call you back. [¶] Let's plan to talk on Tuesday. I think Monday will be a holiday, and perhaps we can conference Maranda. [¶] I do appreciate you and value your talents and abilities and just want them utilized in the proper and important management areas, and not in less important tasks that can be delegated to others to do. [¶] I think we can make e-Smart a great success and it will be by allocating our talent and resources in the right areas and making the right moves.

C.Ex. 23.

Complainant responded on the same day, thanking Grace for her "kind words" and indicating that he would be available all weekend for a call. But he reiterated:

> I no longer leave any messages when I call you because the message is always the same – "We need to talk." Many issues for us to resolve if we are to continue working together, but most important is to re-establish our direct telephone communication. [¶] Separately, the payroll deposit due on October 1 has not been posted to my account yet. Please do so at your earliest convenience.

Id.

Complainant called Grace on Sunday. *Id.* She said she couldn't talk because she was in a meeting. *Id.* Complainant followed up with another email about his pay being late: "Also awaiting the payroll deposit that was due on October 1. By the tenth of the month, I will have to report the oversight to the California Labor Board." *Id.*

The following week, Complainant continued to work on financial forecasts, the litigation, and the plans for e-Smart's Korean operations and an anticipated trip to Korea in early November 2007. Tr. 190-91; C.Ex. 58. Grace's promised Tuesday call never happened. When

Complainant's next paycheck was due on October 15, 2007, e-Smart still hadn't paid the October 1 check, and now it also failed to pay him for October 15th.[32] Tr. 182.

Complainant's resignation and alleged constructive discharge. On October 17, 2007, Complainant wrote Grace an email, the subject of which was "Resignation." Tr. 191; C.Ex. 24. Complainant expressly asserted that e-Smart had constructively discharged him. As he wrote:

> 1. The company has failed to pay my salary on October 1 and again on October 15.
> 2. You have repeatedly reduced the scope of my responsibilities, to the point that I now have very little meaningful work to do for the company.
> 3. You have repeatedly refused to communicate with me directly by telephone since August 22, despite my numerous calls to you and emails requesting that we talk directly.
> 4. You have refused to reinstate my salary to its original amount after removing development activities from my scope of responsibility.

C.Ex. 24. Complainant demanded $31,417 in back pay for the period of September 16 through October 15, 2007; $8,800 for reinstatement of "temporary salary deferral"[33] for the period of August 22 through October 15, 2007; and $377,000 in severance. *Id.* He also demanded a certificate for one million shares of unrestricted e-Smart stock, which he said was owed him per the employment agreement. *Id.*

Fritz responded the same day that e-Smart did not accept Complainant's resignation. C.Ex. 25. She wrote that e-Smart "regrets the delay in the payment of your salary" and assured him that he would receive the funds within 72 hours. *Id.* Fritz also disputed on e-Smart's behalf Complainant's assertion that the Company had constructively discharged him:

> Your responsibilities have been altered, but that is consistent with your position and based on allocation of resources, performance and the needs of the Company as identified by its Chief Executive. Regarding the issue of communication, it is my understanding that Grace has spoken with you directly, has asked that you focus on particular issues, and is in e-mail communication with you. While this method of communication may be, in your view, less conducive to maximum productivity, it is not a basis for a claim of constructive termination.

Id.

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[32] E-Smart might also have been paying Soliven late at this time, Tr. 819, but there's no evidence that Complainant knew of this. Although Krishnan testified that e-Smart sometimes paid him late, he didn't identify when this happened, and again, there is no indication that Complainant knew of it. Tr. 893.

[33] Complainant apparently was asserting that, once Grace removed his technology development duties, he no longer was in the engineering staff's incentive pay program and had returned to the original pay rate in his written employment contract.

E-Smart never paid the wages owing for September 16 through October 17, 2007, and never contacted Complainant to return him to employment following his October 17, 2007 "resignation." Tr. 195.

Filing the complaint. Complainant filed his administrative complaint with the Occupational Health & Safety Administration by certified mail on January 15, 2008. C.Ex. 33; ALJ Ex. 1. In a letter dated January 23, 2008, the Occupational Health & Safety Administration confirmed that the complaint was filed on January 15, 2008. C.Ex. 144.

Alleged Post-Employment Retaliation. Complainant alleges that e-Smart continued to retaliate after the constructive termination and after he filed his administrative complaint. He cites the following:

- E-Smart never provided him with an IRS Form W-2 for 2007. Tr. 199. On February 14, 2008, Complainant requested the form from Grace. C.Ex. 59. She never responded.

- E-Smart has refused to lift the restrictions on Complainant's sale of 500,000 shares of stock e-Smart gave him in the spring of 2007. C.Ex. 36; Tr. 197-99. Complainant asked Grace to lift the restrictions, but she didn't. Tr. 198. The Company gave unrestricted shares to some others, including 2.5 million shares to Saito. C.Ex. 94; Tr. 198-99.

- E-Smart filed a police report against Complainant, which Complainant contends was false. Through Krishnan, e-Smart alleged to San Jose, California police on February 5 and March 11, 2008 that Complainant failed to return Company property when he left its employ. C.Ex. 96. The property allegedly consisted of three laptop computers, three LCD screens, and certain fingerprint sensors. *Id.* at 2. Krishnan said e-Smart also was concerned that Complainant was disclosing proprietary Company information to its competitors. *Id*. E-Smart finally alleged, through Krishnan, that Complainant had embezzled a total of $42,000 from a Company bank account. *Id.* at 1. Having reviewed these complaints, the district attorney declined prosecution.[34] *Id.*

Administrator's Determination at Occupational Safety & Health Administration. On February 26, 2010, the Administrator issued a determination of reasonable cause to find a violation. C.Ex. 26. He ordered, among other relief, that e-Smart immediately reinstate Complainant. *Id.* at 5. Complainant wrote promptly to Grace, offering to return. C.Ex. 26. Neither Grace nor e-Smart responded. Tr. 5-7. The Company failed to comply with the order of immediate reinstatement.

Other post-employment developments. On October 17, 2007, the day that Complainant wrote to Grace that he viewed himself as having been constructively discharged, the Securities and

[34] It was Grace who told Krishnan that Complainant had stolen Company property and money from the Company bank account. Complainant denies the allegations. Tr. 202-03, 205. He says that, if the allegations relate to the property moved from Big Bang Technologies and stored in his barn, Soliven, Sato, Krishnan, and Saito all took items out of the barn during those months. Tr. 203-04. Complainant recalled discussing some missing computers and LCD screens with Saito; he said that Saito ultimately found some of them, and Complainant found a computer, which he'd sent to Saito in Korea. Tr. 204-05. E-Smart offered no evidence at trial to show a good faith basis for the police complaint.

Exchange Commission suspended trading in e-Smart stock in part because e-Smart had failed to make required periodic filings (such as the 10-K for 2006). Tr. 5-7. The Company promptly finalized and filed the 10-K a week later, on October 24, 2007. C.Ex. 13. The final version filed with the Securities and Exchange Commission contained none of Complainant's edits to the technology section; in the other sections, some of his edits were included, and many were not. *See* C.Ex. 13; Tr. 160.

But in a remarkable about-face, e-Smart included in its next-filed 10-K (for calendar 2007) many of the changes that Complainant had argued were necessary to make the 2006 report accurate. *See* C.Ex. 27. In particular, the 10-K for 2007 states, among other things:

- "Except for the activities of its subsidiary, e-Smart Korea, Inc., the Company has not produced or marketed any products, and has not generated any significant revenues to date from the commercialization of any biometric smart cards and sensors." *Id*. at 31.
- The company had made no volume shipments of products to customers.
- E-Smart "has yet to generate any significant revenue from operations."
- The company is in a "development stage" with either no principal operations or no significant revenue from such operations.
- "To date, there has been no activity with [Homeland Defense, Inc.]." *Id.* at 6.
- E-Smart's card no longer is described as unique, and the Company acknowledges its competition: "We face serious competition from many companies, small and large. Many of our competitors are much larger companies with significantly greater resources. There are numerous products and competitors in the smart card and smart card operating system arena." *Id*.
- Most of the language about the Company's technology that Complainant urged be deleted in the report for 2006 in fact is deleted in the report for 2007. C.Ex. 27 at 4-5, 9, 31; Tr. 5-7.
- Much as Complainant had suggested for the 10-K for 2006, the 10-K for 2007 discusses marketing and distribution in the future tense or as anticipated future activity. *See, e.g.*, C.Ex. 27 at 6 ("The Company *intends* to market and distribute its products") (emphasis added).

Discussion

The Sarbanes-Oxley Act's whistleblower provision prohibits publicly traded companies from "discriminat[ing] against an employee in the terms and conditions of employment" because that employee has "provide[d] information . . . regarding any conduct which the employee reasonably believes constitutes a violation" of federal laws prohibiting, among other things, securities fraud or a violation of "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a). The Act protects employees when they provide covered information to "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. §1514A(a)(1)(A)-(C).

I. Complainant Timely Filed an Administrative Complaint.

E-Smart argues that Complainant's filing of the complaint with Occupational Health & Safety was untimely. The Act's implementing regulations require persons raising whistleblower complaints to file an administrative complainant within 90 days after the alleged violation. 29 C.F.R. § 1980.103(d). The 90-day period begins to run "when the discriminatory decision has been both made and communicated to the complainant." *Id.* Respondent offers two arguments for why Complainant's filing was late; each is unavailing.

First, e-Smart argues that the complaint was not effectively filed within the meaning of the regulations until OSHA received it on January 17, 2008, ninety-two days after October 17, 2007, the date of Complainant's letter alleging constructive discharge. But this neglects that the implementing regulation that requires the filing within ninety days provides that, "The date of postmark . . . will be considered to be the date of filing . . . ." 29 C.F.R. § 1980.103(d).[35] Here, the complaint was mailed on January 15, 2008, the last timely day. *See* C.Ex. 33 (complaint and certified mail receipt); C.Ex. 144 (letter from OSHA confirming that the complaint was filed on January 15, 2008); ALJ.Ex. 1 (copy of postmarked envelope in which OSHA received the complaint). The filing therefore was timely so long as the October 17, 2007 "resignation" letter triggered the 90-day filing deadline.

Respondent argues, however, that the triggering event occurred earlier, such as when Grace announced the reassignment of Complainant's technology development duties to Clisham on August 22, 2007. I reject this argument: To accept it would be to redefine Complainant's claim. The statute defines specific acts as prohibited. 18 U.S.C. §1514A(a). Among these is "discharge." This is a distinct act that Congress lists separately from others such as "demote, suspend, threaten, [or] harass." *Id.* Complainant is alleging a discharge, not some other unlawful action. It is for Complainant to define his claim, not e-Smart.

As I discuss below, the reassignment of some of Complainant's job duties (even major duties) did not amount to a constructive discharge. E-Smart stated as much when Fritz responded to Complainant's "resignation" letter, and Complainant's conduct shows that he did not subjectively find the reassignment intolerable – otherwise he wouldn't have been able to continue working for the next six weeks (as he did). Rather, what was intolerable was that, set into the context of the events starting August 22, 2007, e-Smart repeatedly failed to pay Complainant wages, promised to make good on the unpaid wages within 72 hours, and failed to do that too. The 72 hours for e-Smart to make good on the wages ran on October 20, 2007, and that triggered the 90-day filing requirement. Complainant filed the administrative complaint 87 days later. At the least, the filing time was not triggered until October 17, 2007, when Complainant stated his subjective belief that e-Smart had constructively terminated the employment. That was 90 days before he filed the complaint. Either way, Complainant timely filed the administrative complaint. *See* 29 C.F.R. § 1980.103(d); *Galloway v. General Motors*

[35] Respondent misplaces its reliance on an out-of-Circuit trial court case, *Murray v. TXV Corp.*, 279 F. Supp. 2d 799 (N.D. Tex. 2003). The question of when a complaint is deemed filed was not litigated in that case. The parties agreed (incorrectly) that it was filed when received at the Department of Labor. 279 F. Supp. 2d at 802. They had no reason to look further, as the filing was timely even under this more demanding standard. *See id.* at 803-04.

Service Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996) (a "plaintiff may not base [the] suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations").

II. Complainant Established a Prima Facie Case of Retaliatory Termination.

To make out a *prima facie* case of retaliatory discharge under the Sarbanes-Oxley Act, a complainant must satisfy four elements. 29 C.F.R. § 1980.104(b)(1)(i)-(iv); *Van Asdale v. Int'l Game Technology*, 577 F.3d 989, 996 (9th Cir. 2009). He must show by a preponderance of the evidence that:

(1) he engaged in activity or conduct that the Sarbanes-Oxley Act protects;

(2) the respondent knew or suspected (actually or constructively) that the employee engaged in the protected activity;

(3) the respondent took an unfavorable personnel action against him; and

(4) the circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable action.

Sylvester v. Parexel Int'l, LLC, ARB Case No. 07-123, 2011 WL 2165854, at *7 (ARB May 25, 2011) (*en banc*). In the present case, it is undisputed that the Company officials, such as Mary Grace, who are alleged to have created the conditions that amounted to a constructive discharge, knew of Complainant's alleged protected activity. As Chief Executive Officer, Grace assigned Complainant the task of editing the 10-K, and Complainant provided his drafts to her along with copies of his comments about what was needed for accuracy and his request to have his name removed from any filing. That leaves for resolution the three remaining elements of the *prima facie* case: protected activity, unfavorable action (here, constructive discharge), and contributing factor. I address these next.

A. Complainant Engaged in Protected Activity.

Sarbanes-Oxley protects, among others, an employee who provides information:

> Which the employee reasonably believes constitutes a violation of section . . . 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information . . . is provided to . . . (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

Id. §1514A(a)(1).

There is no dispute that Complainant was an employee of e-Smart and that e-Smart is a covered, publicly-traded employer under the Act. *See* 29 C.F.R. §1980.101 (defining "employee"). Nor is there a dispute that the persons to whom he gave his edits and his explanations for why those edits were required were persons with supervisory authority over him (Grace), who had authority to investigate or discover violations (Russo), or who had that authority plus the authority to terminate the conduct (Grace) or at least advise to board of directors to terminate it (outside counsel Fritz).

To demonstrate that he engaged in protected activity, this means Complainant must show that he (1) reasonably believed that (2) the information at issue amounted to securities fraud, a violation of a rule or regulation of the Securities and Exchange Commission, or otherwise related to fraud against shareholders. E-Smart disputes each of these contentions.

First, e-Smart argues that Complainant did not offer information of any violation in which it had engaged, but rather commented only on an unfiled, unpublished draft on which no one could have relied. Thus, the draft 10-K couldn't have defrauded anyone or violated any of the Securities and Exchange Commission's rules or regulations.

Were the facts somewhat different, E-Smart could be correct. For, if the alleged fraudulent violation is "based entirely on unsupported conjecture about hypothetical future events," then the employee's belief is not reasonable and the employee has not engaged in a protected act. *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 361 (4th Cir. 2008) (citing *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 340-41 (4th Cir. 2006)). For the activity to be protected, the employee's "belief must relate to activity that a reasonable person could conclude is *or is about to become* a violation." *Id.* (emphasis in original).

But "the employee need not wait until a law has actually been broken to safely register his or her concern." *Sylvester*, 2011 WL 2165854 at *13 (when company officials refuse to investigate alleged filing of fraudulent data with federal regulators, an employee reporting the fraud has a reasonable belief that the activity will affect major contracts, which will affect revenues and impact the value of the stock, and thus will violate the securities laws); *see also Robinson v. Morgan Stanley*, ARB Case No. 07-070, ALJ Case No. 2005-SOX-00044, slip op. at 13 (ARB Jan. 10, 2010) (activity protected when employee "had a reasonable belief that [the employer] was violating federal banking regulations and that those violations had the *potential* to misstate the financial condition of [the employer]") (emphasis added); *Funke v. Federal Express Corp.,* ARB, No. 09-004, slip op. at 11 (July 8, 2011) ("disclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is likely to happen. Such a belief must be grounded in facts known to an employee, but an employee need not wait until a law has actually been broken to register a concern.").

Here, Fritz told Complainant that Grace was resisting the edits he'd proposed. Fritz herself questioned how the changes could be accomplished without creating an impression on investors that previous 10-K reports contained inaccuracies. When Complainant was asked to offer a second set of edits, the Company presented him with a new draft that did not contain his proposed edits. All that strongly suggested that Complainant's recommended edits weren't going to make it into the final report. Perhaps most telling is that the 10-K for 2006 that Company in fact filed soon after Complainant stopped working for e-Smart did not include most of the edits that he had stated were necessary for accuracy. With the filing occurring so soon after Complainant worked on the 10-K, the absence of his edits in the filed version strongly suggests that Complainant had reasonably concluded by October 17, 2007 that, when the Company did file with the Securities and Exchange Commission, it would likely file the uncorrected report.

To be protected, a complainant's reports must "definitively and specifically" relate to one of violations listed in §1514A. *Platone v. FLYI, Inc.*, ARB Case No. 04-154, ALJ Case No. 2003-SOX-00027 at 17 (ARB Sept. 29, 2006); *see also Van Asdale*, 577 F.3d 989 at 996-97, (citing *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008)) ("'An employee need not cite a code section he believes was violated' to trigger the protections of § 1514A").[36] General concerns about business operations are insufficient. *See Gale v. World Financial Group*, ARB Case No. 06-083, ALJ Case No. 2006-SOX-43 (ARB May 29, 2008).

The Securities and Exchange Act of 1934 and regulations of the Securities and Exchange Commission prohibit the making of untrue statements of material fact and the omission of necessary material facts in connection with the sale or purchase of securities. *See, e.g.*, 17 C.F.R. § 240.10b-5.[37] Thus, with respect to statements about a company's financial condition, "To be protected under the SOX, the whistleblower must ordinarily complain about a material misstatement of fact (or omission) . . . on which an investor would reasonably rely." *Giurovici v. Equinix, Inc*., ARB No. 07-027, 2008 WL 4462991, at *4 (Sept. 30, 2008) (citing *Smith v. Hewlett Packard*, ARB No. 06-064, 2008 WL 1925638 (ARB Apr. 29, 2008); *Harvey v. Home Depot, U.S.A., Inc*., ARB Nos. 04-114, 115; ALJ Nos. 2004-SOX-020, -036, slip op. at 14-15 (ARB June 2, 2006)); *see also Welch v. Bankshares Corp*., ARB No. 05-064, 2007 WL 1578493 (May 31, 2007); *Sylvester*, 2011 WL 2165854 at *38 n.60.[38]

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[36] The Administrative Review Board has recently held that the requirement that the complaint relate "definitely and specifically" to a violation "is often applied too strictly" and that, as it has been applied, the test "presents a potential conflict with the express statutory authority" in the statute. *Sylvester*, 2011 WL 2165854 at *15. This concern, however, finds no application here because Complainant meets even the pre-*Sylvester* stricter test.

[37] This regulation (Rule 10b-5) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
>> (a) To employ any device, scheme, or artifice to defraud,
>>
>> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>>
>> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. §240.10b–5.

[38] Respondent argues, without authority, that a complainant must show that an investor *actually* relied on a material misstatement. This is inconsistent with *Sylvester* in that it would require an employee to wait until an actual violation had occurred before gaining Sarbanes-Oxley protection. It would put a whistle-blowing complainant in a position where she had to prove up someone else's actual fraud damages.

It is also critical that the employee is reporting "conduct that he or she *reasonably believes* constituted a violation of federal law." *Sylvester v. Parexel Int'l LLC*, ARB Case No. 07-123, 2011 WL 2165854, at *15 (ARB May 25, 2011) (*en banc*) (emphasis in original); 18 U.S.C. § 1514A(a)(1). This test has both an objective and a subjective component: the complainant must have actually believed that the violation was taking place, and this belief must have been reasonable based on the knowledge available to a reasonable person of complainant's training and experience in the same circumstances. *Sylvester*, 2011 WL 2165854 at *11-12.

In the present case, Complainant's edits and the comments he expressed about the edits pointed definitively and specifically to the prohibition in the securities laws and regulations against making untrue statements of material facts or omitting to disclose material facts in connection with investors' purchase and sale of securities. *See* 17 C.F.R. §240.10b-5. The document being edited was an annual report to the Securities and Exchange Commission about the financial condition of the Company that the securities laws and regulations require. The purpose of the report is for investors to rely on it when making decisions on the purchase and sale of Company stock. Complainant and the Company understood that was the purpose of the 10-K on which they were working. Grace was talking about getting the stock listed on national exchanges once the 10-K was filed. She and Fritz stated that the 10-K was going to be presented to Brightside (even before filing with the Securities and Exchange Commission) for the specific purpose of developing funding through investors.

Complainant opposed misstatements and omissions in the draft that he believed could be material to investment decisions by distorting the Company's intellectual property and other assets, its capacity to manufacture and sell marketable products, and its ability to achieve revenue in a competitive marketplace. Complainant's edits were grounded in his beliefs about the substantive inaccuracy of the sections on technology, product development, manufacturing capacity, intellectual property, and competition. The draft claimed that the Company had technology that Complainant believed it did not have and in some instances had not even planned. The draft stated that the Company had developed a unique smart card that could communicate with databases that were otherwise incompatible, that could run multiple applications at once, that was essentially error-free, that had sophisticated encryption, and that there were no competitors with similar technology. Complainant believed that none of this was true. The draft described the Company as active in government contracting when Complainant believed its efforts in this arena were moribund. The draft claimed that the Company had patents and licenses that Complainant believed it did not have.

In all, the draft 10-K painted a picture of a cutting edge, innovative technology company with a unique, effective, operational product ready for marketing, manufacture, and sale. Yet the facts, as Complainant believed and reported them, were that the Company had nothing ready (or soon to be ready) for the market, had made no volume shipments of products to customers, had not generated any significant revenues, was still developing products with no volume manufacturing capacity (in-house or outsourced), was not working on a unique product, and had significant competition.

Complainant was specific in telling the Company that the changes were necessary for accuracy. When Grace didn't make herself available to discuss the draft, Complainant told Fritz that his changes were not stylistic but were needed for accuracy. He said that to her explicitly and later referred to uncorrected statements in the draft 10-K as "fabulous" in the sense of "fables." A review of the edits that Complainant was advocating to Grace, Fritz, and Russo shows objectively that they were substantive, not stylistic.

Complainant's beliefs were subjectively and objectively reasonable. Especially telling is that not one Company official ever disputed the facts reflected in Complainant's edits or gave him any reason to doubt either their accuracy or their necessity for compliance with the securities laws. One of the persons reviewing Complainant's edits was outside securities counsel Maranda Fritz. Despite her considerable involvement in editing and reviewing the draft and communicating with all those involved in the project, she never stated or even suggested that Complainant's proposed changes were not mandated by the facts. She understood the requirement that the 10-K be truthful and accurate: When she told the others not to show the 10-K to Brightside until there were further edits, she emphasized that it must be accurate. And yet she never told Complainant that any of his edits were inaccurate or unnecessary.

Instead, she pointed only to what Mary Grace wanted and would accept. When communicating with Complainant, Fritz' focus was more on how Grace had reacted to the edits; that Complainant's edits could make it look like previous 10-K's were untruthful or misleading; and that it might shock investors to reveal so many corrections at once.

Complainant came to his beliefs only after months of investigation into the Company's technology and history, both as a consultant on the *Drizin* litigation (which involved theft of trade secrets) and as Chief Operating Officer. That work involved him with the Company's Chief Technology Officer and the engineering staff, included interviews of representatives of companies with which e-Smart had collaborated or with which it had contracted on technology before, put him in a position of writing the Company's first technology development plan, gave him access to the information from the Company's prime competitors (such as ID Smart), required him to review historical Company data files and reports, and more. He brought to this work substantial expertise in technology development; otherwise e-Smart wouldn't have retained him as a litigation consultant with that specialization. Applying that expertise to the extensive information he'd gathered, Complainant's beliefs were objectively reasonable. Indeed, e-Smart eventually acknowledged the accuracy of most of Complainant's beliefs by incorporating many of his edits in the next 10-K report, which was for 2007.[39]

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[39] Consider also the following: The prototype Complainant saw in Korea in August 2007 was not marketable. It couldn't support credit card transactions, wasn't physically durable, had an error rate of about ten percent when demonstrated, and didn't have software that would work if the user's finger wasn't perfectly lined up. Tr. 59-60, 331, 529-32. The engineers didn't know how to re-create or manufacture the prototype in quantity. Tr. 331-34. The Company had no proprietary interest in the fingerprint sensors; e-Smart was outsourcing that work. Tr. 339-40.

Complainant himself had only recently written the Company's first technology development plan. Tr. 135, 513-14; R.Ex. O. It records data he'd collected about competitors' technology. R.Ex. O at 14. It sets goals to develop much of the technology later that year with moderate volume production of a commercially viable card only in the next year (2008) and a highly reliable, low cost card for financial applications in beta testing only in 2009. Wireless communication capacity, financial service features, greater sensor development, and power management all remained for the future ahead.

Complainant knew the Company's card wasn't unique from his work with Fidelica on a potential business partnership. Tr. 431-34. He saw Fidelica's card with fingerprint matching capability; it was "substantially similar"

Complainant credibly testified that he believed his observations to be true, and his actions confirm his subjective belief. In particular, when it became apparent that the Company was not going to modify the 10-K with Complainant's edits or otherwise address his concerns, he asked to have his name taken off the report and to stop working on it. No corporate executive would stake out such a strong position on a government filing crucial to the company's funding unless he subjectively believed that his position was correct.

None of e-Smart's evidence is sufficient to bring into doubt Complainant's conclusions based on his thoroughgoing, months' long investigation (both as consultant and as Chief Operating Officer) – as well as his direct work with the Company's engineers and patent attorney – aimed at ascertaining the status of the Company's technological developments and establishing its plan

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to e-Smart's card. *Id*. Kudo told Complainant in June 2007 about other companies with similar fingerprint-matching technology. C.Ex. 159, 160, 161; Tr. 737-39.

Additional objective factors correlated with Complainant's findings. After Clisham took over the technology development in August 2007, he reported back to Brightside that a lot of testing was still needed; systems needed to be developed; the Company needed to get Visa and MasterCard interested; and the work thus far had been "a complete ivory tower project." C.Ex. 17. Grace acknowledged at the time that e-Smart still needed parts to run off its "first batch of demo cards" and that NexGen and some former Company employees had needed software and "manufacturing files." C.Ex. 18. Clisham confirmed to Brightside that some Company technology appeared to be with former employees and "legacy outside partners," and that it wasn't possible to plan production until some arrangement was made for access to this technology. C.Ex. 19. He described e-Smart as "moving ahead blindly without a plan in place." *Id.* at 2. He noted an absence of documentation for hardware, software, and mechanical engineering, no quality assurance, no cost data, and no manufacturing plan. *Id.* C.Ex. 138. He was concerned that e-Smart was going to rely on outside suppliers for the card sensors. C.Ex. 20 at 1-2. (After he expressed these thoughts to Grace, she terminated the relationship and didn't pay Clisham for his work or reimburse his expenses.) C.Ex. 32; C.Ex. 140.

Additional objective support for Complainant's contentions comes from Saito's statement to an investigator of the Occupational Safety & Health Administration on August 14, 2009. C.Ex. 143 (transcript of interview). There, Saito stated: "The prototype was at the beginning, 2007 December, even before we made prototype in the U.S.A. and we moved everything to Korea, and we made a prototype in Korea, December to early spring 2008." *Id.* at 4. He stated that the initial cards were "contact type"; e-Smart didn't make wireless cards until the summer of 2008. *Id.* There had been early prototypes that an outside company made as early as 2001, but these could not be mass produced; cards with that capability were not available until after e-Smart moved operations to Korea in mid-2007. *Id.* at 5-6.

It is true that Complainant had heard of some videos from trade shows years before at which e-Smart showed more functional smart cards. But there was no sign that anything supposedly shown in the videos was a current capability of the Company. *See* Tr. 533-34, 636-47, 650, 872 (if work was at former subsidiary BioSensor, that company was defunct and had accomplished little in the way of research). Had any Company official urged a further addition to the draft that, at one time, the Company had additional technology that had been lost or stolen, and that the Company hoped to recover this technology, that is something the Company could have considered. But any such statement would have to disclose that the technology was not in the Company's possession or otherwise currently accessible to it. The possibility of this addition to the 10-K does nothing to detract from the objective reasonableness of the changes Complainant advocated.

Similarly, Complainant was aware that e-Smart had patented technology for certain sensors and for the manufacture of ultra-thin electronic assembly packaging and had developed three fingerprint-matching algorithms that met "zero/zero" error tolerance. R.Ex. O at 15, 17. Those accomplishments could have been added to the 10-K, but again nothing about this diminishes the need for the edits Complainant proposed or the reasonableness of his belief that the edits were needed to comply with the anti-fraud provisions of relevant securities law and regulations. An algorithm on a drawing board is not a capability on a smart card.

for future development.[40] I find no basis to doubt the objective and subjective reasonableness of Complainant's assertions to Fritz (and through her to Grace) that the edits to the 10-K were needed for accuracy.[41]

Complainant's ongoing advocacy for changing the draft gave information to his supervisor and to Company officials in a position to discover, investigate, and terminate securities fraud,

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[40] In its closing argument, e-Smart places no reliance on (and never mentions) either of its witness' trial testimony despite the fact that they were engineers, who at least in theory, could have known about e-Smart's technological developments. Of course, their testimony – to the extent it addressed e-Smart's technology in 2006 and 2007 – was of little value because neither witness seemed to know who his employer was at any given time and therefore what technology could be attributed to which employer. Both witnesses testified that their primary interest was their work on the smart card, and that they didn't care which company they worked for. Tr. 829-30 (Soliven); Tr. 877-78 (Krishnan). Both were thoroughly confused about the corporate identities of their employers.

At times they worked for e-Smart and at other times for e-Smart's competitor, ID Smart. Tr. 815. For example, Soliven recalled that he stopped working for e-Smart at some point because "the company seemed to have mutated into another form, which became ID Smart." Tr. 805. But ID Smart was never a "mutation" of e-Smart; it was a competing company. Tr. 312. ID Smart's technology is nothing that e-Smart could report on a 10-K as something in its possession. Similarly, Krishnan testified: "ID Smart came into the picture and then again e-Smart came in the picture, so that thing happened in between so - - I mean as fair as I was concerned, the project was all the same." Tr. 877. Principally, they saw themselves as working for Saito irrespective of the company with which he affiliated. Tr. 825, 873-74, 898. Thus, neither witness could show that any particular technology existed at e-Smart at any particular time.

Saito should have known something of the historical development of the technology at e-Smart. But the Company failed to offer testimony from him despite repeated opportunities prior to trial, at trial, and post-trial. The Company states that Complainant's beliefs were objectively unreasonable because he didn't consult with Saito. First, this misrepresents the record. Complainant met frequently with Saito to discuss the Company's technology development, including weekly meetings for some months at about the time Complainant was working on the 10-K. Second, the Company neglects that it offered nothing from Saito that would refute Complainant's inferences.

Similarly, the Company offered no testimony from Grace, who should know what technology the Company had as of the end of 2006 and when it developed it.

[41] Complainant is generally credible. E-Smart offered nothing to bring his credibility generally into question. Complainant's extended testimony was internally consistent and was also consistent with the extensive record of email communications and with the drafts of the 10-K. *See, e.g.*, Tr. 59-60 (describing the only functional prototype of an e-Smart smart card that Complainant observed); Tr. 331 (same); Tr. 531 (same); *see also* Tr. 149 (discussing conversations with Fritz about Complainant's proposed edits to the 10-K); Tr. 699-700 (same); C.Ex. 7 (Fritz' email to Complainant and others expressing concern about the edits). I observed, and the record reflects, Complainant's care for precision and accuracy; it frequently appears in his detailed answers on cross-examination. *See, e.g.*, Tr. 278-81 (clarifying the timeline of his contact with various e-Smart employees and contractors); Tr. 331-41 (discussing the possibilities for how e-Smart may have come by its functional prototype, including outsourcing and in-house technology); Tr. 422-23 (discussing timeline and duties in late July and early August).

I reject e-Smart's argument that Complainant's credibility was undermined when, during trial, he wrote notes on his copy of the trial exhibits and then referred to those exhibits while he testified. I discussed this in detail in the "Order Denying Motions to Reopen Record, Take Late Perpetuation Deposition, and File Late Motion to Strike Testimony or for a Mistrial," dated December 30, 2010. Respondent cross-examined Complainant about these notes, both as to the process under which Complainant wrote them and as to their content. Complainant wrote them on his own from his memory at the time of trial and without any knowledge or involvement of his counsel. He thought of this set of exhibits as his to consult and simply wrote thoughts that came to mind as he looked at some of the exhibits while sitting at counsel table. Yes, he had the notes available to him when he testified, but I find nothing dishonest in Complainant's conduct. Complainant was testifying from his own memory as he referred to the exhibits; the only material he considered consisted of notes he wrote moments earlier also from his memory without assistance.

violations of rules and regulations of the Securities and Exchange Commission, and actions that were otherwise related to fraud against shareholders. The information went to materially misleading statements and omissions, made to shareholders and potential investors, that would create a significantly over-rosy image of a Company poised to bring to market a unique and desirable technological innovation, when every indication was that it was nothing of the kind.

Complainant's repeatedly informing responsible Company officials of the inaccuracy of the draft 10-K was protected activity. Complainant reasonably believed, based on both circumstances and explicit representations by Grace, Russo and Fritz, that the document would be filed with the SEC and shared with potential investors such as those identified through Brightside. He correctly understood that there was a legal requirement that the document be accurate and not misleading when read by its intended readers: persons deciding whether to buy or sell e-Smart stock. Complainant did not cite to a specific statutory provision in the securities acts, but the thrust of the information he presented, together with his explanations to Fritz and others, was that, in its unedited form, the draft violated the specific securities laws, rules, and regulations going to materially misleading statements made to investors or otherwise related to securities fraud. Based on his extensive work assessing e-Smart technology first as a consultant and then as an employee, Complainant reasonably believed that the edits he made were necessary to represent accurately the state of e-Smart's technology and the other aspects of its business that he addressed. He sent his edits to his supervisor (as well as others covered in the Act), and he explained that the edits were necessary for accuracy and to avoid publication of a false and fantastical picture of the Company. His belief that e-Smart would soon file the 10-K without the edits for which he advocated was reasonable, given his interactions with Fritz and Grace, including Fritz' statement that the Company was about the show the document to Brightside. The Company confirmed the reasonableness of these expectations when, a week after Complainant's employment ended, the Company filed a 10-K that lacked his edits. Complainant thus meets the statutory standard for a protected activity.

B. E-Smart Constructively Terminated Complainant's Employment.

Complainant alleges that e-Smart constructively discharged him.[42] Although the applicable federal standard for constructive discharge is demanding, Complainant here meets its requirements.

Constructive termination is tested on an objective standard. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004) (Title VII sexual harassment). A court must determine whether "working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Id.*; *see also Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007) (applying the *Suders* test in an age discrimination claim). The Board applies the same test to Sarbanes-Oxley cases. *See Gattegno v. Prospect Energy Corp.,* ARB No. 06-118, ALJ No. 2006-SOX-00008, slip op. at 15 (ARB May 29, 2008).

[42] He told the Company as much at the time he stopped working as of October 17, 2007. *See* C.Ex. 24 (citing factors Complainant said to "constitute constructive termination of my job at e-Smart Technologies").

To be objectively intolerable, conditions must deteriorate "to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer." *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000) (*citing*, EEOC Policy Guide, which requires conditions that "foreseeably would compel a reasonable employee to quit"); *see also Hillebrand v. Coldwater Creek, Inc.*, ALJ Case No. 2008-SOX-2010 at 78 (ALJ April 23, 2010) ("an employee is constructively discharged when her working conditions are rendered 'so difficult, unpleasant, and unattractive that a reasonable person would have felt compelled to resign, such that the resignation is effectively involuntary") (quoting *Reines v. Venture Bank & Venture Fin. Group*, 2005-SOX-00112 at 55 (ALJ Mar. 13, 2007)).

The standard is demanding because employers and employees should solve problems within the existing employee-employer relationship. *Poland*, 494 F.3d at 1184. Thus, "'[a]n employee may not . . . be unreasonably sensitive to a change in job responsibilities.'" *Id.* at 1185 (quoting *Serrano-Cruz v. DFI P.R., Inc.*, 109 F.3d 23, 26 (1st Cir. 1997)). But an employee alleging a constructive discharge need not show that the employer *intended* to cause the employee to quit; the employer's intent is not an element. *Poland* at 1184 n.7.

The objective test focuses on "'a reasonable person in [the employee's] position.'" *Watson v. Nationwide Ins. Co*., 823 F.2d 360, 361 (9th Cir. 1987) (quoting *Satterwhite v. Smith,* 744 F.2d 1380, 1381 (9th Cir. 1984)); *see also Suders*, 524 U.S. at 141 ("Did working conditions become so intolerable that a reasonable person *in the employee's position* would have felt compelled to resign?") (emphasis added). What is intolerable to a reasonable chief operating officer of a technology start-up might differ from what is intolerable to a reasonable line worker at an assembly plant, a mid-level manager, or a chief operating officer of a more established, multi-national corporation. The constructive discharge analysis must take into account the totality of the circumstances. *Watson*, 832 F.2d at 361.

"The determination whether conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question left to the trier of fact." *Watson v. Nationwide Ins. Co.*, 823 F. 2d 360, 361 (9th Cir. 1987). Generally, however, a single incident that is not part of a wider pattern is insufficient. *Wallace v. City of San Diego*, 479 F.3d 616, 626 (9th Cir. 2007) ("a plaintiff . . . must show some aggravating factors, such as a continuous pattern of discriminatory treatment") (citing *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996)). Given the fact-intensive nature of the analysis, a closer look at prior cases provides useful guidance.

Courts have generally held that assigning employees to undesirable geographic locations or job duties is not a constructive discharge. Thus, in *Poland*, a long-term employee of the Customs Service who had previously been stationed in four different states and the District of Columbia was not constructively discharged when he was transferred cross-country from Oregon to Virginia and from a supervisory to a non-supervisory position (without loss of pay), especially in that he continued to work for eight months after the transfer until he took an early retirement, thus suggesting that the transfer was something the employee could tolerate. 494 F.3d at 1184-85.

A company vice-president was not constructively discharged when he was passed over for president and the job was given to a man fifteen years younger – even when he was moved to a smaller office and excluded from a lunch meeting, and other executives were told not to discuss financial matters with him. *Schnidrig*, 80 F.3d at 1411-12. As the Court noted, the employer had not demoted the plaintiff, cut his pay, disciplined him, or encouraged him to leave. *Id.* at 1412.

On the other hand, when a district court set aside a jury verdict and rejected a plaintiff's claim of constructive discharge, the Ninth Circuit reversed. W*allace v. City of San Diego*, 479 F.3d ___, 620 (9th Cir. 2006). In *Wallace*, a police sergeant also was a naval reserve officer. *Id*. Over the years, he'd taken several leaves of absence from his police work to go on active duty with the Navy. *Id.* at 620-22. After he served on a seven-month tour in Operation Desert Storm, the police department denied him several promotions, reassigned him farther from his home, gave him undesirable or reduced responsibilities, subjected him to repeated discipline disproportionate to the alleged wrongdoing, and denied him permission to teach at the police academy. *Id.* at 621, 626. When he took an extended leave to serve in Bosnia in 1999-2000, he was subjected to discipline for allegedly neglecting to tell the department that his tour had been extended. *Id.* The Court held that this was sufficient to support the jury's finding of a constructive discharge and that it was error for the district court to grant judgment notwithstanding the verdict. *Id.* at 628.

In a Sarbanes-Oxley case, an employee in a leadership position with her own office had received high performance ratings. *Brown v. Lockheed Martin Corporation,* ARB Case No. 10-050, ALJ Case No. 2008-SOX-00049 (ARB Feb. 28, 2011) at 10. After she engaged in protected activity, the employer gave her poor performance ratings, took away some of her core duties, took away her office and parking space, confronted her with "visceral opposition" when she applied for a promotion, asked her to work from home, then asked her to return to work without an adequate workspace, took away her leadership position, refused to allowed her to attend an award ceremony at which she was to receive an award, and kept her constantly uncertain as to her job status and whether her job would be eliminated. *Id.* The Administrative Review Board affirmed an administrative law judge's finding that this environment was sufficiently adverse to cause a "reasonable person in [the employee's] shoes" to resign. *Id.* at 11.

With this background, I turn to the relevant evidence adduced here.

Complainant has shown, not just a single incident, but a wider pattern of aggravating factors that escalated and culminated in e-Smart's failing and refusing to pay Complainant's wages.

Reduction in duties. Grace's announcement on August 22, 2007 that she had given Complainant's technology-related responsibilities to Clisham came as a surprise to Complainant. It was not as though Grace took away all of Complainant's duties: He was to work on funding, including a NASDAQ listing and acting as a liaison to Brightside; write a business plan; support outside counsel on patent filings; and support Company litigation. But Grace's announcement did remove from Complainant a central project on which he had been working and in support of which he had voluntarily taken a large cut in base salary (while reserving possible incentive pay). He had spent considerable time investigating the Company's technology base, meeting the technology staff, talking with outside companies with whom the Company had been involved in technology development, writing a technology development plan, evaluating the Company's technology development structure, redesigning that structure and relocating its operation to Korea, building a relationship with the Company's Korean management, and communicating all this to Grace and other Company executives. Complainant's time commitment to this effort exceeded that spent on his other work; technology development had grown into the centerpiece of Complainant's efforts.

To some extent, Complainant and Grace were jointly responsible for some vagueness or lack of definition in Complainant's job duties: Together, they failed to prepare the written job description that they'd contemplated in the employment contract. Complainant was comfortable without a written job description because he'd worked as an executive in other technology start-up companies. But he didn't know what Grace's expectations were. In a way, Grace's statement that Complainant had been acting as chief engineering officer, not chief operating officer, reflects a reasonable analysis.

The difficulty is that Grace's reassignment of Complainant's technology-related duties is inconsistent with her ongoing enthusiastic endorsement and approval of Complainant's efforts and innovations on technological development. It also neglects that Complainant's job description was to be a joint responsibility of both Grace and Complainant, yet Grace unilaterally and preemptively changed it in a very significant way without any discussion with Complainant. She took away the technology piece in a manner that was demeaning, undercut Complainant's position as a corporate executive, and caused Complainant to be confused and insecure about his job status.

Moreover, Grace not only took away Complainant's most central area of effort; she also exaggerated what duties she'd left to him: The remaining duties were more apparent than real. Brightside wasn't yet ready to move forward on funding: Clisham was a Brightside operative sending back investigative reports and opinions to Brightside about e-Smart developmental status and business potential. He had only just begun to learn his way around e-Smart. Complainant knew this because Clisham had been introduced to him as a representative of Brightside only a few days before Grace assigned all of the technology development to him. Similarly, the Company was not ready for listing on a national stock exchange. As Grace later acknowledged, the process to achieve a listing couldn't begin before e-Smart filed the 10-K. Also, Grace and Complainant both knew the Securities and Exchange Commission was looking into e-Smart's activities, a status likely inconsistent with getting listed on a national exchange. In addition, Complainant correctly understood (as he'd repeatedly written to Fritz) that, unlike in the area of technology development, he wasn't an expert in securities (especially for companies on the pink sheets), and his role in getting listed on a stock exchange would necessarily be limited. *See* Tr. 503.

Grace didn't add any new or expanded job duties adequate to fill the gap left when she withdrew Complainant's technology-related duties. Complainant had been working on the business plan and would soon have it ready for Grace's review. He had been working on the patent applications and Company litigation all along; neither was occupying much of his time, and neither had prevented him from doing all of his technology-related work.

Nonetheless, as Grace directed, Complainant worked on the business plan, did some research on NASDAQ listing requirements, and continued to work with outside counsel on the litigation and patents. As the weeks went by, it seemed that the Company reduced the scope of his work in some of these tasks as he wrapped up others. Complainant completed a second draft of the business plan by late September 2007. C.Ex. 21. The Company shifted its legal strategy in the *Drizin* litigation such that Complainant's technological expertise became less relevant. Tr. 723-24. In early October, Grace told him to stop working on the BioSensor litigation. Tr. 618. To move forward with the NASDAQ listing duties, Complainant needed to work with the attorney e-Smart had retained for this purpose, but Grace never responded to his requests for the attorney's contact information. Tr. 615. It was at this time that Grace acknowledged to Complainant that the Company couldn't move forward on the NASDAQ listing until e-Smart had filed its 10-K. Tr. 618-19. By mid-October 2007, Complainant's responsibilities involving Company patents were removed. Tr. 615. These developments left Complainant with little more than Grace's ardent protestations that more would come with time.

Exclusion from executive communication. Prior to Complainant's protected activity, he and Grace communicated frequently by telephone and email and worked closely on key decisions such as moving the technology development operation to Korea and changing the technology staff. After Grace announced the reassignment of the technology development duties, Complainant made repeated attempts to discuss the changes with Grace. *See C*.Ex. 15 (Complainant wrote, "Mary – I assume you will contact me directly when you want to discuss this with me."); Tr. 171 (Complainant unsuccessfully called Grace for an explanation); C.Ex. 52 (September 13, 2007 email to Grace with concern about their working relationship); C.Ex. 39 (October 4, 2007 email to Grace expressing further concern). Grace avoided his calls. On the few occasions Complainant reached her, she told him she was in a meeting and hung up. Grace's failure to communicate with Complainant about the reduction in his responsibilities and her expectations for his future at the Company exacerbated the confusion that would generally be inherent in the changing situation.

A reasonable chief operating officer whose chief executive officer removes his central job duties in a general announcement to the entire management team without any prior notice to him and then avoids discussion about it would be concerned, confused, and uncertain about his status.[43] Grace's only response to Complainant's efforts to talk was an email more than two weeks after her announcement of the reassignment. Objectively, the email would do little to dispel the confusion and concern of a reasonable chief operating officer, and it did little to clarify the situation for Complainant. C.Ex. 23 (October 6, 2007).

In particular, Grace's explanation for the reassignment was that it made better use of Complainant's time and talents. C.Ex. 23. But Complainant had significant background in technology development, and far from complaining about his performance in this area, Grace had expressed nothing but gratitude for it. Grace fully understood that technological development was an area of Complainant's expertise: She had retained him as an expert

[43] Grace did sporadically email Complainant about particular work assignments, but this was less frequent than before his protected activity and the changes in his duties.

consultant in technology development and was sufficiently pleased with his work in that capacity that she'd brought him into the Company as an executive. In short, Grace's explanation didn't make sense. A reasonable inference for a corporate executive to take from having his involvement in this major area removed only three months after starting as Chief Operating Officer is that he no longer enjoyed the chief executive officer's trust and confidence and was being excluded from significant decision-making without a credible explanation.[44]

Failure to reinstate original salary. When e-Smart cut Complainant's base salary from $377,000 per year to $245,000, it was at Complainant's suggestion to create a production incentive for the engineers he was managing. He included a cut in his own salary to demonstrate to his engineers that he was willing to include himself in the risk and had confidence in the outcome. His agreement with Grace was that he retained the potential to recover the $132,000 per year pay cut, depending on the engineering team's success. *See* R.Ex. T.[45] It appears that Grace and Complainant never addressed what would happen if Grace removed Complainant's technology development duties and thereby cut off his chances of earning back the reduced salary.

When Grace took away these duties, Complainant wrote to request that she reinstate his original base salary. Tr. 622. The record does not show that Grace responded. *See* Tr. 621-24. What it shows is that she never reinstated Complainant's original base salary, which Complainant reasonably took as a refusal. *See* C.Ex. 24.

Late payment and non-payment of wages. Given the demanding legal standard and the preference that employers and employees work out their differences while continuing the employment relationship, all of the events that I've described above, without more, would be insufficient to establish a constructive discharge. I cannot distinguish them from the circumstances that the cases discussed above rejected as insufficient. *See, e.g., Poland; Schnidrig* .

But here Complainant offers more, and what he offers is sufficient when set into the context of these already aggravating circumstances. I refer to the Company's pattern, begun immediately after Grace took away Complainant's technology development duties, of paying his wages later and later and then not at all.

Over the course of September and until he left on October 17, 2007, Complainant experienced a pattern of increasingly late salary payments that culminated in a repeated failure to pay him at all. Tr. 182-83; C.Ex. 53. His September 1 paycheck was a few days late. Tr. 182. Despite his

[44] While he might have reported faithfully his subjective concern with the Company's closing the bank account he'd controlled, *see* Tr. 578-84, the closure was consistent with the Company's reassignment of the technology duties. The purpose of the account was mostly for Complainant to pay vendors that he hired for technology development. With the technology duty removed, there was little reason for Complainant to have an e-Smart bank account. A reasonable company executive would distinguish this from the surrounding circumstances; it does not objectively add to the adversity of Complainant's workplace circumstances.

[45] In a letter dated June 20, 2007, Grace refers to the incentive program as a way to conserve cash and to focus on a transition from product development to volume manufacturing. R.Ex. T. She confirms the incentive structure, whereby Complainant could earn back the salary reduction if e-Smart achieved certain goals. *Id.*

requests for payment, Complainant's September 15 paycheck was at least a week late. The October 1, 2007 check didn't arrive by the end of that pay period, again despite repeated requests. Indeed, it never came at all, nor did the October 15 check, nor a check, due under applicable law by October 22, 2007, for Complainant's work done on October 16 and 17, 2007.[46] After Complainant gave notice of the constructive discharge, Company counsel assured him that he'd be paid all amounts owing for October 1 and October 15, 2007 within 72 hours; that never happened either. *See* C.Ex. 25.

The duty to pay employees for their work goes to the heart of the employer-employee relationship. In California, where Complainant worked, employers who are able to pay wages and willfully fail after the employee demands payment are guilty of a misdemeanor. *See* Cal. Labor Code §216(a).[47] They also must pay civil penalties. *See* Cal. Labor Code §210. Though Respondent made much of the fact that Complainant knew of e-Smart's sporadic difficulty paying vendors and contractors, the state legislature's criminalizing a failure to pay employees makes it legally distinct – and far more serious – than the mere breach of contract involved in a failure to pay a vendor or contractor, conduct for which even routine civil tort damages are unavailable.

E-Smart offered no evidence that it was unable to pay Complainant. If it wasn't paying the salary of other Company executives at the time because of financial distress, Grace or Russo could have testified as much; neither did. If the Company knew that it lacked funds to pay Complainant, rather than offer false explanations about depositing the pay to the wrong account or make false promises that all pay owing as of October 15, 2007 would be deposited within 72 hours of October 17, 2007, it should have told Complainant the truth. *See* C.Ex. 38; C.Ex. 23; Tr. 191. A reasonable person in Complainant's position would not assume that the Company had suspended salary payments for all employees – or even all executive employees. He would assume that the Company was sending a message that, all protestations aside, the Company wasn't going to pay him for his work – or at least wasn't going to pay him at any foreseeable time in the reasonably near future.

Totality of the circumstances. Employees cannot reasonably be expected to keep working when they aren't getting paid. They essentially are victims of a crime and would be asked to endure further victimization. Even with an explanation, such as the employer's extreme financial hardship, a reasonable employee could readily conclude that, if his employer didn't pay his wages, it was effectively terminating the employment. But false excuses and promises instead of a truthful and pertinent explanation fall far short of anything a reasonable employee could be expected to accept and tolerate. Ongoing non-payment of wages would foreseeably compel a

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[46] Under applicable California law, an employer must pay within 72 hours all wages owing to an employee who quits without notice. Cal. Labor Code §202(a) (applicable to Complainant as his written employment contract was not for a definite period of time). As October 20, 2007 fell on a Saturday, the wages for October 16 and 17, 2007 were due on Monday, October 22, 2007. Of course, by then the wages for October 1 and 15, 2007 already were late.

[47] Cal. Labor Code §216(a) provides:

> In addition to any other penalty imposed by this article, any person, or an agent, manager, superintendent, or officer thereof is guilty of a misdemeanor, who: (a) Having the ability to pay, willfully refuses to pay wages due and payable after demand has been made.

reasonable employee to consider herself to have been terminated from employment. Setting this into the totality of the circumstances, including the pattern of aggravating events described above (taking away central job duties for pretextual reasons and in a demeaning way, failure to restore a pay cut while removing an incentive pay program tied to the pay cut, cutting off crucial communication), this amounts to a constructive discharge. *See Brooks*, 229 F.3d at 930 ("an employer is liable for constructive discharge when it imposes intolerable working conditions [which] foreseeably would compel a reasonable employee to quit") (internal citation omitted).

C. <u>Complainant's Protected Activity Was a Contributing Factor in E-Smart's Termination of the Employment.</u>

"Causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (Title VII); *see also*, 29 C.F.R. §1980.104(b)(2). As the Ninth Circuit stated in *Villiarimo*:

> We have recognized previously that, in some cases, causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity. *See Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) (noting that causation can be inferred from timing alone); *see also Miller v. Fairchild Indus*., 885 F.2d 498, 505 (9th Cir. 1989) (prima facie case of causation was established when discharges occurred forty-two and fifty-nine days after EEOC hearings); *Yartzoff* [*v. Thomas,* 809 F.2d 1371, 1376 (9th Cir. 1987)] (sufficient evidence existed where adverse actions occurred less than three months after complaint filed, two weeks after charge first investigated, and less than two months after investigation ended). But timing alone will not show causation in all cases; rather, "in order to support an inference of retaliatory motive, the termination must have occurred 'fairly soon after the employee's protected expression.'" *Paluck v. Gooding Rubber Co*., 221 F.3d 1003, 1009-10 (7th Cir. 2000). A nearly 18-month lapse between protected activity and an adverse employment action is simply too long, by itself, to give rise to an inference of causation. *See id*. (finding that a one-year interval between the protected expression and the employee's termination, standing alone, is too long to raise an inference of discrimination); see also *Filipovic v. K & R Express Sys*., Inc., 176 F.3d 390, 398-99 (7th Cir. 1999) (four months too long); *Adusumilli v. City of Chicago*, 164 F.3d 353, 363 (7th Cir. 1998) (eight months), cert. denied, 528 U.S. 988, 120 S.Ct. 450, 145 L.Ed.2d 367 (1999); *Davidson v. Midelfort Clinic, Ltd*., 133 F.3d 499, 511 (7th Cir. 1998) (five months); *Conner v. Schnuck Markets, Inc*., 121 F.3d 1390, 1395 (10th Cir. 1997) (four months).

In this case, e-Smart's adverse steps began on the heels of Complainant's submitting his second round of edits on August 16, 2007 and asking to be removed from the process. It was less than a week later that the adverse steps began, when Grace dramatically reduced Complainant's responsibilities without notice or explanation. The pattern accelerated just over two weeks from those last edits, when the Company began its course of late and then non-payment of wages, a pattern that escalated over the short two months from Complainant's second edits until he notified the Company that he'd been constructively discharged.

Adding to the evidence that Complainant's activity on the 10-K contributed to the adverse shift in e-Smart's conduct toward him is that the Company's explanations for its actions were late, inadequate, and ultimately not credible and thus pretextual. Grace's failure to respond to phone calls for two weeks after her surprise reduction in Complainant's duties was compounded when the explanation she offered was that Complainant's talents were best directed elsewhere. As chief executive officer, it was within Grace's purview to decide how to deploy the Company's expertise. It is not for me to question those decisions. But it is appropriate for me to determine whether Grace's purported reliance on her executive prerogative is credible, and here I find that it was not.

In particular, Grace had initially engaged Complainant as a consultant for his expertise in the development of the relevant technology. Had she been dissatisfied with Complainant's capabilities after he began to work as a consultant, she wouldn't have brought him into the Company as an executive employee. She never criticized his work with the technology engineers, his re-staffing of the function, or his reorganization of it in Korea; on the contrary, she accepted and complimented the many steps that Complainant initiated in the area of technology development; if anything, she was effusively grateful.

The redefinition of Complainant's job included a number of duties that created the appearance but not the fact of responsibility. For example, the Company was not ready for listing on a national exchange when it had financial problems, needed to focus heavily on finding investors, had no sales, no marketing, no manufacturing capability (either in-house or outside), essentially no revenue, and was under investigation by the Securities and Exchange Commission. The explanations for late salary payments and eventual non-payment of salary were false and misleading.

There is also a pattern in the manner in which Grace terminated e-Smart's relationship with Clisham, whom she chose to replace Complainant on the technology development work.[48] As did Complainant, Clisham researched the state of e-Smart's technology. *See, e.g.*, C.Ex. 15. In early September 2007, he (together with other Brightside representatives) and Grace met in Rome with potential customers and investors. C.Ex. 32 at 2; C.Ex. 137 at 2-4. Clisham had grave concerns that he'd been expressing to Brightside about the state of e-Smart's technology; he raised issues similar to those Complainant had raised in his edits to the 10-K. C.Ex. 17; C.Ex. 18; C.Ex. 20; C.Ex. 138. While in Rome, Clisham told Grace that he had concerns about the fingerprint sensors e-Smart was using and the Company's lack of a manufacturing plan. C.Ex. 32 at 2. Grace then promptly told Brightside she didn't want Clisham working on her account. *Id.* Although she ostensibly recanted, about a month later Brightside told Clisham that Grace had not paid for his work since September 3, 2007. C.Ex 140 at 1-2. The parallels are obvious between Grace's reaction to Complainant's questioning the status of the Company's technology and Clisham's doing the same a month later. Each time Grace stated that she wanted them to continue working, while she undercut their involvement and stopped paying them.

[48] Clisham never considered himself to be the chief operating officer of IVI Smart; he viewed himself as working for Brightside and assigned to e-Smart through a contract between it and Brightside. C.Ex. 32.

The immediate proximity in time of the adverse action to the protected activity, the Company's pretextual explanations, and Grace's pattern of behavior with another technology expert, show that Complainant's protected activity was a contributing factor in e-Smart's actions against Complainant.

III. E-Smart Has Failed to Show that It Would Have Discharged Complainant Irrespective of the Protected Activity.

Once a complainant makes out a *prima facie* case of retaliatory discrimination, the burden shifts to the employer to show by clear and convincing evidence that it would have taken the adverse employment action even absent the protected activity. *See* 18 U.S.C. § 1514A(b)(2)(C) (adopting the burdens of proof in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. §42121); 49 U.S.C. § 42121(b)(2)(B)(ii) (requiring clear and convincing evidence); 29 C.F.R. §1980.109(a); *see also Van Asdale*, 577 F.3d at 1004. Clear and convincing evidence is a burden higher than a preponderance of the evidence and lower than the "beyond a reasonable doubt" standard. *See Addington v. Texas*, 441 U.S. 418, 425 (1979); *Bechtel v. Competitive Technologies, Inc.*, 2009 WL 6512627, ALJ No. 2005-SOX-00033, ARB Case No. 06-010 (January 20, 2009). It requires "'evidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Brune v. Horizon Air Industries Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 14, n.37 (ARB Jan. 31, 2006) (quoting BLACK'S LAW DICTIONARY at 577) (AIR 21).

A. E-Smart's Failure to Offer Evidence from the Persons Most Knowledgeable Gives Rise to an Adverse Inference.

E-Smart relies heavily on weak evidence, such as that of the two engineers who weren't certain when they were working for e-Smart and knew nothing about the drafting of the 10-K, the reassignment of Complainant's duties, or the non-payment of his wages. Yet, there were witnesses, such as Grace, Fritz, and Russo readily available to e-Smart who could have offered stronger evidence about the central relevant facts at issue.[49] A party's offering only weak evidence when strong evidence should be available is a basis on which to draw an adverse inference: the suggestion is that the better informed witnesses would have given adverse testimony.[50] I draw such an inference here. At the same time, however, I find the inference surplus: e-Smart has failed to meet its burden even without consideration of the adverse inference.

B. E-Smart's Evidence Falls Short of Clear and Convincing.

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[49] E-Smart expressly waived attorney-client privilege on communications with Fritz.

[50] *See, e.g., Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (holding that the production of weak evidence when strong is available implies that the strong evidence would be adverse: "[S]ilence then becomes evidence of the most convincing character"); *National Labor Relations Board v. Cornell California, Inc.*, 577 F.2d 513, 517 (9th Cir. 1978) ("'adverse inference rule' basically provides that 'when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him'"); *see also, Singh v. Gonzales*, 491 F.3d 1019, 1023-23 (9th Cir. 2007) (proper to draw adverse inference when party refuses access to relevant evidence).

E-Smart devotes only three sentences of its closing brief to argue that it would have taken the same actions even if Complainant hadn't engaged in protected activity.[51] It asserts that its motivation for taking away Complainant's technology development duties was to bring on a new chief operating officer and to refocus Complainant's efforts on other matters. Resp. Br. at 13. At the outset, this doesn't address the Company's failure to pay wages[52] or to restore Complainant's pay rate (having removed him from the incentive program), nor does it address Grace's constriction of communications with Complainant. Beyond this, however, the argument lacks foundation in credible, relevant evidence.

The Company first cites Complainant's testimony about pre-employment conversations he had with Grace about what his duties would be as chief operating officer. Tr. 373. The parties addressed the subject of Complainant's job duties in their written employment contract. The contract includes a merger and integration clause and states that the parties would develop a written job description. The language that provides for development of a job description is unambiguous. Any pre-contractual conversations are merged into the written agreement by operation of the merger and integration clause. In any event, the conversation is irrelevant to establish e-Smart's motivation when reassigning the technology development work to Clisham.

More relevant is a second item to which the Company points: Fritz' letter to Complainant, in which she states that the Company would not accept his (constructive discharge) resignation. C.Ex. 25. As Fritz writes, "Your responsibilities have been altered, but that is consistent with your position and based on allocation of resources, performance and needs of the Company as identified by its Chief Executive." *Id.* There is also Grace's email in which she announces the reassignment of duties to Clisham as new chief operating officer of IVI Smart. C.Ex. 15. There, Grace states that she needs Complainant to attain compliance with some funding requirements in the next two or three weeks and to work "on the funding and building of e-Smart and on the NASDAQ listing requirements." *Id.* Grace also stated in an email to Complainant on October 6, 2007: "I do appreciate you and value your talents and abilities and just want them utilized in the proper and important management areas, and not in less important tasks that can be delegated to others to do." C.Ex. 23.

If accepted at face value, Fritz' letter and Grace's emails imply that e-Smart considered Complainant's remaining job duties to be important and a better use of his time. I find, however, that these emails are less than entirely credible and, especially under the applicable clear and convincing burden, are insufficient to rebut the evidence implying that e-Smart would not have taken these adverse actions had Complainant "played along" on the 10-K.

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[51] The section of the brief is just over a page long. Except for the three sentences, however, it merely reargues e-Smart's position that it took *no* adverse action. *See* Resp. Br. at 12-14.

[52] Although e-Smart argues that Complainant should have assumed that his pay was late because the Company was having financial difficulties, e-Smart offers no evidence that in fact it was having financial difficulties that kept it from paying all Company executives' salary – or having financial difficulty at all. Under the circumstances, there was every reason for Complainant to assume that he was being singled out for non-payment of wages; Grace in fact had singled him out for a significant reduction in responsibility and stature and for a change in job description that kept him from earning significant amounts of incentive pay.

Fritz' response to Complainant's "resignation," rather than a representation of facts known to her, is more the Company's self-serving argument that it has not constructively discharged him. It would have made far more sense for Grace, who was Complainant's direct supervisor and who was also the person who reassigned the job responsibilities, to respond factually about what motivated the changes she made. While I do not exclude Fritz' statements about Grace's motives and purpose as hearsay,[53] there is little reason to assume that Fritz would know what motivated Grace.

Moreover, other statements that Fritz made in the letter suggest that was relying on misinformation. Fritz might have been given reason to believe, as she assured Complainant in her letter, that e-Smart would make good on the wages owed him within 72 hours. But, whatever her belief, her assurances to Complainant were manifestly wrong: E-Smart never paid Complainant those wages. I can only conclude that the representations in Fritz' letter, even if Fritz believed them, were misinformed. I therefore accord Fritz' letter no weight.

As to Grace's emails, they offer little even if taken at face value. They are unsworn, out-of-court, self-serving statements; that somewhat reduces the weight they can be accorded. Grace's having some work for Complainant to do over the next two or three weeks on a funding project does little to explain her removing him from the technology development aspect of the business, an important and ongoing effort that would continue well after three weeks. Grace mentions no additional responsibility that would divert Complainant from the technology work. She states nothing to explain why Complainant couldn't continue to manage the technology development while doing the remaining tasks she left to him.

More important is that the emails misrepresent the relevant facts. First, Grace knew that e-Smart couldn't start the listing process for NASDAQ until it filed its 10-K for 2006; she'd written as much to Complainant when she asked him on July 30, 2007 to get involved in editing the draft 10-K. Nothing on the record suggests that Grace believed the Company was about to file the 10-K, and it didn't do so until late October 2007, after the Securities and Exchange Commission halted trading in e-Smart stock because of its failure to file.

Second, by the time Grace wrote Complainant the explanatory e-mail of October 6, 2007, she had terminated e-Smart's work with Clisham. She paid for Clisham's work for a mere twelve days, from August 22 to September 3, 2007. Once she severed the relationship with Clisham, Grace could have returned the technology work to Complainant, who had consistently managed it beyond Grace's expectations. After all, it was only five or six weeks earlier, shortly before Complainant worked on the 10-K, that Grace told him that she was thanking God for the gift of Complainant's presence at the Company and his work redirecting and restructuring the Company's technology development. What shifted Grace from such profound gratitude for Complainant's contributions on technology development to her removing him from that work if not his edits and advocacy on the 10-K? I find not credible e-Smart's contention that its purpose in removing these duties from Complainant was to transfer the work to someone it engaged for only twelve days in order to free Complainant up to do nothing more than what he already was doing in addition to the technology work.

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[53] Formal rules of evidence do not apply to Sarbanes-Oxley hearings at this Office. *See* 29 C.F.R. §1980.107(d).

I infer from Grace's conduct and the entire record that, in a surprise move without any discussion or consultation with Complainant, she diminished sharply the scope of his work and his stature in the Company, ended his ability to earn incentive pay, ostracized him, gave pretextual reasons for her actions, and stopped paying his salary (while giving false explanations and assurances about it), all to force him out of the Company without triggering the severance pay obligations in Complainant's employment package (under which IVI Smart would have to pay Complainant $377,000 for a termination without cause).[54] At the least, I find that e-Smart has not established the opposite by clear and convincing evidence: That it would have taken the adverse actions described above even absent Complainant's opposition to the drafting and filing of a misleading 10-K report with the Securities and Exchange Commission.[55]

C. Alternative Holding on E-Smart's Burden.

To the extent that the findings in section III.B above are legally insufficient, I find in the alternative that these findings, joined with adverse inference discussed in section III.A, are sufficient to support the conclusion that e-Smart failed to present clear and convincing evidence that it would have taken the same adverse actions even had Complainant not engaged in protected activity.

IV. <u>Damages.</u>

A prevailing employee is entitled to "all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1). This includes reinstatement with full seniority, back pay with interest, and compensation for "any special damages," such as litigation costs, expert witness fees, and reasonable attorney's fees. 18 U.S.C. §1514A(c)(2); *see also* 29 C.F.R. § 1980.109(b).

Complainant seeks:

- Back pay from October 1, 2007 to the date of this order at $377,000 per year;
- Wage and hour penalties under California law;

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[54] Grace appears to have exhibited a hostile animus toward Complainant even after his employment ended. She ordered Krishnan to file a post-termination police report on Complainant, alleging that he'd embezzled Company funds and failed to return Company property. There is no evidence that Grace had a good faith belief that Complainant had embezzled Company funds. The testimony about Company property in the barn shows no more than that Complainant was accommodating the Company temporarily by providing it a storage facility while the technology operations were moved to Korea. Other Company employees, including Saito, knew that this material was shipped out at various times; no testimony showed that Complainant absconded with it. The government officials involved dropped the matter. Nonetheless, I reach the conclusions in the text above without relying on this evidence.

[55] At trial, e-Smart presented sporadic, disjointed evidence that seemed to intimate, but not develop, other potential explanations for Grace's adverse actions toward Complainant. For example, it offered Krishnan and Soliven's criticism of Complainant's re-staffing decisions on the engineering team. Tr. 823; Tr. 891-92. But e-Smart never offered anything to suggest that Grace (or anyone involved in the e-Smart's adverse conduct toward Complainant) considered any of this.

- A bonus of 150 percent of his salary ($565,500) for each year from 2007 through 2010, inclusive;

- The value of ten million shares of e-Smart stock at their May 2007 price;

- Attorney's fees;

- Interest on all of the above amounts;

- An award of severance pay pursuant to his employment package or, in the alternative, one year of front pay.

Compl. Br. at 22.

Back Pay. Respondent argues that any award of back pay should be based on an annual salary of $245,000, the amount to which Complainant's salary was reduced in June 2007. The reduction in salary that Complainant proposed and to which e-Smart agreed in June 2007 was linked to an incentive pay program that would allow Complainant to recover the salary cut depending on whether the Company met certain specified production goals in areas under Complainant's management. When Grace removed from Complainant his management responsibility for technology, she deprived him of the opportunity to meet those goals. When E-Smart rendered it impossible for Complainant to meet the production requirements on which the incentive pay was conditioned, the effect was to excuse Complainant from meeting that condition; it entitled him to the incentive pay.[56] The effect was to return Complainant to the annual base salary of $377,000 stated in the initial employment agreement. To make Complainant whole, I must calculate back wages at the rate of $377,000 per year from the date of termination.

An employee is required to seek alternative employment to mitigate the loss of wages that discrimination causes, but it is the employer's burden to prove that the employee has failed to do so. *See Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1497 (9th Cir. 1994). Respondent here offered no evidence and raised no argument that Complainant failed to mitigate.

There is, however, proof that Complainant eventually accepted other employment after the end of his work for e-Smart. Were I to disregard this alternate employment, it would afford Complainant a double recovery; it would go beyond the make-whole relief that the statute affords.

In particular, Complainant founded a company and accepted positions serving on the boards of directors of two other companies. Tr. 227-29. The work is entrepreneurial: Complainant takes no salary from any of the companies, but rather is compensated in stock. He hopes to profit if these companies succeed in the future. The stock of one of the companies has no present value; the record does not establish the value of the shares in the other two companies. Also uncertain on the record is the date Complainant began his work with these companies; the record shows only that Complainant was active with all three companies by the time of trial.

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[56] *See Buxbom v. Smith*, 23 Cal. 2d 535 (1944); *Erich v. Granoff*, 109 Cal.App.3d 920 (1980).

Complainant's choice to undertake entrepreneurial risk by expending his efforts with start-up companies in return for stock and not wages is a choice he is entitled to make. If any of the companies succeeds, he might reap very large rewards; his efforts might also fail. But by making this choice, he has ceased to function in the economy as an employee and has instead become a business owner. As of the time he exited the labor market, he failed to mitigate his lost wages at e-Smart. The record establishes this occurred by the time of trial.

I therefore find that Complainant is entitled to back wages at an annual rate of $377,000, paid on a bimonthly basis from October 1, 2007 (the date e-Smart stopped paying Complainant) until the time of trial, September 1, 2010. This amounts to $1,115,291.43. The statute also allows interest on back wages. Interest comes to $108,334.72 through September 1, 2011. *See* 26 USC §6621(b)(3) (applying Internal Revenue Code section 1274(d) plus three percent). Total back wages with interest is $1,223,626.15.[i]

State law wage and hour penalties. This Office lacks jurisdiction to award state law wage and hour penalties. Complainant must pursue those, if at all, with the California Labor Commissioner.

Bonus Pay. Complainant's employment agreement provides for "a bonus of up to 150% of his Base Salary based upon performance and other performance-based bonuses as may be implemented by the Company." C.Ex. 1 at 2. Complainant argues that, because the Company awarded stock to Grace and Saito, he is entitled to the performance-based bonus in his employment contract. This argument, however, lacks foundation.

The 10-K for 2007 (on which Complainant relies) indicates that the Company did not give a bonus to either Grace or Saito. *See* C.Ex. 27 at 48. Nothing on the record suggests that the Company's awards of stock to Grace or Saito are performance-based or the equivalent of bonuses. Grace and Saito are the two remaining founders still in the business, which could readily account for ongoing annual stock, and their employment agreements are not on the record.

Bonuses generally are discretionary, and any award of lost bonuses generally is too speculative. *See Ishmael v. Calibur Systems, Inc.*, 1997 WL 665477 at *19 (ARB Oct. 17, 1007) (Solid Waste Disposal Act – bonuses "too speculative to be part of a back pay award"). Thus, if the employment agreement fails to specify a standard on which to determine the amount of any bonus, the bonus fails as speculation. *See Stevens v. Mavent, Inc*., 2008 WL 2824956 at *3 (C.D. Cal. 2008) (California law) ("Plaintiff's first claim for breach of contract for failure to pay performances bonuses fails because the absence of standards for determining performance bonus eligibility renders damages speculative"), citing *Scott v. Pacific Gas and Electric Co.*, 11 Cal. 4th 454, 473, (1955).

Here, Complainant's employment agreement lacks any mandatory language or quantifiable basis; it does no more than set a maximum at 150 percent of Complainant's base salary. Worse, the bonus expressly depends on "other performance-based bonuses as may be implemented by the Company." The only evidence is that the Company declined any such bonuses. Accordingly, any award of a bonus would be too speculative and cannot be allowed.

Stock award. Complainant requests $19,200,000, which he calculates as the value of 10 million shares of stock that he claims he would have received had e-Smart not discharged him. Again, this lacks foundation.

Complainant's employment agreement provides him – not with an award of free stock – but with an option to buy 10 million shares of common stock at the fair market value on the date the board of directors approves the grant. There is a vesting schedule: Options to buy 1 million shares vest when Complainant begins employment (*i.e.*, May 1, 2007); and options to buy 3 million shares vest at May 1 of each succeeding year, starting in 2008, "subject to [Complainant's] continued employment with the Company on each vesting date." C.Ex. 1 at 2-3.

Neither party provided a copy of the Company's option agreement or its option policy for the record; the record is silent about when the options had to be exercised. Had Complainant exercised the options at some point after they vested, the date on which he might have sold the stock is entirely speculative. But every appearance is that an exercise of the options at the fair market value as of the date the board approved the grant would never have resulted in a subsequent profitable sale of the stock.[57]

For example, if Complainant were to have exercised on August 31, 2011 the option to purchase the 10 million shares at the $1.40 price that appears to have obtained on the date the options were granted, and had Complainant then immediately sold the shares that day at the publically traded price, it would have led to an immediate loss of $13 million. Had Complainant exercised the 1 million options that had vested as of the date of termination (October 17, 2007) and then sold the shares immediately, it would have resulted in a loss of $600,000.

Based on this record, Complainant has failed to prove any monetary loss associated with the e-Smart stock options that were part of his compensation package. I infer from this record no more than that, absent e-Smart's unlawful conduct, all of Complainant's 10 million options could have been expected to vest on the vesting schedule stated in the employment contract. He is entitled to a finding that the options have vested and entitle him to whatever is provided contractually between the parties concerning the exercise of the vested options. To make Complainant whole in this regard, he must be allowed to exercise the options as if his last day of employment is the date this Decision and Order becomes final.

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[57] Publically available trading data shows the following: The value of the stock on May 1, 2007, the date that Complainant began to work for e-Smart (which must be close to the date the board approved the grant of the options), was $1.40. On the date of termination, October 17, 2007, the value was $0.80. On May 1, 2007, the stock traded at $1.20. On April 27, 2010, it traded at $0.03. Its value at April 29, 2011 is listed at $0.001. It recovered as of August 31, 2011 to $0.10.

E-Smart awarded Complainant 500,000 shares of restricted stock, dated April 4, 2007.[58] C.Ex. 36. At about the same time, it awarded unrestricted shares to Saito. C.Ex. 94. Complainant asked Grace to remove the restrictions on the stock awarded to him, and she refused. Tr. 198.

Complainant argues that, as a remedy for the Sarbanes-Oxley violation, he is entitled to an order requiring e-Smart to remove the restrictions on sale of his shares, which would allow him to sell the stock publically. He argues that the value of the stock is $960,000.

Complainant offers nothing to show that he was contractually entitled to require e-Smart to award him unrestricted stock. The restricted shares were awarded more than two months before Complainant became involved in work on the 10-K. There is nothing to link the restriction on sale to his work on the 10-K or to show that the Company would have lifted the restrictions had Complainant not expressed his views on the draft 10-K. The requested award of $960,000 for the stock cannot be supported as make whole relief; it exceeds the statutory remedy.[59]

Severance pay or front pay in lieu of reinstatement. Complainant also requests a remedy under a severance agreement with IVI Smart. This remedy is unavailable, as IVI Smart is not a party, and also because severance would be duplicative so long as Complainant receives back wages plus either reinstatement or, under certain circumstances, front pay in lieu of reinstatement. Those remedies put Complainant in the position he would have been in had e-Smart not terminated the employment and thus make an award of severance unnecessary to make Complainant whole. *See* discussion in footnotes 6 and 9.

The statute provides for reinstatement as a remedy, 18 U.S.C. §1514A(c)(2), and the Occupational Safety & Health Administration ordered immediate reinstatement before the case reached this Office. Complainant requested of e-Smart that it comply with the order of immediate reinstatement. E-Smart never sought a stay, and no automatic stay is available. 29 C.F.R. §1980.105(c). OSHA's order notwithstanding, e-Smart never reinstated Complainant. Yet, for his part Complainant never sought enforcement in the district court of the order of reinstatement.[60] And at this point, he no longer wants his employment with e-Smart reinstated; instead he asks for front pay in lieu of reinstatement.

Front pay may be an acceptable substitute for reinstatement, "whenever the antagonism between the plaintiff and her employer is such that it would be inappropriate to expect her to return to work." *Passantino v. Johnson & Johnson Consumer Products, Inc*., 212 F.3d 493, 512 (9th Cir. 2000) (Title VII and state law sex discrimination claim). Complainant was employed at an executive level in the Company. By its nature, a job at that level requires personal trust and confidence between Complainant and the chief executive officer. E-Smart's failure to reinstate

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[58] Given that the date on the stock certificate is *before* Complainant began his employment with e-Smart, it could be that this award was for work Complainant performed as a contractor/consultant, not in connection with his employment. As I will not award Complainant a remedy based on this stock, I do not reach whether this was employee compensation.

[59] Even if there were a basis to award Complainant the value of the stock (which there is not), the current value of the 500,000 shares appears to be $50,000, not $960,000.

[60] *See* 18 U.S.C. §1514A(b)(2)(A), incorporating by reference 49 U.S.C. §42121(b)(6)(A).

Complainant suggests a loss of trust and confidence; Complainant's not pursuing the matter in the district court suggests the same; and Complainant's current stated preference for front pay implies a continued lack of the necessary relationship required for the success of an executive-level job. This is generally an appropriate case for an award of front pay in lieu of reinstatement.

The reason that front pay is not available, however, is the same reason that back wages must be cut off as of the date of trial. Complainant chose a vocational path as an entrepreneur at some unspecified time prior to trial. Had he continued vocationally as an employee and taken other employment prior to trial, it would have reduced his entitlement to front pay by amount of wages he was earning; any other result would lead to a double recovery. Complainant, however, chose to take himself out of the labor market to engage in business ventures with little or no current remuneration but with the potential for very large future profits. That is his right and his choice, but where, as here, it occurred prior to the date of this Order, which is when front pay otherwise would take, it precludes front pay. By choosing to expend his efforts on large possible future profits rather than present wages, Complainant has abandoned any claim that his lost wages are continuing, unabated by current earnings.

VI. This Office Lacks Jurisdiction to Require E-Smart to Post a Bond Pending Appeal.

Complainant requests that e-Smart be required to post a bond pending appeal. The statute and regulations that confer jurisdiction establish the applicable procedures for appeals. 29 C.F.R. § 18.58. The Sarbanes-Oxley regulations provide an automatic stay of the decision of an administrative law judge if the Administrative Review Board timely notifies the parties (within 30 days after the filing of a petition for review) that that the Board has accepted the case for review. 29 C.F.R. §1980.110(b). The regulations do not provide for limitations on the automatic stay, except to state that the stay does not extend to orders of reinstatement. *Id.* Complainant's request therefore lacks merit.

Conclusion and Order

E-Smart discharged Complainant from employment because he provided information to a person with supervisory authority over him (and others working for employer with authority to investigate, discover, or terminate relevant misconduct) regarding conduct that he reasonably believed to constitute violations of the anti-fraud provisions in the securities acts and the rules of the Securities and Exchange Commission. E-Smart violated the whistleblower protection provisions of the Sarbanes-Oxley Act. 18 U.S.C. § 1514A. Accordingly,

1. E-Smart will pay Complainant back wages and interest in the amount of $1,223,626.15.

2. The option rights to buy 10 million shares of e-Smart common stock as provided in the employment agreement between the parties vested according to the schedule in the employment agreement; all options were fully vested as of May 1, 2010; Complainant's exercise of the options must be permitted consistent with Company policy, taking as Complainant's last day of employment the date this Order becomes final.

3. E-Smart will pay Complainant's attorney's fees and costs reasonably incurred in the litigation. Counsel may file a fee petition within 30 days. Any petition will include admissible evidence to show the fair market hourly rates chargeable by attorneys with Complainant's counsel's reputation, experience, and expertise in the San Francisco market at the relevant time. E-Smart may file any objections or oppositions to the fee petition within 21 days following service of the petition. Counsel may file a reply within 14 days of service of the opposition.

4. Complainant's other requests for remedies, including a bond on appeal, are denied.

SO ORDERED.

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STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).

SEE ENDNOTE TO FOLLOW:

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Pay Due Date	Amount Due	Running Total(Amt Due + Qtrly Interest)	Rate	Short Term Rate	Interest	Quarterly Interest	Pay Due Date
10/1/2007	$ 15,708.33	$ 15,708.33	3%				10/1/2007
10/16/2007	$ 15,708.33	$ 31,416.66	3%	4.11%	$ 46.54		10/16/2007
11/1/2007	$ 15,708.33	$ 47,124.99	3%	4.11%	$ 93.07		11/1/2007
11/16/2007	$ 15,708.33	$ 62,833.32	3%	4.04%	$ 138.23		11/16/2007
12/1/2007	$ 15,708.33	$ 78,541.65	3%	4.04%	$ 184.31		12/1/2007
12/16/2007	$ 15,708.33	$ 94,249.98	3%	3.81%	$ 222.86		12/16/2007
1/1/2008	$ 15,708.33	$ 110,910.76	3%	3.81%	$ 267.43	$ 952.45	1/1/2008
1/16/2008	$ 15,708.33	$ 126,619.09	3%	3.14%	$ 283.75		1/16/2008
2/1/2008	$ 15,708.33	$ 142,327.42	3%	3.14%	$ 323.93		2/1/2008
2/16/2008	$ 15,708.33	$ 158,035.75	3%	3.07%	$ 359.97		2/16/2008
3/1/2008	$ 15,708.33	$ 173,744.08	3%	3.07%	$ 399.70		3/1/2008
3/16/2008	$ 15,708.33	$ 189,452.41	3%	2.23%	$ 378.62		3/16/2008
4/1/2008	$ 15,708.33	$ 207,319.55	3%	2.23%	$ 412.85	$ 2,158.81	4/1/2008
4/16/2008	$ 15,708.33	$ 223,027.88	3%	1.83%	$ 417.23		4/16/2008
5/1/2008	$ 15,708.33	$ 238,736.21	3%	1.83%	$ 448.84		5/1/2008
5/16/2008	$ 15,708.33	$ 254,444.54	3%	1.62%	$ 459.57		5/16/2008
6/1/2008	$ 15,708.33	$ 270,152.87	3%	1.62%	$ 489.81		6/1/2008
6/16/2008	$ 15,708.33	$ 285,861.20	3%	2.06%	$ 569.57		6/16/2008
7/1/2008	$ 15,708.33	$ 304,557.24	3%	2.06%	$ 602.69	$ 2,987.71	7/1/2008
7/16/2008	$ 15,708.33	$ 320,265.57	3%	2.40%	$ 685.25		7/16/2008
8/1/2008	$ 15,708.33	$ 335,973.90	3%	2.40%	$ 720.60		8/1/2008
8/16/2008	$ 15,708.33	$ 351,682.23	3%	2.51%	$ 771.34		8/16/2008
9/1/2008	$ 15,708.33	$ 367,390.56	3%	2.51%	$ 807.40		9/1/2008
9/16/2008	$ 15,708.33	$ 383,098.89	3%	2.36%	$ 820.51		9/16/2008
10/1/2008	$ 15,708.33	$ 403,467.91	3%	2.36%	$ 855.59	$ 4,660.69	10/1/2008
10/16/2008	$ 15,708.33	$ 419,176.24	3%	2.17%	$ 869.14		10/16/2008
11/1/2008	$ 15,708.33	$ 434,884.57	3%	2.17%	$ 902.98		11/1/2008

11/16/2008	$ 15,708.33	$ 450,592.90	3%	1.61%	$ 835.34		11/16/2008
12/1/2008	$ 15,708.33	$ 466,301.23	3%	1.61%	$ 865.51		12/1/2008
12/16/2008	$ 15,708.33	$ 482,009.56	3%	1.36%	$ 847.11		12/16/2008
1/1/2009	$ 15,708.33	$ 502,913.62	3%	1.36%	$ 875.65	$ 5,195.73	1/1/2009
1/16/2009	$ 15,708.33	$ 518,621.95	3%	0.81%	$ 798.38		1/16/2009
2/1/2009	$ 15,708.33	$ 534,330.28	3%	0.81%	$ 823.31		2/1/2009
2/16/2009	$ 15,708.33	$ 550,038.61	3%	0.60%	$ 801.50		2/16/2009
3/1/2009	$ 15,708.33	$ 565,746.94	3%	0.60%	$ 825.06		3/1/2009
3/16/2009	$ 15,708.33	$ 581,455.27	3%	0.72%	$ 876.91		3/16/2009
4/1/2009	$ 15,708.33	$ 602,190.01	3%	0.72%	$ 901.26	$ 5,026.40	4/1/2009
4/16/2009	$ 15,708.33	$ 617,898.34	3%	0.83%	$ 960.99		4/16/2009
5/1/2009	$ 15,708.33	$ 633,606.67	3%	0.83%	$ 986.06		5/1/2009
5/16/2009	$ 15,708.33	$ 649,315.00	3%	0.76%	$ 992.65		5/16/2009
6/1/2009	$ 15,708.33	$ 665,023.33	3%	0.76%	$ 1,017.26		6/1/2009
6/16/2009	$ 15,708.33	$ 680,731.66	3%	0.75%	$ 1,039.10		6/16/2009
7/1/2009	$ 15,708.33	$ 702,499.70	3%	0.75%	$ 1,063.64	$ 6,059.71	7/1/2009
7/16/2009	$ 15,708.33	$ 718,208.03	3%	0.82%	$ 1,118.15		7/16/2009
8/1/2009	$ 15,708.33	$ 733,916.36	3%	0.82%	$ 1,143.15		8/1/2009
8/16/2009	$ 15,708.33	$ 749,624.69	3%	0.83%	$ 1,171.21		8/16/2009
9/1/2009	$ 15,708.33	$ 765,333.02	3%	0.83%	$ 1,196.28		9/1/2009
9/16/2009	$ 15,708.33	$ 781,041.35	3%	0.84%	$ 1,224.53		9/16/2009
10/1/2009	$ 15,708.33	$ 803,852.65	3%	0.84%	$ 1,249.67	$ 7,102.98	10/1/2009
10/16/2009	$ 15,708.33	$ 819,560.98	3%	0.75%	$ 1,256.02		10/16/2009
11/1/2009	$ 15,708.33	$ 835,269.31	3%	0.75%	$ 1,280.56		11/1/2009
11/16/2009	$ 15,708.33	$ 850,977.64	3%	0.71%	$ 1,291.19		11/16/2009
12/1/2009	$ 15,708.33	$ 866,685.97	3%	0.71%	$ 1,315.47		12/1/2009
12/16/2009	$ 15,708.33	$ 882,394.30	3%	0.69%	$ 1,332.53		12/16/2009
1/1/2010	$ 15,708.33	$ 905,935.09	3%	0.69%	$ 1,356.68	$ 7,832.45	1/1/2010
1/16/2010	$ 15,708.33	$ 921,643.42	3%	0.57%	$ 1,347.58		1/16/2010
2/1/2010	$ 15,708.33	$ 937,351.75	3%	0.57%	$ 1,370.94		2/1/2010
2/16/2010	$ 15,708.33	$ 953,060.08	3%	0.72%	$ 1,452.90		2/16/2010
3/1/2010	$ 15,708.33	$ 968,768.41	3%	0.72%	$ 1,477.24		3/1/2010

3/16/2010	$ 15,708.33	$ 984,476.74	3%	0.64%	$ 1,469.30		3/16/2010
4/1/2010	$ 15,708.33	$ 1,008,796.15	3%	0.64%	$ 1,493.12	$ 8,611.08	4/1/2010
4/16/2010	$ 15,708.33	$ 1,024,504.48	3%	0.67%	$ 1,542.62		4/16/2010
5/1/2010	$ 15,708.33	$ 1,040,212.81	3%	0.67%	$ 1,566.64		5/1/2010
5/16/2010	$ 15,708.33	$ 1,055,921.14	3%	0.79%	$ 1,642.67		5/16/2010
6/1/2010	$ 15,708.33	$ 1,071,629.47	3%	0.79%	$ 1,667.48		6/1/2010
6/16/2010	$ 15,708.33	$ 1,087,337.80	3%	0.74%	$ 1,669.96		6/16/2010
7/1/2010	$ 15,708.33	$ 1,112,829.92	3%	0.74%	$ 1,694.43	$ 9,783.79	7/1/2010
7/16/2010	$ 15,708.33	$ 1,128,538.25	3%	0.61%	$ 1,673.88		7/16/2010
8/1/2010	$ 15,708.33	$ 1,144,246.58	3%	0.61%	$ 1,697.51		8/1/2010
8/16/2010	$ 15,708.33	$ 1,159,954.91	3%	0.53%	$ 1,683.00		8/16/2010
9/1/2010	$ 15,708.33	$ 1,175,663.24	3%	0.53%	$ 1,706.10		9/1/2010
9/16/2010		$ 1,175,663.24	3%	0.46%	$ 1,694.91		9/16/2010
10/1/2010		$ 1,185,813.56	3%	0.46%	$ 1,694.91	$ 10,150.32	10/1/2010
10/16/2010		$ 1,185,813.56	3%	0.41%	$ 1,684.84		10/16/2010
11/1/2010		$ 1,185,813.56	3%	0.41%	$ 1,684.84		11/1/2010
11/16/2010		$ 1,185,813.56	3%	0.35%	$ 1,655.20		11/16/2010
12/1/2010		$ 1,185,813.56	3%	0.35%	$ 1,655.20		12/1/2010
12/16/2010		$ 1,185,813.56	3%	0.32%	$ 1,640.38		12/16/2010
1/1/2011		$ 1,195,774.39	3%	0.32%	$ 1,640.38	$ 9,960.83	1/1/2011
1/16/2011		$ 1,195,774.39	3%	0.43%	$ 1,708.96		1/16/2011
2/1/2011		$ 1,195,774.39	3%	0.43%	$ 1,708.96		2/1/2011
2/16/2011		$ 1,195,774.39	3%	0.51%	$ 1,748.82		2/16/2011
3/1/2011		$ 1,195,774.39	3%	0.51%	$ 1,748.82		3/1/2011
3/16/2011		$ 1,195,774.39	3%	0.54%	$ 1,763.77		3/16/2011
4/1/2011		$ 1,206,217.49	3%	0.54%	$ 1,763.77	$ 10,443.10	4/1/2011
4/16/2011		$ 1,206,217.49	3%	0.55%	$ 1,784.20		4/16/2011
5/1/2011		$ 1,206,217.49	3%	0.55%	$ 1,784.20		5/1/2011
5/16/2011		$ 1,206,217.49	3%	0.56%	$ 1,789.22		5/16/2011
6/1/2011		$ 1,206,217.49	3%	0.56%	$ 1,789.22		6/1/2011
6/16/2011		$ 1,206,217.49	3%	0.46%	$ 1,738.96		6/16/2011
7/1/2011		$ 1,216,842.25	3%	0.46%	$ 1,738.96	$ 10,624.77	7/1/2011

7/16/2011		$ 1,216,842.25	3%	0.37%	$ 1,708.65		7/16/2011
8/1/2011		$ 1,216,842.25	3%	0.37%	$ 1,708.65		8/1/2011
8/16/2011		$ 1,216,842.25	3%	0.32%	$ 1,683.30		8/16/2011
9/1/2011		$ 1,223,626.15	3%	0.32%	$ 1,683.30	$ 6,783.90	9/1/2011
					$ 108,334.72		