

## SUPERIOR COURT

DATE: 03/08/06      TIME: 9:00 A.M.      DEPT: F      CASE NO: CV053693

PRESIDING: HON. VERNON F. SMITH

REPORTER: ELAINE NINKOVICH

CLERK: LOUISE MORRIS

PLAINTIFF: OVERSTOCK.COM, INC., ET AL

vs.

DEFENDANT: GRADIENT ANALYTICS, INC., ET AL (COMPLEX CASE)

T. GRIFFINGER 9814343

T. KEATING 4562266

J. KEKER 3977188

G. CARTER 8567100

NATURE OF PROCEEDINGS: 1) NOTICE OF MOTION - ANTI-SLAPP MOTION TO STRIKE FIRST AMENDED COMPLAINT (DEFT) ROCKER MANAGEMENT, LLC., A NEW JERSEY LLC (DEFT) ROCKER OFFSHORE MANAGEMENT COMPANY, INC., A NY CORP (DEFT) ROCKER PARTNERS, LP., A NEW YORK LIMITED PARTNERSHIP

2) HEARING ON DEMURRER TO FIRST AMENDED COMPLAINT (DEFT) MARC COHODES (DEFT) ROCKER MANAGEMENT, LLC., A NEW JERSEY LLC (DEFT) ROCKER OFFSHORE MANAGEMENT COMPANY, INC., A NY CORP.

### RULING

SPECIAL MOTIONS TO STRIKE PURSUANT TO CODE OF CIVIL PROCEDURE, SECTION 425.16, BY DEFENDANTS GRADIENT ANALYTICS, INC., ET AL, AND ROCKER PARTNERS, ET AL. ARE DENIED.

FIRST, THE COURT REJECTS PLAINTIFF'S CONTENTION THAT ROCKER'S MOTION TO STRIKE IS EXEMPT PURSUANT TO CODE OF CIVIL PROCEDURE, SECTION 425.17. THE STATEMENTS ROCKER IS ALLEGED TO HAVE MADE AGAINST OVERSTOCK WERE NOT FOR THE PURPOSE OF "OBTAINING APPROVAL FOR, PROMOTING, OR SECURING SALES OR LEASES OF, OR COMMERCIAL TRANSACTIONS IN, [ROCKER'S] GOODS OR SERVICES," NOR WERE THEY A "STATEMENT OR CONDUCT . . . MADE IN THE COURSE OF DELIVERING [ROCKER'S] GOODS OR SERVICES." IN OTHER WORDS, ROCKER'S ALLEGED MISCONDUCT IN CONSPIRING WITH GRADIENT TO ISSUE NEGATIVE INVESTMENT REPORTS IS NOT, ON ITS FACE, PROMOTIONAL IN NATURE, EVEN IF ITS LONG TERM GOAL WAS TO PROFIT FROM A DECREASE IN THE PRICE OF OVERSTOCK'S STOCK. THE CASE LAW LEADING TO THE ADOPTION OF §425.17 WAS ADDRESSED TO COMMERCIAL SPEECH SUCH AS LABELING, ADVERTISING AND OTHER "MARKETING-RELATED ACTIVITIES." (SEE *MARTINEZ V. METABOLIFE*)

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*INTERNATIONAL, INC.* (2003) 113 CAL.APP.4TH 181, AND *SCOTT V. METABOLIFE INTERNATIONAL, INC.* (2004) 115 CAL.APP.4TH 404.)

NEXT, ALTHOUGH THE COURT FINDS DEFENDANTS HAVE MET THEIR BURDEN OF SHOWING THAT PLAINTIFF'S ACTION ARISES FROM AND/OR IS BASED ON AN ACT OF DEFENDANTS IN FURTHERANCE OF THEIR RIGHT TO FREE SPEECH IN CONNECTION WITH AN ISSUE OF PUBLIC INTEREST (SEE *COMMONWEALTH ENERGY CORP. V. INVESTOR DATA EXCHANGE, INC.* (2003) 110 CAL.APP.4TH 26, 33, CITING *RIVERO V. AMERICAN FEDERATION* (2003) 105 CAL.APP.4TH 913, 924), PLAINTIFF HAS ESTABLISHED ON THIS POINT IN THE LITIGATION, A PROBABILITY THAT IT WILL PREVAIL ON THE MERITS OF ITS COMPLAINT. ROCKER'S OBJECTIONS TO THE DECLARATION OF DEMETRIOS ANIFANTIS AND DEFENDANTS' OBJECTIONS TO DECLARATION OF DAVID CHIDESTER ARE OVERRULED.

THE COURT AGREES WITH PLAINTIFF THAT *MORNINGSTAR, INC. V. SUPERIOR COURT* (1994) 23 CAL.APP.4TH 676, AND *THOMAS V. LOS ANGELES TIMES COMMUNICATIONS* (C.D. CAL. 2002) 189 F.SUPP.2D 1005, CITED BY DEFENDANTS, ARE DISTINGUISHABLE. THE SUBJECT REPORTS BY GRADIENT, ALTHOUGH LIBERALLY COUCHED IN TERMS OF OPINION, IMPLY THAT OVERSTOCK INTENTIONALLY MISSTATED FINANCIAL METRICS TO ARTIFICIALLY INFLATE ITS EARNINGS REPORTS AND ENGAGED IN A VARIETY OF ACCOUNTING IMPROPRIETIES THAT COULD BE CONSTRUED AS STATEMENTS OF FACT. THE REPORTS ARE NOT WRITTEN IN THE FORM OF LOOSE, FIGURATIVE, OR HYPERBOLIC LANGUAGE, BUT ARE SERIOUS IN TONE AND CONTENT.

REGARDING THE ISSUE OF ACTUAL MALICE, EVEN IF PORTIONS OF THE OTHER DECLARATIONS FILED BY PLAINTIFF ARE OBJECTIONABLE AS LACKING PERSONAL KNOWLEDGE, ETC., THE ANIFANTIS DECLARATION IS SUFFICIENT PRIMA FACIE EVIDENCE DEMONSTRATING GRADIENT'S PREDECESSOR (CAMELBACK) PUBLISHED "SPECIAL REPORTS" IN RECKLESS DISREGARD OF THE TRUTH (I.E. WITH ACTUAL MALICE). (*READERS' DIGEST ASSN. V. SUPERIOR COURT* (1984) 37 CAL.3D 244, 257-258.)

THE FIRST AMENDED COMPLAINT INVOLVES THE SAME GENERAL SET OF FACTS AND RELATES BACK TO THE ORIGINAL COMPLAINT FOR STATUTE OF LIMITATIONS PURPOSES. (SEE COMPLAINT, ¶ 21.) WHILE SEVERAL OF THE REPORTS PRE-DATE AUG. 11, 2004, IT IS NOT TRUE, AS DEFENDANTS ARGUES, THAT "THE BULK" OF THE STATEMENTS THAT FORM THE SUBJECT OF THE FAC ARE BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS. THE FAC ITSELF CITES ONLY *ONE STATEMENT* FROM A SINGLE REPORT THAT IS ARGUABLY BARRED. (SEE FAC, ¶36, PAGE 9:3-5, AND FN. 2.)

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GRADIENT'S DEMURRER TO THE THIRD AND FOURTH CAUSES OF ACTION OF THE FIRST AMENDED COMPLAINT IS OVERRULED. PLAINTIFF'S REFERENCE IN THE THIRD CAUSE OF ACTION TO "ITS SUPPLIERS, BANKERS, CUSTOMERS, LENDERS, [AND] INVESTORS" (FAC, ¶68) IS SUFFICIENT TO ALLEGE AN IDENTIFIABLE CLASS OF THIRD PARTIES WITH WHOM PLAINTIFF HAS A DEFINED, PRE-EXISTING RELATIONSHIP. THE FOURTH CAUSE OF ACTION DOES NOT INVOLVE A "SECURITIES TRANSACTION." (SEE *BOWEN V. ZIASUN TECHNOLOGIES, INC.* (2004) 116 CAL.APP.4<sup>TH</sup> 777, 788.)

ROCKERS' DEMURRER TO THE FIRST AMENDED COMPLAINT IS OVERRULED, EXCEPT AS TO THE SECOND CAUSE OF ACTION (ELEMENT OF SPECIAL DAMAGES), WHICH IS SUSTAINED, WITH 20 DAYS LEAVE TO AMEND. (*PRIDONOFF V. BALOKOVICH* (1951) 36 CAL.2D 788, 792.)

AFTER REVIEW, TENTATIVE RULING ADOPTED AS FINAL.

ANY PARTY SEEKING ORAL ARGUMENT MUST NOTIFY THE COURT AND COUNSEL. ARGUMENT WILL OCCUR ON MARCH 15, 2006 AT 9:00 A.M.