

ENDORSED
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San Francisco County Superior Court

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CASE MANAGEMENT CONFERENCE SET

JUL 06 2007 -9⁰⁰AM

7 Attorneys for Plaintiffs
OVERSTOCK.COM, INC., a Delaware corporation;
8 KEITH CARPENTER, an individual; OLIVIER
CHENG, an individual; MARY HELBURN, an
9 individual; ELIZABETH FOSTER, an individual;
and HUGH D. BARRON, an individual

DEPARTMENT 212

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO

14 OVERSTOCK.COM, INC., a Delaware
corporation; KEITH CARPENTER, an
15 individual; OLIVIER CHENG, an
individual; MARY HELBURN, an
16 individual; ELIZABETH FOSTER, an
individual; and HUGH D. BARRON, an
17 individual,

Case No. **CGC-07-460147**

COMPLAINT FOR:

(1) CONVERSION

(2) TRESPASS TO CHATTELS

(3) INTENTIONAL INTERFERENCE
WITH PROSPECTIVE ECONOMIC
ADVANTAGE

(4) VIOLATIONS OF CALIFORNIA
CORPORATIONS CODE SECTIONS
25400, *et seq.*

(5) UNFAIR BUSINESS PRACTICES (CAL.
BUS. & PROF. CODE SECTIONS 17200, *et*
seq. AND SECTIONS 17500, *et seq.*)

18 Plaintiffs,

19 v.

20 MORGAN STANLEY & CO.,
INCORPORATED, THE GOLDMAN
21 SACHS GROUP, INC., BEAR STEARNS
SECURITIES CORP., BANC OF
22 AMERICA SECURITIES LLC, THE
BANK OF NEW YORK, CITIGROUP,
23 INC., CREDIT SUISSE (USA) INC.,
DEUTSCHE BANK SECURITIES, INC.,
24 MERRILL LYNCH, PIERCE, FENNER &
SMITH, INC., UBS FINANCIAL
25 SERVICES, INC., and DOES 1 through
100,

26 Defendants.

1 Plaintiffs Overstock.com, Inc., a Delaware corporation (“Overstock”); David
2 Trent, an individual; Keith Carpenter, an individual; Olivier Cheng, an individual; Mary Helburn,
3 an individual; and Hugh D. Barron, an individual (collectively, “Plaintiffs”) for their Complaint,
4 allege as follows:

5 **NATURE OF THE CASE**

6 1. Defendants have and continue to participate in a massive, illegal stock
7 market manipulation scheme. Defendants control approximately 80% of the prime brokerage
8 market. Among other things, Defendants have executed short sales of the stock of Overstock
9 with no intention of delivering stock to settle the short sale. Rather, Defendants have
10 intentionally failed to deliver Overstock stock to settle the short positions. Defendants’ actions
11 caused and continue to cause dramatic distortions with regard to the nature and amount of trading
12 in Overstock stock, which have caused Overstock’s share price to drop. Defendants’ conduct
13 violates California’s securities laws, common law, and constitutes unfair business practices under
14 California law. Plaintiffs were harmed by Defendants’ conduct.

15 **PARTIES**

16 2. Overstock is a Delaware corporation with its principal place of business in
17 Salt Lake City, Utah. Overstock’s common stock trades on the NASDAQ National Securities
18 Market (“NASDAQ”) under the symbol “OSTK.”

19 3. Plaintiff Keith Carpenter is an individual and resident of New York, New
20 York, and is a current or former owner of Overstock common stock at the relevant times herein.

21 4. Plaintiff Olivier Cheng is an individual and resident of New York, New
22 York, and is a current or former owner of Overstock common stock at the relevant times herein.

23 5. Plaintiff Mary Helburn is an individual and resident of Idaho, and is a
24 current or former owner of Overstock common stock at the relevant times herein.

25 6. Plaintiff Elizabeth Foster is an individual and resident of New York, and is
26 a current or former owner of Overstock common stock at the relevant times herein
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1 7. Plaintiff Hugh D. Barron is an individual and resident of Marin County,
2 California, and is a current or former owner of Overstock common stock at the relevant times
3 herein.

4 8. Defendant Morgan Stanley & Co., Incorporated ("Morgan Stanley") is a
5 Delaware corporation. Morgan Stanley is qualified to and does do business in the state of
6 California. Morgan Stanley is in the business of, among other things, providing prime brokerage
7 services and securities lending. Upon information and belief, Morgan Stanley is the largest prime
8 brokerage firm in terms of aggregate client assets (23.1% of the prime brokerage market).

9 9. Defendant The Goldman Sachs Group, Inc. ("Goldman") is a Delaware
10 corporation with its principal place of business in New York, New York. Goldman is qualified to
11 and does do business in the state of California. Goldman is in the business of, among other
12 things, providing prime brokerage services and securities lending. Upon information and belief,
13 Goldman is the third largest prime brokerage firm in terms of aggregate client assets (16.5% of
14 the prime brokerage market).

15 10. Defendant Bear Stearns Securities Corp ("Bear Stearns") is a Delaware
16 Corporation with its principal place of business in New York, New York. Bear Stearns is
17 qualified to and does do business in the state of California. Bear Stearns is in the business of,
18 among other things, providing prime brokerage services and securities lending. Upon
19 information and belie, Bear Stearns is the second largest prime brokerage firm in terms of
20 aggregate client assets (20.9% of the prime brokerage market).

21 11. Defendant Banc of America Securities, LLC, ("Banc of America") is a
22 Delaware corporation, qualified to do business in California. Upon information and belief, Banc
23 of America has a principal office in San Francisco, California. Banc of America is in the business
24 of, among other things, providing prime brokerage services and securities lending from its San
25 Francisco office. Upon information and belief, Banc of America is the tenth largest prime
26 brokerage firm in terms of aggregate client assets (2.0% of prime brokerage market).

27 12. Defendant The Bank of New York ("Bank of New York") is a New York
28 corporation. Bank of New York is qualified to and does do business in the state of California.

1 Bank of New York is in the business of, among other things, providing prime brokerage services
2 and securities lending.

3 13. Defendant Citigroup, Inc. ("Citigroup") is a Delaware Corporation.
4 Citigroup is qualified to and does do business in the state of California. Citigroup is in the
5 business of, among other things, providing prime brokerage services and securities lending.
6 Upon information and belief, Citigroup is the sixth largest prime brokerage firm in terms of
7 aggregate client assets (2.7% of the prime brokerage market).

8 14. Defendant Credit Suisse (USA) Inc. ("Credit Suisse") is a Delaware
9 corporation. Credit Suisse is qualified to and does do business in the state of California. Credit
10 Suisse is in the business of, among other things, providing prime brokerage services and
11 securities lending. Upon information and belief, Credit Suisse is the ninth largest prime
12 brokerage firm in terms of aggregate client assets (2.2% of the prime brokerage market).

13 15. Defendant Deutsche Bank Securities, Inc. ("Deutsche Bank") is a Delaware
14 corporation. Deutsche Bank is qualified to and does do business in the state of California.
15 Deutsche Bank is in the business of, among other things, providing prime brokerage services and
16 securities lending. Upon information and belief, Deutsche Bank is the eighth largest prime
17 brokerage firm in terms of aggregate client assets (2.5% of the prime brokerage market).

18 16. Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch")
19 is a Delaware corporation. Merrill Lynch is qualified to and does do business in the state of
20 California. Merrill Lynch is in the business of, among other things, providing prime brokerage
21 services and securities lending. Upon information and belief, Merrill Lynch is the fifth largest
22 prime brokerage firm in terms of aggregate client assets (4.6% of the prime brokerage market).

23 17. Defendant UBS Financial Services, Inc. ("UBS") is a Delaware
24 corporation. UBS is qualified to and does do business in the state of California. UBS is in the
25 business of, among other things, providing prime brokerage services and securities lending.
26 Upon information and belief, UBS is the fourth largest prime brokerage firm in terms of
27 aggregate client assets (5.9% of the prime brokerage market).

1 purchased over \$144 million in inventory from its California trading partners, which was 17% of
2 Overstock's total purchasing expenditure.

3 22. Three large vendors in the San Francisco Bay Area accounted for more
4 than \$19 million of Overstock's purchasing expenditures on California products during this 18
5 month time period. During that same time period, Overstock purchased over \$57 million in
6 advertising services from California companies, including \$18 million from San Francisco Bay
7 Area companies Google, Inc., Yahoo, Nextag, and Shopping.com.

8 23. Each of Overstock's four public offerings was handled by one or more
9 investment banking firms headquartered in San Francisco, California. There are also a substantial
10 number of Overstock shareholders located in California, and California residents own shares of
11 Overstock in at least hundreds of brokerage accounts.

12 DEFENDANTS' WRONGFUL ACTIONS

13 24. Collectively controlling approximately 80% of the prime brokerage market,
14 Defendants act as settlement agents, providing custody for assets and financing for their clients
15 who are hedge funds, money managers, market makers, arbitrageurs, specialists, and other
16 professional investors. Defendants hold themselves out as assuring the proper accounting and
17 settlement of stock trades, including short sales, and providing most of the lending of securities in
18 the marketplace that settles short sales.

19 25. A "short sale" of stock is generally the sale of a stock the seller does not
20 currently own or that the seller will borrow for delivery on the trade settlement date – the date on
21 which payment is made to settle the stock sale. The seller speculates that the price of the stock
22 will go down so that, if the price of the stock in fact drops by the trade settlement date, the short
23 seller is then able to make a profit from the fall in price.

24 26. Generally speaking, in a short sale, a person sells stock that he or she does
25 not then own by borrowing the stock and warranting to the stock lender – the broker-dealer – that
26 the loan will be "covered" with shares purchased at a later date. The borrowed stock will come
27 from either the broker-dealer's own inventory, the margin account of other firm clients, or
28 another lender – and the broker-dealer will charge interest on the loan. Defendants, among other

1 things, promise to locate shares of the shorted stock, borrow the stock, and deliver the stock.
2 Defendants charge a fee to the short sellers for locating and delivering the borrowed shares.

3 27. If Defendants fail to deliver the shares within three days of the short sale,
4 the sale becomes a “naked short sale” and the shares become “fails to deliver.”

5 28. In a naked short sale, the sale to the buyer still occurs, but it is of phantom
6 shares because real shares were never delivered.

7 29. Naked short selling destabilizes and depresses a company’s share price
8 because it removes any supply constraint on stock sales. An unlimited supply of any commodity,
9 including a company’s stock, places a downward pressure on the price of that commodity.

10 30. Since at least January 2005, large quantities of Overstock shares have been
11 the subject of naked short selling. Indeed, there have been instances where the short position in
12 Overstock has exceeded the company’s entire supply of outstanding shares.

13 31. These persistent failures to deliver have created immense downward
14 pressure on the price of Overstock’s stock by creating an unlimited supply of that stock for sale.
15 With Defendants’ failing to buy or borrow a security for settlement, naked short positions in
16 Overstock have grown very large.

17 32. Upon information and belief, the vast majority of Defendants’ fails to
18 deliver Overstock stock are intentional, and not due to inadvertent errors. Defendants are
19 motivated to intentionally fail to deliver stocks because this removes a core cost from their
20 securities lending business – the cost of providing the security – thus allowing them to earn more
21 money through the charging of fees, commissions and/or interest through phantom securities
22 transactions. Upon information and belief, Defendants earn approximately \$10 billion annually
23 from their securities lending operations.

24 33. Overstock’s share price is artificially depressed because of the oversupply
25 caused by failing to settle transactions with shares issued by Overstock. Shares issued by
26 Overstock in the normal course of raising capital as a public company are not being properly
27 valued because of the dilutive effect of the phantom shares, which were not issued by Overstock.
28

1 Selling but failing to deliver actual shares issued by Overstock has the effect of generating a
2 virtually unlimited supply of Overstock shares for sale.

3 34. Upon information and belief, Defendants' market manipulation took place
4 in the State of California.

5 35. Plaintiffs are informed and believe that Defendants and Does 1 through
6 100, individually and collectively, each and all of them agreed and conspired to engage in the
7 unlawful, unfair, or fraudulent business acts or practices, and/or aided and abetted, as alleged
8 herein, the acts of each other, and encouraged, ratified, and/or accepted the benefits of the acts of
9 each other.

10 36. Defendants' wrongful actions have resulted in substantial harm to
11 Plaintiffs. Among the harms Defendants' actions have caused Plaintiffs are: loss of the price per
12 share of Overstock common stock, which has declined substantially; and impairment of
13 Overstock's share price continued ability to grow at historic rates.

14 37. Each Plaintiff sold shares of Overstock during the timeframes alleged
15 herein that Defendants acted wrongfully at prices that were artificially depressed due to
16 Defendants' wrongful conduct. Plaintiffs were damaged in an amount subject to proof at trial,
17 which amount exceeds the jurisdictional minimum of this court.

18
19 **FIRST CAUSE OF ACTION**
(Conversion – Plaintiffs against All Defendants)

20 38. Paragraphs 1 through 37, inclusive, of this Complaint are incorporated by
21 reference as if set forth in full herein.

22 39. Plaintiffs own specific property in the form of Overstock common stock,
23 which includes intangible benefits and prerogatives susceptible of disposition. Plaintiffs have a
24 legitimate claim to the exclusive interest in each of their shares of stock which are capable of
25 precise definition as well as possession or control. By the conduct complained of, Defendants
26 have substantially wrongfully interfered with Plaintiffs' rights to possession of their property.
27 Plaintiffs have therefore been damaged by the loss of the value of those rights.

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FOURTH CAUSE OF ACTION
(California Corporations Code §§ 25400, *et seq.* – Plaintiffs Against All Defendants)

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

47. By virtue of the allegations set forth above, Defendants violated California Corporations Code Sections 25400(a) and (b) *et seq.*, Defendants' violations were committed either directly or indirectly within California.

48. Defendants knew that the transactions they were effecting would be reported solely as sales, without corresponding purchases or changes in the beneficial ownership of Overstock common stock. Defendants acted with the intent to and thereby did create a false or misleading appearance with respect to the market for Overstock's common stock, in violation of Section 25400(a).

49. Defendants effected repeated transactions in Overstock common stock to create actual or apparent active trading in Overstock and depress the price of Overstock with the knowledge that such action would depress the price and to induce the sale of that stock by others in violation of Section 25400(b).

50. As a proximate result of Defendants' acts and omissions occurring in California with regard to Overstock, as alleged, Overstock's stock price was manipulated downward, and Plaintiffs were injured by such downward manipulation.

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

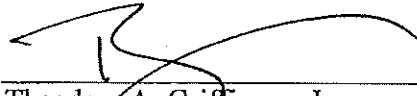
FIFTH CAUSE OF ACTION
**(Violation of California Business & Professions Code §§ 17200, *et seq.*
and §§ 17500, *et seq.* – Plaintiffs against All Defendants)**

52. Paragraphs 1 through 51, inclusive, of this Complaint are incorporated by reference as if set forth in full herein.

1 Dated: February 2, 2007

STEIN & LUBIN LLP

2
3 By:


Theodore A. Griffinger, Jr.
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OVERSTOCK.COM, INC., a Delaware
corporation; DAVID TRENT, an individual;
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