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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

FILED

DIVISION FOUR

MAY 30 2007

OVERSTOCK.COM, INC., et al.,
Plaintiffs and Respondents,

Court of Appeal - First App. Dist.
DIANA HERBERT

v.

A113397

By _____
DEPUTY

GRADIENT ANALYTICS, INC., et al.,
Defendants and Appellants.

(Marin County
Super. Ct. No. CV053693)

A company that produces and publishes subscriber-based analytic reports on public companies, regularly collaborating with the principals of hedge funds and other institutional investors to produce custom, negative reports on targeted companies, stepped over the line into defamation and other torts with respect to the flurry and timing of reports on an online closeout retailer. The hedge fund principals took short positions in the stock and worked closely with the publisher to put out reports that were anything but the purported unbiased and objective assessment promised to subscribers. So says the targeted company in its complaint, and so aver various declarants in the papers opposing the anti-SLAPP¹ motions prosecuted by the

¹ Code of Civil Procedure section 425.16 (§ 425.16). SLAPP stands for strategic lawsuits against public participation.

This statute provides in part: “(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. [¶] (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b)(1), (2).)

publisher and the hedge fund parties. In this scenario, and at this early stage of discovery, the trial court correctly declined to strike respondents' complaint. Accordingly, we affirm the judgment.

I. BACKGROUND

A. *The Parties*

1. *Overstock.com, Inc.*²

According to the Overstock's first amended complaint, Overstock is an online closeout retailer. It offers customers an opportunity to shop online for brand name merchandise at heavily discounted prices, while offering suppliers an alternative way to distribute inventory liquidation. Overstock launched its first Web site for customers in 1999. Its stock is publicly traded on the NASDAQ (National Association of Securities Dealers Automated Quotation System).

2. *The Gradient Appellants*³

Gradient, formerly Camelback Research Alliance, Inc. (Camelback), provides analytical reporting services on publicly traded companies through a subscription program. Its customer base of approximately 125 subscribers consists almost exclusively of large institutional investors. One product is the earnings quality analytics (EQA) report. The EQA reports rate public companies on an "A" through "F" scale, with "A" being the highest mark.

The base price to subscribe to Gradient services is approximately \$25,000 to \$40,000 or more per year. For the base fee customers receive access to all of Gradient's newly published reports, as well as historic reports on publicly traded companies. Additionally, subscribers are entitled to order two custom reports on a specific company, at any time. Beyond that, subscribers can pay for more custom

² Respondents are Overstock.com, Inc. (Overstock or OSTK), Hugh D. Barron and Mary Helburn.

³ Appellants Gradient Analytics, Inc. (Gradient or the firm), James Carr Bettis, Donn Vickrey and Matthew Kliber are referred to collectively as Gradient appellants.