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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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E-SMART TECHNOLOGIES, INC., a
Nevada Corporation, and IVI
SMART TECHNOLOGIES INC., a
Delaware Corporation,

NO. CIV. 3:06-05528 MHP

Plaintiffs,

MEMORANDUM AND ORDER RE: CIVIL
CONTEMPT

v.

WAYNE DRIZIN, MICHAEL GARDINER,
ELECTRONIC PLASTICS CORPORATION,
and A CARD COMPANY,

Defendants.

_____ /

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Plaintiffs e-Smart Technologies, Inc. ("e-Smart") and
IVI Smart Technologies Inc.¹ initiated this action in 2006
against defendants Wayne Drizin, Michael Gardiner, Electronic

¹ Although IVI Smart Technologies Inc. is affiliated with
e-Smart and did not have independent representatives at the
settlement conference, the Order to Show Cause giving rise to the
civil contempt hearing was limited to e-Smart and its
representatives, thus the court's decision is limited to e-Smart.

1 Plastics Corporation, and A Card Company, alleging that
2 defendants stole trade secrets in plaintiffs' biometric smart
3 cards.² In the fifth settlement conference held in this matter,
4 a smart card Gardiner brought to the settlement conference
5 disappeared, resulting in civil contempt charges against e-Smart
6 and four of its representatives.

7 I. Factual and Procedural Background

8 The settlement conference at issue was held on August
9 12, 2010, before Magistrate Judge Zimmerman and lasted the entire
10 day. The attendees at the settlement conference included Mary
11 Grace (e-Smart's Chief Executive Officer), Tamio Saito (e-Smart's
12 Chief Technology Officer), Marcello Soliven (e-Smart's Director
13 of Wireless Research and Development), Ananth Krishnan (research
14 engineer for e-Smart) (referred to collectively as "e-Smart
15 representatives"), Christopher Lilly (plaintiffs' counsel),
16 Drizin, Gardiner, and Magistrate Judge Zimmerman's student
17 extern. When the settlement conference began, the attendees were
18 seated around the conference table in Magistrate Judge
19 Zimmerman's library. Upon concluding that a joint session would
20 not be productive, Magistrate Judge Zimmerman broke the parties
21 up, bringing Gardiner and Drizin into his personal chambers and
22 having plaintiffs' counsel and representatives remain in the
23 library.

24
25 ² Put simply, the biometric smart cards at issue in this
26 dispute are credit-card-sized cards used for identification
27 purposes that have the capability of reading and confirming the
28 user's fingerprint. Although plaintiffs and other companies have
allegedly been producing these cards for quite some time, not a
single card has been sold in the United States, according to
Drizin.

1 When Gardiner and Drizin were alone with Magistrate
2 Judge Zimmerman in his chambers, Gardiner produced a biometric
3 smart card that had a picture of George Washington on it and was
4 manufactured by Fidelica, a company that is not involved in this
5 lawsuit. According to Gardiner, the Fidelica card was a
6 significant piece of evidence because it contained the very trade
7 secrets that defendants had allegedly stolen from plaintiffs and
8 thus provided evidence that e-Smart's card did not contain trade
9 secrets. Magistrate Judge Zimmerman took the Fidelica card to e-
10 Smart's representatives in the library, explained defendants'
11 position about the card's value in the settlement process, and
12 showed the representatives the card. Grace and Saito examined
13 the card, and the last time Magistrate Judge Zimmerman saw the
14 card, it was in Saito's hand. At the end of the settlement
15 conference, Gardiner indicated that the card had not been
16 returned to him, at which time he accompanied Magistrate Judge
17 Zimmerman to the library and Magistrate Judge Zimmerman
18 instructed everyone present to search their personal effects for
19 the card.

20 Magistrate Judge Zimmerman attempted to have a marshal
21 come search the attendees for the card; however, the United
22 States Marshal's Office persuaded him not to conduct a search
23 because the female marshal who would need to search Grace had
24 left for the day and could take about one hour to return.
25 Magistrate Judge Zimmerman thus concluded the conference and
26 requested the parties to search for the card again that evening.
27 The following day, Magistrate Judge Zimmerman issued a sealed
28 order requiring the e-Smart representatives to make every effort

1 to locate the card and allowing them to return it anonymously to
2 the court by August 20, 2010. (Docket No. 324.)

3 When the Fidelica card was not returned by August 20,
4 2010, Magistrate Judge Zimmerman certified his version of the
5 facts pursuant to 28 U.S.C. § 636(e) to Judge Patel as
6 constituting civil contempt, stating that he "has reason to
7 believe e-Smart, through one or more of its representatives,
8 still has the missing card, or disposed of it, to prevent it from
9 being used as evidence by defendants." (Docket No. 328.) Judge
10 Patel subsequently issued an Order to Show Cause against e-Smart
11 and its representatives, requiring them to "show cause why you
12 should not be adjudged guilty of criminal and/or liable for civil
13 contempt and this action be dismissed with prejudice." (Docket
14 No. 329.) E-Smart responded to the Order to Show Cause and
15 included declarations by its representatives denying that they
16 took the Fidelica card and giving their version of the events
17 leading up to the disappearance of the card. After the United
18 States Attorney's Office declined to initiate criminal contempt
19 charges, Judge Patel appointed Stephen E. Taylor and Jonathan A.
20 Patchen of the Taylor & Company Law Offices, LLP, to prosecute
21 the civil contempt charges.

22 Because Magistrate Judge Zimmerman would serve as a key
23 witness in the civil contempt hearing, the undersigned, a judge
24 from outside of the district, was assigned to preside over the
25 contempt hearing. After conducting a four-day evidentiary
26 hearing, the court finds e-Smart in civil contempt. This
27 Memorandum constitutes the court's findings of fact and
28 conclusions of law.

1 II. Discussion

2 A court's power of contempt is regarded as an
3 "inherent" power that is "necessary to the exercise of all
4 others." Int'l Union, United Mine Workers of Am. v. Bagwell, 512
5 U.S. 821, 831 (1994). "A district court has the power to adjudge
6 in civil contempt any person who [] disobeys a specific and
7 definite order of the court." Gifford v. Heckler, 741 F.2d 263,
8 265 (9th Cir. 1984). "Intent is not an issue in civil contempt
9 proceedings. The sole question is whether a party complied with
10 the district court's order." Donovan v. Mazzola, 716 F.2d 1226,
11 1240 (9th Cir. 1983) (internal citations omitted).

12 "Judicial sanctions in civil contempt proceedings may,
13 in a proper case, be employed for either or both of two purposes;
14 to coerce the defendant into compliance with the court's order,
15 and to compensate the complainant for losses sustained." United
16 States v. United Mine Workers of Am., 330 U.S. 258, 303-04
17 (1947); accord United States v. Bright, 596 F.3d 683, 695-96 (9th
18 Cir. 2010) ("Civil contempt is characterized by the court's
19 desire to compel obedience to a court order or to compensate the
20 contemnor's adversary for the injuries which result from the
21 noncompliance." (quoting Falstaff Brewing Corp. v. Miller Brewing
22 Co., 702 F.2d 770, 778 (9th Cir. 1983))) (internal quotation
23 marks omitted).

24 "The standard for finding a party in civil contempt is
25 well settled: The moving party has the burden of showing by clear
26 and convincing evidence that the contemnors violated a specific
27 and definite order of the court." In re Bennett, 298 F.3d 1059,
28 1069 (9th Cir. 2002). The clear and convincing evidence standard

1 requires the moving party to "place in the ultimate factfinder an
2 abiding conviction that the truth of its factual contentions are
3 'highly probable.'" Colorado v. New Mexico, 467 U.S. 310, 316
4 (1984). Factual contentions are highly probable if the evidence
5 offered in support of them "instantly tilt[s] the evidentiary
6 scales in the affirmative when weighed against the evidence [the
7 non-moving party] offered in opposition." Id.

8 A. Determining Who Took the Fidelica Card

9 Based on the evidence presented at the hearing, the
10 court finds, by clear and convincing evidence, that the Fidelica
11 card was taken by one of the e-Smart representatives at the
12 conference because only they had the opportunity to take the
13 card. Further, of the e-Smart representatives, the court is
14 convinced Mary Grace took the card based on her lack of credible
15 and consistent testimony about the events that day and the
16 evidence revealing her motive to take it.³

17 Magistrate Judge Zimmerman credibly testified⁴ that,
18 after Gardiner produced the e-Smart card in his chambers, he went
19 to the library without Gardiner or Drizin to show the e-Smart
20 representatives the Fidelica card. After giving the card to the
21 e-Smart representatives, Magistrate Judge Zimmerman testified
22 that he last saw the card in Saito's hand and the e-Smart

23
24 ³ As credibility was a central issue at the hearing, the
25 character of the e-Smart representatives, Gardiner, and Drizin
26 was relevant and considered by the court. The court did not,
27 however, consider or rely on any of the exhibits defendants
28 submitted after Grace's testimony, which are filed as Docket
Numbers 368 to 374.

⁴ The court finds Magistrate Judge Zimmerman's testimony
credible on all material issues and accepts his testimony as the
most accurate account of the relevant events.

1 representatives testified that the card was placed on the library
2 table when they finished examining it. Thus, it is undisputed
3 that the card remained in the library after Magistrate Judge
4 Zimmerman showed it to the e-Smart representatives. Although
5 there is conflicting testimony about when and for how long
6 Gardiner and Drizin returned to the library during the remainder
7 of the settlement discussions, all of the parties agree that
8 every time Gardiner and Drizin returned to the library, they were
9 accompanied by Magistrate Judge Zimmerman. The e-Smart
10 representatives were thus the only individuals left in the
11 library alone with the card and therefore the only individuals
12 who had the opportunity to take the card outside the presence of
13 Magistrate Judge Zimmerman.

14 E-Smart has attempted to suggest that, even though only
15 its representatives had access to the card in the library,
16 Gardiner and Drizin snuck into the library to take the card after
17 the e-Smart representatives left for lunch. In their
18 declarations and at the hearing, the e-Smart representatives
19 state that the Fidelica card was on the conference table in the
20 library when they left for lunch and gone when they returned from
21 lunch. Significantly, however, this explanation was never
22 mentioned to Magistrate Judge Zimmerman when everyone was looking
23 for the card at the close of the settlement conference and was
24 raised for the first time in the declarations. Magistrate Judge
25 Zimmerman's judicial assistant also credibly testified that she
26 escorted Gardiner and Drizin out of chambers during the lunch
27 break, which would have precluded them from sneaking into the
28 library to take the Fidelica card.

1 E-Smart has also tried to suggest that, based primarily
2 on their prior felony convictions, Gardiner's and Drizin's
3 character makes it just as likely that they took the card. While
4 the court did not find Drizin to be a credible witness and finds
5 him, like Grace, to display the typical characteristics of a con-
6 artist, none of the evidence creates a plausible scenario under
7 which Drizin had the motive or opportunity to take the Fidelica
8 card.

9 As for Gardiner, not only did he lack the opportunity
10 to take the Fidelica card, but the court finds it is even less
11 plausible that he would take the very card he brought to the
12 settlement conference in the hopes of getting plaintiffs in
13 trouble. Although Gardiner has been convicted of a felony, the
14 court does not believe his prior misconduct paints him to be of
15 as bad character as e-Smart suggests. While he was convicted for
16 fraud, his sentence included only a \$10,000.00 fine and three
17 years probation and he cooperated with the government. The court
18 has the impression that Gardiner tends to be gullible to
19 fraudulent schemes, and the court therefore is inclined to
20 believe that he was himself a victim as well as a perpetrator in
21 that case.

22 The only other individuals who had access to the
23 library were Magistrate Judge Zimmerman's staff, which included
24 his judicial assistant and a student extern who accompanied him
25 for part of the settlement conference. The record is devoid of
26 any evidence suggesting even a remote possibility that these

1 individuals took the e-Smart card.⁵

2 Accordingly, the e-Smart representatives were the only
3 individuals with the opportunity to take the card and, of the e-
4 Smart representatives, the evidence persuades the court that
5 Grace was the one who took the card. In contrast to Magistrate
6 Judge Zimmerman's credible testimony about what occurred when he
7 originally introduced the card, Grace's testimony about the
8 events was amorphous and appeared to develop as she testified.
9 For example, when questioned about the technology on the Fidelica
10 card, Grace capriciously interjected that she actually asked
11 Magistrate Judge Zimmerman to hold onto the card:

12 I said, why in the world would he [(Gardiner)]--in fact,
13 I said to the Judge, I said, "Judge would you hold this
14 card? Would you hold this card with the special master
15 in the court, so" . . . "we can prove this is stolen, our
16 stolen technology. Not just on the ID Smart cards, but
17 now on the Fidelica cards that they had the audacity to
18 bring into court."

19 (Apr. 20, 2011, Tr. 59:2-9.) Not only was this answer--along
20 with a majority of Grace's testimony--non-responsive to the
21 actual question, Grace's testimony that she asked Magistrate
22 Judge Zimmerman to hold onto the Fidelica card was not
23 corroborated by any other witness and was absent from her
24 original declaration filed in response to Judge Patel's Order to
25 Show Cause.

26 Grace also testified that, when the Fidelica card was
27 presented, Gardiner indicated that he knew the technology on it

28 ⁵ Magistrate Judge Zimmerman's testimony about contacting
the Marshal's Office indicates his law clerk was in chambers
later that day. Nothing in the testimony suggests--nor can this
court surmise--any reason why the law clerk, or any other court
employee, would have taken the card.

1 was stolen from e-Smart and that he had previously prepared an
2 affidavit to that effect. Similar to her new testimony about
3 asking Magistrate Judge Zimmerman to hold onto the card, any
4 suggestion that Gardiner had prepared such an affidavit is absent
5 from any of the e-Smart representatives' declarations. Although
6 Grace testified that some of the testimony missing from her
7 declaration was in her notes and that e-Smart's attorney failed
8 to include it, she neither produced her notes nor denied that she
9 reviewed her declaration before signing it. As this declaration
10 was prepared in response to the Order to Show Cause, the
11 importance of her account of what happened was clear. The
12 absence of such significant testimony from her declaration and
13 her addition of it for the first time at the hearing leaves the
14 court firmly convinced that Grace is developing an ever-changing
15 story to cover up for her misconduct in taking the Fidelica card.

16 With respect to her motive to take the card, the court
17 finds it highly probable that Grace was simply taking back what
18 she, in her way of perceiving things, believed belonged to e-
19 Smart. Magistrate Judge Zimmerman testified that when he
20 initially presented the card to the e-Smart representatives,
21 Grace "sort of did a -- like, a double-take, you know," giving
22 him the impression that she thought defendants had "found
23 something." (Apr. 7, 2011, Tr. 57:2-4.) Grace also testified
24 that the Fidelica card had e-Smart's "stolen technology," (Apr.
25 20, 2011, Tr. 49:9), and told Magistrate Judge Zimmerman that
26 Fidelica "was another company that has stolen our trade secrets."
27 (Apr. 7, 2011, Tr. 57:9-10.) Grace further testified that she
28 believed the Fidelica card Gardiner produced at the settlement

1 conference "was stolen from us, from e-Smart, and brought into
2 the conference." (Apr. 20, 2011, Tr. 66:4-7.) Grace's reaction
3 to the card and purported belief that it was stolen from e-Smart
4 and contained e-Smart's stolen technology, along with her
5 demeanor throughout her testimony and obvious animosity toward
6 Gardiner and Drizin,⁶ convinces the court that Grace felt
7 justified in simply taking back what she asserted belonged to her
8 company.

9 Grace's testimony and demeanor also persuade the court
10 that she has skated through her various ventures as a flim-flam
11

12 ⁶ Throughout her testimony, Grace constantly tried to
13 slip in negative comments about Gardiner and Drizin, making her
14 disdain for them anything but discreet. The following is one
15 example:

16 [MR. PATCHEN]: My question is: If the Fidelica card was
17 not using the trade secrets of e-Smart, then you would
18 have no objection to Mr. Gardiner producing a card that
19 was like Fidelica.

20 A: I can't answer that question. Because, like Mr.
21 Satio explained, I'm not qualified to answer what card
22 has what on it.

23 I would have to ask experts if this card in any way
24 -- it has been derived from our technology, has been --
25 these are all ex-employees. These people -- have you
26 ever seen their entire background?

27 Q: My question for you, Ms. Grace --

28 A: Okay. Their entire background that we're -- it
includes owning a brothel by -- there was a book written
last year called "The Man who Took America to War" that
said he --

THE COURT: Don't get into it --

THE WITNESS: -- laundered money for the Mafia, and he

--

MR. PATCHEN: Your honor, move to strike.

THE WITNESS: I mean, these people are -- he's
defrauded so many of our investors and shareholders that
we can bring in here that he would --

THE COURT: Wait, don't --

THE WITNESS: He would guarantee them he would give
them triple their money back. And then --

(Apr. 20, 2011, Tr. 62:10-23.)

1 artist who fabricates information in an attempt to extort a
2 profit. For example, when asked why e-Smart had not filed its
3 required "10-K" Securities and Exchange Commission filings since
4 2007, Grace first evaded the question and, when the court
5 repeated the question, she could not give a consistent or clear
6 answer:

7 Well, we filed it -- we have not filed it, on the advice
8 of counsel. And, we will be preparing it. But, we are
9 looking at different reorganization -- I mean,
10 restructuring of the company. And on advice of counsel,
11 we will do it. We have -- you know, we have informed our
12 attorneys. I -- I act on advice of counsel, but -- and,
13 it will be. I mean, we are in the process of trying to
14 get the 10-Ks filed.

15 (Id. at 92-93:5.) Grace also repeatedly evaded questions by
16 resorting to an explanation that e-Smart has six hundred
17 shareholders and her utmost concern is for those shareholders.
18 The court was unpersuaded, however, that e-Smart is anything more
19 than a sham company or that Grace's concern for its shareholders
20 extends beyond the financial gain they bring her.

21 Based on her demeanor testifying and conduct during the
22 settlement process of this case, the court is also convinced that
23 Grace views the judicial process as a mere tool to conduct
24 business rather than an avenue to resolve disputes. Magistrate
25 Judge Zimmerman, who spent more hours attempting to settle this
26 case than in any other case, testified that he was under the
27 impression that Grace was not negotiating in good faith during
28 the settlement process. When discussing a separate case against
29 Gardiner and Drizin with a colleague, Grace's comment about her
30 strategy also reflects her use of litigation as an improper
31 business tool: "I believe if we can put the pressure of a second

1 lawsuit on both Gardiner and Drizin, that we can resolve both
2 suits exponentially [sic]." (Defs.' Ex. Y.)

3 The testimony of the other e-Smart representatives does
4 not create any reason to doubt that Grace took the card. The
5 court did not find Soliven to be a credible witness and does not
6 believe his testimony that Gardiner and Drizin left belongings
7 close to the card and, after the e-Smart representatives returned
8 from lunch, that the card and belongings on the table were gone.
9 Krishnan did not appear to have an independent recollection of
10 the details of what occurred that day and appeared to simply
11 agree with the general story advanced by his colleagues. Lastly,
12 based on his defensive and argumentative demeanor throughout his
13 testimony, the court finds it highly probable that, even though
14 he did not take the Fidelica card, Saito would not disclose the
15 fact that Grace took it if he was privy to that information.

16 Accordingly, when contrasted to the lack of any
17 plausible scenario under which another individual took the
18 Fidelica card, the evidence establishing that Grace had the
19 opportunity and motive to take the card, along with her lack of
20 credibility as witness, convinces the court that it is highly
21 probable that Grace took the Fidelica card on August 12, 2010.

22 B. Determining Whether Civil Contempt Occured

23 Having found that Grace took the Fidelica card, the
24 next question is whether the Special Prosecutor proved, by clear
25 and convincing evidence, that her conduct "violated a specific
26 and definite order of the court." In re Bennett, 298 F.3d at
27 1069. Relying on United States v. McGainey, 37 F.3d 682 (D.C.
28 Cir. 1992), the Special Prosecutor argues that e-Smart can be

1 held in civil contempt if Grace obstructed the administration of
2 justice even if her conduct did not violate a specific court
3 order.

4 In McGainey, the appellate court upheld McGainey's
5 conviction for criminal contempt after he made a threatening
6 gesture in the galley of a courtroom during a criminal trial.
7 Id. at 685-86. His conviction for criminal contempt, however,
8 was based on 18 U.S.C. § 401(1), which empowers the court to hold
9 an individual in criminal contempt for "[m]isbehavior . . . in
10 its presence or so near thereto as to obstruct the administration
11 of justice." 18 U.S.C. § 401(1); see also McGainey, 37 F.3d at
12 684 (identifying the elements of criminal contempt as
13 "misbehavior of a person, in or near to the presence of the
14 court, which obstructs the administration of justice, and which
15 is committed with the required degree of criminal intent"). For
16 a criminal contempt conviction under § 401, courts have held that
17 "[w]illfulness is an essential element." United States v.
18 Laurins, 857 F.2d 529, 534 (9th Cir. 1988).

19 At first blush, McGainey appears easily distinguishable
20 as it dealt with criminal, not civil, contempt and § 401 governs
21 criminal, not civil, contempt. The Ninth Circuit, however, has
22 repeatedly stated that § 401, although appearing in the criminal
23 code, applies equally to civil contempt. See United States v.
24 Powers, 629 F.2d 619, 624 (9th Cir. 1980) ("Title 18 U.S.C. §§
25 401 and 402 provide federal courts statutory authority to punish
26 contemptuous actions. Section 401 applies to both criminal and
27 civil contempt and contains no limitation on the power of the
28 district court to impose fine or imprisonment for a violation.");

1 United States v. Miller, 588 F.2d 1256, 1262 (9th Cir. 1978)
2 (same); cf. Britton v. Co-op Banking Grp., 916 F.2d 1405, 1409
3 n.4 (9th Cir. 1990) (noting that a district court may impose
4 civil contempt pursuant to 18 U.S.C. § 401(3), which provides for
5 criminal contempt for "[d]isobedience or resistance to [the
6 court's] lawful writ, process, order, rule, decree, or
7 command").⁷

8 Despite indicating that § 401 provides authority for
9 civil and criminal contempt, the Ninth Circuit has never held
10 that obstruction of justice, without the violation of a specific
11 court order, is sufficient to give rise to civil contempt. If
12 the issue were to be properly raised before the Ninth Circuit,
13 this court doubts that the Ninth Circuit would continue to rely
14 on § 401 for civil contempt. Limiting application of § 401 to
15 criminal contempt and relying on caselaw for the standards
16 governing the court's inherent civil contempt power is also
17 consistent with the Supreme Court's criminal and civil contempt
18 decisions. See, e.g., Hutto v. Finney, 437 U.S. 678, 690-91
19 (1978) (citing § 401 as authority for criminal contempt and a
20

21 ⁷ Presumably, if § 401 could be relied on for civil
22 contempt, the caselaw requiring the requisite level of intent for
23 criminal contempt under § 401 would not apply to civil contempt.
24 See McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949)
25 ("Civil as distinguished from criminal contempt is a sanction to
26 enforce compliance with an order of the court or to compensate
27 for losses or damages sustained by reason of noncompliance.
28 Since the purpose is remedial, it matters not with what intent
the defendant did the prohibited act."); Perry v. O'Donnell, 759
F.2d 702, 705 (9th Cir. 1985) ("Although willfulness is a
necessary element of criminal contempt, we find it significant
that civil contempt may be established even though the failure to
comply with the court order was unintentional."); United States
v. Asay, 614 F.2d 655, 661 (9th Cir. 1980) ("Willfulness is not
an element of civil contempt.").

1 prior Supreme Court decision as authority for civil contempt);
2 Bagwell, 512 U.S. 821 (omitting any reference to § 401 in its
3 lengthy discussion of civil contempt).

4 Relying on subsection 401(1) to find civil contempt
5 absent a court order would also conflict with the unequivocal and
6 long-standing precedent requiring disobedience of a court order
7 for civil contempt. See Gifford, 741 F.2d at 265; In re Bennett,
8 298 F.3d at 1069; see also Labor/Comty. Strategy Ctr. v. L.A.
9 Cnty. Metro. Transp. Auth., 564 F.3d 1115, 1123 (9th Cir. 2009)
10 ("For issuance of a contempt order against MTA to be proper, BRU
11 must establish (1) that [the contemnor] violated the court order,
12 (2) beyond substantial compliance, (3) not based on a good faith
13 and reasonable interpretation of the order, (4) by clear and
14 convincing evidence.") (internal quotation marks omitted); Gates
15 v. Shinn, 98 F.3d 463, 472 (9th Cir. 1996) ("Civil contempt is
16 appropriate only when a party fails to comply with a court order
17 that is both specific and definite.") (internal quotation marks
18 omitted).

19 Not only does the precedent in this circuit state that
20 civil contempt cannot occur absent disobedience of an order from
21 the court, none of the parties cited and this court was unable to
22 find a single Ninth Circuit case in which a party has been
23 adjudged in civil contempt absent a court order. In an effort to
24 be thorough, this court conducted a Westlaw search for every
25 published Ninth Circuit decision that used the term "civil
26 contempt." The search revealed 298 cases and the court's review
27 of each of those cases confirmed that the Ninth Circuit has never
28 addressed, in a published opinion, a district court's

1 adjudication of civil contempt absent disobedience of a court
2 order giving rise to the contempt.⁸

3 Accordingly, in light of the clear precedent in this
4 circuit and the absence of a single Ninth Circuit decision in
5 which a contemnor was found in civil contempt absent disobedience
6 of a court order, the court concludes that an individual can be
7 found in civil contempt only for violation of a specific and
8 definite court order, not for the obstruction of justice in the
9 absence of a court order.

10 Because e-Smart cannot be held in civil contempt absent
11 one of its representative's disobedience of a specific and
12 definite order of the court, the court must determine whether
13 Grace's conduct violated a court order. None of the parties
14 contend that Magistrate Judge Zimmerman issued an order
15 prohibiting taking the card, and thus Grace's theft of the card
16 did not constitute civil contempt. When the Fidelica card was
17 initially missing at the close of the settlement conference,
18 Magistrate Judge Zimmerman instructed the parties to "conduct a
19 really good search" because he "want[ed] the card found." (Apr.
20 7, 2011, Tr. 67:6-10.) Although it was clear that Magistrate
21 Judge Zimmerman wanted the missing card returned immediately, his
22 instructions to the e-Smart representatives did not clearly

24 ⁸ The brevity of four per curiam decisions prevents the
25 court from determining whether an order gave rise to the civil
26 contempts at issue in the appeals, but nothing suggests that
27 orders were not issued in each of the cases. See Hughes v.
28 Sharp, 476 F.2d 975 (9th Cir. 1973); Olsen v. United States, 446
F.2d 912 (9th Cir. 1971); Matter of Bowden, 444 F.2d 546 (9th
Cir. 1971); Bd. of Governors of the Fed. Reserve Sys. v.
Transamerica Corp. & Bank of Am., Nat'l Trust & Sav. Ass'n, 184
F.2d 326 (9th Cir. 1950).

1 constitute an order from the court. Most tellingly, Magistrate
2 Judge Zimmerman used the verb "jawbone" to describe his efforts
3 to have the card returned, which included telling the e-Smart
4 representatives that searches would be performed. See
5 Dictionary.com, <http://dictionary.reference.com/browse/jawbone>
6 (defining the informal use of jawbone as "to attempt to influence
7 or pressure by persuasion rather than by the exertion of force or
8 one's authority, as in urging voluntary compliance with economic
9 guidelines") (last accessed May 12, 2011). Because Magistrate
10 Judge Zimmerman did not clearly order the card returned the day
11 of the settlement conference, Grace's refusal to return the card
12 at the settlement conference cannot amount to civil contempt.

13 On the day after the settlement conference, however,
14 Magistrate Judge Zimmerman issued a clear, unequivocal, and
15 specific order to the e-Smart representatives. The sealed Order
16 stated:

17 **IT IS HEREBY ORDERED** that everyone who participated in
18 yesterday's settlement conference shall make every effort
19 to locate the missing smart card (with a picture of
George Washington on it) and return it to the Court. It
20 may be returned anonymously by sending it to [chambers].
21 . . . Counsel for plaintiff is **ORDERED** to serve a copy of
this Order on every one of plaintiff's representatives
22 and to file a declaration of service. If the card is not
returned by **August 20, 2010**, I will turn the matter over
23 to the FBI to investigate or certify the facts to Judge
Patel to determine if there has been spoliation of
evidence.

24 (Docket No. 324.) Grace does not deny receiving notice of this
25 order and, other than denying that she originally stole the
26 Fidelica card, Grace does not defend on the grounds that she

1 could not comply with Magistrate Judge Zimmerman's Order.⁹
2 Accordingly, after stealing the e-Smart card during the
3 settlement conference, Grace was in contempt of court when she
4 failed to return it by August 20, 2010, in violation of the
5 August 13, 2010, Order.

6 C. Determination of the Appropriate Remedy

7 As the adjudication of civil contempt concludes the
8 need for Magistrate Judge Zimmerman to serve as a witness to the
9 events at the settlement conference on August 12, 2010, the
10 conflict resulting from Judge Patel or another judge in the
11 Northern District presiding over the civil contempt hearing no
12 longer exists. Accordingly, the court will defer to Judge Patel
13 to determine whether the appropriate remedy is dismissal with
14 prejudice, as suggested in the Order to Show Cause, or some
15 lesser sanction, such as one of the alternatives the Special
16 Prosecutor suggested in his memorandum of April 20, 2011. (See

17 _____
18 ⁹ It could be hypothesized that Grace was unable to
19 return the card because she had destroyed or discarded it. See
20 generally United States v. Rylander, 460 U.S. 752, 757 (1983)
21 ("In a civil contempt proceeding . . . , a defendant may assert a
22 present inability to comply with the order in question. . . . It
23 is settled, however, that in raising this defense, the defendant
24 has a burden of production."). But see Falstaff Brewing Corp. v.
25 Miller Brewing Co., 702 F.2d 770, 782 n.7 (9th Cir. 1983) ("This
26 court, in dicta, has asserted that self-induced inability [to
27 comply] is not a defense to a charge of compensatory civil
28 contempt.") (citing United States v. Asay, 614 F.2d 655, 660 (9th
Cir. 1980)). Even assuming inability to comply could serve as a
defense in this case, none of the evidence before the court
suggests that Grace would have discarded or destroyed the card
before Magistrate Judge Zimmerman issued his Order. To the
contrary, the court finds it highly probable that, after
successfully stealing what she believed belonged to her, Grace
would have held on to the card. Moreover, even if Grace
discarded the card, the Order--issued less than twenty-four hours
after she could have discarded it--unequivocally ordered her to
"make every effort to locate the missing card." (Docket No.
324.)

1 Docket No. 363 (suggesting that appropriate remedies could be
2 ordering "reimbursement of Defendants['] costs associated with
3 retaining and preparing [an] expert" to testify about the
4 technology on the Fidelica card, "a preclusion order, a shift of
5 the burdens of production and/or persuasion, or an order
6 requiring payment for Defendants' costs to locate and subpoena
7 production of a replacement Fidelica card".)

8 NOW, THEREFORE plaintiff e-Smart Technologies, Inc., is
9 hereby adjudged in civil contempt of the court's Order of August
10 13, 2010. (Docket No. 324.) This matter is hereby referred back
11 to Judge Patel for all further proceedings, including
12 determination of the appropriate remedy to enforce this Order.

13 IT IS SO ORDERED.

14 DATED: May 18, 2011

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16 WILLIAM B. SHUBB
17 UNITED STATES DISTRICT JUDGE
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