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8 Attorneys for Specially-Appearing Cross-Defendants  
JOHN J. BYRNE, JR., ALLISON H. ABRAHAM,  
9 and JASON C. LINDSEY and Cross-Defendant  
JOHN A. FISHER  
10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF MARIN  
13 UNLIMITED JURISDICTION

HOWARD  
RICE  
NEMEROVSKI  
CANADY  
FALK  
& RABKIN  
A Professional Corporation

15 OVERSTOCK.COM, INC., et al.,  
16 Plaintiffs,  
17 v.  
18 GRADIENT ANALYTICS, INC., an Arizona  
corporation, et al.,  
19 Defendants.  
20

No. CV 053693

Action Filed: August 11, 2005

DECLARATION OF CROSS-DEFENDANT  
JOHN A. FISHER IN SUPPORT OF  
SPECIAL MOTION TO STRIKE SLAPP  
SUIT

Date: March 19, 2008

Time: 9:00 a.m.

Dep't: B

Judge: Hon. Terrence R. Boren

Trial Date: September 9, 2008

22  
23 AND RELATED CROSS-ACTION.  
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1 I, John A. Fisher, declare as follows:

2 1. I am a Cross-Defendant herein. I have personal knowledge of these matters, and if  
3 called as a witness, I could and would testify as set forth below.

4 2. I was a member of the Board of Directors and the Audit Committee for Overstock.com,  
5 Inc. ("Overstock") from May 2002 until February 2007.

6 3. Contrary to the allegations in the Cross-Complaint, during my tenure, the Board of  
7 Directors never approved or ratified Overstock's lawsuit against Copper River and Gradient. The  
8 August 2005 filing of the lawsuit was a management-level decision.

9 4. I am not now, nor have I ever been, aware of the identity of any of Copper River's or  
10 Rocker Partner's contract partners or prospective business relationships.

11 5. The allegations in the Cross-Complaint that I used my relationship with W.R.  
12 Hambrecht to have a research analyst fired in January 2005 and another research analyst fired in  
13 January 2006 are mistaken. I never sought to have either analyst fired nor criticized them to W.R.  
14 Hambrecht management.

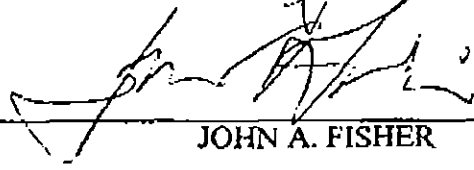
15 6. In 2003, Overstock changed its customer service and return policies and procedures in  
16 order to improve customer experience. Responsibility for returns permitted the Company under  
17 GAAP accounting to report revenues on a gross, rather than net, basis following this change. In  
18 order to conform with GAAP accounting and with revenue-recognition practices of our leading  
19 online retail competitors such as Amazon.com, we elected to change revenue recognition at the time  
20 of changing our customer returns policies and procedures. We were advised by management and by  
21 independent auditors that, after assuming responsibility for product returns, regardless of whether  
22 the products were originally shipped by Overstock or one of its fulfillment partners, Overstock could  
23 properly record gross revenues from those sales. A true and correct copy of the July 30, 2003, SEC  
24 filing and press release announcing this change in handling product returns and the resulting change  
25 in revenue reporting is attached hereto as Exhibit A. The decision of the Audit Committee to  
26 approve this change in revenue reporting was made based on the advance consultation and approval  
27 of Overstock's independent auditors at PricewaterhouseCoopers.

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7. Similarly, the Audit Committee followed the advice of the PricewaterhouseCoopers auditors in reviewing the adequacy of Overstock's reserves each quarter. It was the custom and practice of the Audit Committee to consult quarterly with the independent auditors regarding Overstock's reserves and correctness of all management's material accounting entries for the prior quarter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 11 day of January, 2008, at Atlanta, California

  
\_\_\_\_\_  
JOHN A. FISHER

HOWARD  
RICE  
NEMEROVSKI  
CANALY  
FALK  
BY KARKIN

# **EXHIBIT A**

# OVERSTOCK.COM, INC (OSTK)

6350 SOUTH 3000 EAST  
SALT LAKE CITY, UT 84121  
801.947.3100  
<http://www.overstock.com/>

## 8-K

8-K  
Filed on 07/31/2003 - Period: 07/31/2003  
File Number 000-49799



**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**  
Washington, D.C. 20549

**FORM 8-K**

**CURRENT REPORT**  
Pursuant to Section 13 or 15(d) of  
the Securities Exchange Act of 1934

July 31, 2003  
Date of Report (date of earliest event reported)

**Overstock.com, Inc.**

(Exact name of Registrant as specified in its charter)

**Delaware**  
(State or other jurisdiction of  
incorporation or organization)

**000-49799**  
(Commission File Number)

**87-0634302**  
(I.R.S. Employer  
Identification Number)

**6322 South 3000 East, Suite 100**  
**Salt Lake City, Utah 84121**  
(Address of principal executive offices)

**(801) 947-3100**  
(Registrant's telephone number, including area code)

(Former name or former address, if changed since last report)

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**Item 12. Results of Operations and Financial Condition**

The attached Press Release discussing Overstock.com, Inc.'s 2003 2<sup>nd</sup> quarter results is furnished herewith as Exhibit 99.1. Pursuant to the rules and regulations of the Securities and Exchange Commission, such exhibit and the information set forth therein and herein shall be deemed "furnished" and not "filed" for purpose of Section 18 of the Securities Exchange Act of 1934, as amended, and such exhibit and information shall not be deemed incorporated by reference in any filing under the Securities Act of 1933, as amended, except as shall be expressly set forth by specific reference in such filing.

Exhibit Number	Description
99.1	Press Release issued July 30, 2003.

**SIGNATURE**

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

OVERSTOCK.COM, INC.

By: /s/ Jason C. Lindsey  
Jason C. Lindsey  
President and Chief Financial Officer

Date: July 30, 2003

EXHIBIT INDEX

Exhibit Number	Description
99.1	Press Release issued July 30, 2003.

# OVERSTOCK.COM, INC (OSTK)

6350 SOUTH 3000 EAST  
SALT LAKE CITY, UT 84121  
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<http://www.overstock.com/>

## EX-99.1

EX-99.1  
8-K Filed on 07/31/2003 - Period: 07/31/2003  
File Number 000-49799



For Immediate Release

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**OVERSTOCK.COM ANNOUNCES GAAP REVENUE OF \$29 MILLION  
FOR THE SECOND QUARTER 2003**

*Year-over-year GAAP sales increased 101%*

*Year-over-year GAAP losses decreased 52%*

*New streamlined return process to affect future revenue reporting*

SALT LAKE CITY, UT – July 30, 2003 – Overstock.com, Inc. (Nasdaq: OSTK) today announced its financial results for the second quarter ended June 30, 2003.

The Company reported GAAP total revenue of \$28.8 million for the quarter, a 101% increase over the \$14.4 million recorded in the same period a year ago. Net loss for the second quarter was \$1.1 million or \$0.07 loss per share compared to \$2.4 million or \$0.20 loss per share a year earlier.

“The year-over-year growth remained strong, and we significantly narrowed our loss this quarter compared to first quarter,” said Patrick Byrne, CEO of Overstock.com®. “Several factors contributed to our improved bottom line: In April we reduced our corporate payroll by 15% to better align expenses with revenues; we restructured or eliminated underperforming marketing programs, which has helped lower our marketing spend; and we improved our gross margins. In short, if this was a four round fight I’d say we were unexpectedly dropped to the canvas at the end of the first round, but we got our knees back under us in the second, and we are getting up on our toes again now.”

**New streamlined return process results in change in revenue recognition**

Overstock.com has changed its customer service and return policies and procedures to improve the shopping experience for customers. As a result, the way Overstock.com records revenue on some of its sales will change in the third quarter and thereafter.

As of July 1, 2003, the majority of customer returns will be handled through the Company's Salt Lake City warehouse, regardless of whether they were originally shipped by Overstock.com or shipped by an Overstock.com fulfillment partner. In addition, returned products that Overstock.com resells will be shipped to consumers from the Company's warehouse in Utah. As a result of this change, starting with its third quarter 2003 results, Overstock.com will record revenues generated from the Company's fulfillment partners on a gross basis instead of on a net basis as was previously the case. (Prior to the customer service and return policies and procedures change, Overstock.com GAAP gross sales included only the commission portion earned on products shipped by fulfillment partners.)

"We have always been committed to delivering a seamless customer experience, and I believe this change is good for Overstock.com's customers because it enables us to exercise comprehensive oversight of the entire consumer experience," said Byrne. "This change in operating procedures is causing us to switch our accounting from net treatment to gross treatment on products that are drop-shipped on our behalf. Therefore, third-quarter GAAP revenues will increase dramatically. I emphasize, however, that this does not change the underlying economics of our business one iota, though it may help investors better understand those economics."

#### **Key Financial and Operating Metrics**

GAAP total revenue — Overstock.com reported GAAP revenue of \$28.8 million, a 101% increase over the \$14.4 million recorded in the same period a year ago.

GAAP gross profit — Overstock.com reported GAAP gross profit was \$4.8 million, an 88% increase over the \$2.5 million recorded in the same period a year ago.

GAAP gross margins — GAAP gross margins were 17% compared to 18% for second quarter 2002.

GAAP net loss — Overstock.com reported a GAAP net loss of \$1.1 million or \$0.07 loss per share compared to \$2.4 million or \$0.20 loss per share a year earlier.

Gross merchandise sales — Gross merchandise sales (non-GAAP) were \$51.3 million, a 94% increase over the \$26.5 million recorded in the same period a year ago. Gross merchandise sales

represents the gross sales price of all sales transactions, including those for which the company only records a commission under generally accepted accounting principles, and therefore differs from GAAP revenue. The following table reconciles total revenue to gross merchandise sales:

	<u>Three months ended</u>	
	June 30, 2002	June 30, 2003
Total revenue	\$ 14.4	\$ 28.8
Add: Obligations payable to third parties upon sale of third-party merchandise	\$ 9.5	\$ 19.4
Add: Sales returns and discounts	<u>\$ 2.6</u>	<u>\$ 3.1</u>
Gross merchandise sales (non-GAAP)	\$ 26.5	\$ 51.3

Overstock.com had cash and marketable securities of \$31.7 million at quarter end compared to \$32.7 million on December 31, 2002.

#### About Overstock.com

Overstock.com Inc. is an online "closeout" retailer offering discount, brand-name merchandise for sale over the Internet. The company offers its customers an opportunity to shop for bargains conveniently, while offering its suppliers an alternative inventory liquidation distribution channel. Overstock.com is a publicly traded company listed on the NASDAQ National Market System, headquartered in Salt Lake City, and can be found online at [www.overstock.com](http://www.overstock.com). Overstock.com is a registered trademark of Overstock.com, Inc.

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This press release contains certain forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Such forward-looking statements include, but are not limited to, statements regarding the company's growth, future performance, and customer service enhancements. These forward-looking statements involve certain risks and uncertainties that could cause actual results to differ, including, but not limited to, our limited operating history, our ability to manage growth, a general downturn in economic conditions, and such other risks as identified in our Prospectus dated May 29, 2002, filed with the Securities and Exchange Commission and all subsequent filings with the Securities and Exchange Commission, including our Form 10-K for the year ended December 31, 2002, and our Prospectus dated February 12, 2003, which contain and identify

important factors that could cause the actual results to differ materially from those contained in our projections or forward-looking statements.

**Overstock.com, Inc.**  
**Consolidated Statements of Operations**  
(in thousands, except per share amounts)

	Three months ended				
	Jun. 30, 2002	Sept. 30, 2002	Dec. 31, 2002	Mar. 31, 2003	Jun. 30, 2003
Direct revenue	\$ 11,853	\$ 20,759	\$ 35,302	\$ 24,962	\$ 25,159
Commission revenue	2,230	2,857	5,633	3,966	3,431
Warehouse revenue	297	192	594	236	243
<b>Total revenue</b>	<b>14,380</b>	<b>23,808</b>	<b>41,529</b>	<b>29,164</b>	<b>28,833</b>
Cost of goods sold	11,831	19,238	32,382	24,539	24,030
<b>Gross profit</b>	<b>2,549</b>	<b>4,570</b>	<b>9,147</b>	<b>4,625</b>	<b>4,803</b>
Operating expenses:					
Sales and marketing expenses	1,313	2,083	4,054	3,848	2,572
General and administrative expenses	2,195	2,372	3,456	4,545	3,367
Amortization of stock-based compensation	806	674	577	328	112
<b>Total operating expenses</b>	<b>4,314</b>	<b>5,129</b>	<b>8,087</b>	<b>8,721</b>	<b>6,051</b>
<b>Operating income (loss)</b>	<b>(1,765)</b>	<b>(559)</b>	<b>1,060</b>	<b>(4,096)</b>	<b>(1,248)</b>
Interest income	49	229	103	152	142
Interest expense	(208)	(7)	(10)	(7)	(55)
Other income (expense), net	(442)	63	(66)	10	25
<b>Net income (loss)</b>	<b>(2,366)</b>	<b>(274)</b>	<b>1,087</b>	<b>(3,941)</b>	<b>(1,136)</b>
Decmed dividend related to redeemable common stock	(106)	(97)	(92)	(77)	(78)
<b>Net income (loss) attributable to common shares</b>	<b>\$ (2,472)</b>	<b>\$ (371)</b>	<b>\$ 995</b>	<b>\$ (4,018)</b>	<b>\$ (1,214)</b>
<b>Net income (loss) per share</b>					
• basic	\$ (0.20)	\$ (0.03)	\$ 0.07	\$ (0.26)	\$ (0.07)
• diluted	\$ (0.20)	\$ (0.03)	\$ 0.06	\$ (0.26)	\$ (0.07)
Weighted average common shares outstanding					
• basic	12,280	14,447	14,486	15,486	16,384
• diluted	12,280	14,447	15,696	15,486	16,384
<b>Reconciliation of total revenue (GAAP) to gross merchandise sales (non-GAAP)</b>					
Total revenue	\$ 14,380	\$ 23,808	\$ 41,529	\$ 29,164	\$ 28,833
Add: Obligations payable to third parties upon sale of third-party merchandise	9,474	12,488	21,969	20,527	19,399
Add: Sales returns and discounts	2,651	2,476	3,719	2,579	3,083
<b>Gross merchandise sales (non-GAAP)</b>	<b>\$ 26,505</b>	<b>\$ 38,772</b>	<b>\$ 67,217</b>	<b>\$ 52,270</b>	<b>\$ 51,315</b>

**Overstock.com, Inc.**  
**Consolidated Statements of Operations**  
(in thousands, except per share amounts)

	Six months ended June 30,	
	2002	2003
Direct revenue	\$ 21,882	\$ 50,121
Commission revenue	3,889	7,397
Warehouse revenue	676	479
Total revenue	26,447	57,997
Cost of goods sold	21,821	48,569
Gross profit	4,626	9,428
Operating expenses:		
Sales and marketing expenses	2,532	6,420
General and administrative expenses	4,997	7,912
Amortization of stock-based compensation	1,652	440
Total operating expenses	9,181	14,772
Operating loss	(4,555)	(5,344)
Interest income	71	294
Interest expense	(448)	(62)
Other income (expense), net	(441)	35
Net loss	(5,373)	(5,077)
Deemed dividend related to redeemable common stock	(217)	(155)
Deemed dividend related to beneficial conversion feature of preferred stock	(6,607)	---
Net loss attributable to common shares	\$ (12,197)	\$ (5,232)
Net loss per common share	\$ (1.04)	\$ (0.33)
Weighted average common shares outstanding	11,728	15,938

**Overstock.com, Inc.**  
**Consolidated Balance Sheet Data**  
(in thousands)

	December 31, 2002	June 30, 2003
	Cash and marketable securities	\$ 32,662
Inventories, net	13,954	19,475
Working capital	35,679	55,154
Total liabilities	20,322	11,804
Total stockholders' equity	39,271	60,437