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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

GRADIENT ANALYTICS, INC., et al., Defendants and Appellants, v. OVERSTOCK.COM, INC. et al., Plaintiffs and Respondents.	**Case No. A113397** (Marin Superior Court Case No. CV-053693)

BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE

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INTRODUCTION

This appeal raises important questions about whether "securities-related" transactions, as broadly construed by Appellants, are exempt from the unfair competition law (UCL) (Business & Professions Code § 17200 et seq.).

As the trial court held, this case does not involve a stock transaction between the parties. Instead, the gravamen of this action is libel. Plaintiff Overstock.com, Inc. asserts that defendant Rocker Partners, L.P. provided negative and false information about Overstock to defendant Gradient Analytics, Inc.; that Gradient issued reports on Overstock containing false statements, which caused non-party investors to sell off their Overstock shares; and that the stock price fell as a consequence, causing damage to Overstock. (Rocker Partners AOB, p. 43.) Defendants contend that Overstock's fourth cause of action for violation of the UCL cannot stand based on the holding in *Bowen v. Ziasun Technologies* (2004) 116 Cal.App.4th 777 (*Bowen*) that the UCL does not apply to securities transactions. By construing the issuance of reports allegedly containing negative information and false statements as "securities-related" transactions, defendants attempt to extend *Bowen* and exempt from the UCL claims that are connected to the purchase and sale of securities only through the actions of non-parties. The potential breadth of such an exception, as well as the underlying presumption that a UCL claim cannot extend to the securities field, contradict the plain language of the UCL and should not be accepted.

The Attorney General believes that *Bowen* was wrongly decided because it was based on the mistaken assumption that the scope of the UCL is limited only to those areas covered by the Federal Trade Commission (FTC) Act or where the FTC has acted, and is determined by reference to the "little FTC Acts" of other states. Judicially grafting an exemption for securities transactions onto the UCL would frustrate the broad intent of a statute which prohibits *any* unlawful, unfair or fraudulent business act or practice, without exception, and which provides remedies that are expressly cumulative to other laws. Even if *Bowen* does apply, it does not stand for the proposition that all situations where securities are somehow implicated but not purchased or sold by the parties are exempt from the UCL, and thus provides no support for defendants' attempt to defeat plaintiff's UCL claim because it purportedly is based on "securities-related" transactions.[1]

INTEREST OF THE ATTORNEY GENERAL AS AMICUS CURIAE

The Attorney General is the chief law officer of this State (Cal. Const., art. V, § 13) and has broad statutory and common law powers that may be invoked to protect the public interest. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) The Attorney General and other prosecutorial agencies are specifically authorized under the UCL to bring actions in the name of the People of the State of California to obtain injunctive and other equitable relief, restitution, and civil penalties to redress unfair, unlawful, and fraudulent business practices and deceptive

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[1]Although defendants contend that, as a result of Proposition 64, a plaintiff must plead and prove actual reliance (and may not rely on a "fraud on the market" theory), this court need not address Proposition 64 because Overstock disclaims any reliance on a "fraud on the market" theory and states that its' "damage claim is not based on its reliance upon and deception by the Gradient reports." (Respondents' Opposition Brief, at p. 29.) This issue accordingly is out of the case.

advertising, including violations of Section 17200 and 17500.[2] (See Bus. & Prof. Code, §§ 17203, 17204, 17206, 17535, 17536.) Our Supreme Court has characterized actions brought by the Attorney General under these sections as civil law enforcement actions. (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17.) Private parties who meet the standing requirement may also bring actions for injunctive and other equitable relief but not civil penalties. (Bus. & Prof. Code, §§ 17203, 17535.)

An appeal in a private action involving the UCL, such as the appeal in this case, may have profound ramifications for law enforcement agencies which regularly rely on the UCL for combating a host of unfair, deceptive, and unlawful practices. Accordingly, appellants are required to serve the Attorney General with copies of their briefs in matters involving the UCL. (See Bus. & Prof. Code, §§ 17209, 17536.5; Cal. Rules of Court, rule 44.5.) The Attorney General may then determine to file a brief as amicus curiae to present the public law enforcement perspective. (See Cal. Rules of Court, rule 13(c)(6) [permitting Attorney General to file brief as amicus curiae without obtaining prior leave of court].)

The Attorney General has a significant interest in questions regarding the applicability of the UCL to "securities-related" transactions and in ensuring that this State's consumer protection statutes are properly construed and applied. The outcome of this case may affect the enforcement of the statutes in question by law enforcement agencies. Accordingly, the Attorney General respectfully appears as amicus curiae under Rule 13(c)(6), California Rules of Court.

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[2]Unless otherwise noted, all references in the Attorney General's Amicus Brief to code sections are to the Business and Professions Code.

ARGUMENT

I. THE SCOPE OF THE UNFAIR COMPETITION LAW

Based on more than 30 years of California Supreme Court precedent, it is settled that the UCL "embraces anything that can properly be called a business practice and that at the same time is forbidden by law." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 (*Korea Supply*) [internal quotation marks omitted]; accord *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 112 (*Barquis*).)

Business and Professions Code section 17200 states, without limitation, that "unfair competition shall mean and include *any* unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." (Bus. & Prof. Code § 17200 (italics added).) The definition of unfair competition thus establishes three alternative prohibitions -- against a business practice or act or advertising that is *unlawful*, or *unfair*, or *deceptive*. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*); *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647 [the test for determining a violation of the unfair competition laws is a disjunctive one].) The "unfair competition statutes have always been framed in 'broad, sweeping language precisely to enable judicial tribunals to deal with the innumerable "'new schemes which the fertility of man's invention would contrive.'" (*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 284.)

An action under the UCL "is not an all-purpose substitute for a tort or contract action;" rather, "the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173-74 (*Cortez*); *Cel-Tech, supra*, 20 Cal.4th at p. 180 [unfair competition statute governs anti-competitive business practices, as well as injuries to consumers, and has as a major purpose the preservation of fair business competition].)

Section 17203 authorizes the court to fashion remedies to prevent, deter, and compensate for unfair business practices. In addition to an injunction, section 17203 provides that the court may make such orders or judgments as may be necessary to prevent practices that constitute unfair competition or to restore to any person in interest any money or property acquired by unfair competition. (Bus. & Prof Code §17203.) "Unless otherwise *expressly* provided, the remedies or penalties provided by [the UCL] are cumulative to each other and to the remedies or penalties available under all other laws of this state." (Bus. & Prof. Code § 17205 (italics added); see also *Cortez, supra*, 23 Cal.4th at p. 179.)

In construing the expansive reach of the UCL, our high court has held that "[b]y proscribing any unlawful business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." (*Cel-Tech, supra*, 20 Cal.4th at p. 180 [internal quotation marks omitted]; accord *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383 (*Farmers Ins.*).) " "Virtually any law or regulation–federal or state, statutory or common law–can serve as [a] predicate for a [Business and

Professions Code section] 17200 'unlawful' violation." " (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659; *Saunders v. Superior Court* (1994) 27 Cal.4th 832, 838-39.)

Although not so plead in the First Amended Complaint filed by Overstock in this instance,[3] a violation of federal securities laws could provide the predicate violation for an unlawful business act or practices claim brought under the UCL, as this court concluded in *Roskind v. Morgan Stanley Dean Witter & Co.* (2000) 80 Cal.App.4th 345 (*Roskind*). Roskind alleged that his stockbroker, instead of timely selling his Netscape stock as instructed, delayed the sale and "traded ahead" by selling its own large block of Netscape stock first. As a result of the stockbroker's delay and trading ahead, plaintiff alleged that he lost money that he otherwise would have gained if his stock had been sold in a timely fashion, and that the broker's actions violated the UCL.

After reviewing the statutory language and legal precedents, division five of this Court concluded that, based on "broad and sweeping [UCL] precedents, it is clear that the UCL could potentially provide a remedy for the conduct in issue here, if the UCL is not preempted by federal law in this

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[3]Although plaintiffs Barron and Helburn assert a cause of action for violation of California Corporations Code §§ 25400 et seq., they do not allege a claim under the UCL. Plaintiff Overstock does allege a UCL claim, which it purports to base on "Gradient's failure to disclose the Rocker Appellants' participation in the preparation and publication of the Gradient reports on Overstock; Gradient's failure to disclose its own financial interest in the performance of Overstock's stock by virtue of its own hedge fund, Pinnacle; and Gradient's advertisement of its reports as being 'unbiased, independent and objective' without disclosing the role of the Rocker Appellants or the financial interest of all Appellants in the securities of the companies that are the targets of the reports." (Respondents' Opposition Brief, at pp. 47-48.)

context." (*Id.* at p. 351, citing *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1046-47.)

The *Roskind* court then examined federal securities laws, noting the U.S. Supreme Court's determination that "Congress plainly contemplated the possibility of dual litigation in state and federal courts relating to securities transactions." (*Id.* at p. 352, quoting *Matsushita Elec. Industrial Co. v. Epstein* (1996) 516 U.S. 367, 383, 116 S.Ct. 873.) "Consistent with this analysis," this court concluded that "case authority clearly provides that violation of a federal law may serve as a predicate for a section 17200 action." (*Roskind, supra*, 80 Cal.App.4th at p. 352.) The *Roskind* court thus determined that the UCL can apply to securities transactions; it then held that federal law did not preempt plaintiff's UCL claim under state law.

The *Bowen* court, in reaching the opposite conclusion that securities transactions are exempt from the UCL, attempted to distinguish *Roskind* on two grounds: (1) that it addressed the question of whether federal securities law preempts section 17200, not whether that section applies to securities transactions; and (2) that California courts "have consistently treated section 17200 as a 'little FTC Act' and have relied upon section 5 of the FTC Act to provide guidance as to its scope." (*Bowen, supra*, 116 Cal.App.4th 777, at p. 790, fn.10.) The first point is not persuasive because the *Roskind* court's determination that the UCL extends to securities transactions was integral to its analysis of field preemption, and thus the necessary predicate to its ruling that the federal securities law does not preempt plaintiff's UCL claim. The second point is not persuasive for the reasons discussed in Section II.A. below.

This court in *Roskind*, grounding its analysis on California precedent regarding the scope of the UCL, properly concluded that securities are not exempt from the UCL.

II. "SECURITIES-RELATED" TRANSACTIONS ARE NOT EXEMPT FROM THE UCL

By construing the issuance of reports allegedly containing negative information and false statements as "securities-related" transactions, defendants attempt to exempt from the UCL types of claims not addressed in *Bowen*. This case does not involve a stock transaction between the parties, as was alleged in *Bowen*. Moreover, because the *Bowen* court based its decision on the mistaken assumptions that the scope of the UCL is limited to only those areas covered by the FTC Act or where the FTC has acted, and is determined by reference to the "little FTC Acts" of other states, *Bowen* incorrectly concluded that violations of the federal securities laws were unlawful business practices that could not be redressed under the UCL. Even if this court were to conclude that the UCL does not cover "securities violations," that limitation should not be extended to "securities-related" transactions, as broadly construed by defendants.

A. The Court in *Bowen v. Ziasun Technologies* Erred in Holding that Securities Violations Are Outside the Scope of the UCL

Plaintiffs in *Bowen* alleged that they were defrauded by a "pyramid" or "Ponzi" scheme orchestrated by defendant Ziasun Technologies, from which they purchased shares of stock. (*Bowen*, *supra*, 116 Cal.App.4th at p. 779.) The court found that plaintiff's UCL claims failed as a matter of law because section 17200 "does not apply to securities transactions." (*Id.* at p. 784.) The *Bowen* court based that conclusion on the following reasoning: (1) section 17200 mirrors the FTC Act, (2) historically, the FTC has not viewed the FTC Act as reaching securities transactions, and (3) a majority of states considering the issue have held that claims based upon securities violations are not actionable under their "little FTC Acts." (*Id.* at pp. 786-789.) Because this analysis ignores important differences between the UCL and the FTC Act, and between state "little FTC Acts", and also misconstrues the significance of the FTC's failure to pursue unfair competition in the securities field, the court's erroneous holding in *Bowen* provides limited guidance.

1. Important Differences Exist Between The UCL and The FTC Act

In concluding that securities transactions are exempt from the UCL, the *Bowen* court overlooked important differences between the UCL and the FTC Act. As an initial matter, the language of the UCL is not the same as the FTC Act. As originally enacted in 1933, former section 3369 [today section 17200] defined "unfair competition" only in terms of "unfair or fraudulent business practice(s);" in 1963, however, the legislature amended the section to add the word "unlawful" to the types of wrongful business conduct that could be enjoined. (See *Barquis*, *supra*, 7 Cal.3d at p. 112.) The UCL thus provides relief against "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code § 17200; see also *Cel-Tech*, *supra*, 20 Cal.4th at p. 180; *Korea Supply*, *supra*, 29 Cal.4th at p. 1143 .) The FTC Act prohibits "unfair methods of competition ... and deceptive acts or practice in or affecting commerce" (FTCA § 5(a)(1), 15 U.S.C. § 45(a)), but does not expressly prohibit "unlawful" business acts or practices. Thus, not only does section 17200 not mirror the language of the FTC Act, but the ability to predicate a claim under the UCL on the violation of a state or federal law i.e. "unlawful" act is not specifically provided for under the FTC Act.

The FTC Act also expressly excludes various industries addressed under other federal laws, such as financial institutions, common carriers, air carriers, and meat packers. (See 15 U.S.C. § 45(a)(2).) These fields, like securities, are superintended by other federal agencies. The UCL contains no such exclusions. Indeed, claims under the UCL have been brought against financial institutions even though such claims are not permitted under the FTC Act. (See, *e.g.*, *Smith v. Wells Fargo Bank* (2006) 135 Cal.App.4th 1463 [action against bank alleging UCL claim based on violation of OCC disclosure requirements]; *Lippitt v. Raymond James Financial Services, Inc.* (9th Cir. 2003) 340 F.3d 1033 [investor brought action alleging that marketing by national brokerage firms of an instrument known as a "callable certificate of deposit" violated the UCL].

The explicit exclusion of certain industries from the scope of the FTC Act, and the absence of an express prohibition against "unlawful" business acts or practices, indicates that the FTC Act was designed to operate as part of a federal regulatory scheme that encompasses various agencies with particular superintendent responsibilities, and not to be an all-purpose unfair trade statute applicable in all circumstances, as was the UCL.

2. The FTC's Failure to Pursue Unfair Competition in the Securities Field Does Not Determine the Reach of the UCL

The FTC Act does not expressly exclude securities transactions or entities involved in some way in the securities field, such as the publisher of stock reports or the investment fund that are defendants in this action.

The appellate court in *Bowen* nonetheless placed particular emphasis on the FTC's failure to apply the FTC Act to securities. (*Bowen, supra,* 116 Cal.App.777 at pp. 786, 789.) But the FTC's failure to pursue unfair competition in the securities field does not rob the FTC of authority to act should it chose to do so, and certainly does not determine the reach of the UCL.

The FTC, of course, is not charged with overseeing securities; that function is given to the Securities and Exchange Commission (SEC). The fact that Congress has created separate federal agencies with different purviews, however, does not mean that the FTC could not take action with respect to misleading or deceptive acts or practices that involve securities, and certainly has no implication for the scope of state unfair competition laws.[4] Neither the existence of the SEC nor the securities laws impliedly deprive the FTC of authority to take action to enforce laws governing unfair and deceptive business practices that touch upon securities. The implication of the *Bowen* court's reasoning is that because a power has not been exercised, the power does not exist – a dubious proposition at best.

In *Federal Trade Commission v. Ken Roberts Co.* (D.C.Cir. 2002) 276 F.3d 583, in order to determine whether defendant had engaged in deceptive advertising or selling of goods or services in violation of sections 5 and 12 of the FTC Act, the FTC issued civil investigative demands requiring defendant to produce documents and respond to interrogatories relating to its business practices. Defendants sought to avoid the discovery on the grounds that the regulation of their advertising practices was subject

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[4]Federal laws, of course, may have implications with respect to the preemption of state laws, but preemption was not an issue in *Bowen*, nor is it here.

to the exclusive jurisdiction of the Commodity Future Trading Commission (CFTC) or the SEC, and therefore the FTC lacked authority to investigate. (*Id.* at p. 584.) The court rejected that argument, explaining:

> It is true that the CFTC was created to regulate all commodities and commodities trading [citation]; it does not follow from this, however, that Congress intended to preempt the activities of all other federal agencies in their regulatory realms. "Preemption of the regulation of the market does not also mean preemption of all law that might involve participants in the market."

(*Id.* at p. 591.)

"Because we live in 'an age of overlapping and concurring regulatory jurisdiction,' [citation], a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may." (*Id.*, at p. 593; see also *Pennsylvania v. ICC* (D.C.Cir. 1977) 561 F.2d 278, 292 ["It is well established that when two regulatory systems are applicable to a certain subject matter, they are to be reconciled and, to the extent possible, both given effect."].) That the SEC is charged with regulating securities thus does not mean that the FTC could not take action regarding unfair and deceptive practices that involve securities, or that such practices are outside the scope of the UCL. The existence of multiple federal agencies is simply irrelevant to the application of the UCL to *any* unlawful, unfair or fraudulent business act or practice, without exception.

That California courts may "turn for guidance to jurisprudence arising under the "parallel" [citation] section 5 of the [FTC Act]" or even find decisions of the federal court on the subject "more than ordinarily persuasive," does not mean that application of the UCL is limited only to those areas covered by the FTC Act or where the FTC has acted. (*Cel-Tech*, *supra*, 20 Cal.4th at p. 185.) The California Supreme Court in *Cel-Tech* clearly stated that:

> Our notice of federal law under section 5 means only that federal cases interpreting the prohibition against "unfair methods of competition" may assist us in determining whether a particular challenged act or practice is unfair under the test we adopted. We do not deem the federal cases controlling or determinative, merely persuasive.

(*Id.* at p. 186, fn.11.) "California courts remain the ultimate arbiters of the meaning and scope of the unfair competition law ...." (*Id.* at p. 186.)

Here, in the context of securities and an action between business entities, there is not congruity of purpose between the FTC Act and the UCL. In this context, reference to the FTC is unnecessary and federal court decisions relating to the FTC Act are not more than ordinarily persuasive.

3. Reference to the "Baby" or "Little" FTC Acts Of Other States Is Meaningless Because of the Differences Between State Laws

The *Bowen* court also considered that, at the time of the decision, only three states had concluded that their "little FTC Acts" apply to securities transactions,[5] whereas "at least 15 other jurisdictions" had held the opposite. (*Bowen, supra,* at p. 787.) The common reference to state consumer protection statutes as "little" or "baby" FTC Acts implicitly suggests there are no meaningful differences between the state laws. That, in fact, is not the case. The informative question is not how many state "little FTC Acts" apply their consumer protection laws to securities transactions versus the number that do not, but rather on what grounds do states decide whether securities are subject to their consumer protection

[5]A recent case, *Johnson v. John Hancock Funds* (Tenn.Ct.App. June 30, 2006) 2006 WL 1864802, suggests that at least seven states have held their unfair and deceptive trade practices statutes apply to the sale or purchase of securities. (*Id.* at *7, fn.16.)

laws. Not surprisingly, as the following examples demonstrate, decisions regarding the application of a particular state law to securities transactions generally are determined by the particular language and context of each state's statute. That each state law may, in some general sense, be a "little" FTC Act does not determine its scope.

In *Portland Savings and Loan Assoc. v. Bevill, Bresler & Schulman Gov't Securities, Inc.* (Tex.App. 1981) 619 S.W.2d 241, plaintiff brought suit against a securities broker to recover damages for alleged misrepresentations of material facts occurring during the sale of certain securities. To assert a claim under the Texas Deceptive Trade Practices Act (Tex. Bus. & Comm. Code § `17.46) (DTPA), a consumer must have purchased or leased "goods or services." (*Id.* at p. 245.) "Goods" are defined in the statute as tangible chattels or real property purchased or leased for use. (*Id.*, citing DTPA § 17.45(1) (1980).) The Texas court concluded that "[t]his definition of "goods" excludes the sale of securities as a sale of "goods" under the DTPA." In contrast, in *LeSage v. Norwest Bank Calhoun-Isles, N.A.* (Minn.App. 1987) 409 N.W.2d 536, the court held that Minnesota's Consumer Fraud Act "applies to the sale of investment contracts, since the statutory definition of "merchandise" includes "commodities" and "intangibles." (*Id.* at p. 539.) Similarly, a federal court in Illinois concluded that an investor could bring a claim for securities fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act because the statutory definition of "merchandise" includes both intangibles and services (*Wafra Leasing Corp. v. Prime Capital Corp.* (N.D.Ill. 2002) 204 F.Supp.2d 1120, 1123) (*Wafra*).

Unlike the statutes of Texas, Minnesota and Illinois, the UCL does not refer to "goods" or "merchandise" and, therefore, the decisions of these courts regarding the inclusion or exclusion of securities sheds no light on the scope of the UCL. Reference to the "little FTC Acts" of these or other states is essentially meaningless because there are no statutes in other jurisdictions with language identical to California's UCL. (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 684 ["there are no similar statutes in other jurisdictions. Thus, we rely on the language itself and the apparent purposes of the statute."]; *Mass. Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1291 [defendants' citation to out of state authorities not persuasive because none of the cases "involve the UCL and its unique scope"].)

As noted above, Section 17200 is expressly expansive, applying, without limitation, to *"any* unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [Section 17500 through 17509] of the Business and Professions Code." (Bus. & Prof. Code § 17200 (italics added).) Section 17500, the false advertising law on which Overstock purports to base its UCL claim at least in part, specifically provides that "[i]t is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto," to make or disseminate to the public any untrue or misleading statement concerning the services. (Bus. & Prof. Code § 17500.) By its terms, section 17500 would not exclude securities or transactions related to the securities market.

4. The Ninth Circuit's Holding in *Spinner Corp. v. Princeville Dev. Corp.* Also Does Not Determine the Scope of the UCL

In support of the notion that transactions that "broadly relate to the securities market" but do not involve the sale of securities are beyond the reach of the UCL, defendants turn to *Spinner Corp. v. Princeville Dev. Corp.* (9th Cir. 1988) 849 F.2d 388 (*Spinner*), a case the *Bowen* court deemed to be "instructive." (*Bowen, supra,* 116 Cal.App.4th at p. 788.) Plaintiff Spinner launched a hostile tender offer against Princeville. During litigation initiated by Spinner to invalidate anti-takeover provisions that Princeville had adopted earlier, Princeville discovered that confidential information had been provided to Spinner. Princeville counterclaimed for deceit under Hawaii's "baby FTC Act," alleging that the release of confidential information in the context of a securities transaction violated the state statute. The question for the Ninth Circuit in *Spinner* was whether Hawaii's "baby FTC Act" applies to conduct "ordinarily associated with securities transactions." (*Id.* at 390.)

The decision in *Spinner* is of limited utility in determining the scope of the UCL given the differences between Hawaii's consumer protection law and the California statute. Like the FTC Act, Hawaii's "baby FTC Act" does not prohibit "unlawful" business practices, as does the UCL. Hawaii's consumer protection statute also specifically provides that it shall be "construed in accordance with judicial interpretations of similar federal antitrust statutes." (*Id.* at pp. 389-90, quoting Haw.Rev.Stat. § 480-3.) "Thus, courts must refer to judicial interpretations of § 5(a)(1) of the FTCA, 15 U.S.C. § 45(a)(1), before applying [the Hawaii statute]." (*Id.*) The *Spinner* court also referred to the "baby FTC acts" of Connecticut and

Massachusetts,[6] each of which, like the Hawaii act, expressly directs courts to be guided by judicial interpretations of section 5(a)(1) of the FTC Act. (*Id.* at pp. 391-2.)

Similarly, the Florida Deceptive and Unfair Trade Practices Act, which was at issue in *Rogers v. Cisco Systems, Inc.* (N.D.Fla.2003) 268 F.Supp.2d 1305 (*Rogers*) and *Crowell v. Morgan Stanley Dean Witter Services, Co.* (S.D.Fla.2000) 87 F.Supp.2d 1287, 1294, cited by the Rocker defendants at page 45 of their Opening Brief, expressly states that "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act." The *Rogers* court interpreted that provision as indicating that the Florida statute "should be interpreted consistently with the FTC Act, which has been held inapplicable to securities claims." (*Rogers, supra,* 268 F.Supp.2d at p. 1316.) While that may be a proper interpretation of the language of the Florida, Connecticut, Massachusetts and Hawaii statutes, it is not applicable to California's unfair competition law because no such provision exists in the UCL.[7]

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[6]In *Cabot Corp. v. Baddour* (1985) 394 Mass. 720, 477 N.E.2d 399, relied on by *Spinner*, Massachusetts' highest court held that the state's unfair competition law did not apply to securities based on arguments also offered in *Spinner*: the FTC does not regulate securities fraud and the state legislature had enacted a comprehensive state securities fraud regulatory scheme. The Massachusetts legislature apparently did not approve of these interpretations and amended the unfair competition statute to explicitly cover securities and commodities cases. (Unfair and Deceptive Acts and Practices, Sixth Ed. (National Consumer Law Center 2004) ("NCLC"), § 2.2.9.3, p. 45, citing 1987 Mass. Acts 664, amending Mass. Gen. Laws ch. 93A, §§ 1, 4, 9.)

[7]The consumer protection statutes of Connecticut, Florida and Hawaii are patterned on Alternative #1 of the Unfair Trade Practices and Consumer Protection Law, which was developed by the FTC in conjunction with the Committee on Suggested State Legislation of the Council of State

The court in *Spinner* distinguished a decision of the Supreme Court of Arizona that applied the state's consumer protection statute to securities transactions based upon the following language, which was added to the Arizona statute in 1981: "The provisions of this article are in addition to all other causes of action, remedies and penalties to this state." (*Id.* at p. 393, fn.6, citing *Corbin v. Pickrell* (1983) 136 Ariz. 589 (*Corbin*) ["We believe that the clear language of the [1981] amendment mandates the conclusion that the legislature intended the consumer fraud act to provide an additional avenue of relief to those aggrieved by securities act violations."].)[8] The Hawaii consumer protection statute at issue in *Spinner* does not contain such language.

California's unfair competition law, like the Arizona statute, specifically states that "unless otherwise expressly provided, the remedies or penalties provided by this chapter [i.e., ch. 5, Enforcement, Bus. & Prof. Code §§ 17200-17209] *are cumulative to* each other and to the remedies or penalties available under all other laws of this state." (Bus. & Prof. Code § 17205 (italics added); see also *Cortez, supra*, 23 Cal.4th 163 at p. 179; *Farmers Ins., supra*, 2 Cal.4th at p. 383.) As this court has previously stated,

> "The clear language of the Business and Professions Code prohibiting unfair competition authorizes filing of a complaint for unfair competition supplementary to any other provision of law.

Governments (NCLC § 3.4.2.2, p. 132, fn.162.) Alternative #1, which 14 states have adopted, is patterned exactly after section 5(a) of the FTC Act. (*Id.*) The UCL is not.

[8]The Arizona statute, in contrast to the statutes of Hawaii, Connecticut, Florida and Massachusetts, is not patterned after the Unfair Trade Practices and Consumer Protection Law, but instead is a type of consumer fraud act. (NCLC, § 3.4.2.5, p. 133, fn.177.)

> That the Labor Code provides similar relief against unlawful labor practices cannot foreclose cumulative remedies under the Business and Professions Code if the alleged misconduct does indeed constitute an unfair business practice.

(*Consumers Union of United States, Inc. v. Fisher Development* (1989) 208 Cal.App.3d 1433, 1442, fn. 5, quoting *People v. Los Angeles Palm* (1981) 121 Cal.App.3d 25, 33.) Pursuant to section 17205, the fact that state or federal securities laws may provide similar relief against unfair securities practices cannot foreclose cumulative remedies under the UCL if the alleged misconduct constitutes an unfair business practice, unless otherwise expressly provided.

In order to conclude that the FTC Act, or the FTC's failure to take action, or the "little FTC Acts" of other states *impliedly* repeal the UCL's broad scope, one would have to read the word "implicitly" into section 17205 or read the word "expressly" out of it. The court, of course, is "not authorized to insert qualifying provisions not included, and may not rewrite the statute to conform to an assumed intention which does not appear from its language." (*Stop Youth Addiction v. Lucky Stores, Inc.* (1988) 17 Cal.4th at 553, 573 ["when the Legislature has desire to limit UCL remedies, it has "expressly provided" (§ 17205) for such limitation"].)

Based upon the plain language of the UCL, as well as the reasoning of *Spinner* and *Corbin*, California's unfair competition law extends to securities transactions as it does to every other kind of violation not otherwise expressly excluded.

B. Even if the UCL Does Not Cover Securities Violations, Defendants' Broad Interpretation of "Securities-Related" Transactions Should Not Be Accepted

In the instant case, unlike *Bowen*, plaintiff Overstock did not purchase stock from defendants and the claims it asserts do not arise from any stock transaction between the parties. Instead, Overstock complains about the Gradient defendants' allegedly libelous reports regarding Overstock and the Rocker defendants' alleged role with respect to those reports. Thus, as the trial court correctly concluded, plaintiff's UCL claim does not involve a "securities transaction."

Even if this court were to reject its analysis in *Roskind* and accept the *Bowen* court's conclusion that securities transactions are exempt from the UCL, there still is no basis to extend that holding to "securities-related" transactions, as defendants advocate. The *Bowen* case arose from the purchase and sale of stock, i.e. actual "securities transactions." While the court specifically addressed "securities transactions," it made no reference to ""securities-*related*" transactions and certainly did not suggest that its holding encompasses all situations where securities are somehow implicated but not purchased or sold by the parties.

As noted above, section 17200 is framed in broad, sweeping language and contains no express exemption for securities. The gravamen of this action is libel, not the purchase or sale of securities. By construing plaintiff's UCL claim as "securities-related," defendants attempt to exempt from the UCL claims that are connected to the purchase or sale of securities only through the actions of third parties. The potential breadth of such an exception contradicts the sweeping scope of the UCL intended by the legislature and should not be accepted.

CONCLUSION

The trial court correctly concluded that this action does not involve securities. Defendants' attempt to challenge that ruling by advocating a broad exception for "securities-related" transactions is contrary to the plain language of the UCL and established UCL jurisprudence, and should not be accepted. Neither the FTC Act, nor the action (or inaction) of the FTC, nor the "little FTC Acts" of other states, remove the securities field from the reach of the UCL. Thus, even if this case did involve securities, that would not deprive plaintiffs of a claim under the UCL.

DATED: August 11, 2006

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 14(c)(1) or 33(b)(1) of the California Rules of Court, the enclosed BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE is produced using 13-point Roman type including footnotes and contains approximately 5,835 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

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DECLARATION OF SERVICE

Case Name: Gradient Analytics, Inc., et al v. Overstock.Com, Inc., et al

No.: A113397

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 11, 2006, I served the attached

BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

See Service List Attached

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 11, 2006, at San Francisco, California.

Georgene Roberts	Georgene Roberts
Declarant	Signature

Case Name: Gradient Analytics, Inc., et al v. Overstock.Com, Inc., et al.
No.: Court of Appeal, First Appellate District, Division Four, Case No. A113397

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