

THE RECORDER

131ST YEAR NO. 60

www.callaw.com

WEDNESDAY, MARCH 28, 2007

ALM



IN ONE CORNER: Stein & Lubin partner Ellen Cirangle, left, and of counsel Theodore “Dore” Griffinger Jr. are representing Overstock.com in its libel suit claiming fishy stock analyses.

CHRISTINE JEGAN

Stock analysis led to libel suit

Overstock.com case has caught the eye of analysts, financial media

By Mike McKee
RECORDER STAFF WRITER

When the stock for Overstock.com Inc. began to plummet in early 2005, its executives blamed it on a conspiracy to smear the online retailer.

Specifically, they accused Gradient Analytics Inc., a company that analyzes stocks for investors, of giving Overstock.com an “F” rating based on negative reports by hedge fund Rocker Partners which Gradient’s owners knew to be false.

Believing the two companies had conspired to drive Overstock.com’s stock down in order to profit from the short selling of its shares, Overstock.com executives and shareholders struck back by suing Gradient and the Milburn, N.J.-based Rocker for libel.

The suit gained momentum last year when

a Marin County judge denied the defendants’ attempt to brand it as a SLAPP, a strategic lawsuit against public participation, and get it dismissed.

The appeal of that decision, which goes before the First District Court of Appeal on April 10, has been closely watched by stock analysts and financial journalists who fear a ruling favoring Overstock.com could drastically impede free speech.

“Journalists and others who regularly voice their opinions must be allowed to work without the threat of litigation from those who may disagree,” attorneys for a handful of press organizations wrote in an amicus curiae brief filed with the First District. “If upheld, the superior court’s decision will punish those who offer serious financial opinions about the value of publicly traded companies.”

Gavin Rooney, a partner in Roseland,

N.J.’s Lowenstein Sandler who will argue for Rocker Partners, noted in a telephone interview that two copycat cases have already been filed against Gradient in his state. Overstock.com’s case, he said, has “become the model” for companies upset by negative reviews.

But attorneys for Overstock.com — a Salt Lake City company that sells excess retail inventory over the Internet — scoff at their opponents’ free-speech concerns.

“They are cloaking themselves in that banner, but the activity we’re dealing with has nothing to do with free speech,” Theodore “Dore” Griffinger Jr., of counsel in San Francisco’s Stein & Lubin, said last week. “It has to do with lying, cheating and stealing.”

CONSPIRACY THEORY

In briefs filed with the First District, Overstock.com’s lawyers accuse Rocker Partners

of selling huge amounts of stock borrowed from a broker in order to profit from a potential decline in price — a commonly used tactic known as taking a short position. Griffinger and partner Ellen Cirangle claim that at the same time, Rocker executives were badmouthing Overstock.com to Scottsdale, Ariz.-based Gradient, which allegedly cooperated by publishing negative reports it knew were filled with false statements.

For example, Gradient's reports accused Overstock.com of falsifying accounting statements in a bid to defraud investors, Griffinger argued.

"Appellants' tortuous conduct was intended to and did drive down the price of Overstock's stock," Griffinger wrote, "reaping enormous benefits for appellants and causing harm to Overstock."

Gradient Analytics Inc. v. Overstock.com Inc., A113397, was filed in Marin County because at least one plaintiff resides there, as do some of the principals in Gradient.

In his brief for Gradient, Kecker & Van Nest partner Steven Hirsch accuses Overstock.com of conducting a "vendetta masquerading as a lawsuit." He and Rooney, the attorney for Rocker Partners, say Overstock.com is simply trying to silence its critics by

bludgeoning them with costly litigation.

"In the aftermath of debacles like the collapse of Enron and the accounting scandals involving Tyco International, Adelphia Communications and Global Crossing," Hirsch wrote, "courts must ensure that debates over corporate governance remain 'uninhibited, robust and wide open.'"

Lawsuits such as Overstock.com's put independent marketing analysis "at risk of extinction," said Hirsch, who will argue in the First District.

Rooney also argued in court papers that there isn't any evidence Rocker Partners ever made false statements about Overstock.com. He called the lawsuit "a disturbing precedent" that lets companies "strike back against any critics who might dare to question whether the securities market has overvalued their stock price."

The suit already has caused Gradient Analytics some problems. Soon after it was filed, the Securities and Exchange Commission began an investigation into the company's activities. Gradient announced last month that the SEC had ended it and recommended that no enforcement action be taken.

Rooney and Hirsch hope to convince the appellate court that Marin County Superior

Court Judge Vernon Smith erred by not finding Overstock.com's suit a SLAPP.

Hirsch and Kecker & Van Nest partner Susan Harriman argue in briefs for Gradient that there are at least two "unimpeachable grounds for dismissal," saying Overstock.com is unable to prove substantial falsity or malice.

Griffinger, meanwhile, argues that Overstock.com just has to overcome a low hurdle at this point.

"The trial court correctly found," he wrote in court papers, "that, consistent with Overstock's minimal burden at this state, Overstock established its claims were viable."

In a telephone interview, Griffinger said Overstock.com is still kicking in spite of Gradient's poor ratings. It's the second largest online retailer in the world, he said, with \$900 million in revenue a year.

Nonetheless, he said, the suit remains important not only to Overstock.com, but to the financial world in general.

"It's very significant," he said, "that a company like Overstock is vulnerable to this kind of activity."

Senior Writer Mike McKee's e-mail address is mmckee@alm.com.