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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

UNLIMITED CIVIL JURISDICTION

OVERSTOCK.COM, INC., a Delaware corporation; HUGH D. BARRON, an individual; MARY HELBURN, an individual, Plaintiffs, v. GRADIENT ANALYTICS, INC., an Arizona corporation; ROCKER PARTNERS, LP, a New York limited partnership; ROCKER MANAGEMENT, LLC, a New Jersey limited liability company; ROCKER OFFSHORE MANAGEMENT COMPANY, INC., a New York corporation; DAVID ROCKER, an individual; MARC COHODES, an individual; JAMES CARR BETTIS, an individual; DONN VICKREY, an individual; MATTHEW KLIBER, an individual; and DOES 1 through 200, Defendants.	Case No. CV053693 **FIRST AMENDED COMPLAINT FOR:** **1) LIBEL PER SE;** **2) LIBEL PER QUOD;** **3) INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE;** **4) UNFAIR BUSINESS PRACTICES (VIOLATION OF CAL. BUS. & PROF. CODE §§ 17200, *ET SEQ.* AND §§ 17500 *ET SEQ.*); AND** **5) VIOLATIONS OF CALIFORNIA CORPORATIONS CODE §§ 25400, *ET SEQ.***</br>

Plaintiffs Overstock.com, Inc., Hugh D. Barron, and Mary Helburn, for their First Amended Complaint, allege as follows.

NATURE OF THE CASE

1. Plaintiff Overstock.com ("Overstock") alleges that Defendants have orchestrated a wide-scale predatory campaign of knowingly distributing false, and covertly biased, written reports about Overstock in order to disparage Overstock and enrich themselves. Not only was the content of these reports not the result of objective analysis, but the Defendant stock analysts worked together with the Defendant hedge funds, without disclosing the unscrupulous collaboration. Defendant hedge funds conspired in creating these defamatory reports because they stood to gain huge financial benefit from the inevitable harm to Overstock.

2. As intended, Defendants' actions caused substantial harm to Overstock, in the form of decreased market capitalization, tarnished reputation and unwarranted disruption of its relationships with its customers, investors and vendors. Overstock's loss was Defendants' gain – Defendants reaped substantial illegal profits from their attack on Overstock. Plaintiffs Hugh D. Barron and Mary Helburn, individual shareholders of Overstock, were harmed by the drop in and depression of Overstock's stock price. As set forth below, Defendants' illegal conduct gives rise to claims for (i) libel per se and per quod under California common law, (ii) intentional interference with prospective economic advantage under California common law, (iii) unfair business practices in violation of Business & Professions Code §§ 17200, *et seq.* and 17500, *et seq.*, and (iv) violations of California Corporations Code §§ 25400, *et seq.*

PARTIES

3. Overstock is a Delaware corporation with its principal place of business in Salt Lake City, Utah. Overstock's common stock trades on the NASDAQ National Securities Market ("NASDAQ") under the symbol "OSTK."

4. Hugh D. Barron ("Barron") is an individual who resides in Marin County, California. Barron is a former owner of Overstock common stock.

5. Mary Helburn ("Helburn") is an individual who resides in Santa Clara County, California. Helburn is a former owner of Overstock common stock.

6. Upon information and belief, Gradient Analytics, Inc. ("Gradient") is a purportedly independent stock research firm which disseminates its research reports to hedge funds, mutual funds, and financial commentators on a subscription basis throughout California. Upon information and belief, Gradient is an Arizona corporation with its principal place of business in Scottsdale, Arizona; was formerly known as Camelback Research Alliance, Inc.; adopted its present name in November 2004; and is owned and controlled by Defendants James Carr Bettis and Donn Vickrey.

7. Upon information and belief, Rocker Partners, LP ("Rocker Partners") is a New York limited partnership which is authorized to conduct and does conduct business in California, and which maintains an office in Larkspur, California. Upon information and belief, Rocker Partners is owned and controlled by its general partners, Defendants David Rocker and Marc Cohodes, individually and/or through Rocker Offshore Management Company, Inc. or Rocker Management, LLC.

8. Upon information and belief, Rocker Offshore Management Company, Inc. ("Rocker Offshore") is a New York corporation which is authorized to conduct and does conduct business in California. Upon information and belief, Rocker Offshore is owned, operated and controlled by Defendant David Rocker.

9. Upon information and belief, Rocker Management, LLC ("Rocker Management") is a New Jersey limited liability company which is authorized to conduct and does conduct business in California, and which maintains an office in Larkspur, California. Upon information and belief, Rocker Management is owned, operated and controlled by Defendants David Rocker and Marc Cohodes.

10. Defendants Rocker Partners, Rocker Offshore, and Rocker Management are sometimes collectively referred to herein as "the Rocker Defendants."

11. Upon information and belief, David Rocker ("Rocker") is an individual who resides in New Jersey and is an officer, sole managing partner, member, and/or controlling owner of the Rocker Defendants.

12. Upon information and belief, Marc Cohodes ("Cohodes") is an individual who resides in Marin County, California, and is an officer, member, and/or controlling owner of the Rocker Defendants.

13. Upon information and belief, James Carr Bettis ("Bettis") is an individual who resides in Scottsdale, Arizona. Upon information and belief, Bettis co-founded Defendant Gradient and is the company's President and Chief Executive Officer. Gradient describes Bettis' role as "guid[ing] the strategic direction and oversee[ing] the business operations [of the company]." Bettis regularly does business in California. Bettis is the Director of Greenbrook Financial Services, which has its corporate headquarters in San Diego, California. Greenbrook Financial Services previously did business as Pinnacle Investment Advisors, which was affiliated with Defendant Gradient.

14. Upon information and belief, Donn Vickrey ("Vickrey") is an individual who resides in California. Upon information and belief, Vickrey co-founded Defendant Gradient, and currently oversees and manages all of Gradient's purported "analyst-driven content."

15. Upon information and belief, Matthew Kliber ("Kliber") is an individual who resides in California. Upon information and belief, Kliber is Defendant Gradient's Vice President of Research and "leads the development of Gradient's analyst-driven research products."

16. The names and capacities of the Defendants named as Does 1 through 200, inclusive, are presently unknown to the Plaintiffs. Plaintiffs are informed and believe that Does 1 through 200, inclusive, are the affiliates, partners, co-venturers, co-conspirators and/or aiders and abettors of the other Defendants, and each other, and Defendants agreed, conspired and participated with the other Defendants in doing the things alleged herein, and ratified and accepted the benefits of the acts of the other Defendants, such that they are in some manner responsible for the acts and omissions complained of herein. Accordingly, these Defendants, each of whom is legally responsible for the acts alleged herein, are sued by these fictitious names. When the identities and capacities of Does 1 through 200, inclusive, are ascertained, Plaintiffs will seek leave of Court to amend the Complaint accordingly.

17. Upon information and belief, the Rocker Defendants are owned, operated and controlled by each other and ultimately by Rocker and/or Cohodes. Because of such ownership, operation and control, the Rocker Defendants, Rocker and Cohodes have such a unity of interest that the separate personalities of the entities and the individuals no longer exist, and if the acts complained of herein are treated as those of the entities alone, an inequitable result will follow.

18. Defendants Gradient, the Rocker Defendants, Rocker, Cohodes, Bettis, Vickrey, Kliber, and Does 1 through 100 are sometimes collectively referred to herein as "Defendants." Each of the Defendants is jointly and severally liable for the acts and omissions complained of herein. When the term "Defendants" is used herein, it shall mean Defendants and each of them.

OVERSTOCK'S BUSINESS

19. Overstock is a leading online "closeout" retailer. It offers customers the opportunity to shop conveniently online for brand name merchandise at heavily discounted prices, and offers its suppliers an alternative means of inventory liquidation distribution. Overstock launched its first website through which customers could purchase products in 1999. Since that time, Overstock's overall business and gross revenues have grown steadily and consistently, at the rate of approximately 100% each year since 2000. Overstock's annual revenues for the year ending December 31, 2004, were approximately $500 million. Its revenues and gross profits for the first six months of 2005 were on a pace to exceed 2004's revenues on an annualized basis. Further, consistent with Overstock's strategy and business model, traffic on the company's website has continued, and continues, to increase dramatically.

20. Overstock's economic links to California are substantial. In 2004, California sales amounted to over 16% of the company's overall sales. Overstock does business with a significant number of California-based suppliers and buys a substantial amount of its inventory from such suppliers. In 2004 and the first eight months of 2005 alone, Overstock purchased over $241,000,000 in inventory from its California trading partners, which is 26% of Overstock's total purchasing expenditures. Three large vendors in the San Francisco Bay Area,

Peking Handicraft, Palm, Inc. and Just Deals alone, account for more than $17,000,000 of Overstock's purchasing expenditure on California products. During that same time period, Overstock purchased over $60,000,000 in advertising services from California companies, including over $13,000,000 purchased from San Francisco Bay Area companies Google, Inc., Yahoo, Nextag and Shopping.com. Each of Overstock's four public offerings was handled by one or more investment banking firms headquartered in San Francisco, California. There are also a substantial number of Overstock shareholders located in California, and California residents own shares of Overstock in over 1300 brokerage accounts.

GRADIENT'S BUSINESS

21. Gradient holds itself out as "an independent research firm providing both analyst-written research work...and quantitative stock ratings for institutional clients . . ." Gradient produces and publishes reports which provide analysis of various publicly traded companies. These reports are written in a technical and academic tone and its speakers imply thorough knowledge of facts which lead to their conclusions. Gradient is an influential company, and sells reports and analyses of companies to both hedge funds and traditional mutual funds. The wide exposure of its products gives Gradient a large audience.

22. Upon information and belief, Vickrey is the primary creator of the Gradient reports, and currently oversees and manages all of Defendant Gradient's purported "analyst-driven content." Kliber is Defendant Gradient's Vice President of Research and leads the development of Gradient's analyst-driven research products. Bettis is the company's President and Chief Executive Officer, and guides the strategic direction and oversees the business operations of the company. In a bid to further Gradient's claim of providing independent and objective reports and analyses, both Vickrey and Bettis are identified and touted as renowned academicians.

GRADIENT'S AND THE OTHER DEFENDANTS' WRONGFUL ASSOCIATION

23. Contrary to its purported "independent" status, Gradient is closely aligned with various stock hedge funds. One of those hedge funds is Rocker Partners which, on information and belief, is owned and/or controlled by Rocker and Cohodes, individually and/or through Rocker Offshore or Rocker Management. The Rocker Defendants' business model

largely revolves around short selling and other similarly structured transactions which benefit from a decline in a stock's price as an investment strategy. Generally speaking, in a short sale, a person sells stock that he or she does not then own, by borrowing the stock and warranting that the loan will be "covered" with shares purchased at a later date. The seller speculates that the price of the stock will go down so that, when (if ever) the loan is "covered," he or she will profit from the drop in price. Therefore, the Rocker Defendants' goal is that the stock price of a company whose stock they have shorted, or engaged in other similarly situated transactions will, in the long-term (i) decrease from the price at which they sold the stock, and (ii) not recover to that price, thereby locking in a profit if covered. Thus, by the very nature of their business strategy, the Rocker Defendants have a vested interest in seeing the share prices of their portfolio holdings decrease.

24. Upon information and belief, the Rocker Defendants and Does 1 through 50 have, and maintain, significant short and other similarly structured positions that benefit from a decline in Overstock's common stock. Defendant Cohodes has publicly admitted that he is also shorting Overstock's stock. It is, therefore, in the interest of the Rocker Defendants, Rocker, Cohodes and other Doe Defendants and clients of Gradient in the long-term for the price of Overstock's common stock to decrease and to remain depressed.

25. Consistent with Defendants' interest, Rocker has, upon information and belief, frequently sought to persuade stock analysts to issue negative reports about Overstock. In the January 10, 2005 issue of Barron's, Rocker pointed to Overstock as an example of the alleged phenomenon in which "[t]he diciest stocks lurch upward with avid followings." In the article, Rocker further bemoans the rise in Overstock's share price in 2004 "despite" what Rocker falsely stated were Overstock's shortcomings. Rocker failed to disclose that at least one of his companies, Rocker Partners, held a short interest and/or other similarly structured positions that benefit from the decline in the price of Overstock's common stock.

26. In addition to Rocker personally making negative statements regarding Overstock without disclosing his companies' pecuniary interests in Overstock, Defendants Rocker, Cohodes and the Rocker Defendants have enlisted the help of Gradient in their campaign to drive down Overstock's stock price.

27. Beginning around June 2003, Gradient began publishing its reports on Overstock, uniformly giving the company the lowest possible grades. Gradient (i) initially gave Overstock a grade of "D," (ii) dropped that grade to "F" in November 2003, and (iii) has maintained its "F" rating of the company ever since.

28. In December 2004, Gradient stated that it would henceforth leave Overstock alone. However, Gradient inexplicably resumed its negative reports about Overstock on January 17, 2005, seven days after Rocker's article appeared in Barron's. This time, Defendants dramatically increased their efforts to harm Overstock. In the first half of 2005, Gradient issued a blizzard of negative reports and commentary on Overstock. Gradient issued negative reports on Overstock on at least: January 17-21, and 24-28, 2005; February 1, 4, 7, 15, 23, and 28, 2005; March 7, 10, 14, 21, and 29, 2005; April 11, 19, and 25, 2005; May 2, 4, 9, 16, 17, and 23, 2005, and June 1, 6, and 13, 2005. In 2005, the reports also became markedly more critical of Overstock.

29. Far from being what Gradient represented to be objective and independent analyses, these reports were previewed, edited, and controlled by at least the Rocker Defendants, Rocker, and Cohodes. Indeed, upon information and belief, Vickrey routinely provided Gradient's reports on Overstock to the Rocker Defendants, Rocker and Cohodes, prior to publication.

30. Upon information and belief, from their Marin County office, Cohodes, Rocker Partners and Rocker Management routinely made requests to Gradient to alter the reports. Upon information and belief, from the Marin County office, Cohodes, Rocker Partners and Rocker Management routinely edited Defendant Gradient's reports to insert specific negative input and false information.

31. Further, on information and belief, Vickrey allowed Rocker and Cohodes to control the timing of the release and dissemination of the Gradient/Rocker reports at the request of Rocker and/or Cohodes, in order to give the Rocker Defendants, Rocker and Cohodes the opportunity and time to position their portfolios to benefit from the false and negative analyses of Overstock in the publications.

32. The Gradient/Rocker reports failed to disclose that the Rocker Defendants, Rocker and Cohodes controlled their content, and that the reports were not independent and objective analyses of their target. Nor did Gradient disclose that they were in large part, simply platforms for the Rocker Defendants, Rocker and Cohodes to pursue their long-term goal of profiting by Overstock's share price decreasing as much as possible and remaining depressed.

33. The Gradient/Rocker reports also failed to disclose direct affiliations with other hedge funds. For example, upon information and belief, Vickrey and/or Bettis own and manage, or have while operating Gradient (or its predecessor) owned and managed, various hedge funds including, among others, Pinnacle Investment Advisors, Camelback Equity Consulting, LLC, Camelback Capital Advisors, LLC, Greenbook Investment Management Inc., the Hallmark Funds, and Helios Equity Fund. Further, also on information and belief, Vickery and/or Bettis instructed Gradient's employees to lie about whether Vickrey and/or Bettis were affiliated with hedge funds, and otherwise actively concealed these affiliations.

THE FALSE AND MISLEADING STATEMENTS ABOUT OVERSTOCK CONTAINED IN THE GRADIENT/ROCKER REPORTS

34. Apart from failing to disclose the control of the Rocker Defendants, Rocker, and Cohodes over the Gradient/Rocker reports on Overstock, those reports also contain significant false and misleading statements about the company, including untrue facts, and opinions without fully disclosed provably true facts.

35. For example, the Gradient/Rocker reports have repeatedly stated that Overstock has either inflated or otherwise intentionally misstated various financial and operating metrics – sales, operating cash flow, inventory allowances, prepaid expenses, profit margins, etc. – in order to cosmetically enhance its balance sheet and meet analysts' forecasts.[1] These statements are false.

36. For example, the Gradient/Rocker reports have claimed that Overstock's accounting for fulfillment partner revenue on a gross basis was improper and was likely to be "solely motivated" by "the desire to report higher revenues." The reports based such defamatory

[1] Gradient Research Report on Overstock, November 3, 2004, p. 6.

conclusions on false and misleading assertions of fact and failures to disclose, and compounded misrepresentation error by using incorrect numerical calculations that purported to "prove" that Overstock took no "meaningful amount of general inventory risk." A further falsity and omission on this issue was Gradient's reliance on "a survey of peer firms," the "vast majority" of which use the more conservative approach in accounting for fulfillment sales.[2] However, the peer most frequently mentioned by Gradient, Amazon.com, as well as others in the online retail business, do not take the same risk and do not even publicly disclose their third party sales information as Overstock does.[3] Despite acknowledging this, Gradient did not assess Overstock's accounting change any more favorably.

37. Another such falsity and omission in Gradient's reporting of Overstock's revenue recognition change was Gradient's trivialization and misstatement of Overstock's risk acceptance. Gradient has stated that Overstock had no accrued returns or obsolete inventories on its balance sheets to indicate increased risk, and "virtually nil" risk. It has contended that the "vast majority" of the returns of Overstock's fulfillment partners' goods are for "shipping errors," "warranty claims," "refused packages," insufficient packaging," "incorrect items," "defective merchandise," "incomplete orders," and other similar reasons[4]. The truth is, however, that the majority of the returns of Overstock's fulfillment partner's goods are for simple buyer's remorse, for which Overstock bears the risk of product returns and the responsibility for the returned inventory. Based on these falsities and omissions, Gradient segued from Overstock's supposed lack of risk and improper accounting of revenue to a purported motivation to "overstate" its sales and "misstate" its revenue and to "drive its share price higher (and give [CEO] Mr. Byrne a chance to meet his seemingly unattainable sales goal of $2 billion by 2006."[5] However, "overstating" Overstock's sales growth was a Gradient fiction; Overstock has always expressed its growth rate in terms of gross merchandise sales ("GMS") or gross bookings, although Gradient did not

[2] Gradient Research Report on Overstock, March 18, 2004, pp.4-5.
[3] *Id.*
[4] Gradient Earnings Quality Analytics Alert, August 26, 2004.
[5] Gradient Research Bulletin on Overstock September 24, 2004.

mention that this metric was wholly unaffected by Overstock's revenue recognition accounting change.

38. Gradient stubbornly persisted in defaming Overstock's revenue recognition accounting method, claiming it amounted to a "violation of the intent (if not the form) of GAAP[6]," despite the facts that (i) Overstock's outside auditors PricewaterhouseCoopers ("PwC"), supported the company's accounting change as compliant with the U.S. generally accepted accounting principles ("GAAP") based on specific criteria; (ii) Overstock openly explained the change in business practice that led to the change in revenue recognition in a contemporaneous press release, in subsequent SEC filings, and in subsequent earnings conference call; and (iii) in contrast to Gradient, the other analysts covering Overstock, including Legg Mason, Merrill Lynch, WR Hambrecht + Co., and JMP Securities, reported the accounting change without inflammatory slurs.

39. Another example of Gradient's defamation of Overstock was regarding Overstock's purportedly artificial enhancement of its year-end results using seasonal cash flow. Overstock, being a retailer, generates positive cash flow in the normal course of business during the fourth quarter holiday season from the seasonal increase in credit card sales of products shipped by its fulfillment partners. For a large fraction of these sales, Overstock pays for the merchandise about 16 to 30 days later, which is sometime in the first quarter. Overstock's year-end balance sheet reports both the accumulation of temporary cash balances (referred to by Overstock as "float cash"), and the associated payables to Overstock's fulfillment partners, which both decline in the first quarter when Overstock pays its fulfillment partners in the normal course of business. Overstock has described its float cash in great detail in several earnings releases and conference calls, and rightfully considers it a very attractive aspect of Overstock's business, as this cash can be used to provide working capital for the business and enhances Overstock's overall liquidity. As Overstock grows, it will actually generate more float cash, which is a rare occurrence in business.

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[6] GAAP, or Generally Accepted Accounting Principles, defines the standards by which accounting should be performed. GAAP ensures that when a company is audited, the auditor can make statements about the accuracy of the company's financial statements.

40. However, Gradient's reports on Overstock repeatedly referred to Overstock's operational cash flow as if it were a deceptive device, and as if Overstock's fourth quarter cash flow statement was somehow incorrect and/or improper. Gradient falsely contended that Overstock's "operating cash flow was artificially boosted in 2004."[7] In effect, the cash flow from operations is a cash-float operation – more of other people's money, not an operational win."[8] In fact, Gradient's claim about operational cash flow is provably false. Because of the favorable impact on liquidity, this is exactly what can be fairly called an operational win.

41. Again, Gradient doggedly clung to its slanted perspective, even in the face of Overstock's public explanations and other analysts' impartial assessments of the company's business model and its clear advantage in being able to generate positive working capital during periods of rapid growth.

42. For another example, Gradient has at least twice stated that the increase in short positions in Overstock's common stock "corroborate[s]"[9] or "lends credence"[10] to its negative statements about the company. These statements (issued on July 18, 2003, and December 5, 2003, respectively) are false and misleading and without analytical merit, as they fail to disclose Gradient's connections to hedge funds clients such as the Rocker Defendants, Rocker, and/or Cohodes, who are existing or intended short sellers of the stock. Further, the statements are vacuous in their circularity.

43. Still other examples of Gradient's false and misleading statements about Overstock's accounting practices included the following:

a. Gradient misstated Overstock's supposed under-reserving for inventory, accounts receivable and sales returns. Gradient has accused Overstock of having "an inadequate allowance for doubtful accounts," and in the same report, Gradient again falsely

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[7] Gradient Research Report on Overstock, February 4, 2005; Gradient Greatest Concerns Lists dated February 15, 2005, February 23, 2005, February 28, 2005, March 7, 2005, March 14, 2005, April 11, 2005, April 19, 2005.

[8] Gradient Research Report on Overstock, February 4, 2005; Gradient Research Notes, January 24-28, 2005; Gradient Greatest Concerns List, February 15, 2005.

[9] Gradient Research Report on Overstock, July 18, 2003, p.8.

[10] Gradient Research Report on Overstock, December 5, 2003.

charged Overstock with intentionally manipulating its earnings numbers.[11] The truth is, and as Overstock has made public in detail, and as reviewed each quarter and at year-end by its auditor, PwC, all of its reserves are specific reserves and based on specific, most current available data for each category of reserves – inventory reserves, sales return reserves, and allowances for doubtful accounts. Although Overstock has no "inadequate allowances," Gradient has falsely reported that Overstock's "...declines in allowances for obsolete inventories and sales returns may have been used to boost quarterly profits and meet earning expectations."

b. Another example of Gradient's defamation of Overstock's business was its mischaracterization of the company's fully reserving its deferred tax asset on its balance sheet. While Gradient has claimed that, since Overstock has a full valuation allowance for its deferred tax asset, it must mean that Overstock's management does not believe that Overstock will ever be able to make a profit in the future, the fact is that until Overstock shows sustained, annual profitability, GAAP does not allow Overstock (or any other company) to recognize any of its deferred tax asset. The deferred tax asset is a benefit to income, and therefore can only be recognized to offset a company's actual income tax liability until it is clear that over the long-term, the company will create enough earnings to utilize the tax asset.

c. Yet another example of Gradient's false reporting about Overstock's corporate accounting was Gradient's statement about a risk created by Overstock's "improper" capitalization of costs caused by a "sharp rise in prepaid expenses." While prepaid expenses and prepaid inventory are a normal part of Overstock's business (and the reasons have been clearly explained during multiple conference calls), there are times when an increase in prepaid expenses simply denotes prepaid inventory that has not yet been delivered, Gradient reported the expensing as "improper" and as having an "adverse impact" on earnings, wholly failing to acknowledge the prepayment of inventory. Instead, Gradient claimed that it was "at a loss" to explain the significant jump in prepaid expenses.[12]

[11] Gradient Research Report on Overstock, July 18, 2003.
[12] Gradient Concerns List, April 25, 2005.

d. A further instance of Gradient falsely charging Overstock with accounting deception is Overstock's creation of a "variable interest entity" to handle the purchase and sale of diamonds. Overstock has a separate legal agreement with an entity formed to manage certain jewelry sales from Overstock's website. Overstock set up this separate entity for income tax purposes because this business operates in New York State. Overstock loaned the entity approximately $8 million to finance the purchase of a large diamond inventory. Overstock has no ownership interest in this entity. Since Overstock contributed all the entity's capital and shares in the risks and rewards of its operations, the entity is by definition a "variable interest entity," pursuant to governing accounting standards. GAAP requires Overstock to consolidate fully the operations and balance sheet of this variable interest entity, as if Overstock owned it, and therefore, the entity's operating results are included in Overstock's reported results each quarter. The designation of this entity as a variable interest entity – rather than as an off-balance-sheet special purpose entity – is beneficial to investors, because the success or failure of the entity will always be fully reflected in Overstock's financial results. Nonetheless, Gradient's reports have contained false and misleading assertions regarding the use of this variable interest entity, including: That Overstock somehow "chose" to create a mysterious "variable interest entity" in an effort to hide the true operating results of the entity; that with this structure, Overstock could somehow book 100% of the revenue, but only half of the losses, (which would also imply only half of the profits if it was making money); and that if the variable interest entity fails, Overstock could walk away without any damage other than a write-off of its loan. In truth, Overstock is making all appropriate disclosures and accountings for this variable interest entity.

e. An additional area of defamation concerns Gradient's falsities about Overstock's structured repurchase agreements. Overstock has disclosed publicly that it entered into a series of stock repurchase agreements with a broker-dealer in the second quarter of 2005 as part of its board-authorized and publicly disclosed stock repurchase program. Overstock paid out the cash upfront when it purchased these contracts, and the economics of these agreements were fixed at that time. Based on Overstock's stock price at the maturity of the stock repurchase agreement, Overstock would receive either stock or its cash back plus a cash premium. Overstock would not have to pay out any additional cash. Gradient has falsely asserted, however, that as Overstock's stock price changed, Overstock was at risk of having to pay out additional cash under these contracts, which Gradient "estimated" could be as much as $13 million.[13]

f. Another aspect of Gradient's defamatory publications relates to an occurrence labeled as "parking goods" and "round trip trading." In August 2004, an Overstock customer returned a large order of electronics goods, which Overstock then resold in the ordinary course of its business. Gradient made a series of inaccurate statements about this transaction, accusing Overstock of improper accounting of the return and resale of the goods, even after Overstock's representative directly explained to Gradient's Vickrey how the accounting was done and why it was proper. Instead, Gradient relied on an incorrect source to conclude that "the transaction has been at least initially recorded improperly." Gradient went on to question whether the transaction signaled "a lack of internal control" or "the intent to misrepresent the transaction," and elaborated on the latter rhetoric to insinuate that the transaction could be evidence of "parking goods or round trip trading," transactions "executed solely for the purpose of boosting top line revenues and overstating economic activity."[14]

g. Moreover, Gradient has made many other miscellaneous misstatements in its relentless attack on Overstock. Gradient stated at least twice in 2003 that Overstock's operations were the subject of "noticeably bearish market sentiment" – this, while the stock price rose from $13 to $18 to $20 (and thereafter to $38, $40, $60, and higher). Gradient's reports stated that Overstock's margins were "failing" when to the contrary, they were improving. Gradient contended that company directors and officers were not allowed to sell their stock and that not a single insider had done so, when there was no such policy prohibiting stock sales, and at least one insider, Senior Vice President of Technology, Shawn Schwegman, had sold shares. This sale was reported and had even been announced by CEO Byrne at a conference call. Gradient's reports nonsensically compared second quarter results with fourth quarter figures, despite the fact that a retailer's sales volume always skews heavily to the fourth quarter. Gradient misleadingly

[13] Gradient Brief Report on Overstock, May 4, 2005.
[14] Gradient Earnings Quality Analytics Alert, August 24, 2004.

compared the company's statements about its marketing expenses and capital requirements in the company's first year, when it had $100,000,000 in revenue, to those in its second and third years, after its sales increased over 100% each year; in making this misleading comparison, Gradient sought to make Overstock's initial statements seem contradicted by the later ones, rather than as natural consequences of the company's fast growth and changing circumstances.

DAMAGE TO OVERSTOCK RESULTING FROM DEFENDANTS' WRONGFUL CONDUCT

44. Defendants' concerted and wrongful actions have resulted in substantial harm to Overstock. Among the harms Defendants' actions have caused Overstock are: harm to Overstock's reputation and good will; loss of product sales and the profits therefrom; interference with and damage to Overstock's relationships with its suppliers, bankers, lenders, institutional investors, and the media; loss of market share and business opportunity for its products; increased cost to Overstock in its acquisition of SkiWest, Inc. in July 2005; loss of investment capital; loss of operating capital and impairment of Overstock's ability to continue to grow at historic rates.

FIRST CAUSE OF ACTION
(Libel Per Se – Plaintiff Overstock Against All Defendants)

45. Paragraphs 1 through 44, inclusive, of this Complaint are incorporated by reference as if set forth in full herein.

46. Defendants Gradient, Rocker and Does 51 through 100 made false and defamatory statements as alleged herein about Overstock and published these statements in writing to unprivileged third parties including, but not limited to, purchasers of print financial publications.

47. The statements had a natural and probable defamatory effect on the reader without the necessity of explanatory matter and accordingly, Defendants' defamatory statements are libelous per se.

48. Defendants knew it was foreseeable that the defamatory statements would be repeated by second parties. Defendants Gradient, Rocker and Does 51 through 100, as the originators, are liable for each repetition of the defamatory matter by second parties.

49. The Rocker Defendants, Cohodes, Vickrey, Bettis, Kliber and Does 1 through 50 also aided and abetted the libel per se committed by Gradient, Rocker and Does 51 through 100, by collaborating and cooperating in the publication of Gradient's, Rocker's and Does 51 through 100's libelous statements against Overstock. The Rocker Defendants, Cohodes, Vickrey, Bettis, Kliber and Does 1 through 50 aided and abetted the libel per se committed by Gradient and Rocker, with scienter, and/or with reckless disregard for the truth or falsity of the libelous statements.

50. Overstock is entitled to injunctive relief restraining the Defendants from committing further libel per se.

51. Defendants' libelous statements caused harm to Overstock, including without limitation, monetary loss from: harm to Overstock's reputation and good will; loss of product sales and the profits therefrom; interference with and damage to Overstock's relationships with its suppliers, bankers, lenders, institutional investors, and the media; loss of market share and business opportunity for its products; increased cost to Overstock in its acquisition of SkiWest, Inc. in July 2005; loss of investment capital; loss of operating capital and impairment of Overstock's ability to continue to grow at historic rates.

52. Defendants Gradient, Rocker and Does 51 through 100 made these negative defamatory statements with the intent and import that the statements were assertions of facts and not merely opinion.

53. Defendants Gradient, Rocker and Does 51 through 100 made the foregoing negative defamatory and libelous statements against Overstock with knowledge of their falsity and/or with reckless disregard for the truth or falsity thereof.

54. Defendants knew such statements disparaged the quality of Overstock's business and its stock, and intended these statements to cause Overstock pecuniary loss.

55. Defendants made their defamatory and libelous statements with malice, malicious intent, and with intent to cause the foregoing harm to Overstock. Accordingly, Plaintiff is entitled to, and should be awarded, punitive damages against each of the Defendants.

SECOND CAUSE OF ACTION
(Libel Per Quod – Plaintiff Overstock Against All Defendants)

56. Paragraphs 1 through 44, inclusive, of this Complaint are incorporated by reference as if set forth in full herein.

57. Defendants Gradient, Rocker and Does 51 through 100 made false and defamatory statements as alleged herein about Overstock and published these statements in writing to unprivileged third parties including, but not limited to purchasers of print financial publications.

58. To the extent any of the libelous statements herein are not libelous per se, they are libelous per quod. Because of facts and circumstances known to the readers of the statements, the statements tended to injure Overstock's business.

59. Defendants knew it was foreseeable that the defamatory statements would be repeated by second parties. Defendants Gradient, Rocker and Does 51 through 100, as the originators, are liable for each repetition of the defamatory matter by second parties.

60. The Rocker Defendants, Cohodes, Vickrey, Bettis, Kliber and Does 1 through 50 also aided and abetted the libel per quod committed by Gradient, Rocker and Does 51 through 100, by collaborating and cooperating in the publication of Gradient's, Rocker's and Does 51 through 100's libelous statements against Overstock. The Rocker Defendants, Cohodes, Vickrey, Bettis, Kliber and Does 51 through 100 aided and abetted the libel per quod committed by Gradient and Rocker, with scienter, and/or with reckless disregard for the truth or falsity of the libelous statements.

61. Defendants' libelous statements caused harm loss to Overstock, including without limitation, monetary loss from: harm to Overstock's reputation and good will; loss of product sales and the profits therefrom; interference with and damage to Overstock's relationships with its suppliers, bankers, lenders, institutional investors, and the media; loss of market share and business opportunity for its products; increased cost to Overstock in its acquisition of SkiWest, Inc. in July 2005 and impairment of Overstock's ability to continue to grow at historic rates.

62. Overstock is entitled to injunctive relief restraining the Defendants from committing further libel per quod.

63. Defendants Gradient, Rocker and Does 51 through 100 made these negative defamatory statements with the intent and import that the statements were assertions of facts and not merely opinion.

64. Defendants Gradient, Rocker and Does 51 through 100 made the foregoing negative defamatory and libelous statements against Overstock with knowledge of their falsity and/or with reckless disregard for the truth or falsity thereof.

65. Defendants knew such statements disparaged the quality of Overstock's business and intended these statements cause Overstock pecuniary loss.

66. Defendants made their defamatory and libelous statements with malice, malicious intent, and with intent to cause the foregoing harm to Overstock. Accordingly, Plaintiff is entitled to, and should be awarded, punitive damages against each of the Defendants.

THIRD CAUSE OF ACTION
(Interference with Prospective Economic Advantage - Plaintiff Overstock Against All Defendants)

67. Paragraphs 1 through 66, inclusive of this Complaint are incorporated by reference as if set forth in full herein.

68. Overstock has or had valuable prospective economic relationships and business opportunities with its suppliers, bankers, customers, lenders, investors, and prospective investors, from which Overstock derived economic gain, and from which Overstock had a reasonable expectancy of deriving future economic gain. Defendants were and are aware of these relationships. Defendants, through the acts alleged herein, have and continue to, wrongfully, knowingly and intentionally act to interfere with and destroy or harm Overstock's existing and/or prospective business relationships.

69. Defendants' wrongful acts as alleged herein have actually interfered with and disrupted Overstock's relationships and/or prospective relationships, and these acts designed to interfere with and disrupt these relationships have been a substantial factor in causing Overstock's harm through the loss of prospective economic advantage.

70. Overstock is entitled to, and should be, awarded damages caused by Defendants' actions, including without limitation, monetary loss from: harm to Overstock's

reputation and good will; loss of product sales and the profits therefrom; interference with and damage to Overstock's relationships with its suppliers, bankers, lenders, institutional investors, and the media; loss of market share and business opportunity for its products; increased cost to Overstock in its acquisition of SkiWest, Inc. in July 2005; loss of investment capital; loss of operating capital and impairment of Overstock's ability to continue to grow at historic rates.

71. Defendants acted with malice, fraud, and oppression, and accordingly, Overstock is entitled to, and should be awarded, punitive damages against each of the Defendants, Overstock is further entitled to, and should be awarded a preliminary and permanent injunction against Defendants.

FOURTH CAUSE OF ACTION
(Violation of Business and Professions Code §§ 17200, *et seq.* and §§ 17500, *et seq.* - Plaintiff Overstock Against All Defendants)

72. Paragraphs 1 through 71, inclusive, of this Complaint are incorporated by reference as if set forth in full herein.

73. Gradient's knowing and intentional dissemination of negative reports on Overstock containing false and/or misleading statements concerning Overstock, and without disclosing the input of the Rocker Defendants, Rocker, and Cohodes therein, and Rocker's knowing and intentional false statements concerning Overstock, constitute unlawful, unfair, or fraudulent business acts or practices by the Defendants, and each of them, in violation of Business and Professions Code §§ 17200, *et seq.* and §§ 17500, *et seq.*

74. Overstock has been injured by the Defendants' violations of Business and Professions Code §§ 17200, *et seq.* and §§ 17500, *et seq.*, and Defendants have been unjustly enriched at Plaintiff's expense.

75. Overstock is informed and believes that the Rocker Defendants, Rocker, Cohodes, and Does 1 through 100 agreed and conspired with Gradient, Vickrey, Bettis, Kliber and Does 1 through 100 to engage in acts of unlawful, unfair, or fraudulent business acts or practices, and/or aided and abetted, as alleged herein, the acts of each other, and encouraged, ratified, and/or accepted the benefits of the acts of each other.

76. Overstock is entitled to preliminary and permanent injunctive relief restraining the Defendants from committing further unfair trade practices and mandating the full disclosure of Defendant Gradient's hidden collaborators, full disclosure of the Rocker Defendants', Rocker's, and Cohodes' personal interest in seeing Overstock harmed, full disclosure of the false and/or misleading nature of Defendants' statements regarding Overstock, and restitution from Defendants of (i) all amounts lost by Overstock due to the diminution in value of Overstock's tangible and intangible assets, (ii) all amounts lost in the decline of Overstock's market capitalization and other vested interests of Overstock resulting from the Defendants' conduct; (iii) attorneys' fees; and (iv) prejudgment interest.

FIFTH CAUSE OF ACTION
(California Corporations Code §§ 25400, *et seq.* - Plaintiffs Barron and Helburn Against Rocker Defendants, Rocker, Cohodes and Does 1-50)

77. Paragraphs 1 through 76, inclusive, of this Complaint are incorporated by reference as if set forth in full herein.

78. Rocker Defendants, Rocker, Cohodes and Does 1 through 50 ("These Defendants") at all relevant times, were buyers and/or sellers of Overstock common stock.

79. Barron formerly was the owner of approximately 650 shares of Overstock common stock. Barron sold 200 shares on January 6, 2005 at $60.00/share, and 250 shares on March 14, 2005, at $45.00/share. These prices were wrongfully and artificially depressed by These Defendants' actions.

80. Helburn formerly was the owner of 500 shares of Overstock common stock. Those shares were purchased on January 28, 2005 at $57.08/share, and sold on August 5, 2005 at $41.83/share, for a gross loss of $15.25/share. These prices were artificially depressed by These Defendants' actions.

81. By virtue of the allegations set forth above, These Defendants violated California Corporations Code Sections 25400, *et seq.* These Defendants' violations, which were committed either directly or indirectly within California, include but are not limited to those listed in the following three paragraphs:

82. These Defendants sold substantial short positions against the common stock of Overstock engaged in other similarly structured transactions that benefit from a decline in Overstock's common stock, knowing that the transactions would likely be reported solely as a sale, without a corresponding purchase or change in the beneficial ownership of Overstock common stock, and that these transactions would thereby create a misleading market for Overstock's common stock.

83. These Defendants worked together to effect repeated and substantial short sales or other such transactions of Overstock common stock, to depress the price and to induce the sale of that stock by others, including but not limited to Plaintiffs Barron and Helburn.

84. These Defendants knowingly made false statements or willingly participated in a scheme to make statements they had reason to know were false, the purpose of which was to induce the sale of Overstock common stock by third parties, including but not limited to Plaintiffs Barron and Helburn and to thereby wrongfully enrich These Defendants and harm Plaintiffs.

85. As a proximate result of These Defendants' acts and omissions occurring in California with regard to Overstock, as alleged, the number of shares of Overstock's common stock trading in the market was systemically artificially inflated causing downward pressure on the stock price, and Plaintiffs Barron and Helburn were injured by such actions by These Defendants.

86. Pursuant to the provisions of California Corporations Code § 25500, Plaintiffs are entitled to, and should be awarded, damages against These Defendants for unlawful manipulation of the price of Overstock common stock.

PRAYER

WHEREFORE, Plaintiffs seek judgment against Defendants as follows:

On the First Cause of Action:

1. For general damages, in an amount in excess of the jurisdictional minimum of this Court.

2. For special damages in an amount according to proof at trial, in an amount in excess of the jurisdictional minimum of this Court.

3. For injunctive relief.

4. For punitive damages.

On the Second Cause of Action:

1. For general damages in an amount according to proof at trial, in an amount in excess of the jurisdictional minimum of this Court.

2. For special damages in an amount according to proof at trial, in an amount in excess of the jurisdictional minimum of this Court.

3. For injunctive relief.

4. For punitive damages.

On the Third Cause of Action:

1. For general damages in an amount according to proof at trial, in an amount in excess of the jurisdictional minimum of this Court.

2. For special damages in an amount according to proof at trial, in an amount in excess of the jurisdictional minimum of this Court.

3. For injunctive relief.

4. For punitive damages.

On the Fourth Cause of Action:

1. For all appropriate remedies under §§17200, *et seq*. and §§17500, *et seq*., including but not limited to:

2. Restoration of money and property acquired by unfair business practices.

2. Injunctive relief.

3. Restitution of benefits unfairly obtained by Defendants.

4. Attorneys' fees.

5. Prejudgment interest.

On the Fifth Cause of Action:

1. For general damages in an amount according to proof at trial, in an amount in excess of the jurisdictional minimum of this Court.

2. For special damages in an amount according to proof at trial, in an amount in excess of the jurisdictional minimum of this Court.

3. For prejudgment interest.

4. Other applicable remedies as provided in the Corporations Code.

On All Causes of Action:

1. For costs;

2. For reasonable attorneys' fees; and,

3. For such and further relief as the Court may deem appropriate.

Dated: October 12, 2005

STEIN & LUBIN LLP

By: [signature]
THEODORE A. GRIFFINGER, JR.
ELLEN A. CIRANGLE

Dated: October 12, 2005

FREITAS, McCARTHY, MacMAHON & KEATING, LLP

By: [signature]
THOMAS F. KEATING, JR.,
NEIL J. MORAN

Dated: October 12, 2005

SIEGLER LAW GROUP

By: [signature]
WILLIAM J. SEXTON
MICHAEL D. MURPHY

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OVERSTOCK.COM, INC., a Delaware corporation, HUGH D. BARRON, an individual and MARY HELBURN, an individual