

# JUDGE McRAHON

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08 CV 9171

## IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

10 DOUGLAS M. BORWICK, on Behalf of  
11 e-Smart Technologies, Inc.,

12 Plaintiff,

13 vs.

14 CHARLES R. BLACK, ELLIOT H. COLE,  
15 THOMAS J. VOLPE and MARY A. GRACE,

16 Defendants.

### DERIVATIVE COMPLAINT

Case No.

Judge:

DEMAND FOR JURY TRIAL

OCT 27 2008  
U.S.D.C. S.D.N.Y.  
CASHIERS

17 Plaintiff Douglas M. Borwick ("Borwick"), on behalf of e-Smart Technologies, Inc.,  
18 ("e-Smart"), alleges the following based upon, among other things, personal knowledge, certain  
19 anonymous sources, corporate books and records, public filings, and/or on information and belief  
20 as to all other matters. Plaintiff hereby complains and alleges against Charles R. Black, Elliot M.  
21 Cole, Thomas J. Volpe, and Mary A. Grace (collectively, "Defendants"), derivatively on behalf of  
22 e-Smart, as follows:

### PARTIES

23  
24 1. Plaintiff Douglas M. Borwick is an individual who resides in Colorado and is  
25 a citizen of the State of Colorado. Plaintiff owns over 2,000,000 shares of e-Smart stock.  
26 Plaintiff has owned shares of e-Smart from approximately 2002 to the present. Plaintiff  
27 owned shares of e-Smart at the times of all of the relevant transactions at issue in this  
28 complaint.

1           2.       On information and belief, defendant Charles R. Black is and was, at all  
2 relevant times, a Director of e-Smart. On information and believe, Charles R. Black resides  
3 in the District of Columbia and is a citizen of the District of Columbia. On information and  
4 belief, Mr. Black is also currently employed by the presidential campaign of Senator John  
5 McCain. According to Source Watch, Mr. Black previously served as senior advisor to  
6 Presidents Ronald Regan and George H.W. Bush. On information and belief, Mr. Black  
7 serves on the managing board of Civitas Group, LLC, a homeland security consulting firm.  
8 On the Civitas Group, LLC website, it is reported that Mr. Black “served as principal public  
9 spokesman for President Bush in the 1992 presidential campaign, and earlier, as spokesman  
10 or the Republican National Committee.” In 2000, it is reported by Civitas Group, LLC, that  
11 Mr. Black “served as a volunteer political advisor and surrogate spokesman for the  
12 Bush/Cheney presidential campaign” and that Mr. Black “has managed the successful  
13 elections of more than ten members of the U.S. Senate and more than a dozen Members of  
14 Congress.” Mr. Black was appointed as a director of e-Smart on or about July 17, 2006.

15           3.       Defendant Elliot H. Cole is and was, at all relevant times, a Director of e-  
16 Smart. On information and belief, Elliot H. Cole is a citizen of the District of Columbia and  
17 resides in the District of Columbia. Cole has been a director of e-Smart since in or around  
18 April 2005. On information and belief, Cole is a senior partner with the firm of Patton  
19 Boggs, LLP (Washington, DC), and has practiced corporate law in the District of Columbia  
20 for over 40 years.

21           4.       Defendant Thomas J. Volpe is and was, at all relevant times, a Director of e-  
22 Smart. On information and belief, Volpe is a citizen of New York and resides in New York.  
23 On information and belief, Volpe is currently employed by Babcock & Brown, a leading  
24 global alternative asset manager which operates from 31 offices has in excess of 1,500  
25 employees worldwide. Volpe has been a director of e-Smart since or around April 7, 2005.  
26 On information and belief, Volpe was previously a senior vice president of financial  
27 operations for the Interpublic Group of Companies, vice president and treasurer of Colgate-  
28 Palmolive and a principal at Deloitte, Haskins & Sells.



1 present, Grace caused e-Smart to make false or misleading statements in press releases  
2 concerning e-Smart's financial condition, e-Smart's ownership of certain patents and the  
3 value of those patents, the distribution of e-Smarts shares, the status of business transactions  
4 and potential revenues of the company. Moreover, the board of directors of e-Smart are  
5 personally liable for financial harm caused to e-Smart because each member has, among  
6 other things, breached their duty of care to the corporation; breached their duty of loyalty to  
7 the corporation; directly participated in and/or facilitated Grace's misappropriation of e-  
8 Smart's assets for her personal use or use by businesses she controls; allowed Grace to  
9 commingle personal and business assets; and failed to disclose potential or actual conflicts of  
10 interest. To date, none of the members of the board took any action to report or prevent the  
11 abuse and misuse of e-Smart's corporate funds. In fact, these board members exercised no  
12 corporate governance whatsoever during their tenure, despite their knowledge of Grace's  
13 fraudulent activities for an extended period of time.

#### 14 **COMPANY BACKGROUND**

15 11. e-Smart, formerly known as Boppers Holdings, Inc., and Plainview  
16 Laboratories, Inc., is a publicly traded company with approximately 730,000,000 outstanding  
17 common shares and 17,500,000 preferred shares. e-Smart was formed in Nevada in July  
18 1997.

19 12. In or about May 30, 2000, e-Smart registered its common stock with the SEC  
20 pursuant to Section 12(g) of the Exchange Act by filing a form 10-SB.

21 13. On or around December 12, 2002, the SEC announced the "temporary  
22 suspension, pursuant to Section 12(k) of the Securities Exchange Act of 1934 (the "Exchange  
23 Act"), of trading of the securities of e-Smart Technologies, Inc. ("e-Smart")." The SEC  
24 release further clarified that the SEC was "temporarily suspended trading in the securities of  
25 e-Smart because of questions that have been raised about the accuracy and adequacy of  
26 publicly disseminated information concerning, among other things, e-Smart's results of  
27 operations, contractual relationships, ownership of technology assets, and projected revenues  
28 and profits, and the market for the securities of e-Smart."

1           14.     In or about December 16, 2002, the Securities and Exchange Commission  
2     ("SEC") initiated a proceeding against e-Smart pursuant to Section 12(j) of the Securities  
3     Exchange Act of 1934. The Commission alleged that e-Smart failed to comply with the  
4     reporting requirements of Section 13(a) of the Securities Exchange Act of 1934, by filing  
5     materially false and misleading reports with the SEC and failing to file annual and quarterly  
6     reports over several fiscal periods.

7           15.     The SEC also alleged that e-Smart violated Rule 12b-20 of the Exchange Act  
8     because it failed to disclose in its Form 10-QSB for the period ending June 30, 2003 that  
9     Wayne Drizin ("Drizin"), one of the purported co-inventors of the company's smart card, was  
10    arrested and later convicted of wire fraud. Black wrote at least one letter to the judge in that  
11    case claiming Drizin's work had national security implications and alleging a government  
12    conspiracy and claiming Drizin's innocence.

13    <http://firstread.msnbc.msn.com/archive/2008/04/17/912511.aspx>. Drizin was convicted of  
14    wire fraud in Arizona in 2003. On information and belief, Drizin received favorable  
15    sentencing/parole terms because, according to Black, he was working on technology critical  
16    to "national security."

17           16.     On or about March 4, 2004, Administrative Law Judge Lillian A. McEwen  
18    ruled that e-Smart violated Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13  
19    thereunder. Judge McEwen held that "[d]uring the relevant period, the investing public was  
20    deprived of current, accurate financial information on e-Smart."

21           17.     Accordingly, Judge McEwen ruled that "the registration of the common stock  
22    of e-Smart Technologies, Inc. . . be and it hereby is REVOKED, for the company's violations  
23    of the period reporting requirements of Section 13(a) of the Securities Exchange Act of 1934  
24    and Rules 13a-1 and 13a-13 thereunder." Exchange Act Release No. 50030 (July 16, 2004).

25           18.     e-Smart appealed the decision of the Commission and the Commission  
26    reversed itself. Initial Decision Release No. 272 (February 3, 2005).

1 **SELF-DEALING**

2 19. Since on or around March 2001, Grace has systematically moved the assets of  
3 e-Smart to entities she controls, has illegally taken control of the shares of e-Smart, and has  
4 engaged in related party transactions without disclosure causing e-Smart to issue millions of  
5 additional common shares illegally so she could sell them and use the proceeds for her  
6 personal benefit. In an apparent attempt to keep the price of the stock up, Grace caused e-  
7 Smart to issue numerous false and misleading press releases.

8 20. A recent example occurred on or around May 4, 2007, when Grace caused e-  
9 Smart to issue a total of 17,500,000 shares of Series A Convertible Preferred Stock to IVI, an  
10 entity she controls. These shares were Series A Preferred and as such are convertible into  
11 shares of e-Smart common stock at a conversion ratio of 65.191890 shares of common stock  
12 for each share of Series A Preferred. Effectively this issuance caused Grace to have an  
13 undisclosed control position in e-Smart of approximately 70% of the total number of shares  
14 outstanding at the time their issuance was approved. On information and belief, Grace  
15 provided no consideration or fair value for these shares.

16 21. On information and belief, Grace repeatedly misrepresented in press releases,  
17 to the public, and to shareholders that e-Smart's purported primary asset, its patents and  
18 trademarks, were actually assets of e-Smart when in fact, she held the patents and trademarks  
19 in the name of privately-held corporations she controlled and continues to control. Grace has  
20 primarily used three private corporations which she controls, IVI Technologies, Inc., a Utah  
21 corporation ("IVI"), and Intermarket Ventures, a Delaware corporation ("IMV") and IVI  
22 Smart Technologies, Inc. ("IVI Smart"), a New York corporation, to control the assets that  
23 should be the property of e-Smart. According to E-Smart's most recent 10-Q dated , e-Smart  
24 paid for all research and development of the smart card patent, all patent filing fees and costs,  
25 all totaling approximately \$100,000,000, but does not even have a proper license to use or  
26 market the Smart Card technology.

27 22. On information and belief, in or around 2005, Grace caused e-Smart to assign  
28 its technology and pending patent applications [e-Smart's purported primary asset] to IVI

1 Smart, a privately-held corporation she controlled and continues to control, in exchange for a  
2 license for South Korea and certain other Asia Pacific markets. The issued and pending  
3 patent applications transferred relate to a technology used in a biometric "smart card." Grace  
4 misrepresented the ownership and licensing of this patented technology in numerous press  
5 releases and in filings with the SEC. Grace referred to this technology as if it belonged to e-  
6 Smart on a shareholders' conference call, and other meeting with potential investors.

7 23. In a call with investors dated December 27, 2007, Grace also stated that in  
8 2007 alone e-Smart had filed "13 patents on new and upgraded technologies, which [Grace]  
9 was looking forward to the Company and [its] shareholders having the opportunity to benefit  
10 from in the future." A search of the U.S. Patent & Trademark website shows no patents in  
11 the name of e-Smart and multiple patents for smart card technology licensed from the  
12 inventor to IVI Smart Technologies, Inc.

13 24. In its Form 10QSB/A filed 11/20/07 for the period ending 09/30/06, Grace  
14 states that Tamio Saito, a well-respected inventor, is no longer working for the company.  
15 However in a November 2007 Letter From the Chairman prepared by Grace, she repeatedly  
16 refers to e-Smart's inventory of patents and trademarks being expanded under the leadership  
17 of e-Smart's Chief Technology Officer, Tamio Saito. As mentioned above, Grace did not  
18 discuss the fact that patents were not held or owned by e-Smart.

19 25. On information and belief, Grace has been moving, and continues to move the  
20 patents, trademarks and other technology belonging to e-Smart to subsidiaries or related  
21 entities that she controls for the purpose of preventing shareholders getting access to these  
22 assets.

23 26. Between March 2001 and continuing through the present, Grace sold millions  
24 of shares of e-Smart common stock to private investors in sham loan transactions. Grace  
25 would take cash from investors and enter into a loan agreement pledging her restricted stock  
26 as collateral. Grace represented that upon default of these short-term loans (one and two  
27 week loans), since the restricted shares were held as collateral for a defaulted loan, the  
28 restrictive legend could be removed upon default. In reality, this was not a loan and all

1 parties reasonably understood that e-Smart would likely default on the loan with the result  
2 effectively being a sale of free trading stock at a fraction of the market price. The company  
3 did not have the financial ability to repay the loans at the time the loans were obtained and  
4 conveyed information to investors that it was just about to complete a large fund raising.  
5 This promise of fund raising was used to convince investors that the company was about to  
6 transition into a viable commercial entity, but the date would keep slipping for accomplishing  
7 the fund raising. Grace obtained an opinion letter from an experienced securities attorney to  
8 assist her in the initial transactions. Grace, however, continued with these disguised and  
9 sham loan transactions and drastically altered and forged the content of the attorney's opinion  
10 letter on numerous subsequent occasions to fit whatever type of stock sales transaction she  
11 desired. Grace routinely changed critical information in the original opinion letter to reflect  
12 the current unregistered sale of stock to private investors. Grace raised approximately  
13 \$10,000,000 and caused e-Smart to issue approximately hundreds of millions of shares using  
14 a forged and altered attorney opinion letter. The SEC's recent trading suspension on October  
15 17, 2008 also questions the legality of this practice as "a possible distribution of e-Smart's  
16 common stock without registration under the Securities Act of 1933."

17 27. Grace has also engaged in self-dealing with respect to paying or issuing stock  
18 to close friends at substantially discounted prices to compensate them for finding other  
19 investors. Grace does this by ostensibly engaging close friends as "finders" and issuing them  
20 cheap stock. Grace gave over 200,000,000 shares to close friends and associates over this  
21 period at an expense of over \$10,000,000. Grace was able to issue these large amounts of  
22 shares without customary resolutions by using a registrar and transfer agent that would follow  
23 her oral instructions. According to books and records for the company, Grace has gone  
24 through approximately \$100,000,000 of costs and expenses without generating one dollar of  
25 revenue during this entire period.



1 despite multiple warnings, failed to disclose improper fund raising in a Hawaiian research  
2 partnership called BioSensor and used those funds raised in Hawaii for her own personal  
3 benefit.

4 34. Grace and the board allowed the corporate affairs to deteriorate to the point  
5 where as set for the above, the SEC, on October 17, 2008, announced the temporary  
6 suspension of trading of the securities of e-Smart for the very same conduct alleged in this  
7 complaint.

#### 8 **FALSE AND MISLEADING PRESS RELEASES**

9 35. Since on or about March 2001, Grace has repeatedly and systematically  
10 caused e-Smart to issue false and misleading press releases without factual support, designed  
11 by her to inflate the price of e-Smart's common stock, allowing her to sell additional shares  
12 to raise money that she has misused, and continues to use, for her own purposes and to  
13 present a false image to the shareholders and the marketplace that the company was making  
14 progress, when in fact it did not make a single sale in eight years. Grace has a long pattern of  
15 underreporting negative issues and over-reporting progress. This pattern is evident when  
16 each of these agreements is scrutinized -- they all call for e-Smart to obtain funding and  
17 produce actual smart cards.

18 36. On information and belief, e-Smart has never had the funding or the facilities  
19 to produce any of the smart cards using the technology Grace claimed e-Smart owned. On  
20 information and belief, e-Smart paid a third-party manufacturing firm to produce less than 5  
21 "production" quality cards to use as demonstration samples. Grace used a majority of the  
22 money raised for her own benefit while continuing to churn out false and misleading  
23 information to the public. These press releases were and continue to be posted on e-Smarts  
24 Internet websites located at [www.e-smart.com](http://www.e-smart.com) and  
25 <http://www.esmartkorea.com/english/default.asp> or in filings with the SEC. Grace repeatedly  
26 stated to the public and potential shareholders that "The value of our Company is in this  
27 technology and in our Company's contracts that we work so hard to get."  
28

1           37.     Since in or about March 2001 and continuing through the present, Grace has  
2     misused e-Smart's funds to support her extravagant lifestyle, including but not limited to  
3     paying for her residence, healthcare needs, entertainment, clothing and exotic travel, all to the  
4     detriment of e-Smart and its shareholders.

5           38.     As an example of many false press releases, on or about March 4, 2008, e-  
6     Smart announced that it had entered into a "Master Teaming Agreement with the Samsung S1  
7     Corporation, a member of the Samsung family of companies." e-Smart also represented that  
8     this contract has three potential customers of the Samsung/e-Smart card. The press release  
9     creates the appearance that the agreement is with Samsung Corporation and will result in  
10    significant revenue. In reality, the contract has no economic benefit and is conditioned on e-  
11    Smart raising capital and producing cards. Grace and the board knew e-Smart had no money  
12    or production capability to produce smart cards. On information and belief, as with all other  
13    press releases, the intent of this release was to cause an increase in the price of e-Smart's  
14    stock and/or to assist e-Smart with obtaining sham loans, which converted into equity.

15          39.     In that same March 4th Letter from the Chairman, Grace stated that "a long-  
16    term funding commitment, which is instrumental in guaranteeing world-wide implementation  
17    of our biometric security system, was negotiated and agreed. At the same time, we are also in  
18    the process of finalizing parallel funding agreements which I will report to you in more detail  
19    upon conclusion." No revenue ever appeared in any public filing or press release. Grace  
20    also announced a major restructuring of the Company. She said that "[a]long with the new  
21    divisions in South Korea, the Company also intends to make significant changes in its U.S.  
22    operations, creating specialized divisions to better utilize the Company's resources, necessary  
23    to meet the demands of a very busy worldwide manufacturing, delivery and implementation  
24    process. To tackle this ambitious schedule we are in the process of creating four new  
25    divisions: Executive Management Division, Network Division, Research and Development  
26    Division and a Manufacturing, Delivery and Quality Control Division, for which we are  
27    currently searching to recruit top management candidates. Announcements will be made and  
28    posted on the website when these executive positions are filled." Review of publicly

1 available information and corporate books and records reflects that no such changes were  
2 ever made.

3 40. On or around February 28, 2008, e-Smart announced that it had “signed a  
4 contract to deliver its newest Super Smart Card(TM), to the SamWon FA Co., Ltd., in Seoul,  
5 South Korea.” No further mention of this agreement appears in any public filings or financial  
6 statements.

7 41. On or around May 18, 2007, E-Smart announced E-Smart, through IVI Smart  
8 Technologies, had received a “\$50 Million Commitment for Funding for S. Korea and  
9 Worldwide Projects.” The release stated that IVI Smart had received a commitment of up to  
10 \$50 million from an unknown entity called Enterprise Growth Corporation SA also known as  
11 World Developments Corporation (“WDC”). The press release further states that “WDC, is a  
12 privately-held U.S. group based in Washington, D.C. providing services that span various  
13 sectors, including development of fully-integrated construction and civil engineering projects  
14 worldwide; installation and implementation of large-scale corporate IT networks; internet  
15 technology and corporate communications solutions, and the creation and maintenance of  
16 healthcare informatics solutions for both public health systems and the private healthcare  
17 sector.” This contract is not mentioned in any future press releases and no revenue or debt is  
18 ever recognized in any e-Smart financial statement.

19 42. In a press release dated May 11, 2007, Grace represented that e-Smart had  
20 entered into an agreement with a group named WDC based in Africa would bring e-Smart  
21 significant potential revenues. In addition, the release states that “WDC has agreed to finance  
22 all projects in the countries of Africa for the right to be IVI/e-Smart's exclusive partner in  
23 Africa. In accordance with the agreement between WDC and IVI, WDC will immediately  
24 advance funds for the manufacturing, delivery, implementation and operations. IVI will  
25 advance the working capital to e-Smart Technologies, Inc.“

26 43. According to its financial statements, no money was ever received by e-Smart  
27 form this purported contract.  
28

1           44.     Grace continued to solicit additional private sales of e-Smart common using  
2 these same misrepresentations, of funding about to take place and the promise of many  
3 contracts about to be fulfilled, retaining much of the proceeds for her personal use. On  
4 information and belief, Grace had many private conversations with actual and/or potential  
5 investors leading them to believe e-Smart owned the smart card technology.

6                           **ACTUAL NOTICE TO E-SMART'S BOARD OF FRAUD AND OTHER**  
7   **VIOLATIONS**

8           45.     On or around November 12, 2007, Borwick sent correspondence via email to  
9 lawyers representing e-Smart's board of directors, requesting a copy of the E-Smart's  
10 Articles of Incorporation, Bylaws, a current stock ledger of shareholders, a detailed copy of  
11 the accounting books and records of the company. The board did not respond to this request  
12 and has taken no action to investigate since that time. In addition, Borwick sent a similar  
13 letter to Mr. Charles Black as follows explaining the details of Mary Grace's fundraising  
14 efforts and asking for "e-Smart's Board of Directors to get the best management in place to  
15 lead the company, to ensure that management is making the best and honorable business  
16 decisions, to encourage long term strategic planning, and to witness that the Board of  
17 Directors is dutifully supervising management." The letter further explains " that the  
18 investors are not happy with the progress of the company over the last 8 years. It is hard to  
19 imagine how the company could have failed to sell a single card and to secure funding to  
20 commercialize its products in that time."

21           46.     Finally, Borwick stated he had "tried to remedy my situation by having Bob  
22 Herzstein of Miller & Chevalier talk with Elliot Cole, to no avail. Having experienced  
23 unethical treatment by Mary Grace, and seeing the lack of progress in the company's  
24 business, I find it difficult to have faith in the current management and the direction it is  
25 taking."

26           47.     Many individuals were also solicited by MGrace for loans toe e-Smart to pay  
27 for operating expenses. The loans were very short term notes, some as short as a few days.  
28

1 Grace promised to repay the loans or to grant stock to the lenders. Grace has failed to grant  
2 stock or repay these loans which exceeded \$500,000.

3 48. On information and belief, the e-Smart board received notification of the  
4 above-referenced conduct. Grace, and the other members of the board were notified  
5 repeatedly over the course of several years by several of these lenders and failed to take  
6 action.

7 49. On information and belief, the board has taken no action since being provided  
8 notice of the above-referenced conduct.

9 **DEMAND IS EXCUSED DUE TO FUTILITY**

10 50. Demand on the companies is excused because all of the directors are incapable  
11 of making an independent and disinterested decision regarding such litigation.

12 51. The allegations contained herein create more than a reasonable doubt  
13 regarding whether the directors are disinterested and independent.

14 52. The directors are not disinterested because each has divided loyalties, and a  
15 corporate decision to pursue litigation would have a material detrimental impact on each  
16 director.

17 53. Each of the directors is conflicted and demand is futile because the board has  
18 been notified by in writing on at least two occasions to investigate and remediate the conduct  
19 set forth above. On information and belief, to date, the board of directors has failed to take  
20 any meaningful action to investigate these allegations. On information and belief, certain E-  
21 Smart employees, agents or consultants were terminated by Grace for providing information  
22 about Grace's conduct to the board.

23 **FIRST CLAIM FOR RELIEF**

24 **(Accounting Against All Defendants)**

25 54. Plaintiff realleges each prior and subsequent allegation.

26 55. Plaintiff is entitled to an accounting.

27 56. Plaintiff is entitled to inspect the books and records of e-Smart.  
28



1 personally interested without full disclosure and without appropriate approval by a  
2 disinterested board or shareholder approval. The directors deliberately ignored defendant  
3 Grace's conduct, and intentionally turned a blind eye away from defendant Grace's  
4 misconduct, despite the specific request of the company's general counsel that such conduct  
5 be remedied. The defendants have failed to investigate and remedy the fraudulent actions of  
6 defendant Grace, despite demand by the company's then general counsel.

7 62. As a direct and proximate result, defendants, and each of them, has caused e-  
8 Smart to suffer substantial damages in an amount to be proven at trial, but in excess of  
9 \$75,000.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff demands judgment as follows:

- 12 A. For damages in an amount to be determined at trial, but which is estimated to  
13 exceed \$75,000;  
14 B. For reasonable attorneys' fees and costs; and  
15 C. For such other and further relief as deemed appropriate.

16 **JURY DEMAND**

17 Plaintiff hereby demands a jury trial on all claims, causes of action, issues, and defenses  
18 properly triable before a jury.

19 Dated: this 27<sup>th</sup> day of October, 2008

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24 *J. Thomas Redditt (Flt)*  
25 \_\_\_\_\_  
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