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As filed with the Securities and Exchange Commission on May 9, 2002

Registration No. 333-83728

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

AMENDMENT NO. 4  
TO

**FORM S-1**  
REGISTRATION STATEMENT  
UNDER  
THE SECURITIES ACT OF 1933

**OVERSTOCK.COM, INC.**

(Exact name of registrant as specified in its charter)

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

**5999**  
(Primary Standard Industrial  
Classification Code Number)

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

**Overstock.com, Inc.**  
6322 South 3000 East, Suite 100  
Salt Lake City, Utah 84121  
(801) 947-3100  
(Address, including zip code, and telephone number, including  
area code, of registrant's principal executive offices)

**Patrick M. Byrne**  
President and Chief Executive Officer  
Overstock.com, Inc.  
6322 South 3000 East, Suite 100  
Salt Lake City, Utah 84121  
(801) 947-3100

(Name and address, including zip code, of agent for service)

*Copies to:*

**Robert G. O'Connor, Esq.**  
**Randy Lewis, Esq.**  
**David R. Bowman, Esq.**  
**Wilson Sonsini Goodrich & Rosati**  
**Professional Corporation**  
**2795 E. Cottonwood Parkway, Suite 300**  
**Salt Lake City, Utah 84121**  
**(801) 993-6400**

**Robert S. Townsend, Esq.**  
**Russell J. Wood, Esq.**  
**Harrison S. Clay, Esq.**  
**Morrison & Foerster LLP**  
**425 Market Street**  
**San Francisco, California 94105**  
**(415) 268-7000**

**Approximate date of commencement of proposed sale to the public:**

As soon as practicable after the effective date of this Registration Statement.

If any of the securities being registered on this form are to be offered on a delayed or continuous basis pursuant to Rule 145 under the Securities Act of 1933, check the following box. / /

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. / /

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. / /

If delivery of the prospectus is expected to be made pursuant to Rule 434, please check the following box. / /

Overstock.com, Inc. hereby amends this Registration Statement on such date or dates as may be necessary to delay its effective date until Overstock.com, Inc. shall file a further amendment which specifically states that this Registration Statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933 or until the Registration Statement shall become effective on such date as the Commission, acting pursuant to said Section 8(a), may determine.

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## Explanatory Note

The purpose of this Amendment No. 4 to the Registration Statement is solely to file Exhibits 1.1, 10.5 and 10.15 to the Registration Statement, as set forth below in Item 16(a) of Part II.

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## PART II

### INFORMATION NOT REQUIRED IN PROSPECTUS

#### Item 13. Other Expenses of Issuance and Distribution

The following table sets forth the costs and expenses, other than underwriting discounts and commissions, payable by Overstock.com, Inc. in connection with the sale of Common Stock being registered. All amounts are estimates except the SEC registration fee and the NASD filing fee.

SEC registration fee	\$	5,079
NASD filing fee		5,000
Nasdaq National Market listing fee		100,000
Printing and engraving costs		20,000
Legal fees and expenses		500,000
Accounting fees and expenses		450,000
Blue sky fees and expenses		10,000
Transfer agent and registrar fees		100,000
Miscellaneous expenses		9,921
Total	\$	1,200,000

#### Item 14. Indemnification of Directors and Officers

Section 145 of the Delaware General Corporation Law permits a corporation to include in its charter documents, and in agreements between the corporation and its directors and officers, provisions expanding the scope of indemnification beyond that specifically provided by the current law.

Article VIII of our Amended and Restated Certificate of Incorporation provides for the indemnification of directors to the fullest extent permissible under Delaware law.

Article VI of our Bylaws provides for the indemnification of officers, directors and third parties acting on behalf of Overstock.com, Inc. if such person acted in good faith and in a manner reasonably believed to be in or not opposed to the best interest of Overstock.com, Inc., and, with respect to any criminal action or proceeding, the indemnified party had no reasonable cause to believe his or her conduct was unlawful.

We have entered into indemnification agreements with our directors and executive officers, in addition to indemnification provided for in our Bylaws, and intend to enter into indemnification agreements with any new directors and executive officers in the future.

#### Item 15. Recent Sales of Unregistered Securities

During the last three years, we have issued unregistered securities to a limited number of persons, as described below. As indicated below, we have relied on Regulation D, Rule 506 thereof, Rule 701 or Section 4(2) of the Securities Act with respect to the issuance of these securities.

1. On June 8, 1999, we issued 980,836 shares of common stock to Haverford Internet, LLC at a per share purchase price of approximately \$3.82 for an aggregate purchase price of \$3,750,000. This issuance was exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transaction did not involve a public offering.
2. On September 24, 1999, we issued 291,467 shares of common stock to Haverford Internet, LLC and six other non-affiliated persons at a per share purchase price of approximately \$3.41 for an aggregate purchase price of \$994,551. These issuances were exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transactions did not involve a public offering.

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3. On September 24, 1999, we issued 28,600 shares of common stock to Robert Brazell, a founder, at a per share purchase price of approximately \$6.64 for an aggregate purchase price of \$189,892. These issuances were exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transaction did not involve a public offering.
4. During September and October of 1999, we issued an aggregate of 561,725 shares of common stock to Haverford Internet, LLC and six non-affiliated other persons at a per share purchase price of approximately \$3.56 for an aggregate of \$1,999,999. These issuances were exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transactions did not involve a public offering.
5. In November and December of 1999 and January 2000, we issued an aggregate of 564,587 shares of common stock to Haverford Internet,

LLC, The Gordon S. Macklin Family Trust, The Marilyn C. Macklin Family Trust, Haverford Utah, LLC, Dorothy M. Byrne, Contex Limited, John J. Byrne III, and twenty-one other non-affiliated persons at a per share purchase price of approximately \$7.09 for an aggregate purchase price of \$4,000,000. These issuances were exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transactions did not involve a public offering.

6. On December 28, 1999, we issued 35,286 shares of common stock to one non-affiliated person for an aggregate purchase price of \$250,000 in exchange for a full recourse promissory note in the principal amount of \$250,000 at an effective per share purchase price of approximately \$7.09. These issuances were exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transactions did not involve a public offering.
7. On May 1, 2000, we issued 1,058,549 shares of common stock and warrants to purchase an additional 264,659 shares of common stock to Haverford Internet, LLC, The Macklin Limited Partnership I, The Gordon S. Macklin Family Trust, The Marilyn C. Macklin Family Trust, Dorothy M. Byrne, John J. Byrne III, Rope Ferry Associates, Ltd., Haverford Utah, LLC, Robert Brazell, and forty-one other non-affiliated persons at a per share purchase price of approximately \$7.09 for an aggregate purchase price of \$7,500,000. These issuances were exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transactions did not involve a public offering.
8. On May 15, 2000, we issued an aggregate of 1,044,313 shares of common stock and warrants to purchase an additional 261,087 shares of common stock to Haverford Internet, LLC, Macklin Family Limited Partnership III, Haverford Utah, LLC, The Gordon S. Macklin Family Trust, The Marilyn C. Macklin Family Trust, Dorothy Byrne, John J. Byrne, Contex Limited, and eight other non-affiliated persons at a per share purchase price of approximately \$7.09 for an aggregate purchase price of \$7,398,904. These issuances were exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transactions did not involve a public offering.
9. On June 22, 2000, we issued 28,229 shares of common stock and a warrant to purchase 7,058 shares of common stock with an exercise price of \$7.09 per share to one non-affiliated person. This issuance was exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transaction did not involve a public offering.
10. On September 12, 2001, we issued to Norwich Associates L.C. a senior revolving promissory note in the principal amount of up to \$7,000,000. This issuance was exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transactions did not involve a public offering.
11. On September 21, 2000, we issued an aggregate of 2,357,540 shares of common stock and warrants to purchase an additional 589,396 shares of common stock to Haverford Internet, LLC, Contex

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Limited, Dorothy M. Byrne, The Gordon S. Macklin Family Trust, Haverford Utah LLC, John J. Byrne, John J. Byrne III, The Marilyn C. Macklin Family Trust, Macklin Family Limited Partnership I, Macklin Family Limited Partnership II, Rope Ferry Associates, Ltd., and seventeen other non-affiliated persons at a per share purchase price of approximately \$4.25 for an aggregate purchase price of \$10,021,856. These issuances were exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transactions did not involve a public offering.

12. On November 11, 2000, we issued a promissory note to First Security Bank, N.A. in the principal amount of \$3,000,000. This issuance was exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transaction did not involve a public offering.
13. On November 17, 2000, we issued an aggregate of 2,055,677 shares of common stock to the stockholders of Gear.com, Inc. stock in connection with our acquisition of Gear.com, Inc. This issuance was exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transaction did not involve a public offering.
14. On February 2, 2001, we issued an aggregate of 987,293 shares of common stock to Haverford Internet, LLC and one other non-affiliated person at a per share purchase price of approximately \$5.06 for an aggregate purchase price of \$5,000,000. These issuances were exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transactions did not involve a public offering.
15. On March 27, 2001, we issued a secured promissory note in the principal amount of up to \$6,000,000 to High Meadows Finance L.C. This issuance was exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transaction did not involve a public offering.
16. On May 24, 2001, we issued 197,459 shares of common stock to High Meadows Finance, L.C. at a per share purchase price of approximately \$5.06 for an aggregate of \$1,000,000. This issuance was exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transaction did not involve a public offering.
17. On September 17, 2001, we issued 10,586 shares of common stock to Norwich Associates L.C. as an origination fee for a \$7,000,000 line of credit from Norwich Associates L.C. This issuance was exempt from registration under the Securities Act pursuant to Section 4(2) thereof on the basis that the transaction did not involve a public offering.
18. On March 4, 2002, we issued 958,612 shares of Series A Preferred Stock to Haverford Internet, LLC, John J. Byrne, Contex Limited, The Gordon S. Macklin Family Trust, Rope Ferry Associates, Ltd., and ten other non-affiliated persons at a per share purchase price of approximately \$6.90 for an aggregate purchase price of \$6,607,000. Subject to adjustment, one share of Series A preferred stock currently converts into one share of common stock. These issuances were exempt from registration under Rule 506 of Regulation D promulgated under the Securities Act.

19. Since January 1, 1999, we have granted stock options under our stock option plans to purchase an aggregate of 1,570,385 shares of common stock (net of expirations, exercises and cancellations) at a weighed average exercise price of \$5.35 per share. These transactions were exempt from registration under the Securities Act pursuant to Rule 701 or pursuant to Section 4(2) thereof on the basis that the transactions did not involve a public offering.
20. Since January 1, 1999, we have issued 19,850 shares of common stock (net of cancellations) under our 2000 Stock Purchase Plan at a weighted average purchase price of \$5.07. These issuances were exempt from registration under the Securities Act pursuant to Rule 701 or pursuant to Section 4(2) thereof on the basis that the transactions did not involve a public offering.

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None of the foregoing transactions involved any underwriters, underwriting discounts or commissions, or any public offering.

## Item 16. Exhibits and Financial Statement Schedules

### (a) Exhibits

Exhibit Number	Description of Document
1.1	Form of Underwriting Agreement
3.1A*	Articles of Amendment to the Amended and Restated Articles of Incorporation of Overstock.com, a Utah corporation and the Amended and Restated Articles of Incorporation
3.1B*	Amended and Restated Certificate of Incorporation of Overstock.com, Inc., a Delaware corporation, dated as of March 15, 2002
3.1C*	Form of Amended and Restated Certificate of Incorporation of Overstock.com, Inc., a Delaware corporation, to be filed with the Delaware Secretary of State prior to the completion of the offering made pursuant to this Registration Statement.
3.1D*	Form of Amended and Restated Certificate of Incorporation of Overstock.com, Inc. to be in effect after the completion of the offering made pursuant to this Registration Statement
3.2A*	Bylaws of Overstock.com, Inc., a Utah corporation.
3.2B*	Form of Bylaws of Overstock.com, Inc., a Delaware corporation.
3.2C*	Form of Amended and Restated Bylaws of Overstock.com, Inc. to be in effect after the closing of the offering made pursuant to this Registration Statement
4.1*	Form of specimen certificate for Overstock.com, Inc.'s common stock
4.2*	Investor Rights Agreement dated March 4, 2002
5.1*	Opinion of Wilson Sonsini Goodrich & Rosati, Professional Corporation
10.1*	Form of Indemnification Agreement between Overstock.com, Inc. and each of its directors and officers
10.2*	1999 Stock Option Plan and form of agreements thereunder
10.3*	2001 Stock Purchase Plan and form of agreements thereunder
10.4*	Gear.com Restated 1998 Stock Option Plan and form of agreements thereunder
10.5	2002 Stock Plan and form of agreements thereunder
10.6*	Agreement and Plan of Merger dated November 3, 2000 by and between Overstock.com, Inc. and Gear.com, Inc.
10.7*	Form of Guaranty of Credit agreement entered into by John J. Byrne, John J. Byrne III, Patrick M. Byrne, J. Gregory Hale, and Cirque Property LC in connection with the Norwich Associates, LC \$7.0 million line of credit established on September 17, 2001.
10.8*	Lease Agreement dated January 23, 2002 between Overstock.com, Inc. and Holladay Building East L.L.C.
10.9*	Lease Agreement dated November 27, 2001 between Overstock.com and Holladay Building East L.L.C.
10.10*	First Lease Extension Agreement dated January 25, 2002 by and between Overstock.com, Inc. and Holladay Building East L.L.C.
10.11*	Lease Agreement, as amended, between 2855 E. Cottonwood Parkway, L.C., and Discountsdirect, dated December 21, 1998
10.12*	Lease Agreement by and between Overstock.com, Inc. and Marvin L. Oates Trust dated March 15, 2000
10.13*	Severance Package Agreement with Douglas Greene dated June 17, 1999
10.14*	Intellectual Property Assignment Agreement with Douglas Greene dated February 28, 2002
10.15†	Strategic Alliance and Product Sales Agreement dated February 26, 2002 between Overstock.com, Inc. and Safeway Inc.

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10.16*	Irrevocable Letter of Credit dated August 24, 2001 from Wells Fargo Bank, N.A. for the account of Patrick M. Byrne in favor of Wells Fargo Merchant Services, LLC.
10.17*	Lease Termination Agreement dated March 27, 2002 by and between Overstock.com, Inc. and 2855 E. Cottonwood Parkway, L.C.
10.18*	Amendment No. 1, dated April 29, 2002 to Intellectual Property Assignment Agreement dated February 28, 2002 by and between Overstock.com, Inc. and Douglas Greene.
10.19*	Registration and Expenses Agreement dated May 3, 2002 among Overstock.com, Inc. and Amazon.com NV Investment Holdings, Inc.
10.20*	Form of Warrant to purchase Overstock.com, Inc. common stock
23.1*	Consent of Independent Accountants
23.2*	Consent of Arthur Andersen LLP
23.3*	Consent of Counsel (included in Exhibit 5.1)
24.1*	Power of Attorney (See page II-7 and filed previously)

† Confidential treatment has been requested with respect to certain portions of this exhibit. This exhibit omits the information subject to this confidentiality request.

\* Filed previously

\*\* To be filed by amendment

**(b) Financial Statement Schedules**

Schedules not listed above have been omitted because the information required to be set forth therein is not applicable or is shown in the financial statements or notes thereto.

**Item 17. Undertakings**

The undersigned hereby undertakes to provide to the underwriters at the closing specified in the Underwriting Agreement certificates in such denominations and registered in such names as required by the Underwriters to permit prompt delivery to each purchaser.

Insofar as indemnification by Overstock.com, Inc. for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of Overstock.com, Inc. pursuant to the provisions referenced in Item 14 of this Registration Statement or otherwise, we have been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Securities Act, and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by Overstock.com, Inc. of expenses incurred or paid by a director, officer, or controlling person of Overstock.com, Inc. in the successful defense of any action, suit or proceeding) is asserted by a director, officer or controlling person in connection with the securities being registered hereunder, we will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

The undersigned Registrant hereby undertakes that:

- (1) For purposes of determining any liability under the Securities Act, the information omitted from the form of Prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by us pursuant to Rule 424(b)(1) or (4) or 497(h) under the Securities Act shall be deemed to be part of this registration statement as of the time it was declared effective.
- (2) For the purpose of determining any liability under the Securities Act, each post-effective amendment that contains a form of prospectus shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

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**SIGNATURES**

Pursuant to the requirements of the Securities Act of 1933, as amended, Overstock.com, Inc. has duly caused this Amendment to the Registration Statement on Form S-1 to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Salt Lake City, State of Utah, on the 9th day of May, 2002.

**OVERSTOCK.COM, INC.**

By: /s/ JASON C. LINDSEY

\_\_\_\_\_  
Jason C. Lindsey,  
Chief Financial Officer and Director

Pursuant to the requirements of the Securities Act of 1933, as amended, this Amendment to the Registration Statement has been signed by the following persons in the capacities and on the dates indicated:

Signature	Title	Date
<u>/s/ PATRICK M. BYRNE</u> (Patrick M. Byrne)	President, Chief Executive Officer and Director (Principal Executive Officer)	May 9, 2002
<u>/s/ JASON C. LINDSEY</u> (Jason C. Lindsey)	Chief Financial Officer and Director (Principal Financial and Accounting Officer)	May 9, 2002
<u>*</u> (John B. Pettway)	Director	May 9, 2002
<u>*</u> (John J. Byrne Jr.)	Director	May 9, 2002

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(Gordon S. Macklin)

Director

May 9, 2002

\*

(Allison H. Abraham)

Director

May 9, 2002

\*

(John A. Fisher)

Director

May 9, 2002

\* By /s/ JASON C. LINDSEY

Jason C. Lindsey  
Attorney-in-Fact

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23.3*	Consent of Counsel (included in Exhibit 5.1)
24.1*	Power of Attorney (See page II-7 and filed previously)

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\_\_\_\_\_ Shares<sup>1</sup>

OVERSTOCK.COM, INC.

COMMON STOCK

UNDERWRITING AGREEMENT

\_\_\_\_\_, 2002

WR Hambrecht + Co., LLC  
539 Bryant Street  
Suite 100  
San Francisco, CA 94107

Ladies and Gentlemen:

Overstock.com, Inc., a Utah corporation (the "Company"), proposes to issue and sell up to an aggregate of [\_\_\_\_\_] shares of its authorized but unissued common stock, \$0.0001 par value per share (the "Common Stock") to you, WR Hambrecht + Co., LLC (the "Underwriter"), and Amazon.com NV Investment Holdings, Inc. (the "Selling Stockholder") proposes to sell an aggregate of [\_\_\_\_\_] shares of Common Stock to the Underwriter (said [\_\_\_\_\_] shares of Common Stock to be issued and sold by the Company and said [\_\_\_\_\_] shares of Common Stock to be sold by the Selling Stockholder being herein called the "Underwritten Stock"). The Company has also granted the Underwriter an option to purchase up to an aggregate of [\_\_\_\_\_] additional shares of Common Stock (the "Option Stock;" the Option Stock, together with the Underwritten Stock, being hereinafter referred to as the "Shares"). The Common Stock is more fully described in the Registration Statement and the Prospectus hereinafter mentioned.

The Company and the Selling Stockholder hereby confirm the agreements made with respect to the purchase of the Shares by you.

**1. Registration Statement.** The Company has filed with the Securities and Exchange Commission (the "Commission") a registration statement on Form S-1 (No. 333-83728), including the related preliminary prospectus, for the registration under the Securities Act of 1933, as amended (the "Securities Act"), of the Shares. Copies of such registration statement and of each amendment thereto, if any, including the related preliminary prospectus (meeting the requirements of Rule 430A of the rules and regulations of the Commission) heretofore filed by the Company with the Commission have been delivered to you.

**1** \_\_\_\_\_ Plus an option to purchase from the Company up to an aggregate of \_\_\_\_\_ additional shares to cover over-allotments.



(a) The term “Registration Statement” as used in this Agreement shall mean such registration statement, including all exhibits and financial statements, all information omitted therefrom in reliance upon Rule 430A and contained in the Prospectus referred to below, in the form in which it became effective, and any registration statement filed pursuant to Rule 462(b) of the rules and regulations of the Commission with respect to the Shares (herein called a “Rule 462(b) registration statement”), and, in the event of any amendment thereto after the effective date of such registration statement (the “Effective Date”), shall also mean (from and after the effectiveness of such amendment) such registration statement as so amended (including any Rule 462(b) registration statement). The term “Prospectus” as used in this Agreement shall mean the prospectus relating to the Stock first filed with the Commission pursuant to Rule 424(b) and Rule 430A (or if no such filing is required, as included in the Registration Statement) and, in the event of any supplement or amendment to such prospectus after the Effective Date, shall also mean (from and after the filing with the Commission of such supplement or the effectiveness of such amendment) such prospectus as so supplemented or amended. The term “Preliminary Prospectus” as used in this Agreement shall mean each preliminary prospectus included in such registration statement prior to the time it becomes effective.

(b) The Registration Statement has been declared effective under the Securities Act, and no post-effective amendment to the Registration Statement has been filed as of the date of this Agreement. The Company has caused to be delivered to you copies of each Preliminary Prospectus and has consented to the use of such copies for the purposes permitted by the Securities Act.

**2. Representations and Warranties of the Company.** The Company hereby represents and warrants to the Underwriter as follows:

(a) Neither the Commission nor any state securities commission has issued any order preventing or suspending the use of any Preliminary Prospectus or has instituted or, to the Company’s knowledge, threatened to institute any proceedings with respect to such an order. The Registration Statement and the Prospectus comply, and on the Closing Date (as hereinafter defined) and any later date on which the Option Stock is to be purchased, the Prospectus will comply, in all material respects, with the provisions of the Securities Act and the rules and regulations of the Commission thereunder (the “Securities Act and Rules”). On the Effective Date, the Registration Statement did not contain any untrue statement of a material fact and did not omit to state any material fact required to be stated therein or necessary in order to make the statements therein not misleading, and on the Effective Date the Prospectus did not and, on the Closing Date and any later date on which the Option Stock is to be purchased, will not contain any untrue statement of a material fact and did not omit to state any material fact required to be stated therein, or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading; *provided, however*, that none of the representations and warranties in this subparagraph 2(a) shall apply to statements in, or omissions from, the Registration Statement or the Prospectus made in reliance upon and in conformity with information herein or otherwise furnished in writing to the Company by or on behalf of the Underwriter expressly for use in the Registration Statement or Prospectus.

(b) Each of the Company and its subsidiaries (i) has been duly organized and is validly existing and in good standing under the laws of its jurisdiction of

incorporation or formation, as the case may be, having full power and corporate authority to own or lease its properties and to conduct its business as described in the Prospectus; and (ii) is duly qualified to do business as a foreign corporation and is in good standing in all jurisdictions in which the character of the property owned or leased or the nature of the business transacted by it makes qualification necessary (except where the failure to be so qualified would not have a material adverse effect on the business, properties, financial condition or results of operations of the Company and its subsidiaries, taken as a whole). The Company and its subsidiaries do not own any capital stock or other equity securities in any other entity.

(c) The outstanding shares of the Company's capital stock have been duly authorized and validly issued by the Company and are fully paid and nonassessable, and were issued in transactions that were exempt from the registration requirements of the Securities Act, without violation of any preemptive rights, rights of first refusal or similar rights. Except as created hereby or otherwise described in the Prospectus, there are no outstanding options, warrants, rights or other arrangements requiring the Company at any time to issue any capital stock. No holders of outstanding shares of capital stock of the Company are entitled as such to any preemptive or other rights to subscribe for any of the Shares, and neither the filing of the Registration Statement nor the offering or sale of the Shares as contemplated by this Agreement gives rise to any rights, other than those that have lapsed or have been waived or satisfied, for or relating to, the registration of any securities of the Company. The Shares are duly authorized, and will be, when sold to the Underwriter as provided herein, validly issued, fully paid and nonassessable and conform to the description thereof contained in the Prospectus. No further approval or authority of the stockholders or the Board of Directors of the Company will be required for the issuance and sale of the Shares as contemplated herein. The outstanding shares of capital stock or ownership interests of each of its subsidiaries have been duly authorized and validly issued, are fully paid and nonassessable, and, except as disclosed in the Prospectus, are solely owned by the Company free and clear of all liens, encumbrances and equities and claims; and no options, warrants or other rights to purchase, agreements or other obligations to issue or other rights to convert any obligations into shares of capital stock or ownership interests in such subsidiary are outstanding.

(d) The Company has full legal right, power and authority to enter into this Agreement and to consummate the transactions provided for herein. This Agreement has been duly authorized, executed and delivered by the Company and, assuming it is a binding agreement of the Underwriter, constitutes a legal, valid and binding agreement of the Company enforceable against the Company in accordance with its terms (except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or other laws of general application relating to or affecting the enforcement of creditors' rights and the application of equitable principles relating to the availability of remedies and except as rights to indemnity or contribution may be limited by federal or state securities laws and the public policy underlying such laws), and none of the Company's execution or delivery of this Agreement, its performance hereunder, its consummation of the transactions contemplated herein, its application of the net proceeds of the offering in the manner set forth under the caption "Use of Proceeds" or the conduct of its business as described in the Prospectus, conflicts or will conflict with or results or will result in any breach or violation of any of the terms or provisions of, or constitutes or will constitute a default under, causes or will cause (or permits or will permit) the maturation or acceleration of any liability or obligation or the termination of any right under, or result in the

creation or imposition of any lien, charge or encumbrance upon, any property or assets of the Company or any of its subsidiaries pursuant to the terms of (i) the articles of incorporation or bylaws of the Company or any of its subsidiaries; (ii) any indenture, mortgage, deed of trust, voting trust agreement, stockholders' agreement, note agreement or other agreement or instrument to which the Company or any of its subsidiaries is a party or by which it is bound or to which its respective property is subject; or (iii) any statute, judgment, decree, order, rule or regulation applicable to the Company or any of its subsidiaries of any government, arbitrator, court, regulatory body or administrative agency or other governmental agency or body, domestic or foreign, having jurisdiction over the Company or any of its subsidiaries, or their activities or properties, which would materially and adversely affect the business or properties of the Company and its subsidiaries, taken as a whole.

(e) The Common Stock has been approved for quotation on The Nasdaq National Market and, prior to the Closing Date, (i) the Common Stock shall be listed and duly admitted to trading on The Nasdaq National Market and (ii) the Shares will be authorized for inclusion in The Nasdaq National Market.

(f) The financial statements of the Company and its subsidiaries and the related notes and schedules thereto included in the Registration Statement and the Prospectus fairly present the financial position, results of operations, stockholders' equity and cash flows of the Company and its subsidiaries at the dates and for the periods specified therein. Such financial statements and the related notes and schedules thereto have been prepared in accordance with generally accepted accounting principles consistently applied throughout the periods involved (except as otherwise noted therein) and all adjustments necessary for a fair presentation of results for such periods have been made; *provided, however*, that the unaudited financial statements are subject to normal year-end audit adjustments (which are not expected to be material) and do not contain all footnotes required under generally accepted accounting principles. The summary and selected financial and statistical data included in the Registration Statement and the Prospectus present fairly the information shown therein and such data have been prepared on a basis consistent with the financial statements contained therein and in the books and records of the Company.

(g) PriceWaterhouseCoopers LLP, who have certified our consolidated balance sheets, related consolidated statements of operations, stockholders' equity, and cash flows as of December 31, 2001 and 2000, and our results of operations and cash flows for each of the three years in the period ended December 30, 2001, filed with the Commission as part of the Registration Statement, have represented to the Company that they are independent public accountants as required by the Securities Act and the rules and regulations promulgated thereunder.

(h) Arthur Andersen LLP, who have certified the financial statements of Gear.com, Inc., a Washington corporation, for the year ended December 31, 1999, filed with the Commission as part of the Registration Statement, have represented to the Company that they are independent public accountants as required by the Securities Act and the rules and regulations promulgated thereunder.

(i) Each of the Company and its subsidiaries maintains a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(j) Subject to applicable law and except as disclosed in the Prospectus, none of the Company's subsidiaries is currently prohibited, directly or indirectly, from paying any dividends to the Company, from making any other distribution on the subsidiary's capital stock, from repaying to the Company any loans or advances to the subsidiary from the Company or from transferring any of such subsidiary's property or assets to the Company.

(k) The Company and its subsidiaries have filed all necessary federal, state and local income, franchise and other material tax returns and have paid all taxes shown as due thereunder, and the Company and its subsidiaries have no tax deficiency that has been or, to their knowledge, that might be assessed against the Company and its subsidiaries that, if so assessed, would materially and adversely affect the business or properties of the Company and its subsidiaries, taken as a whole. All tax liabilities accrued through the date hereof have been adequately provided for on the books of the Company and its subsidiaries.

(l) The Company and its subsidiaries maintain insurance underwritten by insurers of recognized financial responsibility of the types and in amounts and with such deductibles as customary for companies in the same or similar business, all of which insurance is in full force and effect.

(m) Except as disclosed in the Prospectus, there is no action, suit, claim, proceeding or investigation pending or, to the Company's knowledge, threatened against the Company or any of its subsidiaries before or by any court, regulatory body or administrative agency or any other governmental agency or body, domestic or foreign, that (i) questions the validity of the capital stock of the Company or this Agreement or of any action taken or to be taken by the Company pursuant to or in connection with this Agreement; (ii) is required to be disclosed in the Registration Statement, which is not so disclosed (and such proceedings, if any, as are summarized in the Registration Statement are accurately summarized in all material respects); or (iii) may have a material adverse affect upon the business operations, financial conditions or income of the Company and its subsidiaries, taken as a whole.

(n) All executed agreements or copies of executed agreements filed or incorporated by reference as exhibits to the Registration Statement have been duly and validly authorized, executed and delivered by the Company or such subsidiary and constitute the legal, valid and binding agreements of the Company or such subsidiary enforceable by and against it in accordance with their respective terms (except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization or other similar laws relating to enforcement of creditors' rights generally, and general equitable principles relating to the availability of

remedies, and except as rights to indemnity or contribution may be limited by federal or state securities laws and the public policy underlying such laws). The descriptions in the Registration Statement of contracts and other documents are accurate and fairly present the information required to be shown with respect thereto by the Securities Act and Rules, and there are no contracts or other documents that are required by the Securities Act or Rules to be described in the Registration Statement or filed as exhibits to the Registration Statement that are not described or filed as required and the exhibits that have been filed are complete and correct copies of the documents of which they purport to be copies. Except for such rights as described in the Registration Statement and the Prospectus, no party has any right to require the Company to register any securities for sale under the Securities Act.

(o) Since the respective dates as of which information is given in the Registration Statement and the Prospectus, and except as expressly contemplated therein, neither the Company nor any of its subsidiaries has incurred, other than in the ordinary course of its business, any material liabilities or obligations, direct or contingent, purchased any of its outstanding capital stock, paid or declared any dividends or other distributions on its capital stock or entered into any material transactions, and there has been no material change in capital stock or debt or any material adverse change in the business, properties, assets, net worth, condition (financial or otherwise) or results of operations of the Company and its subsidiaries, taken as a whole, whether or not arising from transactions in the ordinary course of business.

(p) Neither the Company nor any of its subsidiaries is, or with the giving of notice or lapse of time or both, will be, in violation of or in default under, any term or provision of (i) its articles of incorporation or bylaws; (ii) any indenture, mortgage, deed of trust, voting trust agreement, stockholders' agreement, note agreement or other agreement or instrument to which it is a party or by which it is bound or to which any of its property is subject, or any indebtedness, the effect of which breach or default singly or in the aggregate may have a material adverse effect on the business, management, properties, assets, rights, operations, or condition (financial or otherwise) of the Company and its subsidiaries, taken as a whole; or (iii) any statute, judgment, decree, order, rule or regulation applicable to the Company or such subsidiary or of any arbitrator, court, regulatory body, administrative agency or any other governmental agency or body, domestic or foreign, having jurisdiction over the Company or such subsidiary or its activities or properties and the effect of which violation or default singly or in the aggregate may have a material adverse effect on the business, management, properties, assets, rights, operations or condition (financial or otherwise) of the Company and its subsidiaries, taken as a whole.

(q) The Company has not incurred any liability for a fee, commission, or other compensation on account of the employment of a broker or finder in connection with the transactions contemplated by this Agreement other than as contemplated hereby.

(r) No labor disturbance by the employees of the Company or any of its subsidiaries or principal suppliers or customers exists or, to the Company's knowledge, is imminent.

(s) Except as disclosed in the Prospectus, each of the Company and its subsidiaries owns, is licensed or otherwise possesses all rights to use, all patents, patent rights,

inventions, know-how (including trade secrets and other unpatented or unpatentable proprietary or confidential information, systems or procedures), trademarks, service marks, trade names, copyrights and other intellectual property rights (collectively, the “Rights”) necessary for the conduct of its business as described in the Prospectus. Except as disclosed in the Prospectus, to the Company’s knowledge, no claims have been asserted against the Company or any of its subsidiaries by any person with respect to the use of any such Rights or challenging or questioning the validity or effectiveness of any such Rights. The continued use of the Rights in connection with the business and operations of the Company and its subsidiaries does not, to the knowledge of the Company and its subsidiaries, infringe on the rights of any person, which, if the subject of an unfavorable decision, ruling or filing, would have a material adverse effect on the financial condition, business or properties of the Company and its subsidiaries, taken as a whole.

(t) The Company and its subsidiaries are conducting their businesses in compliance with all applicable laws, ordinances or governmental rules or regulations of the jurisdictions in which they are conducting business, except where the failure to be so in compliance would not materially and adversely affect the business or properties of the Company and its subsidiaries, taken as a whole. Each approval, consent, order, authorization, designation, declaration or filing by or with any regulatory, administrative or other governmental body necessary in connection with the execution and delivery by the Company and the Selling Stockholder of this Agreement and the consummation of the transactions herein contemplated (except such additional steps as may be required by the National Association of Securities Dealers, Inc. (the “NASD”), the Securities Act, the Securities Exchange Act of 1934, as amended (the “Exchange Act”), or to qualify or exempt the Shares for public offering by the Underwriter under state securities or Blue Sky laws) has been obtained or made and is in full force and effect.

(u) Neither the Company, nor, to the Company’s knowledge, any of its officers, directors or affiliates (within the meaning of the rules and regulations promulgated under the Securities Act), has taken or may take, directly or indirectly, any action designed to cause or result in, or that has constituted or that might reasonably be expected to constitute, the stabilization or manipulation of the price of the shares of Common Stock of the Company, to facilitate the sale or resale of the Shares or otherwise.

(v) Neither the Company nor any of its subsidiaries is, or after giving effect to the issuance and sale of the Shares by the Company will be, an “investment company” within the meaning of such term under the Investment Company Act of 1940, as amended, and the rules and regulations of the Commission promulgated thereunder.

(w) There are no transfer taxes or similar fees or charges under federal law or the laws of any state, or any political subdivision thereof, required to be paid in connection with the execution and delivery of this Agreement or the issuance and sale by the Company of the Shares.

(x) The Company and its subsidiaries have good and marketable title to all properties and assets described in the Prospectus as owned by them, free and clear of all liens, encumbrances, security interests, equities, claims and defects, except such as are described

in the Registration Statement and Prospectus, or such as are not materially important in relation to the business of the Company and its subsidiaries, taken as a whole. The Company has valid and enforceable leases for the properties described in the Prospectus as leased by it, free and clear of all liens, encumbrances, security interests, equities, claims and defects, except such as are not material and do not interfere with the use made by the Company and its subsidiaries thereof and except as disclosed in the Prospectus. The Company and its subsidiaries own or lease all such properties as are necessary to their operations as now conducted, as set forth in the Registration Statement and the Prospectus and the properties and business of the Company and its subsidiaries conform in all material respects to the descriptions thereof contained in the Registration Statement and the Prospectus.

(y) Each of the Company and its subsidiaries holds all franchises, licenses, permits, approvals, certificates and other authorizations from federal, state and other governmental or regulatory authorities necessary to the ownership, leasing and operation of its properties or required for the present conduct of its business, and such franchises, licenses, permits, approvals, certificates and other governmental authorizations are in full force and effect and the Company and its subsidiaries are in compliance therewith in all material respects, except where the failure so to obtain, maintain or comply with would not have a materially adverse effect on the business, financial condition or results of operations of the Company and its subsidiaries, taken as a whole.

(z) The Company and its subsidiaries are in compliance in all material respects with all presently applicable provisions of the Employee Retirement Income Security Act of 1974, as amended, including the regulations and published interpretations thereunder (herein called "ERISA"); no "reportable event" (as defined in ERISA) has occurred with respect to any "pension plan" (as defined in ERISA) for which the Company or any of its subsidiaries would have any liability; the Company and its subsidiaries have not incurred and do not expect to incur liability under (i) Title IV of ERISA with respect to termination of, or withdrawal from, any "pension plan"; or (ii) Sections 412 or 4971 of the Internal Revenue Code of 1986, as amended, including the regulations and published interpretations thereunder (the "Code"); and each "Pension Plan" for which the Company and its subsidiaries would have liability that is intended to be qualified under Section 401(a) of the Code is so qualified in all material respects and nothing has occurred, whether by action or by failure to act, which would cause the loss of such qualification.

(aa) No relationship, direct or indirect, exists between or among the Company or its subsidiaries, on the one hand, and the current or prior directors, officers, stockholders, customers or suppliers of the Company or its subsidiaries, on the other hand, which is required to be described in the Prospectus that is not so described.

(bb) Neither the Company nor any of its subsidiaries, nor to the Company's knowledge any director, officer, agent, employee or other person associated with or acting on behalf of the Company or any of its subsidiaries, has used any corporate funds for any unlawful contribution, gift, entertainment or other unlawful expense relating to political activity; made any direct or indirect unlawful payment to any foreign or domestic government official or employee from corporate funds; violated or is in violation of any provisions of the Foreign

Corrupt Practices Act of 1972; or made any bribe, rebate, payoff, influence, payment, kickback or other unlawful payment.

(cc) The business, operations and facilities of the Company and each of its subsidiaries have been and are being conducted or operated in compliance with all applicable laws, ordinances, rules, regulations, licenses, permits, approvals, plans, authorizations or requirements relating to occupational safety and health, pollution, protection of health or the environment (including, without limitation, those relating to emissions, discharges, release or threatened releases of pollutants, contaminants or hazardous or toxic substances, materials or wastes into ambient air, surface water, groundwater or land, or relating to the manufacture, processing, distribution, use treatment, storage, disposal, transport or handling of chemical substances, pollutants, contaminants or hazardous or toxic substances, materials or wastes, whether solid, gaseous or liquid in nature) or otherwise relating to remediating real property in which the Company or any of its subsidiaries has or has had any interest, whether owned or leased, of any governmental department, commission, board, bureau, agency or instrumentality of the United States, any state or political subdivision thereof and all applicable judicial or administrative agency or regulatory decrees, awards, judgments and orders relating thereto, except for such failures to so comply as would not, individually or in the aggregate, have a material adverse effect on the business of the Company and its subsidiaries taken as a whole, and neither the Company nor any of its subsidiaries has received any notice from a governmental instrumentality or any third party alleging any violation thereof or liability thereunder (including, without limitation, liability for costs of investigating or remediating sites containing hazardous substances or damage to natural resources).

(dd) Neither the Company nor any of its subsidiaries, nor to the Company's knowledge any officer or employee of the Company or any of its subsidiaries, is a party to any contract or commitment that restricts in any material respect the ability of the Company, any of its subsidiaries or such individual to engage in the business of the Company or such subsidiary as described in the Registration Statement and the Prospectus.

**3. Representations and Warranties of the Selling Stockholder.** The Selling Stockholder hereby represents and warrants to the Underwriter as follows:

(a) The Selling Stockholder has good and marketable title to all the Shares to be sold by such Selling Stockholder hereunder, free and clear of all liens, encumbrances, equities, security interests and claims whatsoever, with full right and authority to deliver the same hereunder, subject to the rights of Equiserve Trust Company, N.A. as custodian (herein called the "Custodian"), and that upon the delivery of and payment for such Shares hereunder, the Underwriter will receive good and marketable title thereto, free and clear of all liens, encumbrances, equities, security interests and claims whatsoever. Certificates in negotiable form for the Shares to be sold by the Selling Stockholder have been placed in custody under a Custody Agreement for delivery under this Agreement with the Custodian; the Selling Stockholder specifically agrees that the Shares represented by the certificates so held in custody for the Selling Stockholder are subject to the interests of the Underwriter, that the arrangements made by the Selling Stockholder for such custody, including the Selling Stockholder's Irrevocable Power of Attorney, are to the extent specified in such documents, irrevocable, and that the obligations of the Selling Stockholder shall not be terminated by any act of the Selling



Stockholder or by operation of law, whether by the dissolution or liquidation of the Selling Stockholder or the occurrence of any other event except in conformity with such documents; if any such dissolution, liquidation or other such event should occur before the delivery of such Shares hereunder, certificates for such Shares shall be delivered by the Custodian in accordance with the terms and conditions of this Agreement as if such dissolution, liquidation or other event had not occurred, regardless of whether the Custodian shall have received notice of such dissolution, liquidation or other event.

(b) The performance of this Agreement, the Selling Stockholder's Irrevocable Power of Attorney and the Custody Agreement and the consummation of the transactions herein and therein contemplated will not result in a breach or violation of any agreement to which the Selling Stockholder is a party or by which the Selling Stockholder is bound, other than a breach or violation that would not have a material adverse effect on the Selling Stockholder's ability to perform its obligations under this Agreement.

(c) The Selling Stockholder has not taken, directly or indirectly, any action which has constituted unlawful stabilization or manipulation of the price of sale or resale of the Shares.

(d) The Selling Stockholder has not distributed any offering material in connection with the offering and sale of the Shares other than any Preliminary Prospectus, the Prospectus, the Registration Statement and other materials, if any, permitted by the Securities Act.

(e) This Agreement, the Selling Stockholder's Irrevocable Power of Attorney and the Custody Agreement have been duly authorized, executed and delivered by the Selling Stockholder and are valid and binding obligations of the Selling Stockholder.

#### **4. Purchase of the Shares by the Underwriter.**

(a) On the basis of the representations and warranties and subject to the terms and conditions herein set forth, the Company and the Selling Stockholder shall sell the Underwritten Stock to the Underwriter, and the Underwriter agrees to purchase from the Company and the Selling Stockholder, the Underwritten Stock. The price at which such shares of Underwritten Stock shall be sold by the Company and the Selling Stockholder and purchased by the Underwriter shall be [\$\_\_\_] per share (the "Purchase Price").

(b) On the basis of the representations, warranties and covenants herein contained, and subject to the terms and conditions herein set forth, the Company grants an option to the Underwriter to purchase the Option Stock at the Purchase Price. Said option may be exercised only to cover over-allotments in the sale of the Underwritten Stock by the Underwriter and may be exercised in whole or in part at any time (but not more than once) on or before the 30th day after the date of this agreement upon written or electronic notice by the Underwriter to the Company setting forth the aggregate number of shares of Option Stock as to which the Underwriter is exercising the option. Delivery of the certificates for the shares of Option Stock, and payment therefor shall be made as provided in Section 5 hereof. The number

of shares of the Option Stock to be purchased by the Underwriter shall be in such amounts as the Underwriter shall agree upon prior to the exercise of the option set forth hereunder.

**5. Offering by the Underwriter.**

(a) The terms of the initial public offering by the Underwriter of the Shares to be purchased by the Underwriter shall be as set forth in the Prospectus. The Underwriter may from time to time change the public offering price after the closing of the initial public offering and increase or decrease the concessions and discounts to dealers as the Underwriter may determine.

(b) The information set forth in the paragraph describing the "OpenIPO" process on the front cover page, in the second to last paragraph on page five under the caption "The Offering" and under the caption "Plan of Distribution" in the Registration Statement, any Preliminary Prospectus and the Prospectus relating to the Shares filed by the Company (insofar as such information relates to the Underwriter or related persons) constitutes the only information furnished by the Underwriter to the Company and the Selling Stockholder for inclusion in the Registration Statement, any Preliminary Prospectus and the Prospectus, and you represent and warrant to the Company and the Selling Stockholder that the statements made therein (insofar as they relate to the Underwriter or related persons) are correct and do not omit any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading.

**6. Delivery of and Payment for the Shares.**

(a) Delivery of certificates for the shares of the Underwritten Stock and the Option Stock (if the option granted by Section 3(c) hereof shall have been exercised not later than 7:00 A.M., San Francisco time, on the date two business days preceding the Closing Date), and payment therefor, shall be made at the office of Wilson Sonsini Goodrich and Rosati, [\_\_\_\_\_] on the third (fourth, if the pricing occurs after 4:30 p.m. (Eastern Time) on any given day) business day after the date of this Agreement, or at such time on such other day, not later than seven full business days after such third business day, as shall be agreed upon in writing by the Company, the Selling Stockholder and you. The date and hour of such delivery and payment are herein called the Closing Date.

(b) If the option granted by Section 4(b) hereof shall be exercised after 7:00 A.M., San Francisco time, on the date two business days preceding the Closing Date, delivery of certificates for the shares of Option Stock, and payment therefor, shall be made at the office of Wilson Sonsini Goodrich & Rosati, [\_\_\_\_\_] at 7:00 A.M., San Francisco time, on the third business day after the exercise of such Option, or at such time on such other day, not later than seven full business days after such third business day, as shall be agreed upon in writing by the Company and you.

(c) Payment for the Shares purchased from the Company and the Selling Stockholder shall be made to the Company or its order and the Selling Stockholder by wire transfer or one or more certified or official bank check or checks in same day funds. Such payment shall be made upon delivery of certificates for the Shares to you against receipt therefor

signed by you. Certificates for the Shares to be delivered to you shall be registered in the name or names and shall be in such denominations as you may request at least one business day before the Closing Date, in the case of Underwritten Stock, and at least one business day prior to the purchase thereof, in the case of Option Stock. Such certificates will be made available to the Underwriter for inspection, checking and packaging on the business day preceding the Closing Date or, in the case of Option Stock, by 12:00 P.M., San Francisco time, on the business day preceding the date of purchase.

(d) The Selling Stockholder will pay all applicable state transfer taxes, if any, involved in the transfer to the Underwriter of the Shares to be purchased by them from such Selling Stockholder, and the Underwriter will pay any additional stock transfer taxes involved in further transfers.

**7. Covenants of the Company.** The Company covenants and agrees as follows:

(a) The Company will (i) prepare and timely file with the Commission under Rule 424(b) a Prospectus containing information previously omitted at the time of effectiveness of the Registration Statement in reliance on Rule 430A; and (ii) not file with the Commission any amendment to the Registration Statement or supplement to the Prospectus (A) of which the Underwriter shall not previously have been advised and furnished with a copy a reasonable period of time prior to the proposed filing and as to which filing the Underwriter shall not have given their consent or (B) of which is not in compliance with the Securities Act or the rules and regulations of the Commission thereunder.

(b) As soon as the Company is advised or obtains knowledge thereof, the Company will advise the Underwriter (i) of any request made by the Commission for amendment of the Registration Statement, for supplement to the Prospectus or for additional information; (ii) of the issuance by the Commission of any stop order suspending the effectiveness of the Registration Statement, or the institution or threat of any action, investigation or proceeding for that purpose; or (iii) the receipt by the Company of any notification with respect to the suspension of the qualification of the Shares for sale in any jurisdiction, or the receipt by it of notice of the initiation or threatening of any proceeding for that purpose. The Company will use its best efforts to prevent the issuance of any such order and, if issued, to obtain the lifting or withdrawal thereof as soon as possible.

(c) The Company will (i) on or before the Closing Date, deliver to the Underwriter a signed copy of the Registration Statement as originally filed and of each amendment thereto filed prior to the time the Registration Statement becomes effective and, promptly upon the filing thereof, a signed copy of each post-effective amendment, if any to the Registration Statement (together with, in each case, all exhibits thereto unless previously delivered to the Underwriter); (ii) as promptly as possible deliver to the Underwriter, at such office as the Underwriter may designate, as many copies of the Prospectus as the Underwriter may reasonably request; and (iii) thereafter from time to time during the period in which a prospectus is required by law to be delivered by an Underwriter or dealer, likewise send to the Underwriter as many additional copies of the Prospectus and as many copies of any supplement

to the Prospectus and of any amended prospectus, filed by the Company with the Commission, as the Underwriter may reasonably request for the purposes contemplated by the Securities Act.

(d) If at any time during the period in which a prospectus is required by law to be delivered by an Underwriter or dealer any event relating to or affecting the Company, or of which the Company shall be advised in writing by the Underwriter, shall occur as a result of which it is necessary, in the opinion of counsel for the Company or of counsel for the Underwriter, to supplement or amend the Prospectus in order to make the Prospectus not misleading in the light of the circumstances existing at the time it is delivered to a purchaser of the Shares, the Company will forthwith prepare and file with the Commission a supplement to the Prospectus or an amended prospectus so that the Prospectus as so supplemented or amended will not contain any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements therein, in the light of the circumstances existing at the time such Prospectus is delivered to such purchaser, not misleading. If, after the initial public offering of the Shares by the Underwriter and during such period, the Underwriter shall propose to vary the terms of the offering thereof by reason of changes in general market conditions or otherwise, you will advise the Company in writing of the proposed variation, and, if in the opinion either of counsel for the Company or of counsel for the Underwriter such proposed variation requires that the Prospectus be supplemented or amended, the Company will forthwith prepare and file with the Commission a supplement to the Prospectus or an amended prospectus setting forth such variation. The Company authorizes the Underwriter and all dealers to whom any of the Shares may be sold by the Underwriter to use the Prospectus, as from time to time amended or supplemented, in connection with the sale of the Shares in accordance with the applicable provisions of the Securities Act and the applicable rules and regulations thereunder for such period.

(e) Prior to the filing thereof with the Commission, the Company will submit to you and the Selling Stockholder, for your information, a copy of any post-effective amendment to the Registration Statement and any supplement to the Prospectus or any amended prospectus proposed to be filed.

(f) The Company will cooperate, when and as requested by you, in the qualification of the Shares for offer and sale under the securities or blue sky laws of such jurisdictions as you may designate and, during the period in which a prospectus is required by law to be delivered by an Underwriter or a dealer, in keeping such qualifications in good standing under said securities or blue sky laws; *provided, however*, that the Company shall not be required to qualify as a foreign corporation or file any general consent to service of process in any jurisdiction in which it is not so qualified. The Company will from time to time, prepare and file such statements, reports and other documents as are or may be required to continue such qualifications in effect for so long a period as you may reasonably request for distribution of the Shares.

(g) The Company agrees to pay the costs and expenses relating to the following matters: (A) the preparation, printing or reproduction and filing with the Commission of the Registration Statement (including financial statements and exhibits thereto), each Preliminary Prospectus, the Prospectus, and each amendment or supplement to any of them; (B) the printing (or reproduction) and delivery (including postage, air freight charges and charges

for counting and packaging) of such copies of the Registration Statement, each Preliminary Prospectus, the Prospectus, and all amendments or supplements to any of them, as may, in each case, be reasonably requested for use in connection with the offering and sale of the Shares; (C) the preparation, printing, authentication, issuance and delivery of certificates for the Shares, including any stamp or transfer taxes in connection with the original issuance and sale of the Shares; (D) the printing (or reproduction) and delivery of this Agreement, any blue sky memorandum and all other agreements or documents printed (or reproduced) and delivered in connection with the offering of the Shares; (E) the registration of the Shares under the Exchange Act and the listing of the Shares on the Nasdaq National Market; (F) any registration or qualification of the Shares for offer and sale under the securities or blue sky laws of the several states any any other jurisdictions (including filing fees and the reasonable fees and expenses of counsel for the Underwriter relating to such registration and qualification); (G) any filings required to be made with the National Association of Securities Dealers, Inc. (including filing fees and the reasonable fees and expenses of counsel for the Underwriter relating to such filings); (H) the transportation and other expenses incurred by or on behalf of Company representatives in connection with presentations to prospective purchasers of the Shares; (I) the fees and expenses of the Company's accountants and the fees and expenses of counsel (including local and special counsel) for the Company; and (J) all other costs and expenses incident to the performance by the Company and the Selling Stockholder of their obligations hereunder, including, without limitation, amounts payable under that certain Registration and Expenses Agreement among the Selling Stockholder and the Company.

(h) As soon as practicable, but in any event not later than 45 days after the end of the first fiscal quarter first occurring after the first anniversary of the Effective Date, the Company will make generally available to its security holders, in the manner specified in Rule 158(b) of the rules and regulations promulgated under the Securities Act, an earnings statement that will be in the detail required by, and will otherwise comply with, the provisions of Section 11(a) of the Securities Act and Rule 158(a) of the rules and regulations promulgated thereunder.

(i) During a period of three years after the date hereof, the Company will furnish or make available to you copies of all periodic and special reports furnished to Stockholders of the Company and of all information, documents and reports filed with the Commission.

(j) The Company will maintain a transfer agent and, if necessary under the jurisdiction of incorporation of the Company, a registrar (which may be the same entity as the transfer agent) for its Common Stock.

(k) The Company will not, directly or indirectly, without the prior written consent of WR Hambrecht + Co., LLC, issue, offer, sell, grant any option to purchase or otherwise dispose (or announce any issuance, offer, sale, grant of any option to purchase or other disposition) of any shares of Common Stock or any securities convertible into, or exchangeable or exercisable for, shares of Common Stock for a period of 180 days following the commencement of the public offering of the Shares by the Underwriter, except pursuant to this Agreement and except for issuances pursuant to the exercise of stock options outstanding on or

granted subsequent to the date hereof, pursuant to a stock option or other employee benefit plan in existence on the date hereof and except as contemplated by the Prospectus.

(l) The Company will cause the Shares to be duly included for quotation on the Nasdaq National Market prior to the Closing Date.

(m) The Company will not take, directly or indirectly, and will use its best efforts to cause its officers, directors or affiliates not to take, directly or indirectly, any action designed to, or that might in the future reasonably be expected to cause or result in, stabilization or manipulation of the price of any securities of the Company.

(n) The Company will apply the net proceeds of the offering received by it in the manner set forth under the caption "Use of Proceeds" in the Prospectus.

(o) The Company will use its best efforts to timely file all such reports, forms or other documents as may be required from time to time, under the Securities Act, the rules and regulations promulgated thereunder, the Exchange Act and the rules and regulations promulgated thereunder, and all such reports, forms and documents filed will comply as to form and material substance with the applicable requirements under the Securities Act, the rules and regulations promulgated thereunder, the Exchange Act and the rules and regulations promulgated thereunder.

(p) The Company is familiar with the Investment Company Act of 1940, as amended, and has in the past conducted its affairs, and will in the future conduct its affairs, in such a manner to ensure that the Company was not and will not be an "investment company" or a "company" controlled by an "investment company" within the meaning of the Investment Company Act of 1940, as amended, and the rules and regulations thereunder.

(q) The Company either has caused to be delivered to you or will cause to be delivered to you prior to the effective date of the Registration Statement a letter (the "Lock-Up Agreement") from (i) each of the Company's directors, executive officers, and five percent (5%) stockholders (other than the Selling Stockholder) stating that such person agrees that he or she will not, without the prior written consent of WR Hambrecht + Co., LLC directly or indirectly, sell, offer, contract or grant any option to sell (including without limitation any short sale), pledge, transfer, establish an open "put equivalent position" within the meaning of Rule 16a-1(h) under the Exchange Act or otherwise dispose of (or enter into any transaction that is designed to, or could be expected to, result in the disposition by any person of) any shares of Common Stock, options or warrants to acquire shares of Common Stock, or securities exchangeable or exercisable for or convertible into shares of Common Stock currently or hereafter owned either of record or beneficially (within the meaning of Rule 13d-3 under the Exchange Act) by him or her, or publicly announce his or her intention to do any of the foregoing, prior to the date of the Prospectus for a period of 180 days after the first date any Underwritten Stock is released by the Underwriter for sale to the public and (ii) certain of the Company's other Stockholders, constituting in the aggregate at least 90% of the Stockholders of the company, calculated on an as-diluted basis, containing identical restrictions to the Lock-Up Agreements referred to in (i) above.

**8. Covenants of the Selling Stockholder. The Selling Stockholder covenants and agrees as follows:**

(a) Such Selling Stockholder will not take any action which constitutes unlawful stabilization or manipulation of the price of any security of the Company to facilitate the sale or resale of the Shares.

(b) Such Selling Stockholder will advise you promptly, and if requested by you, will confirm such advice in writing, so long as delivery of a prospectus relating to the Shares by an underwriter or dealer may be required under the Securities Act, of any change in information in the Registration Statement or the Prospectus relating to such Selling Stockholder's good and marketable title to the Shares to be sold by the Selling Stockholder hereunder.

(c) Such Selling Stockholder will not distribute prior to the later of (i) any date on which Option Stock are to be purchased, and (ii) completion of the distribution of the Shares, any offering material in connection with the offering and sale of the Shares other than any Preliminary Prospectus, the Prospectus, the Registration Statement and other materials, if any, permitted by the Securities Act.

(d) Such Selling Stockholder will comply with the agreement contained in Section 6(d).

**9. Conditions of the Underwriter' Obligations.** The obligations of the Underwriter under this Agreement are subject to the performance by each of the Company and the Selling Stockholder on and as of the Closing Date or any later date on which Option Stock is to be purchased, as the case may be, of its respective covenants and agreements hereunder, and the following additional conditions:

(a) The Registration Statement shall have become effective, and no stop order suspending the effectiveness of the Registration Statement shall have been issued, and no proceedings for that purpose shall have been instituted or threatened or, to the knowledge of the Company or the Underwriter, shall be contemplated by the Commission.

(b) The Underwriter shall be satisfied that (i) as of the Effective Date, the statements made in the Registration Statement and the Prospectus were true and correct and neither the Registration Statement nor the Prospectus omitted to state a fact required to be stated therein or is necessary to make the statements therein not misleading; (ii) since the Effective Date, no event has occurred that should have been set forth in a supplement or amendment to the Prospectus that has not been set forth in an effective supplement or amendment; (iii) since the respective dates as of which information is given in the Registration Statement in the form in which it originally became effective and the Prospectus contained therein, there has not been any material adverse change or any development involving a prospective material adverse change in the business, properties, financial condition or results of operations of the Company and its subsidiaries, taken as a whole, whether or not arising from transactions in the ordinary course of business, and since such dates, except in the ordinary course of business, neither the Company nor any of its subsidiaries has entered into any material transaction not referred to in the

Registration Statement in the form in which it originally became effective and the Prospectus contained therein; (iv) neither the Company nor any of its subsidiaries has any material contingent obligations that are not disclosed in the Registration Statement and the Prospectus; (v) there are no pending or, to the Company's knowledge, threatened legal proceedings to which the Company or any of its subsidiaries is a party or of which property of the Company or any of its subsidiaries is subject that are material and that are not disclosed in the Registration Statement and the Prospectus; (vi) there are not any franchises, contracts, leases or other documents that are required to be filed as exhibits to the Registration Statement that have not been filed as required; and (vii) the representations and warranties of the Company herein are true and correct in all material respects as of the Closing Date or any later date on which Option Stock is to be purchased, as the case may be.

(c) On or prior to the Closing Date, the legality and sufficiency of the sale of the Shares hereunder and the validity and form of the certificates representing the Shares, all corporate proceedings and other legal matters incident to the foregoing, and the form of the Registration Statement and of the Prospectus (except as to the financial statements contained therein), shall have been approved at or prior to the Closing Date by Morrison & Foerster LLP, counsel for the Underwriter. The Underwriter shall have received from counsel to the Underwriter, such opinion or opinions with respect to the issuance and sale of the Shares, the Registration Statement and the Prospectus and such other related matters as the Underwriter reasonably may request and such counsel shall have received such documents and other information as they request to enable them to pass upon such matters.

(d) On the Closing Date, and if Option Stock is purchased at any date after the Closing Date, on such later date, the Underwriter shall have received an opinion addressed to the Underwriter, dated the Closing Date or, if related to the later sale of Option Stock, such later date, of Wilson Sonsini Goodrich & Rosati, counsel to the Company, to the effect set forth in Exhibit A hereto. In rendering any such opinion, such counsel may rely, as to matters of fact, to the extent such counsel deems proper, on certificates of responsible officers of the Company and public officials. References to the Registration Statement and the Prospectus in this paragraph (d) shall include any amendment or supplement thereto at the date of such opinion.

(e) On the Closing Date the Underwriter shall have received an opinion addressed to the Underwriter, dated the Closing Date, of [\_\_\_\_], special counsel to the Selling Stockholder, to the effect set forth in Exhibit B hereto.

(f) You shall have received from PriceWaterhouseCoopers LLP a letter addressed to the Underwriter and dated the Closing Date and any later date on which Option Stock is purchased, confirming that PriceWaterhouseCoopers LLP are independent public accountants with respect to the Company within the meaning of the Securities Act and the applicable published rules and regulations thereunder and based upon the procedures described in their letter delivered to the Underwriter concurrently with the execution of this Agreement (the "Original Letter"), but carried out to a date not more than three business days prior to the Closing Date or such later date on which Option Stock is purchased (i) confirming, to the extent true, that the statements and conclusions set forth in the Original Letter are accurate as of the Closing Date or such later date, as the case may be; and (ii) setting forth any revisions and additions to the



statements and conclusions set forth in the Original Letter that are necessary to reflect any changes in the facts described in the Original Letter since the date of the Original Letter or to reflect the availability of more recent financial statements, data or information. The letters shall not disclose any change, or any development involving a prospective change, in or affecting the business or properties of the Company or any of its subsidiaries, which in your sole judgment, makes it impractical or inadvisable to proceed with the public offering of the Shares or the purchase of the Option Stock as contemplated by the Prospectus.

(g) You shall have received from PriceWaterhouseCoopers LLP a letter stating that their review of the Company's internal accounting controls, to the extent they deemed necessary in establishing the scope of their examination of the Company's consolidated balance sheets, related consolidated statements of operations, stockholders' equity, and cash flows as of December 31, 2001 and 2000, and the results of operations and cash flows for each of the three years in the period ended December 31, 2001, did not disclose any weaknesses in internal controls that they considered to be material weaknesses.

(h) You shall have received from Arthur Andersen LLP a letter stating that their review of Gear.com, Inc.'s internal accounting controls, to the extent they deemed necessary in establishing the scope of their examination of Gear.com, Inc.'s statements of operations, stockholders' equity and cash flows for the year ended December 31, 1999, did not disclose any weaknesses in internal controls that they considered to be material weaknesses.

(i) On the Closing Date, and on any later date on which Option Stock is purchased, you shall have received a certificate, dated the Closing Date or such later date, as the case may be, signed by the Chief Executive Officer and Chief Financial Officer of the Company stating that the respective signers of said certificate have carefully examined the Registration Statement in the form in which it originally became effective and the Prospectus contained therein and any amendments or supplements thereto and this Agreement, and that statements (i) through (vii) included in paragraph (b) of this Section 9 are true and correct.

(j) Prior to the Closing Date, the Company and the Selling Stockholder shall have furnished to the Representatives such further information, certificates and documents as the Representatives may reasonably request.

(k) You shall have been furnished evidence in usual written or electronic form from the appropriate authorities of the several jurisdictions, or other evidence satisfactory to you, of the qualification referred to in paragraph (f) of Section 7 hereof.

(l) Prior to the Closing Date, the Shares shall have been duly authorized for inclusion on the Nasdaq National Market upon official notice of issuance.

(m) On or prior to the Closing Date, the Underwriter shall have received from stockholders, constituting at least 90%, in the aggregate, of the stockholders of the Company (calculated on as-diluted basis), including but not limited to all directors, executive officers, and five percent (5%) stockholders (other than the Selling Stockholder), agreements, reasonably satisfactory to WR Hambrecht + Co., LLC, stating that such person or entity will not, without the prior written consent of WR Hambrecht + Co., LLC, offer, sell, contract to sell,

pledge, or otherwise dispose of, (or enter into any transaction which is designed to, or might reasonably be expected to, result in the disposition (whether by actual disposition or effective economic disposition due to cash settlement or otherwise) by such person or entity or any affiliate of such person or entity or any person in privity with such person or entity or any affiliate of such person or entity) directly or indirectly, including the filing (or participation in the filing) of a registration statement with the Commission in respect of, or establish or increase a put equivalent position or liquidate or decrease a call equivalent position within the meaning of Section 16 of the Exchange Act, any other shares of Common Stock or any securities convertible into, or exercisable, or exchangeable for, shares of Common Stock; or publicly announce an intention to effect any such transaction, for a period of 180 days after the Closing Date.

In case any of the conditions specified in this Section 9 shall not be fulfilled, this Agreement may be terminated by you by giving notice to the Company. Any such termination shall be without liability of the Company to the Underwriter and without liability of the Underwriter to the Company; *provided, however*, that (i) in the event of such termination, the Company agrees to indemnify and hold harmless the Underwriter from all costs or expenses incident to the performance of the obligations of the Company under this Agreement, including all costs and expenses referred to in paragraph (g) of Section 7 hereof; and (ii) if this Agreement is terminated by you because of any refusal or failure on the part of the Company to perform any agreement herein, to fulfill any of the conditions herein, or to comply with any provision hereof other than by reason of a default by any of the Underwriter, the Company will reimburse the Underwriter upon demand for all out-of-pocket expenses (including reasonable fees and disbursements of counsel) that shall have been incurred by them in connection with the transactions contemplated hereby.

**10. Conditions of the Obligations of the Company and the Selling Stockholder.**

(a) The obligations of the Company and the Selling Stockholder to deliver the Shares shall be subject to the conditions that (i) the Registration Statement shall have become effective and (ii) no stop order suspending the effectiveness thereof shall be in effect and no proceedings therefor shall be pending or threatened by the Commission. In addition, the obligations of the Selling Stockholder shall be subject to the Selling Stockholder Condition, as defined in the Registration and Expenses Agreement among the Company and the Selling Stockholder dated as of May \_\_, 2002.

(b) In case either of the conditions specified in paragraph (a) of this Section 10 shall not be fulfilled, this Agreement may be terminated by the Company by giving notice to you. Any such termination shall be without liability of the Company or the Selling Stockholder to the Underwriter and without liability of the Underwriter to the Company or the Selling Stockholder; *provided, however*, that in the event of any such termination the Company agrees to indemnify and hold harmless the Underwriter from all costs or expenses incident to the performance of the obligations of the Company under this Agreement, including all costs and expenses referred to in paragraphs (g) of Section 7 hereof.

## 11. Indemnification and Contribution.

(a) Subject to the provisions of paragraph (e) of this Section 11, the Company agrees to indemnify and hold harmless the Underwriter (and any person participating in the distribution who is deemed to be an underwriter (as defined in Section 2(11) of the Securities Act) and each person (including each member or officer thereof), if any, who controls any Underwriter within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act, and the Selling Stockholder, each of its directors and officers (including directors and officers of its direct or indirect parent) and each person who controls the Selling Stockholder within the meaning of Section 15 of the Securities Act and Section 20 of the Exchange Act, from and against any and all losses, claims, damages or liabilities, joint or several (and actions in respect thereof), to which such indemnified parties or any of them may become subject, under the Securities Act, the Exchange Act or other federal or state statutory law or regulation, at common law or otherwise, and the Company agrees to reimburse the Underwriter, Selling Stockholder and each such officer, director and controlling person for any legal or other expenses (including, except as otherwise hereinafter provided, reasonable fees and disbursements of counsel) incurred by the respective indemnified parties in connection with defending against any such losses, claims, damages or liabilities, or in connection with any investigation or inquiry of, or other proceeding that may be brought against, the respective indemnified parties, in each case arising out of or that are based upon (i) any untrue statement or alleged untrue statement of any material fact contained in the Registration Statement (including the Prospectus as part thereof and any Rule 462(b) registration statement) or any post-effective amendment thereto (including any Rule 462(b) registration statement) or the omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading, (ii) any untrue statement or alleged untrue statement of any material fact contained in any Preliminary Prospectus or the Prospectus (as amended or as supplemented if the Company shall have filed with the Commission any amendment thereof or supplement thereto) or the omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstance under which they were made, not misleading and (iii) any untrue statement or alleged untrue statement of any material fact contained in any audio or visual materials provided by the Company or based upon written information furnished by or on behalf of the Company including, without limitation, slides, videos, films or tape recordings used in connection with the marketing of the Shares, including without limitation, untrue or alleged untrue statements communicated to securities analysts employed by the Underwriter; *provided, however*, that (i) the indemnity agreement of the Company contained in this paragraph (a) shall not apply to any such loss, claim, damage, liability or action if such statement or omission was made in reliance upon and in conformity with information furnished as herein stated or otherwise furnished in writing to the Company by or on behalf of any Underwriter expressly for use in any Preliminary Prospectus or the Registration Statement or the Prospectus or any such amendment thereof or supplement thereto, (ii) the indemnity agreement of the Company contained in this paragraph (a) shall not apply to any such loss, claim, damage, liability or action if such statement or omission was made in conformity with the Selling Stockholder's statement that it has good and marketable title to the Shares to be sold by the Selling Stockholder hereunder and (iii) that the indemnity agreement contained in this paragraph (a) with respect to any Preliminary Prospectus shall not inure to the benefit of any Underwriter (or such persons) if the person asserting any such loss, claim, damage, liability or action purchased Shares that are the subject thereof to the extent that any such loss, claim, damage, liability or action (A) results from the fact that such Underwriter failed

to send or give a copy of the Prospectus (as amended or supplemented) to such person at or prior to the confirmation of the sale of such Shares to such person in any case where such delivery is required by the Securities Act and (B) arises out of or is based upon an untrue statement or omission of a material fact contained in such Preliminary Prospectus that was corrected in the Prospectus (as amended and supplemented), unless such failure resulted from non-compliance by the Company with paragraph (c) of Section 7 hereof. The indemnity agreements of the Company contained in this paragraph (a) and the representations and warranties of the Company contained in Section 2 hereof shall remain operative and in full force and effect regardless of any investigation made by or on behalf of any indemnified party and shall survive the delivery and payment for the Shares.

(b) Subject to the provisions of paragraph (e) of this Section 11, the Underwriter agrees to indemnify and hold harmless the Company, each of its directors, each of its officers who has signed the Registration Statement, each person, if any, who controls the Company within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act, and the Selling Stockholder, each of its directors and officers (including directors and officers of its direct or indirect parent) and each person who controls the Selling Stockholder within the meaning of Section 15 of the Securities Act and Section 20 of the Exchange Act, against any and all losses, claims, damages or liabilities, joint or several, to which such indemnified parties or any of them may become subject, under the Securities Act, the Exchange Act or other federal or state statutory law or regulation, at common law or otherwise and to reimburse each of them for any legal or other expenses (including, except as otherwise hereinafter provided, reasonable fees and disbursements of counsel) incurred by the respective indemnified parties in connection with defending against any such losses, claims, damages or liabilities or in connection with any investigation or inquiry of, or other proceeding that may be brought against, the respective indemnified parties, in each case arising out of or are based upon (i) any untrue statement or alleged untrue statement of any material fact contained in the Registration Statement (including the Prospectus as part thereof and any Rule 462(b) registration statement) or any post-effective amendment thereto (including any Rule 462(b) registration statement) or the omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading; or (ii) any untrue statement or alleged untrue statement of any material fact contained in any Preliminary Prospectus or the Prospectus (as amended or as supplemented if the Company shall have filed with the Commission any amendment thereof or supplement thereto) or the omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstance under which they were made, not misleading, in each case to the extent, but only to the extent, that such statement or omission was made in reliance upon and in conformity with information furnished as herein stated or otherwise furnished in writing by or on behalf of the Underwriter to the Company expressly for use in the Registration Statement or the Prospectus or any such amendment thereof or supplement thereto, and will reimburse, as incurred, all legal or other expenses reasonably incurred by the Company and the Selling Stockholder or any such director, officer or controlling person in connection with investigating or defending any such loss, claim, damage, liability or action. The indemnity agreement of the Underwriter contained in this paragraph (b) shall remain operative and in full force and effect regardless of any investigation made by or on behalf of any indemnified party and shall survive the delivery and payment for the Shares.

(c) Subject to the provisions of paragraph (e) of this Section 11, the Selling Stockholder agrees to indemnify and hold harmless the Underwriter, the Company, its directors, its officers who sign the Registration Statement and each person, if any, who controls any Underwriter or the Company within the meaning of either Section 15 of the Securities Act or Section 20 of the Exchange Act, from and against any and all losses, claims, damages and liabilities (including, without limitation, any legal or other expenses reasonably incurred in connection with defending or investigating any such action or claim) caused by any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement or any amendment thereof, any preliminary prospectus or the Prospectus (as amended or supplemented if the Company shall have furnished any amendments or supplements thereto), or caused by any omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading, but only with reference to the Selling Stockholder's statement that is has good and marketable title to the Shares to be sold by the Selling Stockholder hereunder.

(d) Each party indemnified under the provisions of paragraph (a), (b) or (c) of this Section 11 agrees that, upon the service of a summons or other initial legal process upon it in any action or suit instituted against it or upon its receipt of written notification of the commencement of any investigation or inquiry of, or proceeding against it, in respect of which indemnity may be sought on account of any indemnity agreement contained in such paragraphs, such indemnified party will promptly notify any party or parties from whom indemnification may be sought hereunder of the commencement thereof in writing. No indemnification provided for in such paragraphs shall be available to any party who shall fail so to give such notice if the party to whom such notice was not given was unaware of the action, suit, investigation, inquiry or proceeding to which such notice would have related and was prejudiced by the failure to give the notice, but the omission so to notify such indemnifying party or parties of any such service or notification shall not relieve such indemnifying party or parties from any liability that it or they may have to the indemnified party for contribution or otherwise than on account of such indemnity agreement. Any indemnifying party or parties against which a claim is to be made will be entitled, at its own expense, to participate in the defense of such action, suit, investigation or inquiry of, an indemnified party. Any indemnifying party shall be entitled, if it so elects within a reasonable time after receipt of notice from the indemnified party or parties of an action, suit, investigation or inquiry to which indemnity may be sought, to assume the entire defense thereof (alone or in conjunction with any other indemnifying party or parties), at its own expense, in which case such defense shall be conducted by counsel reasonably satisfactory to the indemnified party or parties; *provided, however*, that (i) if the indemnified party or parties has reasonably concluded that there may be a conflict between the positions of the indemnifying party or parties and of the indemnified party or parties in conducting the defense of such action, suit, investigation, inquiry or proceeding or that there may be legal defenses available to such indemnified party or parties different from or in addition to those available to the indemnifying party or parties, then counsel for the indemnified party or parties shall be entitled to conduct such defense to the extent reasonably determined by such counsel to be necessary to protect the interests of the indemnified party or parties; and (ii) in any event, the indemnified party or parties shall be entitled to have counsel chosen by such indemnified party or parties participate in, but not conduct, the defense. Upon receipt of notice from the indemnifying party to such indemnified party of its election so to assume the defense of such action and approval by the indemnified party of counsel, the indemnifying party will not be liable to such indemnified party

under this Section 11 for any legal or other expenses (other than the reasonable costs of investigation) subsequently incurred by such indemnified party in connection with the defense thereof unless (i) the indemnified party has employed such counsel in connection with the assumption of different or additional legal defenses in accordance with the proviso to the immediately preceding sentence; or (ii) the indemnifying party has authorized in writing the employment of counsel for the indemnified party at the expense of the indemnifying party. If no such notice to assume the defense of such action has been given within a reasonable time of the indemnified party's or parties' notice to such indemnifying party or parties, the indemnifying party or parties shall be responsible for any legal or other expenses incurred by the indemnified party or parties in connection with the defense of the action, suit, investigation, inquiry or proceeding.

(e) If the indemnification provided for in this Section 11 is unavailable or insufficient to hold harmless an indemnified party under paragraph (a), (b) or (c) above in respect of any losses, claims, damages, expenses or liabilities (or actions in respect thereof) referred to therein, then each indemnifying party, in lieu of indemnifying such indemnified party, shall contribute to the amount paid or payable by such indemnified party as a result of such losses, claims, damages or liabilities (or actions in respect thereof) referred to in paragraphs (a), (b) and (c) above (i) in such proportion as is appropriate to reflect the relative benefits received by each of the contributing parties from the offering of the Shares; or (ii) if the allocation provided by clause (i) above is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) above but also the relative fault of each of the contributing parties, on the one hand, and the party to be indemnified, on the other hand in connection with the statements or omissions that resulted in such losses, claims, damages or liabilities, as well as any other relevant equitable considerations. The relative benefits received by the Company and the Selling Stockholder, on the one hand, and the Underwriter, on the other, shall be deemed to be in the same proportion as the total net proceeds from the offering of the Shares (after deducting the underwriting discount but before deducting expenses) and the total underwriting discount received by the Underwriter, in each case as set forth in the table on the cover page of the Prospectus, bear to the aggregate public offering price of the Shares. Relative fault shall be determined by reference to, among other things, whether the untrue or alleged untrue statement of a material fact or the omission or alleged omission to state a material fact relates to information supplied by each indemnifying party, and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such untrue statement or omission.

The parties agree that it would not be just and equitable if contributions pursuant to this paragraph (e) were to be determined by pro rata allocation or by any other method of allocation that does not take into account the equitable consideration referred to above. The amount paid or payable by an indemnified party as a result of the losses, claims, damages or liabilities (or actions in respect thereof) referred to above in this paragraph (e) shall be deemed to include any legal or other expenses reasonably incurred by such indemnified party in connection with investigating or defending any such action or claim. Notwithstanding the provisions of this paragraph (e), the Underwriter shall not be required to contribute any amount in excess of the underwriting discount applicable to the Shares purchased by the Underwriter hereunder and the Selling Stockholder shall not be required to contribute any amount in excess of the net proceeds received by such Selling Stockholder from the offering of the Shares (after deducting the

underwriting discount but before deducting expenses). No person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation. The sum of the total amounts payable in indemnity by the Selling Stockholder under Section 11(c) and for contribution under this Section 11(e) shall not exceed the gross proceeds received by the Selling Stockholder from the offering of the Shares.

Each party entitled to contribution agrees that upon the service of a summons or other initial legal process upon it in any action instituted against it in respect to which a claim for contribution may be made against another party or parties under this paragraph (e), it will promptly notify such party or parties from whom contribution may be sought, but the omission so to notify such party or parties shall not relieve the party or parties from whom contribution may be sought from any other obligation it may have hereunder or otherwise (except as specifically provided in paragraph (d) of this Section 11). The contribution agreement set forth above shall be in addition to any liabilities that any indemnifying party may have at common law or otherwise.

(f) No indemnifying party will, without the prior written consent of the indemnified party, settle or compromise or consent to the entry of any judgment in any pending or threatened claim, action, suit or proceeding in respect of which indemnification may be sought hereunder (whether or not such indemnified party or any person who controls the Underwriter within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act is a party to such claim, action, suit or proceeding) unless such settlement, compromise or consent includes an unconditional release of such indemnified party and each such controlling person from all liability arising out of such claim, action, suit or proceeding.

**12. Reimbursement of Certain Expenses.** In addition to its other obligations under Section 11 of this Agreement, the Company hereby agrees to reimburse on a quarterly basis the Underwriter and the Selling Stockholder for all reasonable legal and other expenses incurred in connection with investigating or defending any claim, action, investigation, inquiry or other proceeding arising out of or based upon any statement or omission, or any alleged statement or omission, described in paragraph (a) of Section 11 of this Agreement, notwithstanding the absence of a judicial determination as to the propriety and enforceability of the obligations under this Section 12 and the possibility that such payments might later be held to be improper; *provided, however,* that (i) to the extent that any such payment is ultimately held to be improper, the Underwriter shall promptly refund it; and (ii) the Underwriter shall provide to the Company, upon request, reasonable assurances of their ability to effect any refund, when and if due.

**13. Representations, etc. to Survive Delivery.** The respective representations, warranties, agreements, covenants, indemnities and statements of, and on behalf of, the Company and its officers, the Selling Stockholder and the Underwriter, respectively, set forth in or made pursuant to this Agreement will remain in full force and effect, regardless of any investigation made by or on behalf of the Underwriter, and will survive delivery of and payment for the Shares. Any successors to the Underwriter shall be entitled to the indemnity, contribution and reimbursement agreements contained in this Agreement.

**14. Termination.**

(a) This Agreement (except for the provisions of Section 11 hereof) may be terminated by you by notice to the Company at any time prior to the Closing Date if: (i) the Company shall have sustained a loss by strike, fire, flood, accident or other calamity of such a character as to interfere materially with the conduct of the business and operations of the Company regardless of whether or not such loss was insured; (ii) trading in the Common Stock shall have been suspended or trading in securities generally on the New York Stock Exchange, the American Stock Exchange or the Nasdaq National Market shall have been suspended or limitations on such trading shall have been imposed or limitations on prices shall have been established on any such exchange or market system; (iii) the engagement in hostilities or an escalation of major hostilities by the United States or the declaration of war or a national emergency by the United States on or after the date hereof shall have occurred; (iv) any outbreak of hostilities or other national or international calamity or crisis or material adverse change in economic or political conditions shall have occurred if the effect of such outbreak, calamity, crisis or change in economic or political conditions in the financial markets of the United States would, in your reasonable judgment, make the offering or delivery of the Shares impracticable; (v) the enactment, publication, decree or other promulgation of any federal or state statute, regulation, rule or order of, or commencement of any proceeding or investigation by, any court, legislative body, agency or other governmental authority shall have occurred that in the Underwriter's reasonable opinion materially and adversely affects or will materially or adversely affect the business or operations of the Company; (vi) a banking moratorium shall have been declared by New York or United States authorities; or (vii) the taking of any action by any federal, state or local government or agency in respect of its monetary or fiscal affairs shall have occurred that in your reasonable judgment has a material adverse effect on the securities markets in the United States.

(b) If this Agreement is terminated pursuant to this Section 14, there shall be no liability of the Company to the Underwriter and no liability of the Underwriter to the Company; *provided, however*, that in the event of any such termination, the Company agrees to indemnify and hold harmless the Underwriter from all costs or expenses incident to the performance of the obligations of the Company under this Agreement, including all costs and expenses referred to in paragraph (g) of Section 7. Notwithstanding any termination of this agreement, the provisions of Section 11 hereof shall survive and remain in full force and effect.

**15. Notices.** All communications hereunder shall be in writing and if sent to the Underwriter shall be mailed or delivered or emailed and confirmed by letter or telecopied and confirmed by letter to WR Hambrecht + Co., LLC at 539 Bryant Street, San Francisco, California 94107, with copies to Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105, Attn: Robert S. Townsend, Esq., if sent to the Company, shall be mailed or delivered or emailed and confirmed to the Company at 6322 South 3000 East, Suite 100, Salt Lake City, Utah 84121 Attn: Chief Executive Officer, with copies to Wilson Sonsini Goodrich & Rosati, 2795 East Cottonwood Parkway, Suite 300, Attn: Robert O. Connor, Esq., or, if sent to the Selling Stockholder, shall be mailed or delivered to the Selling Stockholder at Amazon.com NV Investment Holdings, Inc., 18124 Wedge Parkway, Suite 433, Reno NV 89511, with copies to Amazon.com, Inc., 1200 12th Avenue South, Seattle, WA 98144, Attn: General Counsel, and to Gibson Dunn & Crutcher, 1050 Connecticut Avenue, NW #900, Washington, DC 20036-5306, Attn: Ron Mueller.



**16. Successors.** This agreement shall be to the benefit of and be binding upon the Company, the Selling Stockholder and the Underwriter and, with respect to the provisions of Section 11 hereof, the several parties (in addition to the Company, the Selling Stockholder and the Underwriter) indemnified under the provisions of said Section 11, and their respective personal representatives, successors and assigns. Nothing in this agreement is intended or shall be construed to give any other person any legal or equitable right, remedy or claim under or in respect of this agreement, or any provisions herein contained. The term "successors and assigns" as herein used shall not include any purchaser, as such purchaser, of any of the Shares from the Underwriter.

**17. Counterparts.** This agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which together shall be deemed to be one and the same instrument.

**18. Governing Law.** This agreement shall be governed by and construed in accordance with the laws of the State of California. Any legal suit, action or proceeding arising out of or based upon this Agreement or the transactions contemplated hereby may be instituted in the federal courts of the United States of America located in the City and County of San Francisco or the courts of the State of California in each case located in the City and County of San Francisco (collectively, the "Specified Courts"), and each party irrevocably submits to the exclusive jurisdiction (except for proceedings instituted in regard to the enforcement of a judgment of any such court, as to which such jurisdiction is non-exclusive) of such courts in any such suit, action or proceeding. Service of any process, summons, notice or document by mail to such party's address set forth above shall be effective service of process for any suit, action or other proceeding brought in any such court. The parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action or other proceeding in the Specified Courts and irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such suit, action or other proceeding brought in any such court has been brought in an inconvenient forum.

If the foregoing correctly sets forth our understanding, please indicate the Underwriter' acceptance thereof in the space provided below for that purpose, whereupon this letter shall constitute a binding agreement between us.

Very truly yours,

**OVERSTOCK.COM, INC.**

By: \_\_\_\_\_

Name: Patrick Byrne

Title: President and Chief Executive Officer

**SELLING STOCKHOLDER:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Attorney-In-Fact

Accepted as of the date first above  
written:

**WR HAMBRECHT + CO., LLC**

By: WR Hambrecht + Co., LLC

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## Exhibit A

### Form of Opinion of Wilson Sonsini Goodrich & Rosati on Behalf of the Company

(a) Each of the Company and its subsidiaries has been duly incorporated and is validly existing as a corporation in good standing under the laws of its jurisdiction of incorporation with full power and authority (corporate and other) to own or lease its properties and to conduct its business as described in the Registration Statement and the Prospectus and is duly qualified to do business as a foreign corporation and is in good standing in each jurisdiction in which the ownership or leasing of property or the conduct of its business requires such qualification (except for those jurisdictions in which the failure so to qualify would not have a material adverse effect on the Company and its subsidiaries, taken as a whole).

(b) The authorized capital stock of the Company consists of \_\_\_\_\_ shares of Preferred Stock, \$ \_\_\_\_\_ par value, of which there are no outstanding shares, and \_\_\_\_\_ shares of Common Stock, no par value, of which there are outstanding \_\_\_\_\_ shares (including the Underwritten Stock and any shares of Option Stock issued on the date hereof). The securities of the Company conform in all material respects to the description thereof contained in the Prospectus. Proper corporate proceedings have been validly taken to authorize the Company's authorized capital stock and all outstanding shares of such capital stock (including the Underwritten Stock and the shares of Option Stock issued, if any) have been duly authorized and validly issued by the Company, are fully paid and nonassessable and have been issued in compliance with all Federal and state securities laws. Any Option Stock purchased after the Closing Date, when issued and delivered to and paid for by the Underwriters as provided in the Underwriting Agreement, will have been duly and validly issued and be fully paid and nonassessable. No preemptive rights, rights of first refusal or other rights exist with respect to the Shares, or the issue and sale thereof, pursuant to the Company's certificate of incorporation or bylaws, and there are no contractual preemptive rights that have not been waived, right of first refusal or rights of co-sale that exist with respect to the Shares.

(c) The outstanding shares of capital stock or ownership interests of each of the Company's subsidiaries have been duly authorized and validly issued, are fully paid and non-assessable, and are solely owned by the Company free and clear of all liens, encumbrances and equities and claims; and no options, warrants or other rights to purchase, agreements or other obligations to issue or other rights to convert any obligations into shares of capital stock or ownership interests in such subsidiary are outstanding.

(d) The Company does not own or control, directly or indirectly, any corporation, association or other entity other than the subsidiaries set forth in the Registration Statement.

(e) There are no rights of any holders of the Company's securities, not effectively satisfied or waived, to require registration under the Securities Act of any of

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the Company's securities or other securities of the Company in connection with the filing of the Registration Statement or with the offer or sale of the Shares.

(f) There are no rights of any holders of the Company's securities to require the Company to register any securities under the Act that are not described in the Registration Statement and the Prospectus.

(g) The Company has full legal right, power and authority to enter into the Underwriting Agreement and to consummate the transactions provided for therein. The Underwriting Agreement has been duly authorized, executed and delivered by the Company and constitutes the legal, valid and binding agreement of the Company, enforceable in accordance with its terms, except as limited by applicable bankruptcy, insolvency, reorganization, moratorium or other laws now or hereafter in effect relating to or affecting creditors' rights generally or by general principles of equity relating to the availability of remedies and except as rights to indemnity and contribution may be limited by Federal or state securities laws or the public policy underlying such laws.

(h) None of the Company's execution or delivery of the Underwriting Agreement, its performance thereof, its consummation of the transactions contemplated therein or its application of the net proceeds of the offering in the manner set forth under the caption "Use of Proceeds," conflicts or will conflict with or results or will result in any breach or violation of any of the terms or provisions of, or constitute a default under, or result in the creation or imposition of any lien, charge or encumbrance upon, any property or assets of the Company pursuant to the terms of the certificate of incorporation or bylaws of the Company or any of its subsidiaries; the terms of any indenture, mortgage, deed of trust, voting trust agreement, stockholder's agreement, note agreement or other agreement or instrument known to such counsel after reasonable investigation to which the Company or any of its subsidiaries is a party or by which it is or may be bound or to which its properties may be subject; any statute, rule or regulation of any regulatory body or administrative agency or other governmental agency or body, domestic or foreign, having jurisdiction over the Company or any of its subsidiaries or any of their activities or properties; or any judgment, decree or order, known to such counsel after reasonable investigation, of any government, arbitrator, court, regulatory body or administrative agency or other governmental agency or body, domestic or foreign, having such jurisdiction.

(i) No consent, approval, authorization or order of any court, regulatory body or administrative agency or other governmental agency or body, domestic or foreign, has been or is required for the consummation of the transactions contemplated in the Underwriting Agreement, except such as have been obtained under the Act or may be required under state securities or Blue Sky laws in connection with the purchase and distribution of the Shares by the Underwriters.

(j) To the knowledge of such counsel, the conduct of the business of the Company and its subsidiaries is not in violation of any federal, state or local statute, administrative regulation or other law, which violation is likely to have a material adverse effect on the Company and its subsidiaries, taken as a whole; and each of the Company

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and its subsidiaries has obtained all licenses, permits, franchises, certificates and other authorizations from state, Federal and other regulatory authorities as are necessary or required for the ownership, leasing and operation of its properties and the conduct of its business as presently conducted and as contemplated in the Prospectus.

(k) The Registration Statement is effective under the Act; any required filing of the Prospectus pursuant to Rule 424(b) has been made in the manner and within the time period required by Rule 424(b); and no stop order suspending the effectiveness of the Registration Statement or any amendment thereto has been issued, and no proceedings for that purpose have been instituted or are pending or, to the knowledge of such counsel, are threatened or contemplated by the Commission.

(l) The Registration Statement and the Prospectus (except for the financial statements, schedules and other financial data included therein, as to which such counsel need not express any opinion), comply as to form in all material respects with the requirements of the Securities Act and Rules.

(m) The descriptions contained and summarized in the Registration Statement and the Prospectus of franchises, contracts, leases, documents, or any threatened legal or governmental actions, suits or proceedings, are accurate and fairly represent in all material respects the information required to be shown by the Act and the rules and regulations of the Commission thereunder. There are no franchises, contracts, leases, documents, or any threatened legal or governmental actions, suits or proceedings, which are required by the Act and the rules and regulations of the Commission thereunder to be described in the Registration Statement or the Prospectus or to be filed as exhibits to the Registration Statement that are not described or filed as required.

(n) The statements (1) in the Prospectus under the captions "Risk Factors"; "Management's Discussion and Analysis of Financial Condition and Results of Operations - Liquidity and Capital Resources" "Business - Technology" and "Business - Intellectual Property"; "Business - Government Regulation;" "Management"; "Certain Relationships and Related Transactions"; "Description of Our Capital Stock"; and "Shares Eligible for Future Sale" and (2) in the Registration Statement in Items 14 and 15; in each case insofar as such statements constitute summaries of the legal matters, documents or proceedings referred to therein, fairly present the information required under the Securities Act and Rules with respect to such legal matters, documents and proceedings and fairly summarize the matters referred to therein to the extent required by the Securities Act and Rules at the time the Registration Statement became effective, and did not contain any untrue statement of material fact or omit to state a material fact to be stated therein or necessary to make the statements therein not misleading.

(o) Neither the Company nor any of its subsidiaries is, or after giving effect to the issuance and sale of the Shares by the Company will be, an "investment company" or a "company" controlled by an "investment company" within the meaning of such term under the Investment Company Act of 1940, as amended, and the rules and regulations of the Commission promulgated thereunder.

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(p) To our knowledge, there is no legal or governmental proceedings pending or threatened to which the Company or any of its subsidiaries is a party or to which any of the properties of the Company or any of its subsidiaries is subject that are required to be described in the Registration Statement or the Prospectus and are not so described, and there is no statute, regulation, contract or other document that is required to be described in the Registration Statement or the Prospectus or to be filed as an exhibit to the Registration Statement that is not described or filed as required.

(q) Good and marketable title to the Shares sold under the Underwriting Agreement, free and clear of all liens, encumbrances, equities, security interests and claims, has been transferred to the Underwriters, assuming for the purpose of this opinion that the Underwriters purchased the same in good faith without notice of any liens, encumbrances, equities, security interests or adverse claims.

(r) The Shares have been duly authorized for inclusion in The Nasdaq National Market upon official notice of issuance.

In addition, such counsel shall state that in the course of the preparation of the Registration Statement and the Prospectus, such counsel has participated in conferences with officers and representatives of the Company and with the Company's independent public accountants, at which conferences such counsel made inquiries of such officers, representatives and accountants and discussed the contents of the Registration Statement and the Prospectus and (without taking any further action to verify independently the statements made in the Registration Statement and the Prospectus and, except as stated in the foregoing opinion, without assuming responsibility for the accuracy, completeness or fairness of such statements) nothing has come to such counsel's attention that causes such counsel to believe that either the Registration Statement as of the date it is declared effective and as of the Closing Date (or if related to the later sale of the Option Stock, such later date) or the Prospectus as of the date thereof and as of the Closing Date (or if related to the later sale of the Option Stock, such later date) contained or contains any untrue statement of a material fact or omitted or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading (it being understood that such counsel need not express any opinion with respect to the financial statements, schedules and other financial data included in the Registration Statement or the Prospectus).

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**Exhibit B**

Form of Opinion of [\_\_\_\_\_] on Behalf of the Selling Stockholder

(a) The Underwriting Agreement, the Selling Stockholder's Irrevocable Power of Attorney and the Custody Agreement have been duly authorized, executed and delivered by or on behalf of the Selling Stockholder and are valid and binding agreements of the Selling Stockholder.

(b) The performance by the Selling Stockholder of its obligations under the Underwriting Agreement, the Custody Agreement and the Power of Attorney and the consummation of the transactions contemplated thereby will not result in a breach or violation of any agreement known to us to which the Selling Stockholder is a party or by which the Selling Stockholder is bound, other than a breach or violation that would not have a material adverse effect on the Selling Stockholder's ability to perform its obligations this Agreement.

(c) The Selling Stockholder has valid title to the Shares to be sold by such Selling Stockholder and the legal right and power, and all authorization and approval required by law to sell, transfer and deliver the Shares to be sold by such Selling Stockholder; delivery of the Shares to be sold by the Selling Stockholder pursuant to the Underwriting Agreement will pass title to such Shares free and clear of any security interests, claims, liens, equities and other encumbrances.

(d) Solely with respect to information relating to the Selling Stockholder's good and marketable title to the Shares to be sold by such Selling Stockholder, we (A) have no reason to believe that (except for financial statements and schedules and other financial and statistical data as to which we need not express any belief) the Registration Statement and the prospectus included therein at the time the Registration Statement became effective contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and (B) have no reason to believe that (except for financial statements and schedules and other financial and statistical data as to which we need not express any belief) the Prospectus contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading.

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**EXHIBIT 10.5**

**OVERSTOCK.COM, INC.**

**2002 STOCK OPTION PLAN**

(As amended by the Board of Directors on May 2, 2002)

1. Purposes of the Plan. The purposes of this 2002 Stock Option Plan are:

- to attract and retain the best available personnel for positions of substantial responsibility,
- to provide additional incentive to Employees, Directors and Consultants, and
- to promote the success of the Company's business.

Options granted under the Plan may be Incentive Stock Options or Nonstatutory Stock Options, as determined by the Administrator at the time of grant. Stock Purchase Rights may also be granted under the Plan.

2. Definitions. As used herein, the following definitions shall apply:

(a) "Administrator" means the Board or any of its Committees as shall be administering the Plan, in accordance with Section 4 of the Plan.

(b) "Applicable Laws" means the requirements relating to the administration of stock option plans under U. S. state corporate laws, U.S. federal and state securities laws, the Code, any stock exchange or quotation system on which the Common Stock is listed or quoted and the applicable laws of any foreign country or jurisdiction where Options or Stock Purchase Rights are, or will be, granted under the Plan.

(c) "Board" means the Board of Directors of the Company.

(d) "Cause" means (i) an act of personal dishonesty taken by the Optionee in connection with his or her responsibilities as a Service Provider and intended to result in personal enrichment of the Optionee, (ii) Optionee being convicted of a felony, (iii) a willful act by the Optionee which constitutes gross misconduct and which is injurious to the Company, or (iv) following delivery to the Optionee of a written demand for performance from the Company which describes the basis for the Company's reasonable belief that the Optionee has not substantially performed his duties, continued violations by the Optionee of his or her obligations to the Company which are demonstrably willful and deliberate on the Employee's part.

(e) "Change in Control" means the occurrence of any of the following events:

(i) Any "person" (as such term is used in Sections 13(d) and 14(d) of the Exchange Act), other than Patrick M. Byrne, Dorothy M. Byrne or John J. Byrne Jr. or an individual or entity that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with Patrick M. Byrne, Dorothy M. Byrne and/or John J. Byrne Jr., becomes the "beneficial owner" (as defined in Rule 13d-3 of the Exchange Act),

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directly or indirectly, of securities of the Company representing fifty percent (50%) or more of the total voting power represented by the Company's then outstanding voting securities; or

(ii) The consummation of the sale or disposition by the Company of all or substantially all of the Company's assets;

(iii) A change in the composition of the Board occurring within a two-year period, as a result of which fewer than a majority of the directors are Incumbent Directors. "Incumbent Directors" means directors who either (A) are Directors as of the effective date of the Plan, or (B) are elected, or nominated for election, to the Board with the affirmative votes of at least a majority of the Incumbent Directors at the time of such election or nomination (but will not include an individual whose election or nomination is in connection with an actual or threatened proxy contest relating to the election of directors to the Company); or

(iv) The consummation of a merger or consolidation of the Company with any other corporation, other than a merger or consolidation which would result in the voting securities of the Company outstanding immediately prior thereto continuing to represent (either by remaining outstanding or by being converted into voting securities of the surviving entity or its parent) at least fifty percent (50%) of the total voting power represented by the voting securities of the Company or such surviving entity or its parent outstanding immediately after such merger or consolidation.

(f) "Code" means the Internal Revenue Code of 1986, as amended.

(g) "Committee" means a committee of Directors appointed by the Board in accordance with Section 4 of the Plan.

(h) "Common Stock" means the common stock of the Company.

(i) "Company" means Overstock.com, Inc.

(j) "Consultant" means any natural person, including an advisor, engaged by the Company or a Parent or Subsidiary to render services to such entity.

(k) "Director" means a member of the Board.

(l) "Disability" means total and permanent disability as defined in Section 22(e)(3) of the Code.

(m) "Employee" means any person, including Officers and Directors, employed by the Company or any Parent or Subsidiary of the Company. A Service Provider shall not cease to be an Employee in the case of (i) any leave of absence approved by the Company or (ii) transfers between locations of the Company or between the Company, its Parent, any Subsidiary, or any successor. For purposes of Incentive Stock Options, no such leave may exceed ninety days, unless reemployment upon expiration of such leave is guaranteed by statute or contract. If reemployment upon expiration of a leave of absence approved by the Company is not so guaranteed, then three (3) months following the 91<sup>st</sup> day of such leave any Incentive Stock Option held by the Optionee shall cease to be treated as an Incentive Stock Option and shall be treated for tax purposes as a

Nonstatutory Stock Option. Neither service as a Director nor payment of a director's fee by the Company shall be sufficient to constitute "employment" by the Company.

(n) "Exchange Act" means the Securities Exchange Act of 1934, as amended.

(o) "Fair Market Value" means, as of any date, the value of Common Stock determined as follows:

(i) If the Common Stock is listed on any established stock exchange or a national market system, including without limitation the Nasdaq National Market or The Nasdaq SmallCap Market of The Nasdaq Stock Market, its Fair Market Value shall be the closing sales price for such stock (or the closing bid, if no sales were reported) as quoted on such exchange or system on the day of determination, as reported in *The Wall Street Journal* or such other source as the Administrator deems reliable;

(ii) If the Common Stock is regularly quoted by a recognized securities dealer but selling prices are not reported, the Fair Market Value of a Share of Common Stock shall be the mean between the high bid and low asked prices for the Common Stock on the day of determination, as reported in *The Wall Street Journal* or such other source as the Administrator deems reliable; or

(iii) In the absence of an established market for the Common Stock, the Fair Market Value shall be determined in good faith by the Administrator.

(p) "Incentive Stock Option" means an Option intended to qualify as an incentive stock option within the meaning of Section 422 of the Code and the regulations promulgated thereunder.

(q) "Nonstatutory Stock Option" means an Option not intended to qualify as an Incentive Stock Option.

(r) "Notice of Grant" means a written or electronic notice evidencing certain terms and conditions of an individual Option or Stock Purchase Right grant. The Notice of Grant is part of the Option Agreement.

(s) "Officer" means a person who is an officer of the Company within the meaning of Section 16 of the Exchange Act and the rules and regulations promulgated thereunder.

(t) "Option" means a stock option granted pursuant to the Plan.

(u) "Option Agreement" means an agreement between the Company and an Optionee evidencing the terms and conditions of an individual Option grant. The Option Agreement is subject to the terms and conditions of the Plan.

(v) "Option Exchange Program" means a program whereby outstanding Options are surrendered in exchange for Options with a lower exercise price.

- (w) "Optioned Stock" means the Common Stock subject to an Option or Stock Purchase Right.
- (x) "Optionee" means the holder of an outstanding Option or Stock Purchase Right granted under the Plan.
- (y) "Parent" means a "parent corporation," whether now or hereafter existing, as defined in Section 424(e) of the Code.
- (z) "Plan" means this 2002 Stock Option Plan.
- (aa) "Restricted Stock" means shares of Common Stock acquired pursuant to a grant of Stock Purchase Rights under Section 11 of the Plan.

(bb) "Restricted Stock Purchase Agreement" means a written agreement between the Company and the Optionee evidencing the terms and restrictions applying to stock purchased under a Stock Purchase Right. The Restricted Stock Purchase Agreement is subject to the terms and conditions of the Plan and the Notice of Grant.

(cc) "Rule 16b-3" means Rule 16b-3 of the Exchange Act or any successor to Rule 16b-3, as in effect when discretion is being exercised with respect to the Plan.

(dd) "Section 16(b)" means Section 16(b) of the Exchange Act.

(ee) "Service Provider" means an Employee, Director or Consultant.

(ff) "Share" means a share of the Common Stock, as adjusted in accordance with Section 13 of the Plan.

(gg) "Stock Purchase Right" means the right to purchase Common Stock pursuant to Section 11 of the Plan, as evidenced by a Notice of Grant.

(hh) "Subsidiary" means a "subsidiary corporation", whether now or hereafter existing, as defined in Section 424(f) of the Code.

(ii) "Voluntary Termination for Good Reason" means the Optionee voluntarily resigns within ninety (90) days after the occurrence of any of the following (i) without the Optionee's express written consent, a material reduction of the Optionee's duties, title, authority or responsibilities, relative to the Optionee's duties, title, authority or responsibilities as in effect immediately prior to such reduction, or the assignment to Optionee of such reduced duties, title, authority or responsibilities; provided, however, that a reduction in duties, title, authority or responsibilities solely by virtue of the Company being acquired and made part of a larger entity (as, for example, when the Chief Executive Officer of the Company remains as such following a Change of Control and is not made the Chief Executive Officer of the acquiring corporation) shall not by itself constitute grounds for a "Voluntary Termination for Good Reason;" (ii) a reduction by the Company in the base salary or annual incentive bonus of the Optionee as in effect immediately prior to such reduction; (iii) the relocation of the Optionee to a facility or a location outside of a 35 mile radius from the present facility or location, without the Optionee's express written consent; or (iv)

any act or set of facts or circumstances which would, under applicable case law or statute constitute a constructive termination of the Optionee.

3. Stock Subject to the Plan. Subject to the provisions of Section 13 of the Plan, the maximum aggregate number of Shares that may be optioned and sold under the Plan is 18,100,183 Shares (on pre-reverse stock split basis) plus (a) any Shares which have been reserved but not issued under the Company's 1999 Stock Option Plan (the "1999 Plan") and (b) any Shares returned to the 1999 Plan as a result of termination of options or repurchase of Shares issued under the 1999 Plan. The Shares may be authorized, but unissued, or reacquired Common Stock.

If an Option or Stock Purchase Right expires or becomes unexercisable without having been exercised in full, or is surrendered pursuant to an Option Exchange Program, the unpurchased Shares which were subject thereto shall become available for future grant or sale under the Plan (unless the Plan has terminated); provided, however, that Shares that have actually been issued under the Plan, whether upon exercise of an Option or Right, shall not be returned to the Plan and shall not become available for future distribution under the Plan, except that if unvested Shares are repurchased by the Company at their original purchase price, such Shares shall become available for future grant under the Plan.

4. Administration of the Plan.

(a) Procedure.

(i) Multiple Administrative Bodies. Different Committees with respect to different groups of Service Providers may administer the Plan.

(ii) Section 162(m). To the extent that the Administrator determines it to be desirable to qualify Options granted hereunder as "performance-based compensation" within the meaning of Section 162(m) of the Code, the Plan shall be administered by a Committee of two or more "outside directors" within the meaning of Section 162(m) of the Code.

(iii) Rule 16b-3. To the extent desirable to qualify transactions hereunder as exempt under Rule 16b-3, the transactions contemplated hereunder shall be structured to satisfy the requirements for exemption under Rule 16b-3.

(iv) Other Administration. Other than as provided above, the Plan shall be administered by (A) the Board or (B) a Committee, which committee shall be constituted to satisfy Applicable Laws.

(b) Powers of the Administrator. Subject to the provisions of the Plan, and in the case of a Committee, subject to the specific duties delegated by the Board to such Committee, the Administrator shall have the authority, in its discretion:

- (i) to determine the Fair Market Value;

(ii) to select the Service Providers to whom Options and Stock Purchase Rights may be granted hereunder;

hereunder;  
(iii) to determine the number of shares of Common Stock to be covered by each Option and Stock Purchase Right granted

(iv) to approve forms of agreement for use under the Plan;

(v) to determine the terms and conditions, not inconsistent with the terms of the Plan, of any Option or Stock Purchase Right granted hereunder. Such terms and conditions include, but are not limited to, the exercise price, the time or times when Options or Stock Purchase Rights may be exercised (which may be based on performance criteria), any vesting acceleration or waiver of forfeiture restrictions, and any restriction or limitation regarding any Option or Stock Purchase Right or the shares of Common Stock relating thereto, based in each case on such factors as the Administrator, in its sole discretion, shall determine;

(vi) to reduce the exercise price of any Option or Stock Purchase Right to the then current Fair Market Value if the Fair Market Value of the Common Stock covered by such Option or Stock Purchase Right shall have declined since the date the Option or Stock Purchase Right was granted;

(vii) to institute an Option Exchange Program;

(viii) to construe and interpret the terms of the Plan and awards granted pursuant to the Plan;

(ix) to prescribe, amend and rescind rules and regulations relating to the Plan, including rules and regulations relating to sub-plans established for the purpose of satisfying applicable foreign laws;

(x) to modify or amend each Option or Stock Purchase Right (subject to Section 15(c) of the Plan), including the discretionary authority to extend the post-termination exercisability period of Options longer than is otherwise provided for in the Plan;

(xi) to allow Optionees to satisfy withholding tax obligations by electing to have the Company withhold from the Shares to be issued upon exercise of an Option or Stock Purchase Right that number of Shares having a Fair Market Value equal to the minimum amount required to be withheld. The Fair Market Value of the Shares to be withheld shall be determined on the date that the amount of tax to be withheld is to be determined. All elections by an Optionee to have Shares withheld for this purpose shall be made in such form and under such conditions as the Administrator may deem necessary or advisable;

(xii) to authorize any person to execute on behalf of the Company any instrument required to effect the grant of an Option or Stock Purchase Right previously granted by the Administrator;

(xiii) to make all other determinations deemed necessary or advisable for administering the Plan.

(c) Effect of Administrator's Decision. The Administrator's decisions, determinations and interpretations shall be final and binding on all Optionees and any other holders of Options or Stock Purchase Rights.

5. Eligibility. Nonstatutory Stock Options and Stock Purchase Rights may be granted to Service Providers. Incentive Stock Options may be granted only to Employees.

6. Limitations.

(a) Each Option shall be designated in the Option Agreement as either an Incentive Stock Option or a Nonstatutory Stock Option. However, notwithstanding such designation, to the extent that the aggregate Fair Market Value of the Shares with respect to which Incentive Stock Options are exercisable for the first time by the Optionee during any calendar year (under all plans of the Company and any Parent or Subsidiary) exceeds \$100,000, such Options shall be treated as Nonstatutory Stock Options. For purposes of this Section 6(a), Incentive Stock Options shall be taken into account in the order in which they were granted. The Fair Market Value of the Shares shall be determined as of the time the Option with respect to such Shares is granted.

(b) Neither the Plan nor any Option or Stock Purchase Right shall confer upon an Optionee any right with respect to continuing the Optionee's relationship as a Service Provider with the Company, nor shall they interfere in any way with the Optionee's right or the Company's right to terminate such relationship at any time, with or without cause.

(c) The following limitations shall apply to grants of Options:

(i) No Service Provider shall be granted, in any fiscal year of the Company, Options to purchase more than 12,000,000 Shares (on a pre-reverse stock split basis).

(ii) In connection with his or her initial service, a Service Provider may be granted Options to purchase up to an additional 12,000,000 Shares (on a pre-reverse stock split basis), which shall not count against the limit set forth in subsection (i) above.

(iii) The foregoing limitations shall be adjusted proportionately in connection with any change in the Company's capitalization as described in Section 13.

(iv) If an Option is cancelled in the same fiscal year of the Company in which it was granted (other than in connection with a transaction described in Section 13), the cancelled Option will be counted against the limits set forth in subsections (i) and (ii) above. For this purpose, if the exercise price of an Option is reduced, the transaction will be treated as a cancellation of the Option and the grant of a new Option.

7. Term of Plan. Subject to Section 19 of the Plan, the Plan shall become effective upon its adoption by the Board. It shall continue in effect for a term of ten (10) years unless terminated earlier under Section 15 of the Plan.

8. Term of Option. The term of each Option shall be stated in the Option Agreement. In the case of an Incentive Stock Option, the term shall be ten (10) years from the date of grant or such shorter term as may be provided in the Option Agreement. Moreover, in the case of an

Incentive Stock Option granted to an Optionee who, at the time the Incentive Stock Option is granted, owns stock representing more than ten percent (10%) of the total combined voting power of all classes of stock of the Company or any Parent or Subsidiary, the term of the Incentive Stock Option shall be five (5) years from the date of grant or such shorter term as may be provided in the Option Agreement.

9. Option Exercise Price and Consideration.

(a) Exercise Price. The per share exercise price for the Shares to be issued pursuant to exercise of an Option shall be determined by the Administrator, subject to the following:

(i) In the case of an Incentive Stock Option

(A) granted to an Employee who, at the time the Incentive Stock Option is granted, owns stock representing more than ten percent (10%) of the voting power of all classes of stock of the Company or any Parent or Subsidiary, the per Share exercise price shall be no less than 110% of the Fair Market Value per Share on the date of grant.

(B) granted to any Employee other than an Employee described in paragraph (A) immediately above, the per Share exercise price shall be no less than 100% of the Fair Market Value per Share on the date of grant.

(ii) In the case of a Nonstatutory Stock Option, the per Share exercise price shall be determined by the Administrator. In the case of a Nonstatutory Stock Option intended to qualify as "performance-based compensation" within the meaning of Section 162(m) of the Code, the per Share exercise price shall be no less than 100% of the Fair Market Value per Share on the date of grant.

(iii) Notwithstanding the foregoing, Options may be granted with a per Share exercise price of less than 100% of the Fair Market Value per Share on the date of grant pursuant to a merger or other corporate transaction.

(b) Waiting Period and Exercise Dates. At the time an Option is granted, the Administrator shall fix the period within which the Option may be exercised and shall determine any conditions that must be satisfied before the Option may be exercised.

(c) Form of Consideration. The Administrator shall determine the acceptable form of consideration for exercising an Option, including the method of payment. In the case of an Incentive Stock Option, the Administrator shall determine the acceptable form of consideration at the time of grant. Such consideration may consist entirely of:

(i) cash;

(ii) check;

(iii) promissory note;



(iv) other Shares which, in the case of Shares acquired directly or indirectly from the Company, (A) have been owned by the Optionee for more than six (6) months on the date of surrender, and (B) have a Fair Market Value on the date of surrender equal to the aggregate exercise price of the Shares as to which said Option shall be exercised;

(v) consideration received by the Company under a cashless exercise program implemented by the Company in connection with the Plan;

(vi) a reduction in the amount of any Company liability to the Optionee, including any liability attributable to the Optionee's participation in any Company-sponsored deferred compensation program or arrangement;

(vii) any combination of the foregoing methods of payment; or

(viii) such other consideration and method of payment for the issuance of Shares to the extent permitted by Applicable Laws.

10. Exercise of Option.

(a) Procedure for Exercise; Rights as a Stockholder. Any Option granted hereunder shall be exercisable according to the terms of the Plan and at such times and under such conditions as determined by the Administrator and set forth in the Option Agreement. Unless the Administrator provides otherwise, vesting of Options granted hereunder shall be suspended during any unpaid leave of absence. An Option may not be exercised for a fraction of a Share.

An Option shall be deemed exercised when the Company receives: (i) written or electronic notice of exercise (in accordance with the Option Agreement) from the person entitled to exercise the Option, and (ii) full payment for the Shares with respect to which the Option is exercised. Full payment may consist of any consideration and method of payment authorized by the Administrator and permitted by the Option Agreement and the Plan. Shares issued upon exercise of an Option shall be issued in the name of the Optionee or, if requested by the Optionee, in the name of the Optionee and his or her spouse. Until the Shares are issued (as evidenced by the appropriate entry on the books of the Company or of a duly authorized transfer agent of the Company), no right to vote or receive dividends or any other rights as a stockholder shall exist with respect to the Optioned Stock, notwithstanding the exercise of the Option. The Company shall issue (or cause to be issued) such Shares promptly after the Option is exercised. No adjustment will be made for a dividend or other right for which the record date is prior to the date the Shares are issued, except as provided in Section 13 of the Plan.

Exercising an Option in any manner shall decrease the number of Shares thereafter available, both for purposes of the Plan and for sale under the Option, by the number of Shares as to which the Option is exercised.

(b) Termination of Relationship as a Service Provider. If an Optionee ceases to be a Service Provider, other than upon the Optionee's death or Disability, the Optionee may exercise his or her Option within such period of time as is specified in the Option Agreement to the extent that the Option is vested on the date of termination (but in no event later than the expiration of the term of such Option as set forth in the Option Agreement). In the absence of a specified time in the

Option Agreement, the Option shall remain exercisable for three (3) months following the Optionee's termination. If, on the date of termination, the Optionee is not vested as to his or her entire Option, the Shares covered by the unvested portion of the Option shall revert to the Plan. If, after termination, the Optionee does not exercise his or her Option within the time specified by the Administrator, the Option shall terminate, and the Shares covered by such Option shall revert to the Plan.

(c) Disability of Optionee. If an Optionee ceases to be a Service Provider as a result of the Optionee's Disability, the Optionee may exercise his or her Option within such period of time as is specified in the Option Agreement to the extent the Option is vested on the date of termination (but in no event later than the expiration of the term of such Option as set forth in the Option Agreement). In the absence of a specified time in the Option Agreement, the Option shall remain exercisable for twelve (12) months following the Optionee's termination. If, on the date of termination, the Optionee is not vested as to his or her entire Option, the Shares covered by the unvested portion of the Option shall revert to the Plan. If, after termination, the Optionee does not exercise his or her Option within the time specified herein, the Option shall terminate, and the Shares covered by such Option shall revert to the Plan.

(d) Death of Optionee. If an Optionee dies while a Service Provider, the Option may be exercised following the Optionee's death within such period of time as is specified in the Option Agreement to the extent that the Option is vested on the date of death (but in no event may the option be exercised later than the expiration of the term of such Option as set forth in the Option Agreement), by the Optionee's designated beneficiary, provided such beneficiary has been designated prior to Optionee's death in a form acceptable to the Administrator. If no such beneficiary has been designated by the Optionee, then such Option may be exercised by the personal representative of the Optionee's estate or by the person(s) to whom the Option is transferred pursuant to the Optionee's will or in accordance with the laws of descent and distribution. In the absence of a specified time in the Option Agreement, the Option shall remain exercisable for twelve (12) months following Optionee's death. If, at the time of death, Optionee is not vested as to his or her entire Option, the Shares covered by the unvested portion of the Option shall immediately revert to the Plan. If the Option is not so exercised within the time specified herein, the Option shall terminate, and the Shares covered by such Option shall revert to the Plan.

#### 11. Stock Purchase Rights.

(a) Rights to Purchase. Stock Purchase Rights may be issued either alone, in addition to, or in tandem with other awards granted under the Plan and/or cash awards made outside of the Plan. After the Administrator determines that it will offer Stock Purchase Rights under the Plan, it shall advise the offeree in writing or electronically, by means of a Notice of Grant, of the terms, conditions and restrictions related to the offer, including the number of Shares that the offeree shall be entitled to purchase, the price to be paid, and the time within which the offeree must accept such offer. The offer shall be accepted by execution of a Restricted Stock Purchase Agreement in the form determined by the Administrator.

(b) Repurchase Option. Unless the Administrator determines otherwise, the Restricted Stock Purchase Agreement shall grant the Company a repurchase option exercisable upon the voluntary or involuntary termination of the purchaser's service with the Company for any reason

(including death or Disability). The purchase price for Shares repurchased pursuant to the Restricted Stock Purchase Agreement shall be the original price paid by the purchaser and may be paid by cancellation of any indebtedness of the purchaser to the Company. The repurchase option shall lapse at a rate determined by the Administrator.

(c) Other Provisions. The Restricted Stock Purchase Agreement shall contain such other terms, provisions and conditions not inconsistent with the Plan as may be determined by the Administrator in its sole discretion.

(d) Rights as a Stockholder. Once the Stock Purchase Right is exercised, the purchaser shall have the rights equivalent to those of a stockholder, and shall be a stockholder when his or her purchase is entered upon the records of the duly authorized transfer agent of the Company. No adjustment will be made for a dividend or other right for which the record date is prior to the date the Stock Purchase Right is exercised, except as provided in Section 13 of the Plan.

12. Transferability of Options and Stock Purchase Rights. Unless determined otherwise by the Administrator, an Option or Stock Purchase Right may not be sold, pledged, assigned, hypothecated, transferred, or disposed of in any manner other than by will or by the laws of descent or distribution and may be exercised, during the lifetime of the Optionee, only by the Optionee. If the Administrator makes an Option or Stock Purchase Right transferable, such Option or Stock Purchase Right shall contain such additional terms and conditions as the Administrator deems appropriate.

13. Adjustments Upon Changes in Capitalization, Dissolution, Liquidation, Merger or Change in Control.

(a) Changes in Capitalization. In the event that any dividend or other distribution (whether in the form of cash, Shares, other securities, or other property), recapitalization, stock split, reverse stock split, reorganization, merger, consolidation, split-up, spin-off, combination, repurchase, or exchange of Shares or other securities of the Company, or other change in the corporate structure of the Company affecting the Shares such that an adjustment is determined by the Administrator (in its sole discretion) to be appropriate in order to prevent dilution or enlargement of the benefits or potential benefits intended to be made available under the Plan, then the Administrator shall, in such manner as it may deem equitable, adjust the number and class of Shares which may be delivered under the Plan, the number, class, and price of Shares covered by each outstanding Option and Stock Purchase Right, and the numerical Share limits of Sections 3 and 6.

(b) Dissolution or Liquidation. In the event of the proposed dissolution or liquidation of the Company, the Administrator shall notify each Optionee as soon as practicable prior to the effective date of such proposed transaction. The Administrator in its discretion may provide for an Optionee to have the right to exercise his or her Option until ten (10) days prior to such transaction as to all of the Optioned Stock covered thereby, including Shares as to which the Option would not otherwise be exercisable. In addition, the Administrator may provide that any Company repurchase option applicable to any Shares purchased upon exercise of an Option or Stock Purchase Right shall lapse as to all such Shares, provided the proposed dissolution or liquidation takes place at the time and in the manner contemplated. To the extent it has not been previously

exercised, an Option or Stock Purchase Right will terminate immediately prior to the consummation of such proposed action.

(c) Merger or Change in Control. In the event of a merger of the Company with or into another corporation, or a Change in Control, each outstanding Option and Stock Purchase Right shall be assumed or an equivalent option or right substituted by the successor corporation or a Parent or Subsidiary of the successor corporation.

In the event that the successor corporation refuses to assume or substitute for the Option or Stock Purchase Right, the Optionee shall fully vest in and have the right to exercise the Option or Stock Purchase Right as to all of the Optioned Stock, including Shares as to which it would not otherwise be vested or exercisable. If an Option or Stock Purchase Right becomes fully vested and exercisable in lieu of assumption or substitution in the event of a merger or sale of assets, the Administrator shall notify the Optionee in writing or electronically that the Option or Stock Purchase Right shall be fully vested and exercisable for a period of fifteen (15) days from the date of such notice, and the Option or Stock Purchase Right shall terminate upon the expiration of such period.

For the purposes of this subsection (c), the Option or Stock Purchase Right shall be considered assumed if, following the merger or Change in Control, the option or right confers the right to purchase or receive, for each Share of Optioned Stock subject to the Option or Stock Purchase Right immediately prior to the merger or Change in Control, the consideration (whether stock, cash, or other securities or property) received in the merger or Change in Control by holders of Common Stock for each Share held on the effective date of the transaction (and if holders were offered a choice of consideration, the type of consideration chosen by the holders of a majority of the outstanding Shares); provided, however, that if such consideration received in the merger or Change in Control is not solely common stock of the successor corporation or its Parent, the Administrator may, with the consent of the successor corporation, provide for the consideration to be received upon the exercise of the Option or Stock Purchase Right, for each Share of Optioned Stock subject to the Option or Stock Purchase Right, to be solely common stock of the successor corporation or its Parent equal in fair market value to the per share consideration received by holders of Common Stock in the merger or Change in Control.

(d) Involuntary Termination other than for Cause, Death or Disability or a Voluntary Termination for Good Reason, Following a Change of Control. If, within eighteen (18) months following a Change of Control, Optionee's employment is terminated involuntarily by the Company or successor corporation other than for Cause, death or Disability or by the Optionee by a Voluntary Termination for Good Reason, then Optionee shall fully vest in and have the right to exercise his or her Option as to all of the Shares subject to each such Option including Shares as to which such Option would not otherwise be vested or exercisable.

14. Date of Grant. The date of grant of an Option or Stock Purchase Right shall be, for all purposes, the date on which the Administrator makes the determination granting such Option or Stock Purchase Right, or such other later date as is determined by the Administrator. Notice of the determination shall be provided to each Optionee within a reasonable time after the date of such grant.

15. Amendment and Termination of the Plan.

(a) Amendment and Termination. The Board may at any time amend, alter, suspend or terminate the Plan.

(b) Stockholder Approval. The Company shall obtain stockholder approval of any Plan amendment to the extent necessary and desirable to comply with Applicable Laws.

(c) Effect of Amendment or Termination. No amendment, alteration, suspension or termination of the Plan shall impair the rights of any Optionee, unless mutually agreed otherwise between the Optionee and the Administrator, which agreement must be in writing and signed by the Optionee and the Company. Termination of the Plan shall not affect the Administrator's ability to exercise the powers granted to it hereunder with respect to Options granted under the Plan prior to the date of such termination.

16. Conditions Upon Issuance of Shares.

(a) Legal Compliance. Shares shall not be issued pursuant to the exercise of an Option or Stock Purchase Right unless the exercise of such Option or Stock Purchase Right and the issuance and delivery of such Shares shall comply with Applicable Laws and shall be further subject to the approval of counsel for the Company with respect to such compliance.

(b) Investment Representations. As a condition to the exercise of an Option or Stock Purchase Right, the Company may require the person exercising such Option or Stock Purchase Right to represent and warrant at the time of any such exercise that the Shares are being purchased only for investment and without any present intention to sell or distribute such Shares if, in the opinion of counsel for the Company, such a representation is required.

17. Inability to Obtain Authority. The inability of the Company to obtain authority from any regulatory body having jurisdiction, which authority is deemed by the Company's counsel to be necessary to the lawful issuance and sale of any Shares hereunder, shall relieve the Company of any liability in respect of the failure to issue or sell such Shares as to which such requisite authority shall not have been obtained.

18. Reservation of Shares. The Company, during the term of this Plan, will at all times reserve and keep available such number of Shares as shall be sufficient to satisfy the requirements of the Plan.

19. Stockholder Approval. The Plan shall be subject to approval by the stockholders of the Company within twelve (12) months after the date the Plan is adopted. Such stockholder approval shall be obtained in the manner and to the degree required under Applicable Laws.

**OVERSTOCK.COM, INC.**  
**2002 STOCK OPTION PLAN**  
**STOCK OPTION AGREEMENT**

Unless otherwise defined herein, the terms defined in the 2002 Stock Option Plan shall have the same defined meanings in this Stock Option Agreement.

**I. NOTICE OF STOCK OPTION GRANT**

**[Optionee's Name and Address]**

You have been granted an option to purchase Common Stock of the Company, subject to the terms and conditions of the Plan and this Option Agreement, as follows:

Grant Number	_____
Date of Grant	_____
Vesting Commencement Date	_____
Exercise Price per Share	\$ _____
Total Number of Shares Granted	_____
Total Exercise Price	\$ _____
Type of Option:	_____ Incentive Stock Option _____ Nonstatutory Stock Option
Term/Expiration Date:	_____

Vesting Schedule:

This Option shall be exercisable, in whole or in part, in accordance with the following schedule:

**[28% of the Shares subject to the Option shall vest twelve months after the Vesting Commencement Date, and 2% of the Shares subject to the Option shall vest each month thereafter, subject to the Optionee continuing to be a Service Provider on such dates].**

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Termination Period:

This Option may be exercised for three months after Optionee ceases to be a Service Provider. Upon the death or Disability of the Optionee, this Option may be exercised for twelve months after Optionee ceases to be a Service Provider. In no event shall this Option be exercised later than the Term/Expiration Date as provided above.

**II. AGREEMENT**

A. Grant of Option.

The Plan Administrator of the Company hereby grants to the Optionee named in the Notice of Grant attached as Part I of this Agreement (the "Optionee") an option (the "Option") to purchase the number of Shares, as set forth in the Notice of Grant, at the exercise price per share set forth in the Notice of Grant (the "Exercise Price"), subject to the terms and conditions of the Plan, which is incorporated herein by reference. Subject to Section 15(c) of the Plan, in the event of a conflict between the terms and conditions of the Plan and the terms and conditions of this Option Agreement, the terms and conditions of the Plan shall prevail.

If designated in the Notice of Grant as an Incentive Stock Option ("ISO"), this Option is intended to qualify as an Incentive Stock Option under Section 422 of the Code. However, if this Option is intended to be an Incentive Stock Option, to the extent that it exceeds the \$100,000 rule of Code Section 422(d) it shall be treated as a Nonstatutory Stock Option ("NSO").

B. Exercise of Option.

(a) Right to Exercise. This Option is exercisable during its term in accordance with the Vesting Schedule set out in the Notice of Grant and the applicable provisions of the Plan and this Option Agreement.

(b) Method of Exercise. This Option is exercisable by delivery of an exercise notice, in the form attached as Exhibit A (the "Exercise Notice"), which shall state the election to exercise the Option, the number of Shares in respect of which the Option is being exercised (the "Exercised Shares"), and such other representations and agreements as may be required by the Company pursuant to the provisions of the Plan. The Exercise Notice shall be completed by the Optionee and delivered to Secretary of the Company. The Exercise Notice shall be accompanied by payment of the aggregate Exercise Price as to all Exercised Shares. This Option shall be deemed to be exercised upon receipt by the Company of such fully executed Exercise Notice accompanied by such aggregate Exercise Price.

No Shares shall be issued pursuant to the exercise of this Option unless such issuance and exercise complies with Applicable Laws. Assuming such compliance, for income tax purposes the Exercised Shares shall be considered transferred to the Optionee on the date the Option is exercised with respect to such Exercised Shares.

C. Method of Payment.

Payment of the aggregate Exercise Price shall be by any of the following, or a combination thereof, at the election of the Optionee:

1. cash; or
2. check; or
3. consideration received by the Company under a formal cashless exercise program implemented by the Company in connection with the Plan; or
4. surrender of other Shares which (i) in the case of Shares acquired either directly or indirectly from the Company, have been owned by the Optionee for more than six (6) months on the date of surrender, and (ii) have a Fair Market Value on the date of surrender equal to the aggregate Exercise Price of the Exercised Shares.

D. Non-Transferability of Option.

This Option may not be transferred in any manner otherwise than by will or by the laws of descent or distribution and may be exercised during the lifetime of Optionee only by the Optionee. The terms of the Plan and this Option Agreement shall be binding upon the executors, administrators, heirs, successors and assigns of the Optionee.

E. Term of Option.

This Option may be exercised only within the term set out in the Notice of Grant, and may be exercised during such term only in accordance with the Plan and the terms of this Option Agreement.

F. Tax Obligations.

(a) Withholding Taxes. Optionee agrees to make appropriate arrangements with the Company (or the Parent or Subsidiary employing or retaining Optionee) for the satisfaction of all Federal, state, local and foreign income and employment tax withholding requirements applicable to the Option exercise. Optionee acknowledges and agrees that the Company may refuse to honor the exercise and refuse to deliver Shares if such withholding amounts are not delivered at the time of exercise.

(b) Notice of Disqualifying Disposition of ISO Shares. If the Option granted to Optionee herein is an ISO, and if Optionee sells or otherwise disposes of any of the Shares acquired pursuant to the ISO on or before the later of (1) the date two years after the Date of Grant, or (2) the date one year after the date of exercise, the Optionee shall immediately notify the Company in writing of such disposition. Optionee agrees that Optionee may be subject to income tax withholding by the Company on the compensation income recognized by the Optionee.



G. Entire Agreement; Governing Law.

The Plan is incorporated herein by reference. The Plan and this Option Agreement constitute the entire agreement of the parties with respect to the subject matter hereof and supersede in their entirety all prior undertakings and agreements of the Company and Optionee with respect to the subject matter hereof, and may not be modified adversely to the Optionee's interest except by means of a writing signed by the Company and Optionee. This agreement is governed by the internal substantive laws, but not the choice of law rules, of Delaware.

H. NO GUARANTEE OF CONTINUED SERVICE.

OPTIONEE ACKNOWLEDGES AND AGREES THAT THE VESTING OF SHARES PURSUANT TO THE VESTING SCHEDULE HEREOF IS EARNED ONLY BY CONTINUING AS A SERVICE PROVIDER AT THE WILL OF THE COMPANY (AND NOT THROUGH THE ACT OF BEING HIRED, BEING GRANTED AN OPTION OR PURCHASING SHARES HEREUNDER). OPTIONEE FURTHER ACKNOWLEDGES AND AGREES THAT THIS AGREEMENT, THE TRANSACTIONS CONTEMPLATED HEREUNDER AND THE VESTING SCHEDULE SET FORTH HEREIN DO NOT CONSTITUTE AN EXPRESS OR IMPLIED PROMISE OF CONTINUED ENGAGEMENT AS A SERVICE PROVIDER FOR THE VESTING PERIOD, FOR ANY PERIOD, OR AT ALL, AND SHALL NOT INTERFERE WITH OPTIONEE'S RIGHT OR THE COMPANY'S RIGHT TO TERMINATE OPTIONEE'S RELATIONSHIP AS A SERVICE PROVIDER AT ANY TIME, WITH OR WITHOUT CAUSE.

By your signature and the signature of the Company's representative below, you and the Company agree that this Option is granted under and governed by the terms and conditions of the Plan and this Option Agreement. Optionee has reviewed the Plan and this Option Agreement in their entirety, has had an opportunity to obtain the advice of counsel prior to executing this Option Agreement and fully understands all provisions of the Plan and Option Agreement. Optionee hereby agrees to accept as binding, conclusive and final all decisions or interpretations of the Administrator upon any questions relating to the Plan and Option Agreement. Optionee further agrees to notify the Company upon any change in the residence address indicated below.

OPTIONEE:

OVERSTOCK.COM, INC.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
By

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Residence Address

**EXHIBIT A**

**OVERSTOCK.COM, INC.**

**2002 STOCK OPTION PLAN**

**EXERCISE NOTICE**

Overstock.com, Inc.  
2855 East Cottonwood Parkway  
Suite 500  
Salt Lake City, UT 84121

Attention: Secretary or Chief Financial Officer

1. **Exercise of Option.** Effective as of today, \_\_\_\_\_, \_\_\_\_\_, the undersigned (“Purchaser”) hereby elects to purchase \_\_\_\_\_ shares (the “Shares”) of the Common Stock of Overstock.com, Inc. (the “Company”) under and pursuant to the 2002 Stock Option Plan (the “Plan”) and the Stock Option Agreement dated, \_\_\_\_\_ (the “Option Agreement”). Subject to adjustment in accordance with Section 13 of the Plan, the purchase price for the Shares shall be \$\_\_\_\_\_, as required by the Option Agreement.
  2. **Delivery of Payment.** Purchaser herewith delivers to the Company the full purchase price for the Shares.
  3. **Representations of Purchaser.** Purchaser acknowledges that Purchaser has received, read and understood the Plan and the Option Agreement and agrees to abide by and be bound by their terms and conditions.
  4. **Rights as Shareholder.** Until the issuance (as evidenced by the appropriate entry on the books of the Company or of a duly authorized transfer agent of the Company) of the Shares, no right to vote or receive dividends or any other rights as a shareholder shall exist with respect to the Optioned Stock, notwithstanding the exercise of the Option. The Shares so acquired shall be issued to the Optionee as soon as practicable after exercise of the Option. No adjustment will be made for a dividend or other right for which the record date is prior to the date of issuance, except as provided in Section 13 of the Plan.
  5. **Tax Consultation.** Purchaser understands that Purchaser may suffer adverse tax consequences as a result of Purchaser’s purchase or disposition of the Shares. Purchaser represents that Purchaser has consulted with any tax consultants Purchaser deems advisable in connection with the purchase or disposition of the Shares and that Purchaser is not relying on the Company for any tax advice.
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6. Entire Agreement; Governing Law. The Plan and Option Agreement are incorporated herein by reference. This Agreement, the Plan and the Option Agreement constitute the entire agreement of the parties with respect to the subject matter hereof and supersede in their entirety all prior undertakings and agreements of the Company and Purchaser with respect to the subject matter hereof, and may not be modified adversely to the Purchaser's interest except by means of a writing signed by the Company and Purchaser. This agreement is governed by the internal substantive laws, but not the choice of law rules, of Delaware.

Submitted by:

Accepted by:

PURCHASER:

OVERSTOCK.COM, INC.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
By

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Its

Address:  
\_\_\_\_\_  
\_\_\_\_\_

Address:  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Date Received



Confidential treatment has been requested for portions of this exhibit. The copy filed herewith omits the information subject to the confidentiality request. Omissions are designated as [\*]. A complete version of this exhibit has been filed separately with the Securities and Exchange Commission.

**Strategic Alliance and Product Sales Agreement**

This Strategic Alliance and Product Sales Agreement, including the Exhibits and/or amendments (if any) attached hereto (the "Agreement") is entered into by and between **Overstock.com, Inc.**, a Utah Corporation located at 6322 South, 3000 East, Suite 100, Salt Lake City, UT 84121 ("**Overstock**") and **Safeway Inc.**, a Delaware Corporation with principal headquarters located at 5918 Stoneridge Mall Road, Pleasanton, California 94588 ("**Safeway**"). The Agreement shall be effective as of February 26, 2002 (the "**Effective Date**").

**Background**

**WHEREAS**, Overstock is an Internet retailer of name-brand surplus and close-out merchandise and specializes in selling first-quality merchandise at deep discounts across a broad range of categories;

**WHEREAS**, Safeway is one of the largest food and drug retailers in North America and owns or operates stores throughout North America;

**WHEREAS**, Overstock and Safeway desire to enter into this Agreement according to the terms and conditions set forth herein;

**NOW THEREFORE**, in consideration of the mutual promises set forth herein, the Parties agree as follows:

**1. DEFINITIONS**

1.1. "**Applicable Laws**" means state, federal and local laws, rules, regulations, codes, ordinances, administrative rulings, judgments, decrees, injunctions, writs, orders, and directives of any jurisdiction applicable to the Parties or the Agreement together with any interpretations of any governmental entity or agency with jurisdiction over the Agreement or the Parties.

1.2. "**Business Day**" means a day other than a Saturday, Sunday or holiday on which financial institutions are authorized or obligated to close in New York, New York, U.S.A.

1.3. "**Confidential Information**" is defined in Section 8.1.

1.4. "**Content**" means interviews, concepts, data, images, programming, computer code, photographs, illustrations, graphics, audio clips, video clips, text, or other materials generated in any form or media.

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1.5. **“Custom Content”** shall mean Intellectual Property (including Content) made, conceived, or developed by Overstock after the Effective Date specifically on behalf of Safeway in creating the Web Site. Custom Content does not include any Overstock Content, Overstock Intellectual Property created or otherwise owned or in the possession of Overstock prior to the Effective Date of this Agreement, as well as other Overstock Intellectual Property developed by or on behalf of Overstock outside the scope of this Agreement, or Third Party Content.

1.6. **“Customer Information”** is defined in Section 3.9.2.

1.7. **“Customer Service Standards”** is defined in Section 3.8.3.

1.8. **“Domain Name”** shall mean the domain name specified for the Web Site in accordance with Section 3.3.

1.9. **“Intellectual Property”** means all inventions (whether or not prosecutable under patent laws), works of authorship, information fixed in any tangible medium of expression (whether or not protectable under copyright laws), moral rights, mask works, trademarks, trade names, trade dress, trade secrets, publicity rights, know-how, ideas (whether or not protectable under trade secret laws), and all other subject matter protectable under patent, copyright, moral right, mask work, trademark, trade secret, or other laws, including without limitation all new or useful art, combinations, discoveries, formulae, manufacturing techniques, technical developments, artwork, software, programming, applets, scripts, designs, service marks, logos, tags lines, and other corporate branding/identity.

1.10. **“Look and Feel”** means the graphics, design, organization, presentation, layout, user interface, navigation and stylistic convention (including the digital implementations thereof) of a particular piece of media.

1.11. **“Overstock Content”** shall mean: (i) Intellectual Property (including Content and the Overstock Site) made, conceived, or developed by Overstock prior to the Effective Date and contained in, comprising, or otherwise necessary to produce, display and/or maintain the Web Site; and (ii) Intellectual Property made, conceived or developed by or on behalf of Overstock independent of this Agreement. Overstock Content does not include Safeway Content, Third Party Content, or Custom Content.

1.12. **“Overstock Site”** means the Web sites or collection of Internet pages residing on Servers owned or controlled by Overstock or its affiliated, subsidiary or related companies and currently accessible by the public via the Internet at the URL <http://www.overstock.com>.

1.13. **“Party”** means either Safeway or Overstock; **“Parties”** means Safeway and Overstock.

1.14. **“Privacy Policy”** means the privacy policy set forth in [Exhibit A](#).

1.15. **“Product”** means those products ordered by Safeway under this Agreement for in-store sales and those products offered for sale on the Web Site.

- 1.16. **“Product List”** means a list of those Products (including available quantities and Purchase Price) that are available for purchase by Safeway from Overstock’s vendors, suppliers and other providers.
- 1.17. **“Project Manager”** is defined in Section 10.1
- 1.18. **“Purchase Price”** is defined in Section 2.2.3.
- 1.19. **“Safeway Content”** shall mean Intellectual Property (including Content) made, conceived, or developed by Safeway and contained in, comprising, or otherwise necessary to display and/or maintain the Web Site. Safeway Content does not include Overstock Content or Third Party Content.
- 1.20. **“Safeway Site”** means the Web sites or collection of Internet pages residing on Servers owned or controlled by Safeway or its affiliated, subsidiary or related companies and currently accessible by the public via the Internet at the URL <http://www.safeway.com> or other URLs owned or controlled by any Safeway Store.
- 1.21. **“Safeway Stores”** means Safeway, Safeway Food and Drugs, Carr’s, Dominick’s, Eagle, Genuardi’s, Pak ’n Save Foods, Pavilions, Randalls, Simon David, Tom Thumb, Vons, and other stores owned and/or operated by Safeway or any of its Affiliates on or after the Effective Date.
- 1.22. **“Server”** means computers or other data processing devices that host, store, or deliver content over the Internet or such other communications network or networks as are capable of interactive communications with the Web Site, Safeway Site and Overstock Site, utilizing such communications protocols and technology as exist now or may in the future become available.
- 1.23. **“Term”** is defined in Section 9.1.
- 1.24. **“Third Party Content”** means Intellectual Property (including Content) licensed, made, conceived, or developed by a third party used by Overstock and contained in, comprising, or otherwise necessary to display and/or maintain the Web Site.
- 1.25. **“Web Site”** means the co-branded Web site or collection of Internet pages developed by Overstock and Safeway in connection with this Agreement and residing within the Overstock Site and currently accessible by the public via the Internet at the URL <http://www.safewayexclusives.com>.
- 1.26. **“Web Site Service Standards”** is defined in Section 3.1.

## **2. SALES AND PURCHASES OF PRODUCTS FOR IN-STORE SALES.**

### **2.1. Joint Commitments.**

- 2.1.1. Each Party recognizes that the other Party generally purchases products

from a wide variety of respective vendors, liquidators, and suppliers. Periodically during the term of this Agreement, the Parties may provide one another with non-confidential, general information regarding the identity and status of relevant suppliers and vendors for purposes of complying with the exclusivity obligations set forth herein.

2.1.2. During the Term and subject to this Section 2.1, Safeway agrees to use reasonable good faith efforts to abstain from purchasing any Products or other substantially similar products as are contemplated hereunder from any of Overstock's respective vendors or suppliers with whom Safeway does not have a pre-existing relationship as of the Effective Date. Subject to Safeway's obligations under this Section 2.1, Safeway shall not be prohibited or restricted from purchasing any goods from any liquidator or similar person or entity.

2.1.3. In addition, during the Term and subject to the conditions contained in this Agreement, Safeway shall purchase from Overstock no less than [\*] of all products made available by Safeway in connection with Safeway's "Safeway Exclusives" program. If Safeway fails, for a period of thirty (30) consecutive days during the Term, to sell Products [\*], Overstock shall have the right, for a period of thirty (30) days thereafter, to terminate this Agreement upon not less than thirty (30) days written notice to Safeway. Notwithstanding anything to the contrary contained herein, Safeway's obligation under this Section 2.1 shall be conditioned on Overstock's ability to timely deliver to Safeway Products at competitive prices which are of equal or greater quality, quantity and timeliness as those which Safeway could purchase from third parties. In the event Overstock fails to meet its obligations under this Agreement, the Parties shall negotiate in good faith to appropriately adjust downward Safeway's obligations under this Section 2.1.2.

2.1.4. Notwithstanding anything to the contrary contained herein but without affecting Safeway's purchase obligations in Section 2.1.3, Overstock acknowledges that Safeway currently maintains, and shall be allowed to maintain unaffected by this Agreement, an existing contractual relationship with [\*] for online sales of related products.

2.1.5. Overstock agrees that, during the Term, it shall not sell goods which are the same or similar to the Products to any store that has more than four hundred (400) retail stores in the following categories: (a) drug; (b) mass merchandising; (c) grocery; or (d) club or warehouse stores. In addition to the foregoing, Overstock agrees that, during the Term, it shall not, directly or through an affiliate, enter into any business relationship of any type (including without limitation, on-line sales, in-store sales, or consulting) with any entity selling groceries or drugs that has more than four hundred (400) retail stores.

2.1.6. Non-Solicitation. Each of the Parties agrees that during the term of this Agreement and for a [\*] period thereafter, it shall not, except with the prior written consent of the other, solicit the employment or engagement of any employee of the other Party; provided that nothing shall prohibit either Party from employing an employee of the other who initiated discussions regarding employment, or who responded to a generally publicized advertisement for employment. In the event of a breach of this Section 2.1.6, the breaching Party shall pay to the non-breaching Party, as liquidated damages and not as a penalty, an amount equal to [\*]. Payments to be made under this Section 2.1.6 shall be made within fifteen (15) days of the non-breaching Party's demand.

## 2.2. **Product Offering; Prices and Payment.**

2.2.1. To the extent possible, Overstock shall periodically provide Safeway with



written Product Lists and shall provide the Safeway Project Manager with frequent updates (as such become available) to the Product List to reflect changes in the Product mix, quantity, Purchase Price and other information.

2.2.2. In order to assist Safeway in determining whether to purchase Product and to the extent possible, Overstock shall, within ten (10) Business Days after a request from the Safeway Project Manager, use reasonable efforts to deliver a representative sample (contained in representative packaging) of the requested Product to the Safeway Project Manager, [\*].

2.2.3. Safeway's initial purchase price for each Product shall be equal to Overstock's actual, documented cost for the Product *plus* [\*] ("Purchase Price"), subject to adjustment as provided herein. If Safeway specifically requests special sorting or repackaging services from Overstock, Safeway shall reimburse Overstock at a mutually agreed upon fee.

2.2.4. Overstock shall invoice Safeway for all Product in a form and manner mutually agreed by the Parties. Safeway shall pay all amounts (unless Safeway disputes such invoice amounts in good faith) within the later of ten (10) Business Days after receipt of Overstock's invoice or Safeway's first receipt of Product at the Delivery Point. Safeway may contest, in good faith, all or any portion of an invoice by providing Overstock with written notice of such contest (the "**Contest Notice**"). The Contest Notice will include the reason for such contest and the amount that the Safeway believes is properly due. Overstock shall investigate the matter and provide a written response to Safeway. If the Parties disagree, the dispute shall be submitted to the dispute resolution procedure set forth in Section 10.10 and 10.11 below. Safeway's payment obligations and Overstock's Product delivery obligations hereunder shall be suspended while any good-faith payment dispute is outstanding.

### 2.3. **Orders.**

2.3.1. Safeway's purchase orders ("Purchase Order(s)") for Products shall be submitted to Overstock in writing or via email within ten (10) business days from the anticipated arrival date of Products. Overstock shall provide Safeway with reasonable notice if Overstock has reason to believe that its suppliers or vendors will not have a certain Product available for shipment to Safeway. In addition, Overstock shall provide Safeway with as much notice as possible if it anticipates or has reason to believe that Overstock's supply of a Product will not be sufficient to meet Safeway's requirements. The Parties understand that because Overstock's inventory of Products is dependent on the availability of Products from Overstock's respective vendors, suppliers, and/or other providers, Overstock cannot make any specific representations regarding or otherwise guaranteeing the availability of the types or quantities of Products which may or may not be available for purchase by Safeway. Notwithstanding the foregoing, however, the Parties agree that at such time as Overstock accepts Safeway's Purchase Order in accordance with Section 2.3.4 below, Overstock shall be obligated to timely and accurately fill such Purchase Order.

2.3.2. All purchases and sales between Overstock and Safeway will be initiated by Safeway's issuance of written Purchase Orders or Purchase Orders auto-faxed directly to Overstock from Safeway. Each Purchase Order shall include: (i) identification of Products ordered; (ii) quantity to be purchased; (iii) Purchase Price of Products ordered; (iv) requested

delivery dates; (v) shipping instructions; and (vi) purchase order number(s). Nothing contained in any purchase order will modify any material terms or conditions of this Agreement, and in the event of any conflict between this Agreement and any purchase order, this Agreement shall govern.

2.3.3. During the Term, Overstock shall provide Safeway with [\*] on all Product orders. To that end, Overstock shall use commercially reasonable efforts to timely and accurately fulfill all Safeway orders in accordance with Safeway's [\*], regardless of any allocation methodologies that may otherwise apply to any Product.

2.3.4. Overstock shall notify Safeway of the acceptance or rejection of a Purchase Order within two (2) Business Days of receipt; provided that, in the event that Overstock does not respond to any Purchase Order within such two (2) Business Day period, Overstock shall be deemed to have accepted the order as written.

2.3.5. Safeway may redirect delivery of Products prior to shipment at no additional charge other than any additional freight charges actually incurred by Overstock. Furthermore, Safeway may, [\*], cancel or reschedule delivery of Products if Overstock has not yet placed a binding order for such Products on Safeway's behalf or Overstock is not legally bound to purchase such Products. If Overstock has placed a binding order for such Products on Safeway's behalf or Overstock is legally bound to purchase such Products and Safeway cancels an order, Safeway shall reimburse Overstock an amount equal to [\*]. Overstock shall use best commercially reasonable efforts to return or resell such Products on behalf of Safeway at the highest price possible.

2.3.6. Overstock (at Safeway's expense) shall provide information which is required for Safeway to obtain any export or import licenses required for Safeway to ship or receive Products, including, but not limited to, certificates of origin, (NAFTA, etc.), manufacturer's affidavits, Buy America qualification, and U.S. Federal Communications Commissions identifier, if applicable.

#### 2.4. **Packaging and Shipping.**

2.4.1. Unless otherwise specified by Safeway, Overstock and/or its respective vendors, suppliers or other providers will mark, package and deliver all goods in a manner which is in accordance with industry standard practices. Overstock shall use commercially reasonable efforts to accommodate any special packaging requests made by Safeway, and Safeway shall bear any additional expenses relating thereto.

2.4.2. Shipment will be F.O.B. Safeway's distribution center ("**Delivery Point**"), at which time risk of loss and title pass to Safeway. All freight charges from either Overstock or the third party supplier to the Delivery Point, will be borne by Safeway. Unless provided in this Agreement, [\*].

2.4.3. Upon reaching agreement on the prices associated with Product rush orders, Overstock shall use its reasonable efforts to meet Safeway's requirements for reasonable rush orders for Products requiring immediate delivery. The Parties will negotiate in good faith the prices for such rush orders, taking into consideration Overstock's available inventory and

additional shipping and personnel expense necessary.

2.4.4. If Overstock fails to timely and accurately fill any Safeway Purchase Order that has been accepted by Overstock, Safeway may, in its sole discretion, either (i) accept the deficient order and Overstock shall credit Safeway promptly for such deficiency, or (ii) terminate the order and return any materially deficient order Products at Overstock's expense.

**2.5. Inspection and Acceptance.**

2.5.1. Safeway will inspect all Products for obvious physical damage within five (5) days of receipt thereof. Safeway may reject any Product that appears defective by notifying Overstock in writing or by facsimile of its rejection within such five (5) day inspection period and requesting a Returned Material Authorization ("**RMA**") number. Overstock will provide the RMA number in writing or by facsimile to Safeway within five (5) days of receipt of the request. If Safeway observes Product discrepancies that are the result of shipping or Product carrier and/or transport circumstances, Safeway shall make note of such Product shipping discrepancies on the applicable bill of lading. Within ten (10) days of receipt of the RMA number, Safeway will return to Overstock the rejected Product with the RMA number displayed on the rejected Product. Products not rejected by Safeway within two (2) Business Days of Safeway's inspection thereof shall be deemed accepted by Safeway.

2.5.2. Unless it is determined that Safeway, its agents or affiliates are responsible for the defect or discrepancy apparent in a returned Product, Overstock shall reimburse Safeway for the cost of the defective returned item together with return shipping and related charges from Safeway's Standard Product Recovery Center (PRC) to Overstock or its designee within ten (10) Business Days after receiving the rejected Product from Safeway.

**2.6. Inventory Balancing.**

2.6.1. Safeway may return to Overstock and have liquidated any or all unsold Product ("**Unsold Product**") at Safeway's sole discretion in accordance with this Section 2.6; provided that such request is made within sixty (60) days of Safeway's original receipt of such Unsold Products.

2.6.2. In the event Safeway desires to return or have liquidated any Unsold Product, Safeway shall notify Overstock, and Overstock shall use its best commercially reasonable efforts to promptly identify, through use of its in-house business to business reseller personnel or otherwise, willing, ready and able buyers for the Unsold Products. Overstock shall use best commercially reasonable efforts to liquidate Unsold Products on behalf of Safeway at the highest price possible.

2.6.3. At such time as Overstock identifies a buyer or buyers of all or part of the Unsold Product, Overstock shall provide Safeway with written or email notice of the price to be paid for, and quantity to be purchased of, the Unsold Product by such buyer(s). Safeway shall then have the right to either (i) sell the Unsold Product directly to the buyer(s), (ii) return the Unsold Product to Overstock for processing prior to the sale thereof to the buyer(s) (in which case Overstock shall provide Safeway with a written "not-to-exceed" estimate of its handling costs, which shall not include the cost of return shipping back to Overstock, which shall be

borne by Overstock (but only to the extent that and insofar as such Overstock borne Unsold Product costs do not prevent Overstock from receiving at least [\*] for Products provided Safeway hereunder, as set forth in Section 2.7 below), or (iii) keep the Unsold Product. If Safeway chooses option (ii) above, Safeway shall use best commercially reasonable efforts to itemize, sort, and organize all Unsold Products returned for processing to Overstock.

2.6.4. Safeway shall include an Unsold Product Inventory Report (containing a description of Unsold Products and quantities) with all Unsold Product shipments returned back to Overstock. Such Unsold Product Inventory Reports shall correspond to and adequately reflect Safeway's pre-return Product itemization, sorting and organization obligations hereunder. Upon Overstock's receipt of Unsold Product, Overstock will, within five (5) days, reconcile Unsold Products actually received with Unsold Products documented on Safeway's Unsold Product Inventory Report accompanying such return shipment. The Parties agree that Safeway shall have no financial responsibility to Overstock for Unsold Products that are returned to Overstock on account of "shrinkage", stolen, or missing Unsold Product, unless such damage or loss was caused by Safeway or its agents.

2.6.5. Upon liquidation of Unsold Product as set forth herein, Safeway shall be entitled to receive (either directly from the buyer(s) or from Overstock) the aggregate amount realized from the sale of the Unsold Products. Overstock shall share in any decreased return on Unsold Product, but only to the extent provided in Section 2.7 below.

2.6.6. The Parties agree that Overstock shall have no financial responsibility to Safeway for Unsold Products that are returned to Overstock in damaged or non-resalable form, or on account of "shrinkage", stolen, or missing Product, unless such damage or loss was caused by Overstock or its agents.

2.7. **Reconciliation.** The Parties shall, on a calendar quarterly basis, determine the aggregate Purchase Price paid by Safeway for Unsold Products and the amount actually received by Safeway for the sale of Unsold Products under Section 2.6 above ("Realized Amount"). In the event the Realized Amount is less than the aggregate Purchase Price for the applicable Unsold Products, subject to the next sentence, Overstock shall remit back to Safeway (or credit to Safeway, at Safeway's discretion), the difference between the Realized Amount and the aggregate Purchase Price for the applicable Unsold Products. Notwithstanding the foregoing, the Parties expressly agree that in no event shall Overstock be obligated to remit to Safeway any amount which would, in the aggregate for such calendar quarter, cause Overstock to realize proceeds of less than Overstock's actual, documented cost for such Products *plus* [\*]. See Exhibit B attached hereto as an illustration of the foregoing.

2.8. **Sell-Off.** Upon expiration or termination of this Agreement, Safeway shall have the right, in its sole discretion, to sell-off all Products in its inventory.

### 3. WEB SITE OPERATIONS AND SALES.

3.1. **Hosting and Maintenance of the Web Site.** Overstock will be solely responsible for hosting, maintaining, securing, and operating the Web Site in accordance with the standards set forth herein, including the technical requirements and service standards set forth in Exhibit C

(the “Web Site Service Standards”).

3.2. **Future Developments.** Overstock will use commercially reasonable efforts to provide mutually agreed upon modifications or enhancements to the Website that are requested by Safeway. Any Safeway-initiated modifications, additions, improvements and/or enhancements shall be performed at a mutually agreeable rate, which in no event shall exceed Overstock’s then current consulting and development rates.

3.3. **Domain Name.**

3.3.1. Overstock shall obtain and maintain during the Term, on Safeway’s behalf, at Safeway’s expense for registration fees and similar out-of-pocket expenses, and in Safeway’s name, an Internet Protocol address and corresponding domain name(s) as instructed by Safeway from time to time (singularly or collectively, “Domain Name”), and do all other acts necessary to establish and maintain the Internet Protocol address and Domain Name of the Web Site. The initial Domain Name shall be *www.safewayexclusives.com*.

3.3.2. Safeway (at its own expense for registration fees and similar out-of-pocket expenses) may add to or change the Domain Name at any time by providing Overstock with written notice and Overstock shall make any additions or changes necessary (including without limitation, additional filings with registration entities or additional or modified links to or from the Web Site) within thirty (30) days after receiving such notice. All right, title and interest in the Domain Name shall vest immediately and exclusively in Safeway. Overstock shall list the Administrative Contact and Billing Contact as follows:

Administrative Contact, Technical Contact:  
sande, bob (BSW504) bob.sande@SAFEWAY.COM  
Safeway, Inc.  
2800 Ygnacio Valley Rd  
Walnut Creek, Ca 94596  
925-944-4560

Billing Contact:  
Harry, Little (LHK551) harry.little@SAFEWAY.COM  
Safeway IT  
2800 Ygnacio Valley Rd.  
Walnut Creek, CA 94598  
925-944-4570

3.4. **Hidden Text.** Without prior written permission from Safeway, Overstock shall not include any hidden, microscopic, or invisible text, commands, code, programming, meta tags, or other similar material in the Web Site.

3.5. **Branding; Advertisements.**

3.5.1. The Parties shall mutually agree upon any third party advertisement, trademark, service mark, trade name, copyright or other Content on the Web Site. If Safeway

consents to any third party advertisement on the Web Site, [\*] of any and all revenues invoiced to such third parties. Without limiting the foregoing, neither Party shall enter into any agreement with any third party that imposes any obligations upon the other Party, without the other's prior written consent.

3.5.2. The page header of the Web Site shall be reserved for the exclusive use of Safeway branding and logos. During Term, and subject to Safeway's consent as to placement, size and frequency, Overstock may place on the Web Site text and/or graphics stating "Powered by Overstock" or a similar attribution reasonably acceptable to Safeway.

**3.6. Navigation.**

3.6.1. The Web Site will be accessible to users via the Internet with the aid of any standard Web browser. Overstock shall create and maintain during the Term: (i) a hyperlink from the Safeway Site, and any other Safeway Stores web site(s) requested by Safeway, to the Web Site, and (ii) corresponding hyperlinks from the Web Site back to the Safeway Site. The type and placement of the hyperlinks shall be as agreed to by the Parties.

3.6.2. Overstock shall provide an interstitial page for users that click the hyperlink from the Safeway Site to the Web Site informing such users that it is leaving the Safeway Site. Except as provided in this Section, Overstock shall not, in conjunction with the Web Site, use any interstitials, pop-up windows, other intermediate steps or any other technology or content which acts as a barrier to the transition of a user from the Safeway Site to the Web Site or any transition between pages within the Web Site, nor shall Overstock otherwise frame the pages within the Web Site or use any other technology which interferes with or affects the page layout of such pages.

3.6.3. Overstock agrees not to override browser back button functionality for any purpose, including, without limitation, to prevent users who link to the Web Site from the Safeway Site from returning to the Safeway Site.

**3.7. Infrastructure Requirements.**

3.7.1. During the Term, Overstock shall, [\*], provide all necessary servers, communication lines, connectivity and related hardware, software, equipment, physical facilities, and technology to host and operate the Web Site. In the event Safeway requests that Overstock utilizes any custom hardware, software or equipment solely for Safeway, the Parties shall negotiate in good faith regarding an equitable cost sharing arrangement therefore.

3.7.2. Overstock shall configure and operate the Web Site upon a secure computer hardware server with a direct Internet connection of at least T-1 bandwidth. Overstock shall locate the Web Site at Overstock's premises or at a locked and secured location at a third party's premises, provided no third party will have access to the Web Site, Customer Information or any Confidential Information of Safeway.

**3.8. Sale of Products On the Web Site.**

3.8.1. The Web Site shall promote and sell only those Products mutually agreed by the Parties. In no event shall Overstock knowingly include on the Web Site any Content or offer any Products which (i) infringe upon the copyright, literary, privacy, publicity, trademark, service mark or any other personal or property right of any person; (ii) constitute libel or defamation of any person or entity; (iii) constitute unfair competition or false advertising, (iv) contain content that is obscene, child pornographic or harmful to minors; or (iv) violate any Applicable Laws. The Parties further acknowledge and agree that nothing contained in this Agreement shall obligate Safeway to include Products on the Web Site that would violate the terms of any agreement binding on Safeway as of the Effective Date.

3.8.2. In the event that a Web Site user desires to purchase a Product on or through the Web Site and such Product is no longer available to Overstock, Overstock agrees to use commercially reasonable efforts to provide such customer (at the customer's sole discretion) with a reasonable alternative to the unavailable Product.

3.8.3. Overstock shall provide customer service and support in accordance with the standards specified in Exhibit D (the "**Customer Service Standards**"). Without limiting the foregoing, Overstock (or, if applicable, the respective Product manufacturer) agrees to provide all customer service and support for the Products sold to customers from the Web Site with highest industry standard responsiveness and satisfaction.

3.8.4. **Order Processing.** Overstock will be solely responsible for order processing, order fulfillment, payment processing, shipment, cancellations, complaints, returns and other forms of customer service. All such obligations shall be performed in accordance with the Customer Service Standards, or if not addressed thereon, in accordance with highest industry standards.

### 3.9. **Privacy Policy; Customer Information.**

3.9.1. Overstock represents, covenants, and agrees that it shall comply with all terms and conditions of the Privacy Policy, as may be amended from time to time upon the mutual agreement of the Parties. In the event the Parties are unable to agree upon any such modification, but Overstock implements such modification without the approval of Safeway, Safeway shall have the right, but not the obligation, to terminate this Agreement without penalty or cost upon not less than ten (10) days prior written notice to Overstock.

3.9.2. Without limiting any other warranty or obligation of Overstock under this Agreement, during the Term and thereafter in perpetuity, Overstock will not gather, store, use, disclose, distribute, sell, share, rent or otherwise transfer any personally identifiable information obtained from users of the Web Site, including name, address, phone numbers, credit card numbers, or Products requested (the "**Customer Information**") in any manner, except as expressly provided in this Agreement or as Overstock may be expressly directed in advance in writing by Safeway.

3.9.3. Overstock represents, covenants, and agrees that it will use Customer Information only in compliance with: (i) this Agreement; (ii) the Privacy Policy; and (iii) all Applicable Laws (including applicable laws, policies and regulations related to spamming, privacy, and consumer protection). Overstock further agrees that Overstock will use all

commercially reasonable and appropriate security, such as, for example, encryption and passwords, to protect Customer Information from unauthorized disclosure (internally or externally) and that the use of such security does not give rise to any privacy rights in the communication as between Overstock and Safeway.

3.10. **Changes.**

3.10.1. Overstock shall not make any change to the Look and Feel of the Web Site or Content contained thereon without Safeway's prior written consent. The Parties do acknowledge, however, that Overstock may, without Safeway's consent, but with notice to Safeway, make modifications to the Web Site other than to Look and Feel if such modifications are being made throughout the Overstock Site.

3.10.2. Overstock will use commercially reasonable efforts to provide mutually agreed upon modifications or enhancements to the Web Site during the Term that are requested by Safeway. Any Safeway-initiated modifications, additions, improvements and/or enhancements shall be performed at a mutually agreeable rate, which in no event shall exceed Overstock's then current consulting and development rates.

3.11. **Terms and Conditions.** The Web Site shall include Terms and Conditions for use, mutually agreed to by the Parties, created in such a way as to cause each user to view (*i.e.*, at a minimum, to be forced to scroll through or past) and acknowledge (*e.g.*, by an acknowledgement button following the text) the same.

3.12. **Revenue Sharing for Web Site Sales.**

3.12.1. Within fifteen (15) days of the end of each calendar month during the term, Overstock shall pay to Safeway an amount equal to the greater of (i) [\*] of gross sales, or (ii) [\*] of net profits for the month just ended. For purposes of this Section, "**gross sales**" means the gross price invoiced for all Products sold less only coupon discounts and promotional deductions agreed to by Safeway; "**net profits**" means the gross price invoiced for all Products sold less the actual cost of the Product(s) as documented by Overstock, taxes, out-bound shipping charges, and reasonable reserve for returns. At the end of each calendar quarter during the Term, Overstock shall reconcile the return reserve used in the calculation of net profits with actual returns received during such period. Following such reconciliation, the applicable Party shall pay the other Party the amount necessary to correct any overpayment or underpayment (as applicable) resulting from the variance between the return reserve and actual reserves. If any reconciliation shows an overstatement in the return reserve of more than [\*], Overstock shall pay Safeway the correction amount described in the previous sentence [\*]; provided that [\*] shall not be Safeway's exclusive remedy for an overstated return reserve and payment of such amount shall not limit or otherwise affect any other rights or remedies that Safeway may have under this Agreement or Applicable Law.

3.12.2. Overstock shall provide the following reports to Safeway in the form and manner reasonably requested by Safeway: (a) daily usage reports describing the number of page impressions, number of users and such other information as reasonably requested by Safeway from time to time; (b) detailed weekly logging of content access, and product movement, and (c)



a detailed accounting of all revenues, costs and expenses involved in the calculation of the amount payable under Section 3.12.1 (showing both the “gross sales” and “net profit” calculations). Without limiting the foregoing, upon Safeway’s request, Overstock shall promptly provide Safeway with invoices and other documentation supporting the report described in clause (c).

3.13. **Joint Promotional Activities for the Web Site.** Subject to Section 4.5 below, the Parties will cooperate to promote the Web Site in ways to be mutually agreed upon.

#### 4. OWNERSHIP OF INTELLECTUAL PROPERTY

##### 4.1. Ownership By Safeway.

4.1.1. **Safeway Content.** Safeway is the sole and exclusive owner of the Safeway Content and all Intellectual Property relating thereto. Subject to the terms and conditions contained herein, Safeway grants to Overstock, during the Term, a limited, non-exclusive, non-transferable, non-sublicensable, royalty free license to access, operate, display and use the Safeway Content solely on the Web Site. Overstock acknowledges and agrees that it (i) may only use the Safeway Content in the form provided by Safeway, (ii) may use the Safeway Content solely in connection with this Agreement, and (iii) shall not alter, edit, or make any change to the Safeway Content without Safeway’s prior written approval. Safeway shall deliver the Safeway Content to Overstock in an electronic file format (e.g., .pdf, .txt, .gif, .jpg) or as otherwise agreed to by the Parties. Upon expiration or termination of this Agreement, the licenses granted in this Section 4.1 shall immediately revert to Safeway, and Overstock shall, at Safeway’s instructions, immediately either deliver to Safeway or destroy and erase all original and copies, summaries, abstractions and other iterations (regardless of form) of the Safeway Content.

4.1.2. **Custom Content.** Overstock acknowledges and agrees that its creation and authorship of Custom Content constitutes a “work made for hire,” as that term is defined in Title 17 of the United States Code (the “Copyright Act”), and that Safeway is, and shall be deemed to be, the sole author and owner of the Custom Content including Intellectual Property therein. With respect to all Custom Content that is not covered by the definition of a “work made for hire” under the Copyright Act, such that Overstock would be regarded as the copyright author and owner, Overstock hereby assigns and agrees to assign to Safeway (at Safeway’s expense for registration fees and similar out-of-pocket expenses), and Safeway accepts and agrees to accept, Overstock’s entire right, title, and interest in and to such works, including all copyrights therein, for all media now known or later developed. Overstock further agrees to execute, or cause to be executed by its employees, agents, or subcontractors, whatever assignments of copyright and ancillary and confirmatory documents that may be required or appropriate so that title to any Custom Content and to the copyright therein shall be clearly and exclusively held by Safeway or any nominee thereof.

4.1.3. **Domain Name.** Safeway shall own all right, title and interest in and to the Domain Name and all Intellectual Property related thereto.

##### 4.2. Overstock Content.

Overstock is the sole and exclusive owner of the Overstock

Content and all Intellectual Property relating thereto. Subject to the terms and conditions contained herein, Overstock grants to Safeway, during the Term, a limited, non-exclusive, non-transferable, non-sublicensable license to access, reproduce, display and use the Overstock Content for use in the promotions set forth herein. Safeway acknowledges and agrees that it (i) may only use the Overstock Content in the form provided by Overstock, (ii) may use the Overstock Content solely in connection with this Agreement, and (iii) shall not alter, edit, or make any change to the Overstock Content without Overstock's prior written approval. Overstock shall deliver the Overstock Content to Overstock in an electronic file format (e.g., .pdf, .txt, .gif, .jpg) or as otherwise agreed to by the Parties. Upon expiration or termination of this Agreement and subject to Safeway's right to sell-off inventory of Products, the licenses granted in this Section 4.2 shall revert to Overstock, and Safeway shall, at Overstock's instructions, immediately either deliver to Overstock or destroy and erase all original and copies, summaries, abstractions and other iterations (regardless of form) of the Overstock Content.

4.3. **Third Party Content.** Overstock shall obtain and maintain throughout the Term, at Overstock's sole cost and expense, a world-wide license to use the Third Party Content incorporated into the Web Site . Such license must include the electronic distribution and public display and performance of the Third Party Content and the right to modify, amend, create derivative works, rent, sell, assign, lease, sublicense, or otherwise alter or transfer the Third Party Content. If Safeway specifically requests the inclusion of certain Third Party Content, Safeway shall assist Overstock in securing the aforementioned rights to such Third Party Content.

4.4. **Copyright Notice.**

4.4.1. Overstock shall cause the following copyright notice (or any other notices as instructed by Safeway) to be displayed on each page of the Web Site on which Safeway Content is viewed: "© \_\_\_\_\_ Inc. All Rights Reserved."

4.4.2. Safeway shall cause the following copyright notice (or any other notices as instructed by Safeway) to be displayed on each item on which Overstock Content is displayed: "© \_\_\_\_\_ Inc. All Rights Reserved."

4.5. **Use of Name, Trademark and Logos.**

4.5.1. Each Party understands that listing the other as a customer, client, or otherwise, has value, and therefore agrees that each Party will submit to the other Party for such Party's prior written approval all marketing, advertising, press releases, and all other promotional materials (including sales literature, press releases, trade shows, posters, reference lists, or similar public announcements) referencing the other Party and/or the other Party's trade names, trademarks, service marks, copyright or other Intellectual Property right, prior to the use or distribution of such materials. Neither Party shall use or distribute any such material unless and until it receives the other Party's written approval to do so. Approval shall not be unreasonably withheld or delayed. Once approved, such materials may be reused until such approval is reasonably withdrawn with reasonable prior notice.

4.5.2. In using the other Party's trade names, trademarks, service marks, copyright or other Intellectual Property right hereunder, each Party acknowledges and agrees

that; (i) the other Party's trade names, trademarks, service marks, copyright or other Intellectual Property right shall remain the sole property of the other Party; (ii) nothing in this Agreement shall confer in the Party any right of ownership in the other Party's trade names, trademarks, service marks, copyright or other Intellectual Property; and (iii) the Party shall not now or in the future contest the validity of the other Party's trade names, trademarks, service marks, copyright or other Intellectual Property right.

4.5.3. The Parties acknowledge and agree that, in light of certain conflicts concerning the use of the Safeway name in Indiana, Safeway may condition its consent under Section 4.5.1 to use outside of Indiana and may impose special conditions on such use within Indiana.

## **5. AUDIT RIGHTS.**

5.1. For the purpose of confirming the accuracy of payments either made or outstanding under this Agreement, Safeway will have the right to, or to direct an independent "Big Five" auditor to, audit all books, records and documents of Overstock that relate to this Agreement or payments made or otherwise outstanding hereunder. Safeway shall give Overstock five (5) Business Days prior written notice of such audit, and shall conduct such audit during regular business hours in a manner that does not unreasonably interfere with Overstock's business.

5.2. Overstock shall, during the Term and for five (5) years thereafter, keep and maintain all books and records as are necessary to substantiate, without limitation, Product costs, gross sales calculations, net sales calculations, Product shipments, Product sales, accounts receivable and invoiced amounts.

5.3. All audits shall be at the expense of Safeway unless the audit reveals non-compliance by Overstock with the terms of this Agreement, in which case the audit shall be at the expense of Overstock.

## **6. REPRESENTATIONS AND WARRANTIES; LIMITATION OF LIABILITIES**

6.1. **General Representations and Warranties.** Each Party represents and warrants for the benefit of the other that: (a) it has full and requisite corporate power and authority to enter into and perform under and grant the rights specified in this Agreement; and (b) in performance of its obligations under this Agreement it will comply with all Applicable Laws now or hereafter enacted that are applicable to performance under this Agreement, including the Health Insurance Portability and Accountability Act of 1996 and other Applicable Laws relating to the handling of personally identifiable data, and all Applicable Laws which regulate any material because it is radioactive, toxic, hazardous or otherwise a danger to health, reproduction or the environment, including but not limited to the Comprehensive Environmental Response Compensation and Liability Act of 1980, the Resource Conservation Recovery Act, the Federal Water Pollution Control Act, the Clean Air Act, the Montreal Protocol, the Toxic Substances Control Act and similar laws, rules, statutes, treaties or orders and international understandings.

### **6.2. Overstock Representations, Warranties and Covenants.**

6.2.1. **Service.** Overstock represents, warrants and agrees that all services to

be provided under this Agreement shall be performed in a professional, competent, and timely manner by appropriately qualified personnel in accordance with this Agreement.

6.2.2. **Third Party Compensation.** Overstock represents and warrants that it has not received any compensation from a third party to include any programs, data, hyperlinks, advertisements, or other Content in the Web Site.

6.2.3. **Authority to License.** Overstock represents and warrants that it has full power and authority to grant the rights granted by this Agreement to Safeway (including without limitation, the right to use the Third Party Content), that no consent of any other person or entity is required by Overstock to grant such rights.

6.2.4. **Non-Infringement.** Overstock represents and warrants that to the best of Overstock's knowledge neither the performance of this Agreement by Overstock, nor the license to, and use by, Safeway and the Web Site users of the Overstock Content, Third Party Content, Custom Content or Web Site will in any way violate any agreement, nor constitute an infringement or other violation of any copyright, trade secret, trademark, service mark, patent, design, proprietary information, or other Intellectual Property of any third party.

6.2.5. **Quiet Enjoyment.** Overstock represents and warrants that Safeway and the users of the Web Site shall be entitled to use the Overstock Content, Third Party Content, Custom Content and Web Site without unscheduled disturbance in accordance with this Agreement, subject only to Safeway's obligation to make the required payments under this Agreement.

6.2.6. **Title.** Overstock warrants that to the best of its knowledge, Safeway and its customers shall acquire good and clear title to the Products, free and clear of all liens, claims, and encumbrances.

6.2.7. **Product Warranty.** Overstock shall provide and (where possible) assign Product warranties or other warranties it receives from third parties in performance of this program to Safeway. However, subject to the foregoing, Overstock (including its vendors and suppliers) is neither providing nor representing or warranting that Products under this Agreement come with any product warranty above or in addition to any manufacturer or vendor-provided product warranty for any particular Product. To the extent possible, Products will be provided under this Agreement with the remainder of the manufacturer's stated Product warranty (if any) in place.

6.3. **Safeway Warranties.** Safeway warrants to Overstock that all Content provided to Overstock by Safeway is either owned or properly licensed by Safeway or is in the public domain and the use thereof by Overstock will not infringe any Intellectual Property rights of any third party.

6.4. **Limited Warranty.** UNLESS EXPRESSLY PROVIDED, NEITHER PARTY MAKES ANY WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF TITLE, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

6.5. **Limitation of Liabilities.** EXCLUDING (I) LIABILITY CAUSED BY THE GROSS NEGLIGENCE, FRAUD OR WILLFUL MISCONDUCT OF A PARTY, OR (II) EACH PARTY'S CONFIDENTIALITY OBLIGATIONS UNDER THIS AGREEMENT, BOTH PARTIES' LIABILITY FOR DAMAGES UNDER THIS AGREEMENT SHALL BE LIMITED TO MONETARY DAMAGES, AND THE AGGREGATE AMOUNT THEREOF FOR ALL CLAIMS SHALL IN NO EVENT EXCEED AN AMOUNT EQUAL TO THE AMOUNTS PAID BY SAFEWAY HEREUNDER DURING THE PREVIOUS TWELVE (12) MONTHS PERIOD. NOTWITHSTANDING THE FOREGOING, UNDER NO CIRCUMSTANCES WILL EITHER PARTY BE LIABLE TO THE OTHER UNDER ANY LEGAL OR EQUITABLE THEORY, FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES, INCLUDING WITHOUT LIMITATION, LOST PROFITS, IN CONNECTION WITH THE SUBJECT MATTER OF THIS AGREEMENT. NOTWITHSTANDING THE FOREGOING, THE LIABILITY LIMITATION CONTAINED IN THIS SECTION SHALL NOT APPLY TO (I) LIABILITY CAUSED BY THE GROSS NEGLIGENCE, FRAUD OR WILLFUL MISCONDUCT OF A PARTY, OR (II) EACH PARTY'S CONFIDENTIALITY OBLIGATIONS UNDER THIS AGREEMENT.

## 7. INDEMNIFICATION

### 7.1. Overstock Indemnity.

7.1.1. Overstock shall indemnify, and hold harmless Safeway, its users, directors, officers, agents, employees, members, subsidiaries, joint venture partners, and predecessors and successors in interest from and against any third party claim, action, proceeding, liability, loss, damage, cost, or expense, including, without limitation, attorneys' fees, arising out of, relating to or in any way connected with: (1) any claim that the Overstock Content, Third Party Content, Custom Content, and/or Web Site (collectively, the "**Web Content**") infringes upon or otherwise violates any copyright, trade secret, trademark, service mark, patent, design, proprietary information, or other Intellectual Property rights of any third party (unless such infringement was caused by Safeway), (2) any uncured material breach of its representations or warranties contained herein, and/or (3) any negligent action or inaction of Overstock or its employees, contractor or agents. Overstock shall pay all amounts that a court or arbitrator finally awards or that Overstock agrees to in settlement of such claim(s) as well as any and all expenses or charges arising from such claim(s) as they are incurred by Safeway or any other party indemnified under this Section.

7.1.2. If the operation or use of Web Content becomes, or in Safeway's opinion is likely to become, the subject of a claim, Safeway shall permit Overstock, at Overstock's option and expense for all associated costs, either to (i) procure the right for Safeway to continue to use the Web Content or (ii) modify the Web Content in such a manner for it to become non-infringing, provided such modification does not cause the Web Content to fail to comply with any of the requirements of this Agreement, including all functionality, technical specifications, performance warranties, and Web Site Specifications.

7.1.3. Overstock shall have no indemnity obligation under this Section 7.1 for claims arising out of any Safeway Content incorporated into the Web Site.

### 7.2. Safeway Indemnification Obligations.

7.2.1. Safeway shall defend, indemnify, and hold harmless Overstock, its users, directors, officers, agents, employees, members, subsidiaries, joint venture partners, and predecessors and successors in interest from and against any third party claim, action, proceeding, liability, loss, damage, cost, or expense, including, without limitation, attorneys' fees

as provided herein, arising out of or relating to: (1) any claim that the Safeway Content infringes upon or otherwise violates any copyright, trade secret, trademark, service mark, patent, design, proprietary information, or other Intellectual Property rights of any third party (unless such infringement was caused by Overstock), (2) any uncured material breach of its representations or warranties contained herein, and/or (3) any negligent action or inaction of Safeway or its employees, contractor or agents. Safeway shall pay all amounts that a court or arbitrator finally awards or that Safeway agrees to in settlement of such claim(s) as well as any and all expenses or charges arising from such claim(s) as they are incurred by Overstock or any other party indemnified under this Section.

7.2.2. If the operation or use of Safeway Content becomes, or in Overstock's opinion is likely to become, the subject of a claim, Overstock shall permit Safeway, at Safeway's option and expense for all associated costs, either to (i) procure the right for Overstock to continue to use the Safeway Content or (ii) modify the Safeway Content in such a manner for it to become non-infringing, provided such modification does not cause the Safeway Content to fail to comply with any of the requirements of this Agreement, including all functionality, technical specifications, performance warranties, and Web Site Specifications.

7.2.3. Safeway shall have no indemnity obligation under this Section 7.2 for claims arising out of any Overstock Content, Custom Content or Third Party Content incorporated into the Web Site to the extent that such Overstock Content, Custom Content, or Third Party Content (as opposed to Safeway Content incorporated therein) form the basis for such claims.

7.3 Indemnification Procedure. As an indemnitee under this Agreement, an indemnitee shall (i) promptly notify the indemnitor in writing of any such claim for which indemnity may be had, (ii) allow the indemnitor to have sole control of the defense and all related settlement negotiations so long as such defense and/or settlement proceedings do not impair the rights of indemnitee (however, indemnitee reserves the right to retain independent counsel of its choosing and at its own expense); and (iii) provide indemnitor with reasonably available information, authority and assistance (at the indemnitor's expense) necessary to perform indemnitor's obligations under this Section.

## **8. CONFIDENTIALITY**

8.1. The term "Confidential Information" shall mean (i) the terms of this Agreement (and not its existence), (ii) Customer Information, (ii) any information disclosed by one Party to the other pursuant to this Agreement which is in written, graphic, machine readable or other tangible form and is marked "Confidential", "Proprietary" or in some other manner to indicate its confidential, and (iv) oral information disclosed by one Party to the other pursuant to this Agreement, provided that such information is designated as confidential at the time of disclosure and reduced to a written summary by the disclosing Party, within thirty (30) days after its oral disclosure, which is marked in a manner to indicate its confidential nature and delivered to the receiving Party. Notwithstanding the above, neither Party shall have liability to the other with regard to any Confidential Information of the other which: (i) was generally known and available at the time it was disclosed or becomes generally known and available through no fault of the receiver; (ii) was known to the receiver, without restriction, at the time of disclosure as shown by

the files of the receiver in existence at the time of disclosure; (iii) is disclosed with the prior written approval of the disclosure; (iv) was independently developed by the receiver without any use of the Confidential Information; or (v) becomes known to the receiver, without restriction, from a source other than the disclosure without breach of this Agreement by the receiver and otherwise not in violation of the disclosure's rights. In addition, each Party shall be entitled to disclose the other Party's Confidential Information to the extent such disclosure is requested by the order or requirement of a court, administrative agency, or other governmental body, including the Securities and Exchange Commission; provided, that the Party required to make the disclosure shall provide prompt, advance notice thereof to enable the other Party to seek a protective order or otherwise prevent such disclosure, confidential treatment of certain information, or otherwise prevent such disclosure.

8.2. Each Party shall (i) treat as confidential all Confidential Information of the other Party, (ii) not use such Confidential Information except as expressly set forth herein or otherwise authorized in writing, (iii) implement reasonable procedures to prohibit the disclosure, unauthorized duplication, misuse or removal of the other Party's Confidential Information, and (iv) not disclose any of the other Party's Confidential Information to any third party except as may be necessary and required under this Agreement, and subject to confidentiality obligations at least as protective as those set forth herein. Without limiting the foregoing, each of the Parties shall use at least the same procedures and degree of care which it uses to prevent the disclosure of its own confidential information of like importance to prevent the disclosure of Confidential Information disclosed to it by the other Party under this Agreement, but in no event less than reasonable care. The receiving Party shall notify the disclosing Party, in writing, of any disclosure, loss or use of Confidential Information in violation of this Agreement promptly after the receiving Party receives notice of such violation.

8.3. If either Party breaches any of its obligations with respect to confidentiality, or if such a breach is likely to occur, the other Party shall be entitled to equitable relief, including specific performance or an injunction, in addition to any other rights or remedies, including money damages, provided by law.

8.4. With respect to Confidential Information in the receiving Party's possession as of such expiration or termination, the receiving Party shall within ten (10) Business Days after the expiration or termination of this Agreement, return or destroy all such Confidential Information in its actual or constructive possession (including all original, copies, summaries, abstractions and other iterations, regardless of form) to the disclosing Party in any manner that the disclosing Party may reasonably direct.

## 9. TERM AND TERMINATION

9.1. **Term.** Unless terminated earlier as provided herein, this Agreement shall have a term of two (2) years commencing on the Effective Date (the "**Initial Term**"), unless terminated sooner by written notice given by a Party pursuant to this Agreement. No later than [\*] prior to the expiration of the Initial Term, or any subsequent Term, Safeway may give notice to Overstock, extending the term for [\*]. For purposes of the exclusivity provisions of this Agreement, "**Term**" shall refer to the Initial Term and any renewal or subsequent term(s).

9.2. **Termination for Cause.** This Agreement may be terminated by a Party for cause immediately by written notice upon the occurrence of any of the following events: (i) if the other ceases to do business, or otherwise terminates its business operations; (ii) if the other breaches any provision of this Agreement and fails to cure such breach within thirty (30) days (immediately in the case of a breach of Section 11) of written notice describing the breach; (iii) if the other Party becomes insolvent or seeks protection under any bankruptcy, receivership, trust deed, creditors arrangement, composition or comparable proceeding, or if any such proceeding is instituted against the other (and not dismissed within ninety (90) days); (iv) in accordance with the Customer Service Standards and the Web Site Service Standards; and/or (v) following a force majeure event in accordance with Section 10.2.

9.3. **Survival.** Sections 2.6, 2.7, 2.8, 3.3, 3.10, 3.13, 3.14, 4-8 (inclusive), 9.3, and 10 shall survive the expiration or termination of this Agreement.

## 10. GENERAL

10.1. **Project Managers.** Each Party will appoint a project manager (“**Project Manager**”) as a primary point of contact for this Agreement, and will provide written notification to the other Party of the names of the Project Managers within five (5) Business Days of the Effective Date. The Project Managers shall be responsible for: (i) managing the day-to-day activities under this Agreement, (ii) serving as liaisons between the Parties, (iii) assigning and scheduling the appropriate personnel to perform all of the required services under this Agreement, and (iv) authorizing and executing any and all change order(s) in connection with the development of the Web Site. In the event that either Party appoints a new Project Manager, such Party will promptly notify the other. Should either Party be dissatisfied with the performance, competence, responsiveness, capabilities, cooperativeness, or fitness for a particular task of any person assigned by the other Party to perform services under this Agreement, including the Project Manager, such Party may request the replacement of that person. Each Party shall endeavor to address the concerns of the other Party and, if appropriate, to replace the person(s) requested to be replaced.

10.2. **Force Majeure.** Neither Party shall be considered in default of performance of its obligations under this Agreement to the extent that performance of such obligations is delayed by acts of terrorism, civil disturbance, or acts of God; provided, however, that if performance is delayed by a force majeure even for a period of more than twenty (20) days, either Party, in its sole discretion, may terminate this Agreement.

10.3. **Assignment.** This Agreement shall be binding on the Parties hereto and their successors and assigns. Neither Party may assign, license, or otherwise transfer its rights or obligations under this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld; *provided, however*, that either Party may assign or transfer, in whole or part, this Agreement or any of its rights or obligations arising hereunder in connection with a sale, merger, acquisition or other disposition involving all or substantially all of its assets or liabilities if such assignee agrees in writing to be bound by all terms and conditions contained herein; *provided, further*, that Overstock (or its acquiror) shall remain liable of all of its obligations under this Agreement regardless of any assignment.

10.4. **Independent Contractors.** Each Party shall perform its obligations hereunder as



an independent contractor of the other and shall be solely responsible for its own financial obligations. Nothing contained herein shall be construed to imply a joint venture or principal and agent relationship between the Parties, and neither Party shall have any right, power or authority to create any obligation, express or implied, on behalf of the other in connection with the performance hereunder.

10.5. **Modification.** No alteration, amendment, waiver, cancellation or any other change in any term or condition of this Agreement shall be valid or binding on either Party unless the same shall have been mutually assented to in writing by both Parties.

10.6. **Waiver.** The failure of either Party to enforce at any time any of the provisions of this Agreement, or the failure to require at any time performance by the other Party of any of the provisions of this Agreement, shall in no way be construed to be a present or future waiver of such provisions, nor in any way affect the right of either Party to enforce each and every such provision thereafter. The express waiver by either Party of any provision, condition or requirement of this Agreement shall not constitute a waiver of any future obligation to comply with such provision, condition or requirement.

10.7. **Notices.** All notices, requests, or other communications (excluding invoices) hereunder shall be in writing and either transmitted via certified or registered mail, overnight courier, facsimile (with a machine-provided receipt), hand delivery or certified or registered mail, postage prepaid and return receipt requested to the Parties at the following addresses or such other addresses as may be specified by written notice. Notices will be deemed to have been given (i) on the next Business Day if sent by overnight courier, prepaid, or by facsimile, or hand delivery, or (ii) three (3) Business Days if sent by U.S. mail, postage prepaid.

10.8. **No Third Party Beneficiaries.** Unless otherwise expressly provided, no provisions of this Agreement are intended or shall be construed to confer upon or give to any person or entity other than Safeway or Overstock any rights, remedies or other benefits under or by reason of this Agreement.

10.9. **Severability.** This Agreement represents the negotiated agreement of the Parties, with the advice and assistance of counsel, and shall not be construed against either Party as the drafter thereof. In the event that any provision of this Agreement conflicts with governing law or if any provision is held to be null, void or otherwise ineffective or invalid by a court of competent jurisdiction, (i) such provision shall be deemed to be restated to reflect as nearly as possible the original intentions of the Parties in accordance with Applicable Laws, and (ii) the remaining terms, provisions, covenants and restrictions of this Agreement shall remain in full force and effect and will be construed in such a manner as to carry out the full intention of the Parties and the Parties will negotiate in good faith to replace any material provisions that have been determined to be invalid.

10.10. **Informal Dispute Resolution.** All disputes, controversies or claims (collectively, “**Disputes**”) arising out of or relating to this Agreement (excluding indemnity claims) shall initially be submitted to the Project Managers for good faith negotiations. If the Project Managers are unable to resolve the Dispute within ten (10) Business Days after submission of the dispute to them, either Party may escalate the Dispute to the vice presidents (or other executive with a similar

level of authority) responsible for such Party's performance of the Agreement for attempted resolution through good faith negotiations. If such executives are unable to resolve the Dispute within ten (10) Business Days after submission of the Dispute to them, then the Parties may proceed to litigation or, if mutually agreed, arbitration.

10.11. **Arbitration.** Any Dispute (other than a Dispute under Section 8 of this Agreement) that the Parties are unable to resolve through the procedures set forth in Section 10.10 of this Agreement shall be submitted to arbitration in accordance with the following procedures:

10.11.1. Either Party may demand arbitration by giving the other Party notice to such effect, which notice shall describe, in reasonable detail, the facts and legal grounds forming the basis for the filing Party's request for relief and shall include a statement of the total amount of damages claimed, if any, and any other remedy sought by that Party. If Safeway requests arbitration as a result of a perceived non-compliance by Overstock of the terms of this Agreement, the arbitration shall be held before one neutral arbitrator in Salt Lake City, Utah . If Overstock requests arbitration as a result of a perceived non-compliance by Safeway of the terms of this Agreement, the arbitration shall be held before one neutral arbitrator in the San Francisco Bay Area, California.

10.11.2. Within 5 Business Days after the other Party's receipt of such demand, the Parties shall mutually determine who the arbitrator will be. If the Parties are unable to agree on the arbitrator within that time period, the arbitrator shall be selected by the AAA. In any event, the arbitrator shall have a background in, and knowledge of, the retail sales business and the information technology and e-commerce industries and shall be an appropriate person based on the nature of the Dispute. If a person with experience in both such industries is not available, the arbitrator shall be chosen from the large and complex case panel or, if an appropriate person is not available from such panel, the retired federal judges pool.

10.11.3. The arbitration shall be governed by the Commercial Arbitration Rules of the AAA, except as expressly provided in this Section 10. However, the arbitration shall be administered by any organization mutually agreed to in writing by the Parties. If the Parties are unable to agree on the organization to administer the arbitration, it shall be administered by the AAA under its procedures for large and complex cases. Pending the arbitrator's determination of the merits of the Dispute, either Party may apply to any court of competent jurisdiction to seek injunctive or other extraordinary relief.

10.11.4. Discovery shall be limited to the request for and production of documents and interrogatories. Interrogatories shall be allowed only as follows: a Party may request the other Party to identify by name, last known address and telephone number (i) of all persons having knowledge of facts relevant to the Dispute and a brief description of that person's knowledge, (ii) any experts who may be called as an expert witness, the subject matter about which the expert is expected to testify, the mental impressions and opinions held by the expert and the facts known by the expert (regardless of when the factual information was acquired) which relate to or form the basis for the mental impressions and opinions held by the expert and (iii) any experts who have been used for consultation, but who are not expected to be called as an

expert witness, if such consulting expert's opinions or impressions have been reviewed by an expert witness. All discovery shall be guided by the Federal Rules of Civil Procedure. All issues concerning discovery upon which the Parties cannot agree shall be submitted to the arbitrator for determination.

10.11.5. In rendering an award, the arbitrator shall determine the rights and obligations of the Parties according to the substantive and procedural laws of the State of Delaware, without reference to conflict of law principles.

10.11.6. Each of Safeway and Overstock agree that it shall use commercially reasonable efforts to join (and will allow the other Party to join) any third party that the Parties have agreed is indispensable to the arbitration. If any such third party does not agree to be joined, the arbitration shall proceed nonetheless.

10.11.7. The decision of, and award rendered by, the arbitrator shall be determined no more than thirty (30) days after the selection of the arbitrator and shall be final and binding on the Parties and shall not be subject to appeal. Judgment on the award may be entered in and enforced by any court of competent jurisdiction. Each Party shall bear its own costs and expenses (including filing fees) with respect to the arbitration, including one-half of the fees and expenses of the arbitrator.

10.11.8. The provisions of this Section 10 will not be construed to prevent a Party from (i) seeking a temporary restraining order or injunctive or other equitable relief or specific performance with respect to a breach (or attempted breach) of this Agreement by the other Party, or (ii) instituting litigation or other formal proceedings to the extent necessary (A) to enforce the award of the arbitrator or (B) to avoid the expiration of any applicable limitations period. Except for such matters, the Parties agree that the provisions of this Section 10 are a complete defense to any suit, action or other proceeding instituted in any court or before any administrative tribunal with respect to any Dispute.

10.12. **Governing Law.** This Agreement shall be governed by the laws of the State of Delaware, without reference to conflict of laws principles. If Safeway commences suit hereunder, the Parties irrevocably submit to the jurisdiction of courts in Salt Lake City, Utah. If Overstock commences suit hereunder, the Parties irrevocably submit to the jurisdiction of courts in the San Francisco Bay Area, California.

10.13. **Interpretation.**

10.13.1. This Agreement hereto, represent and constitute the entire agreement between the Parties and supersedes all prior agreements and understandings, whether written or oral, relating to the subject matter contained herein.

10.13.2. When used in this Agreement, the terms "including" or "include" will not limit the generality of any provision of this Agreement but rather will be interpreted as if followed by the words "without limitation" or "but not limited to."

10.13.3. This Agreement and any amendment hereto or any other document

delivered pursuant hereto may be executed by telecopy, in one or more counterparts, and by different Parties in separate counterparts. All of such counterparts will constitute one and the same agreement (or other document) and will become effective (unless otherwise provided therein) when one or more counterparts have been signed by each Party and delivered to the other Party. Any execution by telecopy will be followed promptly by the delivery of signed original counterparts to the Party or Parties receiving the telecopy.

10.13.4. Headings are inserted for convenience only and will not affect the construction of the Agreement.

**IN WITNESS WHEREOF**, the Parties hereto have executed this Agreement by persons duly authorized as of the date and year first above written.

The Parties have signed below to indicate their acceptance of the terms of this Agreement.

**SAFEWAY INC.**

By:  /s/ Daniel Dmochowski

Name: Daniel Dmochowski

Title: Vice President, Marketing Services

**OVERSTOCK.COM, INC.**

By:  /s/ Jason Lindsey

Name:  Jason Lindsey

Title:  CFO

**EXHIBIT A**  
**PRIVACY POLICY**

We use the information we collect when you log on and visit different sections of our site to help make our site, products and services more useful to you. We also use this information to offer savings awards and other promotions to you. We may use this information to give you personally-tailored coupons, offers or other information which may be provided to us by other companies. We may create compilations of information that is not personally-identifying and provide this data to other companies to help them understand the demographics of our customers.

We do not sell or lease personally-identifying information to any other company, person or agency. "Personally-identifying information" means your name, address, social security number, bank account, credit card number, telephone number or other information by which you can be personally identified. We do not disclose personally identifying information to other non-affiliated companies or persons for commercial purposes. We may disclose personally-identifying information in response to a subpoena, court order or a specific request by a law enforcement agency, or as required by law.

Please remember that you may be asked for information by entities other than us when clicking on an advertisement or hypertext language linking this site to other sites. We do not exercise control over any information you give to any other entity, even if that information was provided after linking to the entity requesting the information from our website.

By using this site, you are agreeing to the conditions of this Privacy Policy. **IF YOU DO NOT AGREE WITH THIS PRIVACY POLICY, DO NOT USE THIS SITE.** We reserve the right at our discretion to change, modify, add, or remove portions of this Policy at any time. Any changes will be posted on the site. Please check this page periodically for changes.

**EXHIBIT B**  
**RECONCILIATION ILLUSTRATION**

**(SEE ATTACHED)**

[\*]

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## EXHIBIT C

### WEB SITE SERVICE STANDARDS

Overstock shall comply with the technical requirements set forth in this Exhibit with respect to the Web Site.

1. Servers; Capacity. Overstock shall have a back-up server available and ready to operate in the event the main server ceases to function in accordance with this Agreement. Overstock shall maintain sufficient Server capacity and Internet connectivity throughout the term of this Agreement to accommodate growth in user numbers and overall traffic levels to the Web Site. Overstock shall host and operate the Web Site such that users experience access times and times to retrieve full Web pages that are no slower than the access times and times to retrieve full Web pages by users visiting comparable Web pages hosted by Overstock for the Overstock Web Site. Without limiting the foregoing, Overstock shall use reasonable commercial efforts to manage the Web Site so that usage does not exceed seventy percent (70%) of capacity. In the event Overstock anticipates that such usage will exceed seventy percent (70%) of capacity within the next thirty (30) days, Overstock shall notify Safeway of this anticipated event within five (5) days. If usage does at any time exceed [\*] of capacity, Overstock shall notify Safeway within one (1) day of such event.

2. Site Availability. Except as otherwise agreed in writing between the Parties, the Web Site shall be available, via the Internet, and according to the terms of this Agreement, twenty-four (24) hours a day, seven (7) days a week, without interruption, with the sole exception of scheduled maintenance periods (“**Scheduled Maintenance**”), which shall not exceed two (2) hours per week. Overstock shall use commercially reasonable efforts to conduct any Scheduled Maintenance on equipment during hours when the number of visitors to the Web Site is relatively low compared to the overall visitor access rates. Overstock shall provide Safeway with at least twenty four (24) hours advance notice prior to conducting Scheduled Maintenance. In the event that Site Availability for any month drops below [\*] during the Primary Business Hours (as defined below) (“**Site Availability Failure**”), Safeway shall have the remedies set forth in Section 10 of this Exhibit. For the purposes of this Section, Site Availability will be calculated based on the following formula:

$$X = 100 [1 - (Y / Z)] \text{ where}$$

X = Site Availability

Y = Total number of minutes that the Server is down in the applicable month.

Z = Total number of minutes during Primary Business Hours in applicable month

3. Problem Response. Except during the Scheduled Maintenance period, if the Server or the Web Site becomes unavailable to users via the Internet, Overstock shall have qualified personnel respond immediately and render continuous commercially reasonable efforts until the problem has been remedied; provided that, in the event a problem arises outside of Primary Business Hours, Overstock’s obligation under this Section shall be suspended until the commencement of Primary Business Hours.

4. Cooperation and Access. Overstock shall cooperate fully with Safeway in providing Safeway with physical access to the Server on which the Web Site is stored during normal business hours as reasonably requested by Safeway given a minimum of (3) Business Days notice and in removing access by the general



public to the Web Site from Overstock's computers upon the written request of Safeway.

5. Back-Up. Overstock shall maintain daily onsite and weekly offsite back-up copies of Customer Information and all other information necessary or desirable to calculate revenues and pricing hereunder. Overstock shall provide a copy of all such back-up materials in a form and manner acceptable to Safeway within seventy two (72) hours of Safeway's request.

6. Product Updates. Overstock will promptly update the Products promoted on the Web Site so that at no time will more than [\*] of Products be unavailable to users for immediate delivery.

7. Security. Overstock shall use commercially reasonable efforts to secure the Web Site, reports, Customer Information, and the physical location where the Web Site programs, computers and data are stored, against unauthorized intrusions, modifications, introduction of viruses or damage. All transactions made through the Web Site shall be received and processed using a secure Server. The Server shall log all visits to the Web Site, along with all relevant available information pertaining to the visits.

8. Bug Fixes. Overstock shall use commercially reasonable efforts to correct any bugs or other problems or irregularities that affect the proper operation of the Web Site within forty eight (48) hours of discovery thereof.

9. Abandonment. Overstock shall use its best efforts to minimize shopping cart abandonment on the Web Site.

10. Reports. Within two (2) Business Days after any outage, Overstock shall provide Safeway with Web Site outage reports specifying, the time of outage, response time, time to repair and a root cause analysis. Within ten (10) days after the end of each calendar month, Overstock shall provide Safeway with the following monthly reports specifying (i) the average percentage of Products shown on the Web Site that are available for immediate delivery, (ii) any virus or other similar repairs during the preceding month and the time to complete all such repairs, (iii) average capacity during the preceding month, and (iv) the abandonment report.

11. Remedies for Failures. For each failure to satisfy the standards set forth in Sections 1, 2, 3, 6, 8, or 10 during the Term (each, a "**Service Standard Failure**"), Overstock shall provide Safeway with a credit of [\*] to be applied on Safeway's next order, or if such credit remains at the end of the Term, Overstock shall pay all credits to Safeway within ten (10) days. In the event that the combined number of Site Specification Failures equals or exceeds [\*] during any one (1) month period, Safeway, in addition to any other rights or remedies it may have under the Agreement, shall have the right to terminate the Agreement.

## EXHIBIT D

### CUSTOMER SERVICE REQUIREMENTS

Company shall comply with the following customer service requirements:

1. Receive and respond to e-mails and phone orders within one (1) Business Day of receipt via a computer available to the customer service staff.
2. Provide the User with an order confirmation within twenty four (24) hours of receipt. Order confirmation should include any information on such order status, and expected delivery times.
3. Maintain ability to handle volumes in excess of [\*] of Company's average daily order volumes.
4. Receive orders on the Web Site or e-mail and process orders within forty-eight (48) hours of receipt.
5. Maintain "best practices" customer service policies, e.g. "The Customer is always right, even when he/she is not."
6. Provide and staff a unique e-mail address for customer service for the Web Site.
7. Post the complete and accurate details of Company's customer service policies in the Web Site, including: return policies, warranty information, contact information and any other information as may be required by law.
8. Provide Safeway with monthly reports specifying (i) email and phone order response time, (ii) order confirmation response time, (iii) average daily order volume, (iii) average daily order capacity, and (iv) order processing response time.
9. For each any failure to meet the standards contained in Sections 1, 2, 3, 4 or 8 ("**Service Metric Failures**") during the Term, Overstock shall provide Safeway with a credit of [\*] to be applied on Safeway's next order. In the event that the combined number of Service Metric Failures equals or exceeds [\*], Safeway, in addition to any other rights or remedies it may have under the Agreement, shall have the right to terminate the Agreement.

