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MARIN COUNTY SUPERIOR COURT
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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY MARIN - UNLIMITED 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.: CV 053693 PLAINTIFFS' APPENDIX OF NON-CALIFORNIA CASES IN SUPPORT OF OPPOSITION TO DEFENDANTS' ANTI-SLAPP MOTIONS Date: January 25, 2006 Time: 9:00 a.m. Dept: F Judge: Honorable Vernon F. Smith Trial Date: Not Assigned

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Plaintiffs respectfully submit this Appendix of Non-California Authorities in Support of their Opposition to Defendants' Anti-SLAPP Motions, submitted concurrently herewith.

Exhibit Number	**Authority**
1.	*Accord, Condit v. National Enquirer, Inc.* (E.D. Cal. 2002) 248 F. Sup.2d 945, 953
2.	*Commodities Trend Serv., Inc. v. Commodities Futures Trading Commission* (1998) 149 F.3d 679
3.	*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323
4.	*Global Telemedia Inter., Inc. v. Doe I* (C.D. Cal. 2001) 132 F. Supp.2d 1261
5.	*Globetrotter Software, Inc. v. Elan Computer Group, Inc.* (N.D. Cal. 1999) 63 F.Supp.2d 1127
6.	*Lapidus v. Hecht* (9th Cir. 2000) 232 F. 3d 679
7.	*Levitin v. Painewebhber, Inc.* (12th Circ. 1998) 159 F. 3d 698, 700
8.	*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 19
9.	*New York Times v. Sullivan* (1964) 376 U.S. 254
10.	*Rogers v. Home Shopping Network, Inc.* (C.D. Cal. 1999) 57 F. Supp. 2d 973, 985 n.7
11.	*Troy Group, Inc. v. Tilton* (C.D. 2005) 364 F. supp. 2d 1149
12.	*United States v. Wenger* (10th Cir. 2005) 427 F.3d 840
13.	*West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624

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Exhibit Number	Authority
14.	*Wooley v. Maynard* (1977) 430 U.S. 705

Dated: January 3, 2006

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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.: CV 053693 **PLAINTIFFS' OBJECTIONS TO DECLARATIONS OF DAVID A. ROCKER AND MARC COHODES IN SUPPORT OF ROCKER'S ANTI-SLAPP MOTION** Date: January 25, 2006 Time: 9:00 a.m. Dept: F Judge: Honorable Vernon F. Smith: Trial Date: Not Set

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1. Introduction Re: Plaintiffs' Objections to Rocker and Cohodes' Declarations

Rockers' and Cohodes' Declarations filed in support of defendants' Anti-SLAPP motions consist of inadmissible hearsay, *ad hominem* attacks on the Plaintiffs and others, unfounded conclusions, arguments and unauthenticated documents. Plaintiffs object to the portions of the declarations discussed in detail below, at sections 6 and 7, and respectfully request the court rule on those objections before the hearing on defendants' motions to strike (the anti-SLAPP motions).

Where an anti-SLAPP motion is based solely on inadmissible evidence it may be denied on that ground alone. *Lockyer v. Brar (2004) 115 Cal. App. 4th 1315, 1319.* In ruling on an anti-SLAPP motion the Court must consider only evidence that will be admissible at trial. *Evans v. Unkow (1995) 38 Cal. App. 4th 1490.* The same is true of any motion. The standards are the same as for evidence presented by live witnesses. Declarations must be from competent witnesses having personal knowledge of the facts stated therein, rather than hearsay or conclusions. *Rutter, Civil Procedure Before Trial,* 9:57 at 9(I)-29; *Evidence Code section 702*; *United Community Church v. Garcin (1991) 231 Cal.App.3d 327.*

2. Requirement of Authentication

All writings, including email, internet articles and magazine articles must be authenticated. *Evidence Code Section 1401.* In order for a witness to authenticate a writing the witness must have seen the writing made or executed. *Evidence Code Section 1413.* Because '(a)nyone can put anything on the Internet' and 'hackers can adulterate the content on *any* web-site from *any* location at any time,' evidence procured from the Internet must be properly authenticated. [See *Wady v. Provident Life & Acc. Ins. Co. of America (CD CA 2002) 216 F. Supp. 2d 1060, 1064-1065.* (internal quotes omitted)]

> *The Internet is often viewed as a 'catalyst for rumor, innuendo, and misinformation.' Consequently, information obtained from the Internet is frequently regarded as 'inherently untrustworthy. (St. Clair v. Johnny's Oyster & Shrimp, Inc. (SD TX 1999) 76 F/ Supp.2d 773, 774-775--ownership of boat could not be established through information available on U.S. Coast Guard's*

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online vessel database; United States v. Jackson (7th Cir. 2000) 208 F.3d 633, 637.)

Wady v. Provident Life & Acc. Ins. Co. of America (CD CA 2002) 216 F. Supp. 2d 1060, 1064-1065 [plaintiff's exhibits procured from defendant's Web site inadmissible because there was no proof of personal knowledge of who maintains Web site, who authored documents or accuracy of contents]

3. Inadmissibility of Argument

The case of *In Re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 30, states that argument in declarations, *"is a sloppy practice and should stop."*

> *...even at its most benign, it is a practice that forces the trial and appellate courts, and opposing counsel, to sort out the facts that are actually supported by oath from material that is nothing more than the statement of an opinion ostensibly under oath. More fundamentally, however, it makes a mockery of the requirement that declarations be supported by statements made under penalty of perjury. The proper place for argument is in points and authorities, not declarations.*
>
> *Heggie, supra at page 30.*

Ad hominem arguments which are attacks on the other party's character are irrelevant. And insufficient to support an anti-SLAPP motion. *People ex rel. Lockyer v. Brar* (204) 115 Cal.App.4th 1315, 1318-1319.

4. Inadmissibility of Character Evidence

Rocker's references to previous lawsuits involving Rocker and others are all inadmissible. Evidence of a trait of character is inadmissible when offered to prove conduct on a specified occasion. (*Evid. Code §1101(a); Marocco v. Ford Motor Co. (1970) 7 Cal.App.3d 84, 91-92*) *"[E]vidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion." Evid. Code §1104; Carr v. Stern (1911)) 17 Cal.App. 397, 406-407). "It is a fundamental rule of evidence that you cannot prove the commission of an act by showing the commission of similar acts by the same person at other times and under other circumstances. Such evidence is simply not relevant. ..." Larson v. Larson (1925) 72 Cal.App. 169,*

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172; Marocco v. Ford Motor Co., supra; Evid. Code §1110(b); Witkin, Cal. Evidence (2d ed.) § 350, pp. 309-310.

Character evidence in the form of specific instances of conduct is inadmissible when offered to prove conduct on a specified occasion. *Evidence Code Section 1101.*

5. Inadmissibility of Unqualified Opinion Evidence

If special qualifications are necessary to allow a person to give opinion testimony in court, such qualifications must be set forth in detail in declarations containing such testimony. *Ochoa v. Pacific Gas & Electric Company* (1998) 61 Cal.App.4th 1480, 1487; *Rutter, Civil Procedure Before Trial*, 9:58 at 9(I)-30; *Evid. Code §720.*

6. Objections to Declaration of David Rocker

Objectionable Testimony and Exhibits	**Objections**
Paragraph 2 and Exhibit 1:	
"I am filing this motion because it is my opinion that this lawsuit represents an attempt by Plaintiff Overstock.com, Inc. ("Overstock") and its Chief Executive Officer, Patrick Byrne, to use his family's wealth and influence to silence Overstock's critics and doubters through the burden and expense of a lawsuit. Prior to initiating this lawsuit, Byrne repeatedly charged that any financial reporters or others who criticized him or questioned whether the securities market had overpriced Overstock's shares were the "lap dogs," "quislings," and "condoms" used by a "Sith Lord"[1] who was out to "destroy" Overstock's stock price. He did this despite acknowledging that "CEO's who spend time worrying about shorts or obsessing about shorts are fools. And that most CEOs who tangle with shorts are crooks." As described in an article in the current *Fortune* magazine (a true and correct copy of which is attached hereto as Exhibit 1), Overstock and Byrne	The witness's "opinion" as to the Byrne "family's wealth" is based upon hearsay. *Evid. Code §1200.* The witness has laid no foundation that he has personal knowledge of the Byrne "family's wealth." *Rutter, Civil Procedure Before Trial,* 9:57 at 9(I)-29; *Evid. Code § 702; United Community Church v. Garcin (1991) 231 Cal.App.3d 327.* Irrelevant. The "wealth" of the Plaintiff corporation's CEO, Byrne and his family is irrelevant. *Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal.App.3d 1220, 1242-1243; Evid. Code §350.* Improper opinion. Irrelevant. Hearsay. The declarant's repetition of a Fortune journalist's

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have waged a public campaign to silence Rocker Partners and its other critics among stock analysts and financial journalists." 1/ The "Sith Lord" is the evil emperor from the *Star Wars* movies.	alleged interview of Byrne is double hearsay. *Shumate v. Johnson Pub. Co. (1956) 139 Cal.App.2d 121, 133-134; People v. Garcia (1922) 59 Cal. App. 457, 460-461;; Evid. Code §§1200, 720, 350..* Declarant's opinions and arguments are irrelevant and lack foundation. *Evid. Code §§350, 720(a)* concerning Byrne consist of *ad hominem* arguments which are irrelevant and insufficient to support an anti SLAPP motion. *Lockyer v. Brar (2004) 115 Cal. App. 4th 1315, 1319.*
Paragraph 3:	
"Rocker Partners has openly expressed its views — in the financial press, at public meetings, and in other public forums ~ that Overstock's business model is flawed and its leadership is weak and as such, Overstock is significantly overvalued. The basis for that conclusion stems from (i) the company's failure to live up to the revenue and earnings projections of its Chief Executive Officer, Dr. Patrick Byrne, (ii) Overstock's negatively evolving business model, (iii) its significant management turnover, and (iv) its adoption of questionable accounting procedures to mask these shortcomings. Indeed, we are now being sued for expressing these opinions."	Hearsay. Rocker's "vi4ews" expressed in the press meetings and public forum are hearsay. Similarly, the "basis" for those hearsay statements lacks foundation. *Evid. Code §§1200, 702, 720(a).*
Paragraph 5, lines 8-9:	
"Our investors generally view their investment in Rocker Partners as a hedge against other long-biased investments."	Lack of foundation. Defendant has laid no foundation that he has any basis upon which to testify concerning the state of mind of Rockers' investors. *Evid. Code §§702. 720(a).*

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	The state of mind of Rocker's investors is irrelevant. *Evid. Code §350.*
Paragraph 7:	
"Short sellers play an important and beneficial role in the securities market. As the bursting of the "dot-com" stock bubble in 2000 graphically demonstrated, the securities markets at times may significantly overvalue individual stocks. All too often, the management of the public companies - who, by virtue of their shareholdings and their own stock options, have a vested interest in touting their company's prospects — feed and promote this exuberance in an effort to move their stock prices higher. An efficient securities market, however, requires that a balanced assessment of the information concerning a given company, including the soundness of its business and its future prospects, is available to all investors. For this reason, the voices of independent investors who believe that stocks are overvalued - including, especially, those of short sellers - are crucial for the functioning of such a securities market. It is basic to free speech that all persons are able to offer their opinions."	The witness has laid no foundation that he is qualified to testify concerning the opinions set forth in Paragraph 7. The remainder of the paragraph is argument and not relevant to any issue to be decided by the Court. *Evid. Code §§702, 720(a), 350.*
Paragraph 8 and Exhibit 2:	
"Indeed, prominent economists recognize the valuable role which short sellers play in communicating information to the market and helping the market to price stocks efficiently. As Professor Owen A. Lamont — a noted economics professor with the Yale School of Management -- stated in his testimony on short sellers before the United States House of Representatives:	The statements of Owen Lamont are double hearsay from a third party. *Evid. Code §1200.* No foundation is laid as to Lamont's expert qualifications, other than that he is a "noted economics professor with the Yale School of Management." *Evid. Code §720(a).* Hearsay and lack of foundation. No foundation has been laid to the effect that the

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In order to get [securities] prices right, we need to allow all information, both positive and negative, to get into the market. Short selling is one way that negative information gets into the market. Without short selling, stocks can become overpriced because only optimistic opinions are reflected in the stock price . . . The SEC and other regulators cannot be our only line of defense against corporate fraud. To protect investors, we need a vibrant short selling community . . . As Professor Lamont noted, a lack of short selling leads to unfairly high prices and sets up an inevitable decline in price which hurts investors and other stakeholders in public companies: More generally, suppose we consider the possibility that Internet stocks were priced much too high around 1998-2000. Perhaps many investors thought that Internet stocks were overpriced during the mania, but only a small minority was willing to take a short position, and these short sellers were not enough to drive prices down to rational valuations. As a result, billions of dollars were wasted on uneconomic enterprises, millions of investors suffered losses, and hundreds of thousands of workers switched jobs only to see their new companies fail. It seems to me that the problem was not enough short selling in 1998 to prevent stock prices from reaching untenable levels.	witness, Rocker, knows of his own personal knowledge that Lamont is a "noted economics professor," or that other economists hold the same views. *Evid. Code §§702, 1200.* Testimony that other economists may hold the same views is hearsay and cumulative. *South Bay Chevrolet v. General Motors Acceptance Corp. (1999) 72 Cal.App.4th 861, 905-906; Evid. Code §§1200, 352.*

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As Professor Lamont concluded, a short seller's communication of information to the market directly implicates principles of free speech: There is a natural tendency to feel that short selling is somehow inherently malevolent or un-American. To the contrary, it is quite positive for our economy to correct overpricing and detect fraud. **And nothing could be more American than free speech, free markets, and a healthy competition among ideas and firms.** If we are to have liquid markets that properly reflect available information, investors must be able to buy and to sell. Certainly, the big story from the past few years has been questionable behavior on the part of issuing firms, analysts, accounting firms, and underwriters. The short sellers have been the heroes of the past few years, alerting the public and the authorities to corporate fraud. And it has been the hedge funds which have simultaneously preserved investor capital and corrected mispricing."	
Paragraph 9 and Exhibits 3, 4, and 5: "Rocker Partners' communication of its opinions to the financial marketplace takes many forms. We frequently exchange views with analysts and other portfolio managers. Also, and in response to requests by journalists, I and my partner Marc Cohodes are occasionally quoted in the financial press offering our opinion on companies we believe to be overvalued or undervalued. On	Defendant's communication of its opinions to the marketplace beyond Defendant Rocker's *Barron's* (January 10, 2000) article, Exhibit 4, have not been complained of by Plaintiffs. The information contained in Paragraph 9 and Exhibits 3 and 5 are therefore irrelevant. *Evid. Code § 350.*

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occasion, I also publish articles under my own name which I believe to be in the public interest. For example, during the run-up of the "dot-com" stock bubble of the late 1990's, I published several articles in *Barron's* advocating my opinion to warn investors that these technology and "dot-com" stocks were significantly overvalued: "A Crowded Trade," *Barron's* (March 15, 1999); "The Fed Should Act Now," *Barron's* (January 10, 2000); and "Fantasy Accounting," *Barron's* (February 26, 2001)(true and correct copies attached hereto as Exhibits 3, 4 and 5, respectively)."	The magazine articles marked as Exhibits 3, 4 and 5 are hearsay. *Shumate v. Johnson Pub. Co. (1956) 139 Cal.App.2d 121,* 133-134; *People v. Garcia (1922) 59 Cal. App. 457, 460-461; Evid. Code §1200.*
Paragraph 10 and Exhibit 6:	
"Additionally, I have been asked to testify before Congress on the beneficial aspects of short selling in the securities market. A true and correct copy of my congressional testimony is attached hereto as Exhibit 6. I was also asked to speak and present a paper on short selling at the Institute for Chartered Financial Analysts."	The witness' Congressional testimony, Exhibit 6 is hearsay and the witness has not authenticated it of his own personal knowledge. *Evid. Code §§1200, 702/*
Paragraph 11:	
"At times, Rocker Partners also communicates its opinions in public meetings addressing a company's financial performance and prospects. These include: financial "roadshows" conducted for companies by their investment bankers when seeking to raise capital through public offerings of securities; conference calls held by corporate management with investors and analysts, usually after quarterly earnings reports; and at conferences held by brokers or the companies themselves to showcase their attractiveness as investment vehicles. We attend these events to learn of the company's progress and to ask management probing questions regarding the company's	Rocker Partners' communications of its opinions outside of the context of the complained-of communications are irrelevant. *Evid. Code §350.*

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business fundamentals, and to ensure that management provides answers to these questions to their investors and the markets."	
Paragraph 12:	
"I am proud of Rocker Partners' record of identifying many flawed companies which were, in fact, greatly overvalued by the market. Some companies which we have sold short ~ including Lernout & Hauspie Speech Products, AremisSoft, AAIPharma, Conseco, Boston Chicken, Acclaim Entertainment, and ACT Manufacturing - went bankrupt. Some of these companies were outright frauds. For example, Lernout & Hauspie Speech Products collapsed in an accounting scandal during 2000, after a series of investigative reports by *The Wall Street Journal* revealed that the company had simply invented hundreds of millions of dollars in reported revenue out of whole cloth."	The Declarant's state of mind is not in issue. And is therefore irrelevant. *Evid. Code §350.* The declarant's statements as to what occurred to other companies he has criticized are hearsay, are not established of his own personal knowledge and are not relevant to an inquiry into the truth of the statements which Plaintiffs complain of in this case. *Evid. Code §§1200, 702, 350*
Paragraph 13 and Exhibit 7:	
"Short sellers sometimes evoke the ire of management of the companies whose stock has been sold short. While we have shorted hundreds of companies in our twenty-year history, on only one prior occasion has a company we sold short ~ AremisSoft ~ filed a lawsuit against us. The suit alleged that Rocker Partners and other defendants issued false information to the market. As the matter unfolded, however, Rocker Partners was completely exonerated. Additionally, its opinion that AremisSoft was troubled and overvalued was validated when AremisSoft went bankrupt and its frivolous lawsuit was voluntarily dismissed, with prejudice. The Securities and Exchange Commission ("SEC") recently forced AremisSoft's	The absence of and discussion of prior lawsuits against the Defendant is irrelevant. *Evid. Code §350.* The witness has presented no foundation as to why the prior lawsuit was voluntarily dismissed or why the Plaintiff in that lawsuit went bankrupt. *Evid. Code §702.* The witness' statement that Armesoft went bankrupt is hearsay and without foundation of personal knowledge as is his statement that the SEC forced the CEO of the prior Plaintiff to disgorge his stock. *Evid. Code §§1200, 702.*

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former CEO to disgorge $200 million from illegal insider sales of company stock. At the time of the suit, Irwin Jacobs was the largest shareholder of AremisSoft, and he made essentially the same claims against Rocker Partners as Overstock is doing here. He has since recanted. The *New York Post,* in an article published on September 19, 2005, quoted Jacobs as saying, "Look, I was wrong . . . Rocker and the short-sellers were right. Guys like them are part of the solution in addressing financial fraud. Rocker saw a problem I hadn't and operated ethically in betting against it." A true and correct copy of this article is attached hereto as Exhibit 7."	The statement from the *New York Post* article, Exhibit 7, is totem hearsay. 1. The statement of the CEO to the interviewer. 2. The statement of the interviewer to the author of the article and 3. The article itself. *Evid. Code §1200.*
Paragraph 14:	
"This lawsuit stems from Rocker Partners having established short positions in the stock and, its asking, in various public forums, why the company had failed to reach previous projections and, in light of this, whether current projections were realistic. Rather than meet our questions with substantive answers, Overstock and Dr. Byrne launched a public campaign to vilify and smear Rocker Partners, as he had previously done with a large number of financial reporters and other critics, in the apparent hope of both intimidating us into silence and of diverting attention from the company's problems."	The declarant's opinions are sheer argument and irrelevant. *Evid. Code §350.*
Paragraph 16:	
"In an interview with the *Wall Street Transcript* dated June 7, 2001, Dr. Byrne laid out his vision for Overstock's future. Byrne cited its recently-opened B2B *{i.e.,* business-to-business) website, which enabled retailers to purchase goods from Overstock in small quantities at prices below what	The declarant's statement as to what a WSJ article says Byrne said is hearsay. *Evid. Code §1200.* The witness has not established that he can authenticate the article of his own personal

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they would pay through normal wholesale channels as one of the keys to Overstock's growth. Byrne stated that B2B was "one of the single best business ideas I've ever had or seen in my life" and that it could "just mushroom ... exponentially." Indeed, Byrne claimed that "when I look at the economics of the B2B business, I just drool. It is such a killer concept. I will be disappointed if that has not gotten to $100 million a year over the next couple of years."	knowledge any more than anyone else can. *Wady v. Provident Life & Accident Ins. Co. of America (2002) 216 F. Supp. 2d 1060, 1064; Evid. Code §1401..*
Paragraph 17:	
"When asked in that interview to give investors an idea of how rapidly he expected Overstock to grow over the next several years, Byrne was unabashedly bullish: "We expect to do at least $120 million this year *[i.e.,* 2001] and the B2B business may allow us to blow that away, then the $400 million range next year *[i.e.,* 2002], and want to be closing in on $1 billion by the year after *[i.e.,* 2003]." Moreover, Byrne claimed that Overstock could achieve these aggressive sales results "with little or no added capital" and with "little marketing." Byrne claimed that it was "literally grounds for dismissal within our company to talk about going public. . . ." Finally, Byrne predicted that Overstock would be "profitable as hell" by 2002. A true and correct copy of this interview is attached hereto as Exhibit 8."	The quoted language and Exhibit 8 are both double hearsay. The declarant's repetition of what Byrne said to an interviewer is. *Evid. Code §1200.* Moreover, the article has not been properly authenticated as the conclusion, "A true and correct copy of this interview is attached..." does not suffice as an authentication. *Wady v. Provident Life & Accident Ins. Co. of America* (2002) 216 F. Supp. 2d 1060, 1064; *Evid. Code §1401.*
Paragraph 18:	
"During the three years following this 2001 interview, however, none of Byrne's predictions were realized. To begin with, Byrne almost immediately invalidated his claim that Overstock could achieve its revenue goals with little or no added capital. In fact, Overstock went public less	The declarant's statements as to how the predictions made in the internet interview did not come true are irrelevant and the internet article is hearsay. *Evid. Code §§720(a), 350, 1200.*

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than a year after that interview, realizing approximately $26 million in proceeds. Other public offerings followed in rapid succession. Thus, far from requiring no capital, Overstock actually has raised nearly $280 million in capital through the present time."	
Paragraph 19:	
"But even with these capital infusions, Overstock never attained the sales predicted by Byrne. Overstock reported actual sales of $40 million in 2001, $91.8 million in 2002 and $150 million in 2003 (if one calculates 2003 revenues using a consistent reporting methodology), as compared with Byrne's predictions of $120 million, $400 million and $1 billion, respectively. Thus, Overstock achieved an ever-decreasing fraction of Byrne's own predictions - 33% in 2001, 23% in 2002, and 15% in 2003."	The declarant's statements as to how the predictions made in the internet interview did not come true are irrelevant and the internet article is hearsay. *Evid. Code §§720(a), 350. 1200.*
Paragraph 20:	
"Nor has Byrne's projection that Overstock would be "profitable as hell" by the end of 2002 been borne out. In fact, Overstock has never had a profitable year and has had only one profitable quarter since going public. In 2005, Overstock is widely expected to suffer its greatest annual loss since that 2001 interview. Moreover, Overstock has had to spend ever-increasing amounts on marketing to attract new customers to visit the company's website, despite the fact that Byrne claimed that Overstock would require little more than "word of mouth" advertising."	The declarant's statements as to how the predictions made in the internet interview did not come true are irrelevant and the internet article is hearsay. *Evid. Code §§720(a), 350, 1200.* What is "widely expected" is hearsay and without foundation. *Evid. Code §§1200, 702, 720(a).*
Paragraph 21:	
"Overstock changed its revenue-reporting policy effective July 1, 2003 in a manner which inflated its reported revenues relative to its previous policy. Approximately half of Overstock's sales	Lack of foundation. The witness has not established that the information contained in this paragraph is based upon his own personal

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are sold on behalf of its fulfillment partners for which it earns a commission. Since close to 85% of such sales are remitted to the fulfillment partners, inclusion of the gross amount does not provide a true picture of the company's revenue. Most Internet retailers who sell on this basis, such as Amazon, E-Bay, Smart Bargains and U-Bid, report to investors on a net revenue basis, including only the amount of their retention as revenue. Indeed, this is the method Overstock itself used prior to July 2003, after which it began reporting the full amount of the sale as its revenue."	knowledge. *Evid. Code §702.* Moreover, his statements as to what decisions were made within Plaintiff corporation can only be based upon hearsay. *Evid. Code §1200.* The witness has provided no foundation that he has personal knowledge of what decisions were made within the Plaintiff corporation. *Evid. Code §702.*
Paragraph 22: "This accounting change had a dramatic impact on Overstock's reported sales and, in my opinion, presented investors with a deceptive picture of Overstock's size and growth. Overstock's reported revenues for each fiscal quarter after July 1, 2003 were nearly double what they would have been under the old policy. For example, Overstock reported that its revenue for the fourth quarter of 2003 (which was calculated under the new policy) grew 197% over the revenue reported for the fourth quarter of 2002 (which was calculated under the old policy). Similarly, in press releases issued at the end of the relevant quarters, Overstock reported that its total revenue for the first quarter of 2004 increased 181% compared to the first quarter of 2003, and that total revenue for the second quarter of 2004 was "up 204% versus prior year." True and correct copies of these press releases are attached hereto as Exhibit 9. Much of this increase, however, was due to the accounting change."	The witness has not laid a foundation to establish that he can authenticate Exhibit 9 any more than any person who read the press release can lay that foundation. Accordingly, all of Paragraph 22 which is nothing more than a quotation from Exhibit 9 is inadmissible. *Evid. Code §§1401, 702.*
Paragraph 23: "This change in revenue-reporting policy positively and directly affected Overstock's stock price. For companies like Overstock which have failed to realize a profit, many analysts and investors value the company on a revenue-per-share basis (in lieu of an earnings-per-share basis).	The inadmissibility of Paragraph 22 makes Paragraph 23 irrelevant. *Evid. Code §350.* Moreover, the witness has laid no foundation for his conclusion that the change in revenue

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Therefore, by inflating reported revenue by an accounting gimmick, Overstock made the stock appear more valuable than, in our view, it really was. This did, however, produce the desired effect and Overstock's stock price rose sharply in 2003 after the change."	reporting policy referred to in Paragraph 22 directly affected Overstock's stock price. This is particularly so where the accounting change which he refers to as a "gimmick" was fully explained as indicated in the objection to Paragraph 22. *Evid. Code §§702, 720(a).*
Paragraph 24:	
"Byrne's B2B scheme also failed. B2B sales never accounted for more than a miniscule fraction of Overstock's business, and many small businesses simply bought from the regular B2C *(i.e.,* business to consumer) website. Despite Byrne's prediction that B2B would propel the company to stunningly high sales, Overstock shut down the B2B website down in mid-2004."	Without any foundation for the Byrne prediction that B2B would propel the company to stunningly high sales, Paragraph 24 lacks foundation and is irrelevant. *Evid. Code §§702, 350.*
Paragraph 25:	
"Rocker Partners also doubted the strength of Overstock's business plan, future prospects, and management team. Overstock competes in a crowded field of Internet retailing and faces much larger competitors such as E-Bay, Amazon, Walmart and Target. The success of such Internet retailers usually depends on the number of Internet users who visit the company's website on a regular basis. Overstock is at a substantial disadvantage compared to these better-known sites, which forced Overstock to spend ever-increasing amounts of money on advertising to attract potential customers - despite Byrne's 2001 comments that the company would not require substantial advertising. Customer acquisition costs have increased 109% from $10.97 in 3Q 2003 (when Gradient began covering the company) to $22.92 in 3Q 2005. In 2003, Overstock's Chief Operating Officer, Chief Financial Officer, and	This testimony is vague and ambiguous in that the witness has not stated who at Rocker Partners doubted the strength of Overstock's business plan. Byrne's 2001 comment that the company would not require substantial advertising is based upon the inadmissible testimony he gave in Paragraphs 16 and 17. Therefore, there is no predicate for his testimony concerning an increase in customer acquisition cost. In any event, the figures presented in Paragraph 25 are hearsay and no foundation is laid as to their basis. *Evid. Code §§702, 720(a), 1200.*

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Chief Technology Officer ~ essentially, its entire senior management team ~ left their positions. A successor Chief Executive Officer departed after only a few months at the job."	
Paragraph 28:	
"During a question-and-answer session, I asked Dr. Byrne to explain why Overstock had failed to attain the revenue and profitability goals he had projected in 2001, despite the infusions of capital which he claimed not to have needed. According to Byrne's prediction, Overstock should have had revenues of $1 billion in 2003, not the $150 million it actually realized on a comparable basis (reported results after the aforementioned accounting change were $239 million). I believe that I also asked him why Overstock needed to raise more money. Dr. Byrne, clearly unhappy with these questions, was evasive in his answers."	The witness' quotations of Byrne are based upon hearsay from an internet article for which no proper foundation has been laid. *Knapp v. Doherty (2004) 123 Cal. App. 4th 74, 101-102*; *Wady, supra at page 1064.* The witness' statement that Byrne was evasive is irrelevant, an opinion and lacks foundation. *Evid. Code §§ 350, 702, 720(a).*
Paragraph 29:	
"Dr. Byrne is the scion of a wealthy family, and his father was the former Chief Executive Officer of Geico Insurance Company and is on the board of White Mountain Insurance Group. I understand that the Byrne family has a net worth in excess of $1 billion. He and his family directly own approximately 40% of Overstock's shares."	The witness' "understand[ing]" as to the Byrne family net worth is based upon hearsay for which no foundation has been laid. Moreover, the net worth of the Plaintiff corporation's CEO and his family is irrelevant. *Hoffman v. Brandt (1966) 65 Cal. 2d 549, 553; Seimon v. Southern Pac. Transportation Co. (1977) 67 Cal. App. 3d 600, 606; Evid. Code §§1200, 702, 720(a), 350.*
Paragraph 30 and Exhibit 10:	
"I next interacted with Dr. Byrne when I signed on to ask questions during an Overstock post-earnings conference call regarding its second quarter 2004	Plaintiff has not complained of any statements made by the witness in "*TheStreet.com.*" Paragraph 30 and Exhibit 10 are therefore

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results. After Dr. Byrne refused to take my questions, I wrote a short article as a guest commentator on *Street Insight,* a paid on-line service of *TheStreet. com.* Rocker Partners is a substantial shareholder of *TheStreet.com* but exercises no editorial control over its content. A true and correct copy of this piece is attached hereto as Exhibit 10. In that piece, I mentioned that my questions were not taken during the call, and that I was skeptical of Byrne's enthusiastic crowing about a quarter in which Overstock's losses had doubled from the prior year."	irrelevant. *Evid. Code §350.* The article, Exhibit 10, is hearsay. *Evid. Code §1200.*
Paragraph 31:	
"That night, Dr. Byrne appeared for an interview on the nationally televised show "Kudlow & Cramer," which is broadcast on CNBC. Jim Cramer, who is a co-founder and shareholder of *TheStreet.com,* had read my *Street Insight* piece earlier in the day and asked Byrne on the air why he would not take my questions during the conference call. Byrne falsely denied that he had ducked my call, and claimed that I was angry simply because Rocker Partners had shorted the stock at $18 per share and had lost $10 million in doing so. That claim was, in fact, substantially incorrect on both counts, and Byrne would have lacked access to the information in any event."	The quotation in this paragraph is hearsay. The witness' repetition of a videotape is hearsay. *Evid. Code §1200.* The subject matter is irrelevant, inadmissible *ad hominem* argument. *Evid. Code §350.*
Paragraph 32 and Exhibit 11:	
"In his October 21, 2004 letter to shareholders concerning Overstock's third quarter 2004 results, Byrne asserted "that out there are a bunch of short-sellers and their sycophants who bad-mouth every thing I do or say." Byrne went on to dismiss "much of the talk" as "dishonest rumor-mongering promulgated by shorts trying to manipulate the	Byrne's reactions to Defendants' conduct are irrelevant. *Evid. Code §350.*

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stock in their favor" and accused "shorts" of "lying about their 'notes'" of purported conversations with him. A true and correct copy of this letter is attached hereto as Exhibit 11."	
Paragraph 33 and Exhibit 12:	
"The following day, during Overstock's October 22, 2004 earnings conference call with analysts, Byrne lashed out against Gradient Analytics, Inc. ("Gradient"), an independent analytical firm specializing in accounting review of public companies. Dr. Byrne complained that Gradient had issued some research reports on Overstock critical of him and the other members of Overstock's management team. A true and correct copy of the transcript of the Q3 2004 Overstock.Com Inc. Earnings Conference Call (October 22, 2004 8:30 (ET), is attached hereto as Exhibit 12."	Byrne's reactions to Defendants' conduct are irrelevant. *Evid. Code §350.*
Paragraph 34:	
"I called into the October 22 conference call and, in addition to asking questions about Overstock's performance, asked Byrne what his basis was for his statements regarding our stock positions made on "Kudlow & Cramer". Byrne responded that analyst Jim Cramer of CNBC had read Byrne an email from me purportedly describing Rocker Partners' short position. When I challenged his answer (because no such email ever existed), Byrne refused to answer the question and falsely accused Rocker Partners of having financial relationships with Cramer that motivated Cramer to criticize Overstock in an article he had written."	Byrne's reactions to Defendants' conduct are irrelevant. *Evid. Code §350.*
Paragraph 35 and Exhibit 13:	
"Shortly after the October call, Dr. Byrne sent me an email which stated as follows:	Byrne's reactions to Defendants' conduct are irrelevant. *Evid. Code §350.*
What do I have to say to make it clear to you? I don't like you, I don't like	Byrne's email, Exhibit 13, has not been properly authenticated. *Evid. Code §1401.*

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people like you, I think you are dishonest and slimy.... I don't like you, I am indeed insulting you, I am not wasting time "answering" to you because I don't answer to you. Do whatever you are going to do: you are a bad man, I am insulting you, I will continue to do so publicly, now stop sparring, and do whatever you are going to do. (Emphasis added). A true and correct copy of this email is attached hereto as Exhibit 13."	
Paragraph 36 and Exhibits 14-16:	
"In October 2004, Bethany McLean of *Fortune.com* ran an article titled "Is Overstock the New Amazon?", a copy of which is attached hereto as Exhibit 14. Among other things, the article questioned Overstock's accounting change which boosted its reported revenues, observed that the company's gross margins were much slimmer than those of competitor Amazon, and noted that the company had yet to report anything other than losses. Dr. Byrne responded with an email to Ms. McLean, which asked: So, why exactly did you become a reporter? Giving Goldman traders blow-jobs didn't work out? A true and correct copy of Dr. Byrne's email is attached hereto as Exhibit 15. Byrne has similarly attacked or criticized other journalists, including Carol Remond from Dow Jones, Jesse Eisinger from the *Wall Street Journal,* Roddy Boyd of the *New York Post,* Floyd Norris of the *New York Times,* Herb Greenberg of *CBS Marketwatch,*	The *Fortune* magazine article, Exhibit 14 is hearsay. *Evid. Code §1200.* Byrne's e-mail reaction, Exhibit 15, to the article has not been properly authenticated. The fact that Byrne has criticized the author of that article and the other listed articles is irrelevant. *Evid. Code §1401.* The *Red Herring* magazine article, Exhibit 16, has not been properly authenticated. *Evid. Code §1401.* The prejudicial value of and undue consumption of time created by Exhibits 15 and 16 outweighs its probative value. *Evidence Code Section 352.* There are enough issues in this case without determining whether Plaintiff's CEO defamed 9 non parties. *Evid. Code §352.*

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Elizabeth MacDonald of *Forbes,* Jim Cramer of *TheStreet.com,* Seth Jayson of *The Motley Fool,* and Cheryl Strauss Einhorn of *Barron's,* all of whom have expressed views Byrne did not share. As Dr. Byrne summed up his view of financial reporters in his August 15, 2005 interview with *Red Herring* Magazine: > The hedge funds have half a dozen reporters on their payroll, and they decide what companies to go after. The hedge funds are hand-puppets run by the mastermind. The reporters are condoms used and discarded by them. A true and correct copy *of Red Herring* interview is attached hereto as Exhibit 16 (emphasis added)."	
Exhibit 37:	
In or about November 2004, Dr. Byrne made alliance with Philip Saunders (who operates under a pseudonym "Bob O'Brien") and his organization, the so-called National Coalition Against Naked Short Selling ("NCANS"). NCANS is also playing a direct role in this lawsuit - one of the named plaintiffs who is alleged to be an individual shareholder of Overstock, Mary Helburn, is in fact the Executive Director of NCANS."	The witness has laid no foundation that Byrne made an alliance with Philip Saunders or that he invited Saunders to participate in any telephone call. Nor is there any foundation for his conclusion that NCANS is playing a direct roll in this lawsuit. Statements made by Saunders who is a non-party to this case are hearsay and irrelevant. *Evid. Code §§702, 1200, 350.*
Exhibit 38:	
"Dr. Byrne invited Saunders to participate in Overstock's fourth quarter 2004 earnings conference call, which was held on January 28, 2005. During his opening statement, Byrne stated	The witness has laid no foundation that Byrne made an alliance with Philip Saunders or that he invited Saunders to participate in any telephone call. *Evid. Code §702.*

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that the "tools of Satan are among us. They are trying to ruin things." Then, after taking several questions from legitimate securities analysts, Byrne invited Bob O'Brien (a/k/a Saunders) to speak. Byrne behaved as if he had never spoken to Saunders before in his life."	The witness has not established that there is any foundation for his conclusion that NCANS is playing a direct roll in this lawsuit other than to state that one of the named Plaintiffs is the Executive Director of NCANS. Statements made by Saunders who is a non-party to this case are hearsay and irrelevant. *Evid. Code §§702, 1200, 350.*
Exhibit 39:	
"Saunders then launched into a lengthy monologue (which consumed about 20% of the entire conference call) about the supposed "systematic serial killing of small cap companies" by short sellers and their agents, and that Overstock had been "targeted." Saunders claimed that Overstock's shares were being sold short in a "naked" fashion; "naked" short selling refers to the practice of selling a stock short without first making arrangements to borrow the stock for the transaction. Rocker Partners does not engage in "naked" short selling, and Saunders, Overstock and Byrne lacked any basis to make this allegation or inference. A true and correct copy of the Transcript of Q4 2004 Overstock. Com Inc. Earnings Conference Call, 28 January 2005 8:30 (ET), is attached hereto as Exhibit 17. In fact, Byrne's attorneys later acknowledged in an interview with the *New Jersey Law Journal* that there was no basis on which to allege that Rocker Partners had engaged in manipulative short selling. Byrne ended this call by endorsing Saunders' statements, and by suggesting that the SEC had no interest in prosecuting these issues because it is a "captured regulator."""	The witness has laid no foundation that Byrne made an alliance with Philip Saunders or that he invited Saunders to participate in any telephone call. *Evid. Code §702.* The witness established that there is any foundation for his conclusion that NCANS is playing a direct roll in this lawsuit other than to state that one of the named Plaintiffs is the Executive Director of NCANS. Statements made by Saunders who is a non-party to this case are hearsay and irrelevant.

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Paragraph 40:	
"In a series of postings to Overstock's website on February 15, 2005, Byrne repeated many of Saunders' outlandish allegations, and sought to link Rocker Partners to a vast conspiracy through the same innuendo employed by Saunders (a/k/a O'Brien). Byrne identified Herb Greenberg and Elizabeth MacDonald as journalists "who seem to go out and trash companies David Rocker is short" and who "habitually do hatchet jobs on companies he goes short." As Byrne stated: How do I know this? Someone close (remarkably close!) to a guy mentioned above described it all to me, right down to the number of times per week phone calls are made amongst Donn [Vickrey of Gradient], Herb, and David Rocker. They now barely conceal their collaboration at this point, and frequently refer to each other as sources. I am by no means suggesting that the remarkable coincidence of these journalists' attacks with Rocker's short positions means that they are on the take: *there are many possible explanations for the coincidence (including, for example, that they could all be right, I COULD be a crook, and they all figured it out at the same time).*	The declarant's quotations of Byrne are hearsay. *Evid. Code §1200.* The quoted article is not attached as an exhibit and is unauthenticated. *Evid. Code §1401.* .
Paragraph 41:	
"Following the January 28 call, Byrne became very active in promoting NCANS. In February	The fact that NCANS took out an advertisement in the *Washington Post* is

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2005, NCANS took out a full-page advertisement in *The Washington Post* warning of "naked" short selling. According to the advertisement, "Naked short selling ... is literally stealing money from the widows, retirees and other small investors." Byrne later acknowledged that he basically wrote the ad and paid for much of it. A true and correct copy of this advertisement is attached hereto as Exhibit 18."	irrelevant. *Evid. Code §350.* The declarant lays no foundation for his claim that Byrne later "acknowledged that he basically wrote the ad..." *Evid. Code §702.* The *Washington Post* article itself, Exhibit 18, is hearsay. *Evid. Code §1200.*
Paragraph 42:	
"By this time, Overstock had been added to the Reg SHO list, which is a list of companies maintained by the SEC that have significant delivery failures. In an article that appeared on February 11, 2005, Dow Jones News Service quoted Byrne as saying he now believed that Saunders a/k/a O'Brien was right all along and that "[t]his isn't some wacky conspiracy. We're on Reg SHO's Threshold list." Nevertheless, as Carol Redmond of Dow Jones pointed out in the same article, Overstock was not the target of any "naked" short selling --"unlike most securities added to the threshold lists, Overstock.com's shares can be located and borrowed from stock loan desks at major financial firms.""	Hearsay. The declarant's paraphrase of an alleged article about Byrne is triple hearsay (1. statement by Byrne; 2. statement by the author of the article, 3. statement by witness). *Evid. Code §1200.* The statement of Carol Redmond is also hearsay. The subject article is not attached as an exhibit and not authenticated. *Evid. Code §§1200, 702.*
Paragraph 43:	
"Byrne assisted NCANS in making a purported "news" video addressing the problem of naked short selling and the threat it supposedly poses to private Social Security accounts. Byrne, Helburn and Saunders (using his O'Brien pseudonym and with his face blacked out "because of safety concerns") all appear in the video, which was released to the public on or about March 25, 2005. Byrne appeared in the video claiming he was	The video referred to in this paragraph is neither attached nor authenticated. *Evid. Code §1401.* The declarant's description of a video is hearsay. *Evid. Code §1200.* The video itself is double hearsay. Even if

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doing so as a public service. He said he had no complaints about Overstock's shares which had tripled in the last year."	the video had been offered as evidence, the witness has not laid the foundation as to how he knows that Byrne "assisted" in making the video, or what parts, if any, Byrne authorized. *Evid. Code §§1200, 702..*
Paragraph 44:	
"Helburn appears in the video under her maiden name, Mary Campbell, and is identified as an "Investor" and "Victim of Naked Short .Selling." According to the video, naked short selling caused a decline of about one-half in the value of a family portfolio that was ostensibly going to be used to finance the care required by Helburn's nephew, who was severely injured in a car accident that left him brain damaged. Helburn expresses concern that her nephew might now become a "burden on his siblings." The video does not identify the companies Helburn invested in that had supposedly been affected by naked short selling, or describe when this short selling occurred or the monetary value of her alleged losses."	The video referred to in this paragraph is neither attached nor authenticated. The witness' statement of what the video shows is hearsay. *Evid. Code §§1401, 1200.*
Paragraph 45 and Exhibit 19:	
"Helburn contradicted her claims in the NCANS video with a letter she sent to the editor of the *Madison St. Clair Record* dated December 5, 2004 — in which she boasted of her investing profits: Everyone has to make a living. *I'm making mine by buying stocks of companies that get sued in class action lawsuits. It is all part of the scheme by short-sellers to drive the price down and make money. I go along.*	Given that the video referred to in Paragraphs 43 and 44 is unauthenticated and hearsay, the purported impeachment of statements made by Mary Helburn in the video that appeared in Paragraph 45 is irrelevant. *Evid. Code §350.*

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I am able to retire because of a lawsuit. One of my stocks was sued by the usual suspects, but the complaint was so outrageous, I quadrupled my holdings and now have an income for life. I've been investing for three years and this was just too good not to "let happen!" I got my first dividend check yesterday on 20,000 shares. I bought them on margin and pay 4% interest and they are paying me 14% dividends. (emphasis added). A copy of this letter is attached hereto as Exhibit 19."	
Paragraph 47:	
"Gradient's own website shows that it published its first report on Overstock in July 2003, when the company received a D rating and an earnings quality score of 3. Gradient published its next Overstock report in December 2003, when Gradient downgraded Overstock to an F and an earnings quality grade of 1 (which are the worst grades in Gradient's scales). Gradient published subsequent reports on Overstock in March 2004 and July 2004, in which the company again received F's and 1 's."	The declarant's recitation of what Gradient's web site says is hearsay. *Evid. Code §1200.*
Paragraph 53:	
"Moreover, Overstock has suffered no damages as a result of Gradient's reports. Overstock went public in 2002, and at the time that Gradient began	The declarant's statements as to the dates of the Gradient reports and the Overstock share prices are hearsay. The reports are not

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covering the stock in July 2003 its share price was approximately $12 per share. Today, even though down from its high, Overstock shares are trading in the mid-$30 range, representing a 300% increase in the space of two years. Indeed, a comparison of the stock price with the dates of the release of Gradient's reports demonstrates that Overstock's share price continued to rise despite the reports, through November 2004:	attached as exhibits and have not been authenticated. *Evid. Code §§1200, 1401.*

Date of Gradient Report	OSTK
7/18/03	$12.99
12/5/03	$18.18
3/18/04	$29.94
7/21/04	$31.57
8/2/04	$34.36
11/11/04	$61.43"

Paragraph 54 and Exhibit 21: "Overstock's share price rose sharply in the fourth quarter of 2004, when it climbed from the mid-$30 range to an all-time high of $73.77 per share, as one can observe from the stock chart attached hereto as Exhibit 21. This occurred, however, due to a "short squeeze," as even Patrick Byrne himself acknowledged during a Bloomberg interview with Carol Massar in June 2005. A short squeeze occurs when concentrated buying, usually in response to news, leads to a sharp appreciation in price. Many who hold short positions are then forced to cover their shares at ever-increasing prices to stem their losses."	No foundation has been laid for Exhibit 21 and it has not been authenticated. *Evid. Code §§702, 1401.*
Paragraph 55 and Exhibit 22: "In a September 29, 2004 posting on Overstock's auction website when Overstock was trading at $37, Byrne stated that "We are doing something	The declarant's quotation of Overstock's auction website is double hearsay. *Evid. Code §1200.*

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that will, I expect generate a tsunami of traffic into this auction section this coming weekend. I would expect about 500,000 to 1 million visitors."	The declarant's quotation of Piper Jaffray at line 28 is hearsay. *Evid. Code §1200.*
The stock began rising shortly thereafter as the potential of the auction site was touted (much as Byrne had touted his B2B business before it). In the following weeks, Piper Jaffray (which never before covered Overstock) recommended the company as a "Buy" and Legg Mason upgraded its rating of the stock shortly thereafter. The stock price rose sharply in response.	The declarant lays no foundation for his opinions as to the stock price reaction to the events referred to in Paragraph 55. *Evid. Code §702.*
In November 2004, Overstock closed its largest public issuance of new securities ever, in an offering underwritten by Piper Jaffray, Legg Mason and Lehman Brothers in addition to Hambrecht, Overstock's historic underwriter. Lehman Brothers invited Byrne to speak the day after the offering at its small-cap conference, and then in December issued a research report with the highest price target of any analyst covering the stock.	The declarant's statements concerning Lehman Brother's invitation to Byrne and its issuance of a research report are hearsay without any establishment of personal knowledge on the part of the witness. *Evid. Code §§1200, 702.*
This was the only offering ever done by Overstock which did not use the Dutch auction method (which Byrne publicly extolled), and the only time that Overstock used Piper Jaffray, Legg Mason and Lehman Brothers as underwriters.	The declarant does not lay any foundation for his opinion as to the effect of the events referred to in Paragraph 55 to share price. *Evid. Code §§702, 720.*
This series of events triggered the sharp rise in share price, which Byrne acknowledges as a short squeeze. Such squeezes are not apparently unwelcome. In an earlier interview, Byrne stated "When opportunities come along where we can knee the shorts in the groin, that's always good for fun and amusement." A true and correct copy of the December 11, 2003 interview is attached hereto as Exhibit 22."	Exhibit 22 is not properly authenticated and it is double hearsay. *Evid. Code §§1401, 1200.*
Paragraph 56:	
"The stock has declined during 2005, partly to correct this artificial run-up, but more importantly	The declarant lays no foundation for his opinions regarding stock price. *Evid. Code*

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because Overstock's earnings projections have steadily collapsed. During the course of 2005, the analysts who follow Overstock — including those from Lehman Brothers, Hambrecht, Piper Jaffray, and Legg Mason — reduced their earnings estimates, target prices, and/or recommendations. At the beginning of the year, the consensus of analysts expected Overstock to earn a profit of $0.35 per share for 2005. Today, the consensus among the analysts is that Overstock will report a loss of $0.70 per share for 2005. Overstock's balance sheet has steadily weakened. On its December 31, 2004 balance sheet, Overstock's cash and marketable securities exceeded long-term debt by $171 million. Today, the situation is reversed and long-term debt exceeds cash and marketable securities by $15 million. Overstock's poor financial results, weak management, and the increasingly erratic behavior by Byrne have caused this price decline, and not any actions by short sellers or Gradient."	*§§702. 720.* The declarant's statement as to what "analysts" expect is hearsay from unidentified non-parties, without foundation. *Evid. Code §§1200, 702, 720..* The declarant's statements as to what Overstock's balance sheets show is hearsay. *Evid. Code §350.* The balance sheets have not been attached as exhibits nor have they been authenticated. *Evid. Code §1200.*
Paragraph 57 and Exhibit 23:	
"The Amended Complaint's allegation that the Gradient reports and short sellers have hurt Overstock's share price are without merit. Indeed, Craig Bibb of Hambrecht — Overstock's primary investment banker ~ opines exactly the opposite:	The statement in Exhibit 23 as to what a non-party has stated in a report is double hearsay. *Evid. Code §1200.* Exhibit 23 is hearsay. *Evid. Code §1200.*
> **Patrick Byrne Should Hug Short Sellers.** We wonder where OSTK would be without an army of skeptics betting against it. OSTK has mainly traded in a range of $34-$44 since April. During that time, the consensus forecast for 2005 has fallen from +$0.22 to a loss of ($0.59) and for 2006 from $0.88 to a	Exhibit 23, an internet article, has not been authenticated. *Wady, supra at page 1060. Evid. Code §1401.*

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6. Objections to Declaration of David Rocker

Objectionable Testimony and Exhibits	Objections
loss of ($0.16). . . . ***We have no other plausible explanation for the share' remarkable resilience in the face of plummeting expectations.*** (Emphasis added). A true and correct copy of the W.R. Hambrecht & Company Report, dated October 26, 2005, is attached hereto as Exhibit 23."	
Paragraph 58:	
"Dr. Byrne himself has admitted that Overstock has suffered no damage as a result of the short selling and other complaints he has leveled here. As explained above, in the NCANS video Byrne claimed to have "no complaints" on behalf of Overstock about short selling because "our stock has tripled in the last year." In the recent Fortune.com article attached as Exhibit 1, Dr. Byrne again denied that the defendant's actions have affected the stock price. According to the article, Byrne said that he "'was not blaming stock performance on the blackguards.'""	The witness' quotation of Byrne's statements made in NCANS video and the magazine article, Exhibit 1, are both double hearsay. *Evid. Code §1200.* The video has neither been attached nor authenticated. *Evid. Code §1401.*
Paragraph 59 and Exhibit 24:	
"In a live telecast to investors held on August 12, 2005, Dr. Byrne announced the filing of this suit and explained how he was supposedly fighting back against a shadowy conspiracy of people out "to destroy our stock." He displayed a complex chart of persons supposedly involved in the conspiracy, titled the "Miscreant's Ball," and naming a large number alleged participants in the conspiracy. Among other things, Byrne claimed that four to five hedge funds in the New York area were being directed by a "Sith Lord" whom he claimed was a "master criminal," although he	Exhibit 24 lacks authentication. *Evid. Code §1401.* The statements referred to in Paragraph 59 and Exhibit 24 are irrelevant, *ad hominem* argument. *People ex rel. Lockyer v. Brar, supra at pages 1318-1319. Evid. Code §350.*

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6. Objections to Declaration of David Rocker

Objectionable Testimony and Exhibits	Objections
declined to name either the funds or the "Sith Lord." He also claimed that half a dozen journalists were "on the take," but named none and presented no evidence to support his claim. He put Leon Black, David Einhorn, Jim Carruthers, Tom Barton, and Joe Feshback in this Miscreant's Ball chart, even though they have never had any connection with Overstock. In this way, Byrne demonstrated the absence of any substantive research on his part and his wanton disregard for the reputations of others. He even went to far as to imply that the SEC, the United States Department of Justice, and the New York Attorney General, Mr. Eliot Spitzer, were complicit in the conspiracy, all without presenting a shred of evidence. A true and correct copy of the transcript of this conference call is attached hereto as Exhibit 24."	
Paragraph 60 and Exhibit 25:	
"Dr. Byrne's theater of the absurd did, however, achieve his goal of keeping this matter in the public eye. He has given many interviews to the press and written extensively on Internet message boards; his lawyers have appeared on television interviews, including CNBC; and he has widely circulated three witness declarations, initially to selected reporters and then posting the declarations on Overstock's website. Copies of many of the media articles regarding this lawsuit are attached hereto as Exhibit 25."	Statements in this paragraph are irrelevant argument and lacking foundation. No attempt whatsoever has been made to authenticate the articles attached as Exhibit 25. *Evid. Code §§350, 1401.*

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7. Objections to Declaration of Marc Cohodes

Objectionable Testimony and Exhibits	Objections
Paragraph 2:	
"I have read the Declaration of David Rocker, and agree that the statements he makes in his declaration are correct and accurate. In the interest of brevity, I will not repeat the various facts Mr. Rocker has already presented to the Court."	The declarant has not established that he has personal knowledge upon which to substantiate any of Rocker's testimony. *Evid. Code §702.* The witness' repetition of Rocker's testimony is hearsay. *Evid. Code §1200.*
Paragraph 3:	
"I also wish to alert that Court that in addition to the conduct described in Mr. Rocker's declaration, I and my family have received veiled threats from Philip Saunders, who operates the National Coalition Against Naked Short Selling ("CANS"). One of the plaintiffs here - Mary Helburn -- is the Executive Director of NCANS."	Saunder's threats, if they occurred, are irrelevant. *Evid. Code §350.* No evidence has been provided to the effect that Helburn directed the threats or was even aware that they would be or had been made. Even if it had been established that Helburn was somehow involved in the threats they would not be irrelevant. *Evid. Code §350.*
Paragraph 4:	
"Specifically, in a posting on an Internet chat room, Saunders disclosed my home address, asked (by name) how my wife and son were doing, and told me that it was "game over time" - which I reasonably perceived as a threat of physical violence against my family. After Yahoo blocked Saunders from posting due to this threat, he logged on under a different user name and asked whether it would be "a useful exercise" to post my home address "every hour on the hour." He closed that message by asking me if I "still want to play?""	Saunder's threats, if they occurred, are irrelevant. *Evid. Code §350.* No evidence has been provided to the effect that Helburn directed the threats or was even aware that they would be or had been made. Even if it had been established that Helburn was somehow involved in the threats they would not be irrelevant. *Evid. Code §350.*
Paragraph 5 and Exhibit A:	
"In the May 2, 2005 issue of Barron 's, Bill Alpert authored a story entitled "Tech Trader: A Family	The referenced article is hearsay. Saunder's threats, if they occurred, are irrelevant. *Evid.*

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7. Objections to Declaration of Marc Cohodes

Objectionable Testimony and Exhibits	Objections
Threatened on the 'Net", in which Mr. Alpert noted that Saunders (who often operates under the false name "Bob O'Brien") had "posted thinly-veiled threats against the wife and disabled kid of a hedge-fund manager." Indeed, Alpert reviewed the postings and concluded that they "read like lines from a gangster movie or an anti-abortion Website that targets doctors" and that "only a callous person could disagree" about the nature of the threat. A true and correct copy of that article is attached hereto as Exhibit A.""	*Code §350.* No evidence has been provided to the effect that Helburn directed the threats or was even aware that they would be or had been made. Even if it had been established that Helburn was somehow involved in the threats they would not be irrelevant. *Evid. Code §1200.* Saunder's threats, if they occurred, are irrelevant. *Evid. Code §350.* No evidence has been provided to the effect that Helburn directed the threats or was even aware that they would be or had been made. Even if it had been established that Helburn was somehow involved in the threats they would not be irrelevant. *Evid. Code §350.* The declarant's opinions re Saunder's threats are irrelevant. Saunder's threats, if they occurred, are irrelevant. *Evid. Code §350.* No evidence has been provided to the effect that Helburn directed the threats or was even aware that they would be or had been made. Even if it had been established that Helburn was somehow involved in the threats they would not be irrelevant. *Evid. Code §§350, 720(a).*

8. Conclusion

A. Rocker

Of the 60 paragraphs in the Rocker Declaration, Plaintiffs have objected to 48 paragraphs, leaving only the following 12 paragraphs: 4, 5, 6, 15, 26, 27, 46, 48,. 49, 50. 51, and 52.

Of the 25 exhibits attached to Rocker's Declaration, plaintiffs have objected to 21 exhibits, leaving only the following 4: 8, 9, 17, and 18.

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B. Cohodes

Plaintiffs have objected to 4 of the 5 paragraphs in the declaration and to Exhibit A, the sole exhibit.

Dated: January 3, 2006

FREITAS, McCARTHY, MacMAHON & KEATING, LLP

BY: _____

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FILED
JAN 0 3 2006
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
BY: N. JOHNSON, DEPUTY

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY MARIN - UNLIMITED 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.: CV 053693 **PROOF OF SERVICE**

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PROOF OF SERVICE

I am a resident of the United States, County of Marin, over 18 years of age, and not a party to the within action. My business address is 1108 Fifth Avenue, Third Floor, San Rafael, California 94901, which is located in the County of Marin, where the service described below took place.

On the date hereon, I served the following document in a sealed envelope described as:

PLAINTIFFS' OPPOSITION TO ANTI-SLAPP MOTION TO STRIKE THE FIRST AMENDED COMPLAINT BY DEFENDANTS ROCKER PARTNERS LP, ROCKER MANAGEMENT, LLC, ROCKER OFFSHORE MANAGEMENT COMPANY, INC., DAVID ROCKER, AND MARC COHODES

PLAINTIFFS' RESPONSE AND OPPOSITION TO ANTI-SLAPP MOTION TO STRIKE BY DEFENDANTS GRADIENT ANALYTICS, INC., JAMES CARR BETTIS, DONN VICKREY, AND MATTHEW KLIBER

DECLARATION OF DANETTE DEHNICKE IN OPPOSITION TO DEFENDANTS' ANTI-SLAPP MOTIONS

DECLARATION OF DEMETRIOS ANIFANTIS IN OPPOSITION TO DEFENDANTS' ANTI-SLAPP MOTION

DECLARATION OF DAVID K. CHIDESTER IN OPPOSITION TO DEFENDANTS' ANTI-SLAPP MOTIONS

DECLARATION OF DARYL SMITH IN OPPOSITION TO DEFENDANTS' ANTI-SLAPP MOTIONS

DECLARATION OF ROBERT BALLASH IN OPPOSITION TO DEFENDANTS' ANTI-SLAPP MOTIONS

DECLARATION OF ROBERT J. SHAPIRO IN SUPPORT OF PLAINTIFFS' OPPOSITION TO ANTI-SLAPP MOTION TO STRIKE THE FIRST AMENDED COMPLAINT BY DEFENDANTS ROCKER PARTNERS LP, ROCKER MANAGEMENT, LLC, ROCKER OFFSHORE MANAGEMENT COMPANY, INC., DAVID ROCKER, AND MARK COHODES

DECLARATION OF THOMAS F. KEATING, JR. IN OPPOSITION TO GRADIENT ANALYTICS, INC.'S ANTI-SLAPP MOTION

PLAINTIFFS' OBJECTIONS TO DECLARATIONS OF DAVID A. ROCKER AND MARC COHODES IN SUPPORT OF ROCKER'S ANTI-SLAPP MOTION

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PLAINTIFFS' APPENDIX OF NON-CALIFORNIA CASES IN SUPPORT OF OPPOSITION TO DEFENDANTS' ANTI-SLAPP MOTIONS

PLAINTIFFS' APPENDIX OF NON-CALIFORNIA CASES IN SUPPORT OF OPPOSITION TO DEFENDANTS' ANTI-SLAPP MOTIONS

PROOF OF SERVICE

on the interested parties in this action addressed as follows:

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XXX (BY MAIL)

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On the date hereon, at my business, the document described above was placed for deposit in the United States Postal Service, with postage fully prepaid, addressed to the person(s) as described herein; and that envelope was placed for collection and mailing on that date following ordinary business practice. [CCP §§1013a(1), 1013a (3)]

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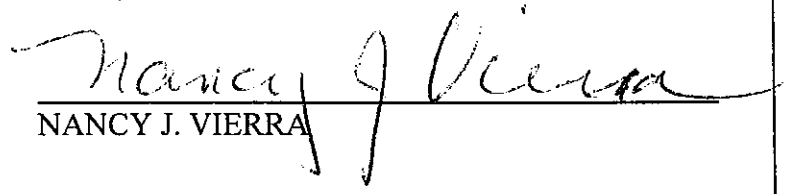
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 3, 2006 at San Rafael, California.



NANCY J. VIERRA

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