

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

**FORM 8-K**

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

**May 13, 2004**

Date of Report (date of earliest event reported)

**Overstock.com, Inc.**

(Exact name of Registrant as specified in its charter)

**Delaware**

(State or other jurisdiction of  
incorporation or organization)

**000-49799**

(Commission File Number)

**87-0634302**

(I.R.S. Employer  
Identification Number)

**6322 South 3000 East, Suite 100**

**Salt Lake City, Utah 84121**

(Address of principal executive offices)

**(801) 947-3100**

(Registrant's telephone number, including area code)

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

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**Item 5. Other Events.**

On May 13, 2004, Overstock.com, Inc. (the "Company") entered into an Underwriting Agreement with WR Hambrecht + Co., LLC and JMP Securities LLC in connection with a registered public offering of 1,200,000 shares of its common stock at an offering price of \$30.50 per share. The sale of the common stock is to be made under the Company's registration statement on Form S-3 (File No. 333-113104), as amended or supplemented, which became effective on March 8, 2004.

The Underwriting Agreement is being filed as Exhibit 1.1 to this Current Report on Form 8-K. The opinion of Bracewell & Patterson, L.L.P., is being filed as Exhibit 5.1 to this Current Report on Form 8-K.

On May 13, 2004, the Company issued a press release announcing the execution of the Underwriting Agreement and a registered public offering of its shares of common stock. The press release is being filed as Exhibit 99.1 to this Current Report on Form 8-K and is incorporated herein and incorporated by reference into the shelf registration statement.

Neither the filing of any press release as an exhibit to this Current Report on Form 8-K nor the inclusion in such press release of a reference to the Company's Internet address shall, under any circumstances, be deemed to incorporate the information available at such Internet address into this Current Report on Form 8-K. The information available at the Company's Internet address is not part of this Current Report on Form 8-K or any other report filed by the Company with the Securities and Exchange Commission.

**Item 7. Exhibits.**

(c) Exhibits

- 1.1 Underwriting Agreement dated May 13, 2004, by and among Overstock.com, Inc., WR Hambrecht + Co., LLC and JMP Securities LLC
  - 5.1 Opinion of Bracewell & Patterson, L.L.P.
  - 99.1 Press Release dated May 13, 2004
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**SIGNATURE**

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

OVERSTOCK.COM, INC.

By: /s/ DAVID K. CHIDESTER

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David K. Chidester  
*Vice President, Finance*

Date: May 13, 2004

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## EXHIBIT INDEX

**Exhibit  
Number**

**Description**

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QuickLinks

[SIGNATURE](#)  
[EXHIBIT INDEX](#)

**1,200,000 Shares(1)**  
**OVERSTOCK.COM, INC.**  
**COMMON STOCK**  
**UNDERWRITING AGREEMENT**

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(1) Plus an option to purchase from the Company up to an aggregate of 100,000 additional shares to cover over-allotments.

May 13, 2004

W.R. Hambrecht + Co., LLC  
JMP Securities LLC  
c/o W.R. Hambrecht + Co., LLC  
539 Bryant Street  
Suite 100  
San Francisco, CA 94107

Ladies and Gentlemen:

Overstock.com, Inc., a Delaware corporation (the "Company"), proposes to issue and sell up to an aggregate of 1,200,000 shares of its authorized but unissued common stock, \$0.0001 par value per share (the "Common Stock"), to the Underwriters (as hereinafter defined) (said 1,200,000 shares of Common Stock to be issued and sold by the Company being herein called the "Underwritten Stock"). The Company has also granted the Underwriters an option to purchase up to an aggregate of 100,000 additional shares of Common Stock (the "Option Stock," and 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 Final Prospectus hereinafter mentioned.

The Company hereby confirms the agreements made with respect to the purchase of the Shares by the Underwriters named in Schedule 1 hereto (herein collectively called the "Underwriters," which term shall also include any underwriter purchasing Shares pursuant to Section 3(b) hereof).

**1. Registration Statement.** The Company has filed with the Securities and Exchange Commission (the "Commission") under the Securities Act of 1933, as amended (the "Securities Act"), a registration statement on Form S-3 (No. 333-113104), including a prospectus relating to the Shares (the "Base Prospectus"). Copies of such registration statement and of each amendment thereto, if any, including the Base Prospectus (meeting the requirements of Rule 415(a)(1)(x) and Rule 415(a)(4) of the rules and regulations of the Commission) heretofore filed by the Company with the Commission have been delivered to you.

(a) The term "Registration Statement" as used in this Agreement shall mean such registration statement, including all exhibits and financial statements, as amended as of the date of this Agreement. If the Company has filed an abbreviated registration statement pursuant to Rule 462(b) of the rules and regulations of the Commission with respect to the Shares (a "Rule 462(b) registration statement"), then any reference herein to the term "Registration Statement" shall be deemed to include such Rule 462(b) registration statement. The term "Final Prospectus" as used in this Agreement shall mean the final prospectus supplement to the Base Prospectus relating to the Shares filed with the Commission pursuant to Rule 424, together with the Base Prospectus. The term "Preliminary Prospectus" as used in this Agreement shall mean each preliminary prospectus supplement to the Base Prospectus relating to the Shares, together

with the Base Prospectus. Any reference in this Agreement to the Registration Statement, any Preliminary Prospectus or the Final Prospectus shall be deemed to refer to and include the documents incorporated by reference therein pursuant to Item 12 of Form S-3 under the Securities Act, and any reference in this Agreement to the terms "amend", "amendment" or "supplement" with respect to the Registration Statement, any Preliminary Prospectus or the Final Prospectus shall be deemed to refer to and include any documents filed after such date under the Securities Exchange Act of 1934, as amended (the "Exchange Act") that are deemed to be incorporated by reference therein.

(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 the Final 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 Underwriters 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 the Final 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 Final Prospectus comply, and on the Closing Date (as hereinafter defined) and any later date on which the Option Stock is to be purchased the Final 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"). The Registration Statement as of its effective date, all documents incorporated by reference in the Registration Statement as of the dates of their filing, and each Preliminary Prospectus and the Final Prospectus, including any amendments or supplements thereto, as of their respective filing dates and the dates on which they were first used, 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. On the Closing Date and on any later date on which Option Stock is to be purchased, the Final Prospectus 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, any Preliminary Prospectus or the Final 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 Underwriters expressly for use in the Registration Statement, any Preliminary Prospectus or the Final Prospectus.

(b) The documents incorporated by reference in the Final Prospectus, when they become effective or were filed with the Commission, as the case may be, conformed in all material respects to the requirements of the Securities Act or the Exchange Act, as applicable, and none of such documents 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, in the light of the circumstances under which they were made, not misleading; and any further documents so filed and incorporated by reference in the Final Prospectus, when such documents become effective or are filed with the Commission, as the case may be, will conform in all material respects to the requirements of the Securities Act or the Exchange Act, as applicable, and will not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they are made, not misleading.

(c) The Company (i) has been duly incorporated and is validly existing as a corporation in good standing under the laws of the State of Delaware, having full power and corporate authority to own or lease its properties and to conduct its business as described in the Final 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 and results of operations of the Company). Except as disclosed in the Registration Statement and in the Final Prospectus, the Company has no subsidiaries and does not own any capital stock or other equity securities in any other entity, except for instruments or interests held by the Company solely for investment.

(d) 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, except as otherwise described in the Final Prospectus and the Registration Statement, 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 Final Prospectus and the Registration Statement, 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 to be sold by the Company, and neither the filing of the Registration Statement nor the offering or sale of the Shares to be sold by the Company 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 to be sold by the Company are duly authorized, and will be, when sold to the Underwriters as provided herein, validly issued, fully paid and nonassessable. 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 to be sold by the Company as contemplated herein.

(e) 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 Underwriters, 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 Final 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 pursuant to the terms of (i) the certificate of incorporation or bylaws of the Company; (ii) any indenture, mortgage, deed of trust, voting trust agreement, stockholders' agreement, note agreement or other agreement or instrument to which the Company 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 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 its activities or properties, which would reasonably be expected to materially and adversely affect the business or properties of the Company.

(f) The Common Stock is registered pursuant to Section 12(g) of the Exchange Act and is quoted on the Nasdaq National Market. The Company has taken no action designed to, or likely to have the effect of, terminating the registration of the Common Stock under the Exchange Act or delisting the Common Stock from the Nasdaq National Market, nor has the Company received any notification that the Commission or the Nasdaq National Market is contemplating terminating such registration or listing.

(g) The financial statements of the Company and the related notes and schedules thereto included in the Registration Statement and the Final Prospectus fairly present the financial position, results of operations, stockholders' equity and cash flows of the Company 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 Final 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.

(h) PricewaterhouseCoopers LLP, who have audited the Company's consolidated balance sheets, related consolidated statements of operations, stockholders' equity, and cash flows as of December 31, 2003 and 2002, and the Company's results of operations and cash flows for each of the three years in the period ended December 31, 2003, filed with the Commission as part of the Registration Statement and the Final Prospectus, are independent public accountants as required by the Securities Act and Rules. All auditing services and non-audit services, other than *de minimus* services, provided to the Company by Pricewaterhouse Coopers LLP since July 30, 2002, have been preapproved by the audit committee of the Company's board of directors to the extent required by Section 10A of the Exchange Act.

(i) The Company 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. The Company has disclosure controls and procedures (as defined in Rules 13a-15(e) and 15d-15(e) under the Exchange Act) to ensure that material information relating to the Company is made known to the Company's principal executive officer and the Company's principal financial officer or persons performing similar functions.

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

(k) The Company maintains 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.

(l) Except as disclosed in the Final Prospectus, there is no action, suit, claim, proceeding or investigation pending or, to the Company's knowledge, threatened against the Company 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 adversely affects any action taken or required to be taken by the Company in order to perform its material obligations under this Agreement; (ii) is required to be disclosed in the Registration Statement and the Final Prospectus, which is not so disclosed (and such proceedings, if any, as are summarized in the Registration Statement and the Final Prospectus are accurately summarized in all material respects); or (iii) may have a material adverse affect upon the business operations, financial condition or results of operations of the Company.

(m) All executed agreements or copies of executed agreements filed or incorporated by reference as exhibits to the Registration Statement and the Final Prospectus have been duly and validly authorized, executed and delivered by the Company and constitute the legal, valid and binding agreements of the Company enforceable by 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 and the Final Prospectus of contracts and other documents are accurate in all material respects and fairly present the information required to be shown with respect thereto by the Securities Act and Rules. There are no contracts or other documents that are required by the Securities Act and Rules to be described in the Registration Statement and the Final Prospectus or filed as exhibits to the Registration Statement that are not described or filed as required. 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 Final Prospectus, no party has any right to require the Company to register any securities for sale under the Securities Act.

(n) Since the respective dates as of which information is given in the Registration Statement and the Final Prospectus, and except as expressly contemplated therein, the Company has not 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, whether or not arising from transactions in the ordinary course of business.

(o) The Company is not, nor with the giving of notice or lapse of time or both will it be, in violation of or in default under, any term or provision of (i) its certificate 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 reasonably be expected to have a material adverse effect on the business, management, properties, assets, rights, operations or condition (financial or otherwise) of the Company; or (iii) to the Company's knowledge, any statute, judgment, decree, order, rule or regulation applicable to the Company 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 its activities or properties and the effect of which violation or

default singly or in the aggregate may reasonably be expected to have a material adverse effect on the business, management, properties, assets, rights, operations or condition (financial or otherwise) of the Company.

(p) 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.

(q) No labor disturbance by the employees of the Company exists or, to the Company's knowledge, is imminent.

(r) Except as disclosed in the Final Prospectus, the Company 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 Final Prospectus. Except as disclosed in the Final Prospectus, to the Company's knowledge, no material claims have been asserted against the Company 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 does not, to the knowledge of the Company, infringe on the rights of any person, which, if the subject of an unfavorable decision, ruling or filing, would reasonably be expected to have a material adverse effect on the financial condition, business or properties of the Company.

(s) To the Company's knowledge, the Company is conducting its businesses in compliance with all applicable laws, ordinances or governmental rules or regulations of the jurisdictions in which it is conducting business, except (i) where the failure to be so in compliance would not materially and adversely affect the business or properties of the Company or (ii) as otherwise disclosed in the Registration Statement or the Final Prospectus. 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 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 Exchange Act or to qualify or exempt the Shares for public offering by the Underwriters under state securities or Blue Sky laws) has been obtained or made and is in full force and effect.

(t) 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.

(u) The Company is not, nor after giving effect to the issuance and sale of the Shares by the Company will it 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.

(v) 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 to be sold by the Company.

(w) The Company has good and marketable title to all properties and assets described in the Final Prospectus as owned by it, free and clear of all liens, encumbrances, security interests, equities, claims and defects, except such as are described in the Registration Statement and the Final Prospectus, or such as are not materially important in relation to the business of the Company. The Company has valid and enforceable leases for the properties described in the Final 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 thereof and except as disclosed in the Final Prospectus. The Company owns or leases all such properties as are necessary to its operations as now conducted, as set forth in the Registration Statement and the Final Prospectus, and the properties and businesses of the Company conform in all material respects to the descriptions thereof contained in the Registration Statement and the Final Prospectus.

(x) To the Company's knowledge, the Company 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 is in compliance therewith in all material respects, except where the failure so to hold, obtain, maintain or comply with would not be reasonably expected to have a materially adverse effect on the business, financial condition or results of operations of the Company.

(y) To the Company's knowledge, the Company is 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 would have any liability; the Company has not incurred and does 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 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.

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

(aa) Neither the Company nor, to the Company's knowledge, any director, officer, agent, employee or other person associated with or acting on behalf of the Company 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.

(bb) Since July 30, 2002, the Company has not, directly or indirectly, including through any subsidiary, extended or maintained credit, arranged for the extension of credit or renewed an extension of credit in the form of a personal loan to or for any director or executive officer in violation of Section 13(k) of the Exchange Act.

(cc) To the Company's knowledge, the business and operations of the Company 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 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, reasonably be expected to have a material adverse effect on the business of the Company, and the Company has not 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, to the Company's knowledge, any officer or employee of the Company is a party to any contract or commitment that restricts in any material respect the ability of the Company or such individual to engage in the business of the Company or such subsidiary as described in the Registration Statement and the Final Prospectus.

### **3. Purchase of the Shares by the Underwriters.**

(a) On the basis of the representations and warranties and subject to the terms and conditions herein set forth, the Company shall sell the Underwritten Stock to the Underwriters, and the Underwriters agree to purchase from the Company, the Underwritten Stock. The price at which such shares of Underwritten Stock shall be sold by the Company and purchased by the Underwriters shall be \$29.4325 per share (the "Purchase Price"). In making this Agreement, each Underwriter is contracting severally and not jointly; except as provided in paragraphs (b) and (c) of this Section 3, the agreement of each Underwriter is to purchase only the respective number of shares of the Underwritten Stock specified on Schedule 1 hereto.

(b) If for any reason any of the Underwriters shall fail or refuse (other than for a reason sufficient to justify the termination of this Agreement under the provisions of Section 7 or 12 hereof) to purchase and pay for the portion of the Shares agreed to be purchased by such Underwriter, the non-defaulting Underwriter shall have the right, within 24 hours after the receipt of notice of such failure or refusal to so purchase, to purchase or procure one or more other Underwriters to purchase, in such proportions as may be agreed upon by such purchasing Underwriter or Underwriters and upon the terms herein set forth, all or any part of the Shares that such defaulting Underwriter agreed to purchase. If the non-defaulting Underwriter fails so to make such arrangements with respect to all such Shares, the number of Shares that the non-defaulting Underwriter is otherwise obligated to purchase under this Agreement shall be automatically increased to absorb the remaining Shares that the defaulting Underwriter agreed to purchase; *provided, however*, that the non-defaulting Underwriter shall not be obligated to purchase the Shares that the defaulting Underwriter agreed to purchase if the aggregate number of such Shares exceeds 10% of the total number of Shares that the Underwriters agreed to purchase under this Agreement. If the total number of Shares that the defaulting Underwriter agreed to purchase shall not be purchased or absorbed in accordance with the two preceding sentences, the Company shall have the right, within 24 hours next succeeding the 24-hour period referred to above, to make arrangements with other Underwriters or purchasers satisfactory to the non-defaulting Underwriter

for purchase of such Shares on the terms herein set forth. In any such case, either you or the Company shall have the right to postpone the Closing Date determined as provided in Section 5 hereof for not more than seven business days after the date originally fixed as the Closing Date pursuant to said Section 5 in order that any necessary changes in the Registration Statement, the Final Prospectus or any other documents or arrangements may be made. If the non-defaulting Underwriter does not make arrangements within the 24-hour periods stated above for the purchase of all the Shares that the defaulting Underwriter agreed to purchase hereunder, this Agreement shall be terminated without further act or deed and without any liability on the part of the Company to the non-defaulting Underwriter and without any liability on the part of the non-defaulting Underwriter to the Company. Nothing in this paragraph (b), and no action taken hereunder, shall relieve the defaulting Underwriter from liability in respect of any default of such Underwriter under this Agreement.

(c) 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 Underwriters to purchase, severally and not jointly, 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 Underwriters 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 Underwriters to the Company setting forth the aggregate number of shares of Option Stock as to which the Underwriters are 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 Option Stock to be purchased by each Underwriter shall be in such amounts as the Underwriters shall agree upon prior to the exercise of the option set forth hereunder.

#### **4. Offering by the Underwriters.**

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

(b) The information set forth under the caption "Plan of Distribution" in the Registration Statement, any Preliminary Prospectus and the Final Prospectus relating to the Shares filed by the Company (insofar as such information relates to the Underwriters or related persons) constitutes the only information furnished by the Underwriters to the Company for inclusion in the Registration Statement, any Preliminary Prospectus and the Final Prospectus, and you represent and warrant to the Company that the statements made therein (insofar as they relate to the Underwriters 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.

#### **5. 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 8:00 A.M., Texas time, on the date two business days preceding the Closing Date), and payment therefor, shall be made at the office of Bracewell & Patterson, L.L.P., 111 Congress, Suite 2300, Austin, Texas 78701, 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 and you. The date and hour of such delivery and payment are herein called the Closing Date.

(b) If the option granted by Section 3(c) hereof shall be exercised after 8:00 A.M., Texas 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 Bracewell & Patterson, L.L.P., 111 Congress, Suite 2300, Austin, Texas 78701 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 shall be made to the Company or its order 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 Underwriters 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.

**6. 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) the Final Prospectus; (ii) will file promptly all reports and any definitive proxy or information statements required to be filed by the Company with the Commission pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act subsequent to the date of the Final Prospectus and for so long as the delivery of a prospectus is required in connection with the offering or sale of the Shares; and (iii) not file with the Commission any amendment to the Registration Statement or supplement (including any Final Prospectus) to the Base Prospectus (A) of which the Underwriters 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 Underwriters shall not have given their consent or (B) that 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 Underwriters (i) of any request made by the Commission for amendment of the Registration Statement, for supplement to the Final 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 Underwriters 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 Underwriters); (ii) as promptly as possible deliver to the Underwriters, at such office as the Underwriters may designate, as many copies of the Final Prospectus as the Underwriters 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 a dealer, likewise send to the Underwriters as many additional copies of the Final

Prospectus and as many copies of any supplement to the Final Prospectus and of any amended prospectus, filed by the Company with the Commission, as the Underwriters 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 Underwriters, shall occur as a result of which it is necessary, in the opinion of counsel for the Company or of counsel for the Underwriters, to supplement or amend the Final Prospectus in order to make the Final Prospectus not misleading in 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 Final Prospectus or an amended prospectus so that the Final 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 public offering of the Shares by the Underwriters and during such period, the Underwriters 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 Underwriters such proposed variation requires that the Final Prospectus be supplemented or amended, the Company will forthwith prepare and file with the Commission a supplement to the Final Prospectus or an amended prospectus setting forth such variation. The Company authorizes the Underwriters and all dealers to whom any of the Shares may be sold by the Underwriters to use the Final 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, for your information, a copy of any post-effective amendment to the Registration Statement and any supplement to the Final 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 Final 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 Final 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 to be sold by the Company; (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 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 and any other jurisdictions (including filing fees and the reasonable fees and expenses of counsel for the Underwriters 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 Underwriters 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 of its obligations hereunder.

(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 date of this Agreement, 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 two years after the date hereof, the Company will furnish or make available to each Underwriter (i) as soon as reasonably practicable after the end of each fiscal year, copies of the Company's Annual Report and (ii) as soon as reasonably practicable after the filing thereof, copies of each proxy statement, Annual Report on Form 10-K, Quarterly Report on Form 10-Q, Report on Form 8-K or other report 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 W.R. Hambrecht + Co., LLC, on behalf of the Underwriters, 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 90 days following the commencement of the public offering of the Shares by the Underwriters, except (i) pursuant to this Agreement, (ii) pursuant to the exercise of warrants outstanding on the date hereof and as described in the Final Prospectus or (iii) pursuant to the exercise of stock options outstanding on the date hereof, or granted subsequent to the date hereof, pursuant to a stock option or other employee benefit plan in existence on the date hereof and as described in the Final Prospectus.

(l) 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.

(m) 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 Final Prospectus.

(n) 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.

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

**7. Conditions of the Underwriters' Obligations.** The obligations of the Underwriters under this Agreement are subject to the performance by the Company 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 Underwriters, shall be contemplated by the Commission.

(b) The Underwriters shall be satisfied that (i) the Registration Statement as of its effective date, all documents incorporated by reference in the Registration Statement as of the dates of their filing, and each Preliminary Prospectus and the Final Prospectus, including any amendments or supplements thereto, as of their respective filing dates and the dates on which they were first used, 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; (ii) since the filing of the Final Prospectus, no event has occurred that should have been set forth in a supplement or amendment to the Final Prospectus that has not been set forth in an effective supplement or amendment; (iii) since the date as of which information is given in the Final Prospectus, 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, whether or not arising from transactions in the ordinary course of business, and since such dates, except in the ordinary course of business, the Company has not entered into any material transaction not referred to in the Final Prospectus; (iv) the Company does not have any material contingent obligations that are not disclosed in the Registration Statement and the Final Prospectus; (v) there are no pending or, to the Company's knowledge, threatened legal proceedings to which the Company is a party or of which property of the Company is subject that are material and that are not disclosed in the Registration Statement and the Final 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 Final 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 Underwriters. The Underwriters shall have received from counsel to the Underwriters, such opinion or opinions with respect to the issuance and sale of the Shares, the Registration Statement and the Final Prospectus and such other related matters as the Underwriters 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 Underwriters shall have received an opinion addressed to the

Underwriters, dated the Closing Date or, if related to the later sale of Option Stock, such later date, of Bracewell & Patterson, L.L.P., 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.

(e) The Underwriters shall have received, on each of the date hereof the Closing Date and any later date on which Option Stock is purchased, a letter from PricewaterhouseCoopers, LLP, independent public accountants, dated as of the date hereof, the Closing Date or such late date, as the case may be, in form and substance satisfactory to the Underwriters; containing statements and information to the effect that:

(i) they are independent certified public accountants with respect to the Company within the meaning of the Securities Act and the applicable published rules and regulations promulgated thereunder;

(ii) in their opinion, the consolidated financial statements of the Company and its subsidiaries audited by them and included in the Registration Statement, any Preliminary Prospectus and the Final Prospectus, as applicable, comply as to form in all material respects with the applicable accounting requirements of the Securities Act and the related rules and regulations promulgated thereunder;

(iii) on the basis of procedures (but not an audit in accordance with generally accepted auditing standards) consisting of:

(A) reading the minutes of meetings of the stockholders, the board of directors and the audit and compensation committees of the Company and its consolidated subsidiaries since December 31, 2003 as set forth in the minute books through a specified date no more than three (3) business days prior to the date of delivery of such letter;

(B) performing the procedures specified by the American Institute of Certified Public Accountants for a review of interim financial information as described in SAS 100, Interim Financial Information, on the unaudited condensed interim financial statements of the Company and its consolidated subsidiaries included or incorporated by reference in the Registration Statement, any Preliminary Prospectus and the Final Prospectus, as applicable, and reading the unaudited interim financial data for the period from the date of the latest balance sheet included or incorporated by reference in the Registration Statement, any Preliminary Prospectus and the Final Prospectus, as applicable, to the date of the latest available interim financial data; and

(C) making inquiries of certain officials of the Company who have responsibility for financial and accounting matters regarding the specific items for which representations are requested below;

nothing has come to their attention as a result of the foregoing procedures that caused them to believe that:

(1) the unaudited condensed interim financial statements, included or incorporated by reference in the Registration Statement, any Preliminary Prospectus and the Final Prospectus, as applicable, do not comply as to form in all material respects with the applicable accounting requirements of the Exchange Act and the related rules and regulations promulgated thereunder;

(2) any material modifications should be made to the unaudited condensed interim financial statements, included or incorporated by reference in the Registration Statement,

any Preliminary Prospectus and the Final Prospectus, as applicable, for them to be in conformity with generally accepted accounting principles;

(3) (i) at the date of the latest available interim financial data and at a specified date not more than three (3) business days prior to the date of delivery of such letter, there was any change in the capital stock or increase in long-term debt of the Company and its consolidated subsidiaries as compared with amounts shown in the latest balance sheet included or incorporated by reference in the Registration Statement, any Preliminary Prospectus and the Final Prospectus, as applicable, or (ii) for the period from the date of the latest income statement included or incorporated by reference in the Registration Statement, any Preliminary Prospectus and the Final Prospectus, as applicable, to the date of the latest available financial data and for the period from the date of the latest income statement included or incorporated by reference in the Registration Statement, any Preliminary Prospectus and the Final Prospectus, as applicable, to a specified date not more than three (3) business days prior to delivery of such letter, there were any decreases, as compared with the corresponding period in the preceding year, in total revenue, except in all instances for changes, increases or decreases which the Registration Statement, any Preliminary Prospectus or the Final Prospectus, as applicable, discloses have occurred or may occur, or they shall state any specific changes, increases or decreases;

(iii) The letter shall also state that PricewaterhouseCoopers, LLP has carried out certain other specified procedures, not constituting an audit, with respect to certain amounts, percentages and financial information which are included or incorporated by reference in the Registration Statement, any Preliminary Prospectus and the Final Prospectus, as applicable, and which are specified by the Underwriters and agreed to by PricewaterhouseCoopers, LLP, and has found such amounts, percentages and financial information to be in agreement with the relevant accounting, financial and other records of the Company and its subsidiaries identified in such letter.

(f) The Company shall deliver to you a copy of a letter from PricewaterhouseCoopers LLP, addressed to the Company, 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, 2003 and 2002, and the results of operations and cash flows for each of the three years in the period ended December 31, 2003, did not disclose any weaknesses in internal controls that they considered to be material weaknesses.

(g) 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 Final Prospectus and any amendments or supplements thereto and this Agreement, and that the statements included in paragraph (b) of this Section 7 are true and correct.

(h) Prior to the Closing Date, the Company shall have furnished to the Underwriters such further information, certificates and documents as the Underwriters may reasonably request.

(i) 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 6 hereof.

(j) The Nasdaq National Market shall have approved the Shares for listing, subject only to official notice of issuance.

In case any of the conditions specified in this Section 7 shall not be fulfilled, this Agreement may be terminated by W.R. Hambrecht + Co., LLC by giving notice to the Company. Any such termination shall be without liability of the Company to the Underwriters and without liability of the Underwriters to the Company; *provided, however*, that (i) in the event of such termination, the Company agrees to indemnify and hold harmless the Underwriters 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 6 hereof; and (ii) if this Agreement is terminated by W.R. Hambrecht + Co., LLC because of any refusal or failure on the part of the Company to perform any of its obligations or agreement contained 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 Underwriters, the Company will reimburse the Underwriters upon demand for all actual, accountable 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.

#### **8. Conditions of the Obligations of the Company.**

(a) The obligations of the Company 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.

(b) In case either of the conditions specified in paragraph (a) of this Section 8 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 to the Underwriters and without liability of the Underwriters to the Company; *provided, however*, that in the event of any such termination the Company agrees to indemnify and hold harmless the Underwriters 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 6 hereof.

#### **9. Indemnification and Contribution.**

(a) Subject to the provisions of paragraph (d) of this Section 9, the Company agrees to indemnify and hold harmless each 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 or such person within the meaning of Section 15 of the Securities Act or 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 each such Underwriter or any other such indemnified party 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 Base 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 and (ii) any untrue statement or alleged untrue statement of any material fact

contained in any Preliminary Prospectus or the Final 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; *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 Final Prospectus or any such amendment thereof or supplement thereto and (ii) 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 Final 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 Final Prospectus (as amended and supplemented), unless such failure resulted from non-compliance by the Company with paragraph (c) of Section 6 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 (d) of this Section 9, each 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 other Underwriter 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 Base 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 Final 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 such indemnifying Underwriter to the Company expressly for use in the Registration Statement or the Final Prospectus or any such amendment thereof or supplement thereto, and will

reimburse, as incurred, all legal or other expenses reasonably incurred by the Company 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 each 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) Each party indemnified under the provisions of paragraph (a) or (b) of this Section 9 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 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 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 9 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 and all legal or other expenses incurred by the indemnified party or parties in connection with the defense of the action, suit, investigation, inquiry or proceeding.

(d) If the indemnification provided for in this Section 9 is unavailable or insufficient to hold harmless an indemnified party under paragraph (a) or (b) 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) and (b) 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, on the one hand, and the Underwriters, 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 Underwriters, in each case as set forth in the table on the cover page of the Final 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 (d) 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 (d) 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 (d), the Underwriters shall not be required to contribute any amount in excess of the underwriting discount applicable to the Shares purchased by the Underwriters hereunder. 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.

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 (d), it will promptly notify such party or parties from whom contribution may be sought, but the omission 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 (c) of this Section 9). The contribution agreement set forth above shall be in addition to any liabilities that any indemnifying party may have at common law or otherwise.

(e) 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.

**10. Reimbursement of Certain Expenses.** In addition to its other obligations under Section 9 of this Agreement, the Company hereby agrees to reimburse on a quarterly basis the Underwriters 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 9 of this Agreement, notwithstanding the absence of a judicial determination as to the propriety and enforceability of the obligations under this Section 10 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 Underwriters shall promptly refund it; and (ii) the Underwriters shall provide to the Company, upon request, reasonable assurances of their ability to effect any refund, when and if due.

**11. Representations, etc. to Survive Delivery.** The respective representations, warranties, agreements, covenants, indemnities and statements of, and on behalf of, the Company and its officers and the Underwriters, 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 Underwriters, and will survive delivery of and payment for the Shares. Any successors to the Underwriters shall be entitled to the indemnity, contribution and reimbursement agreements contained in this Agreement.

**12. Termination.**

(a) This Agreement (except for the provisions of Section 9 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 Underwriters' 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 12, there shall be no liability of the Company to the Underwriters and no liability of the Underwriters to the Company; *provided, however*, that in the event of any such termination, the Company agrees to indemnify and hold harmless the Underwriters from all accountable, out-of-pocket 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 6. Notwithstanding any termination of this Agreement, the provisions of Section 9 hereof shall survive and remain in full force and effect.

**13. Notices.** All communications hereunder shall be in writing and if sent to the Underwriters shall be mailed or delivered or emailed and confirmed by letter or teletyped and confirmed by letter

to W.R. Hambrecht + Co., LLC at 539 Bryant Street, San Francisco, California 94107, Attn: Greg Hartmann, Esq. with copies to Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105, Attn: Bruce Alan Mann, Esq., or, 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: President, with copies to Bracewell & Patterson, L.L.P., 111 Congress, Suite 2300, Austin, Texas 78701, Attn: Tom Adkins, Esq.

**14. Successors.** This Agreement shall be to the benefit of and be binding upon the Company and the Underwriters and, with respect to the provisions of Section 9 hereof, the several parties (in addition to the Company and the Underwriters) indemnified under the provisions of said Section 9, 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 Underwriters.

**15. 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.

**16. 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.

[INTENTIONALLY LEFT BLANK]

If the foregoing correctly sets forth our understanding, please indicate the Underwriters' 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: /s/ DAVID K. CHIDESTER

Name: David K. Chidester

Title: *Vice President, Finance*

Accepted as of the date first above written:

**W.R. HAMBRECHT + CO., LLC**  
**JMP SECURITIES LLC**

By: W.R. Hambrecht + Co., LLC

By: /s/ JONATHAN T. FAYMAN

Name: Jonathan T. Fayman

Title: *Chief Financial Officer*

SCHEDULE 1

UNDERWRITERS

Underwriter	Number of Shares to be Purchased From the Company
W.R. Hambrecht + Co., LLC	686,400
JMP Securities LLC	342,000
Legg Mason Wood Walker, Incorporated	171,600
<b>Total</b>	1,200,000

**Exhibit A**

Form of Opinion of Bracewell & Patterson, L.L.P.  
on Behalf of the Company

(a) The Company has been duly incorporated and is validly existing as a corporation in good standing under the laws of the State of Delaware and has the corporate power and authority to own or lease its properties and conduct its business as described in the Final Prospectus, and is duly qualified as a foreign corporation to transact business and is in good standing in the State of Utah.

(b) The authorized capital stock of the Company consists of 5,000,000 shares of Preferred Stock, \$0.0001 par value, of which there are no outstanding shares, and 100,000,000 shares of Common Stock, \$0.0001 par value, of which there are outstanding            shares (including the Underwritten Stock and any shares of Option Stock issued on the date hereof). The Underwritten Stock and any shares of Option Stock issued on the date hereof, when issued and delivered to and paid for by the Underwriters as provided in the Underwriting Agreement, will be duly and validly issued and will be fully paid and nonassessable. The stockholders of the Company have no preemptive rights or rights of first refusal with respect to the issuance and the sale of the Shares pursuant to the Company's certificate of incorporation or bylaws, and to the knowledge of such counsel after due inquiry, there are no written contractual preemptive rights, right of first refusal or rights of co-sale that exist with respect to the Shares to be sold by the Company that have not been waived or otherwise satisfied.

(c) To the knowledge of such counsel after due inquiry, the Company has no subsidiaries except as disclosed in the Final Prospectus.

(d) To the knowledge of such counsel after due inquiry, and except as disclosed in the Final Prospectus, there are no contracts, agreements or understandings between the Company and any person granting such person the right to require the Company to file a registration statement under the Securities Act with respect to any securities of the Company owned or to be owned by such person or to require the Company to include such securities in the securities registered pursuant to the Registration Statement.

(e) The Company has corporate power and authority to authorize, issue and sell the Shares to be sold by the Company as contemplated by the Underwriting Agreement. The Underwriting Agreement has been duly authorized, executed and delivered by the Company.

(f) Neither the execution, delivery or performance by the Company of its obligations under the Underwriting Agreement, nor the issuance and sale of the Shares to be sold by the Company thereunder, results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (i) any statute, rule or regulation known to such counsel after due inquiry to be customarily applicable to transactions of this nature, (ii) any order of any governmental agency or body or any court having jurisdiction over the Company known by such counsel after due inquiry or (iii) any certificate, agreement, plan or other document filed as an exhibit to the Registration Statement.

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

(h) The Registration Statement has been declared effective under the Securities Act; the filing of the Final Prospectus with the Commission pursuant to Rule 424(b) under the Act was made in the manner and within the time period required by Rule 424(b); and to the knowledge of such counsel

after due inquiry, 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 are threatened or contemplated by the Commission.

(i) To the knowledge of such counsel after due inquiry, there are no contracts, leases, agreements or other documents to which the Company is a party of a character required to be filed as an exhibit to the Registration Statement which are not filed as required.

(j) The Company is not 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.

(k) To the knowledge of such counsel after due inquiry, there are no legal or governmental proceedings to which the Company is a party that are required to be described in the Registration Statement that are not described as required.

In addition, counsel shall state that, because the primary purpose of their engagement was not to establish or confirm factual matters or financial or accounting matters and because of the wholly or partially non-legal character of many of the statements contained in the Registration Statement, the Prospectus and the Prospectus Supplement, such counsel is not passing upon and does not assume any responsibility for the accuracy, completeness or fairness of the statements contained in the Registration Statement, the Prospectus or the Prospectus Supplement, and such counsel has not independently verified the accuracy, completeness or fairness of such statements. Such counsel may state that without limiting the foregoing, such counsel assumes no responsibility for, has not independently verified and has not been asked to comment on the accuracy, completeness or fairness of the financial statements and schedules included in the Registration Statement, the Prospectus or the Prospectus Supplement or the exhibits to the Registration Statement, and has not examined the accounting, financial or other records from which such financial statements, schedules and other financial data and information were derived. Counsel may note that, although certain portions of the Registration Statement (including financial statements and schedules) have been included therein on the authority of "experts" within the meaning of the Securities Act, they are not experts with respect to any portion of the Registration Statement, including, without limitation, such financial statements and schedules and related data included therein. Counsel shall state, however, that they have participated in conferences with officers and other representatives of the Company, the Company's auditors, representatives of the underwriters and their counsel at which the contents of the Registration Statement, the Prospectus and the Prospectus Supplement and related matters were discussed, and that, based upon such participation and review, and relying as to materiality in part upon the factual statements of officers and other representatives of the Company and upon representatives of the underwriters, counsel shall advise that no facts have come to their attention that have caused them to believe that (i) the Registration Statement (except for financial statements, schedules and related data and other financial or accounting data, as to which they have not been asked to comment) does not appear on its face to comply as to form in all material respects with the requirements of Form S-3, or (ii) the Registration Statement (except for the financial statements, schedules and related data and other financial or accounting data, as to which they have not been asked to comment), at the time it became effective, contained an 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, or (iii) the Prospectus, as supplemented by the Prospectus Supplement (except for the financial statements, schedules and related data, as to which they have not been asked to comment), as of the date of the Prospectus Supplement, contained an untrue statement of a material fact or omitted 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.

## QuickLinks

[1,200,000 Shares\(1\) OVERSTOCK.COM, INC. COMMON STOCK UNDERWRITING AGREEMENT  
SCHEDULE 1 UNDERWRITERS  
Exhibit A](#)

May 13, 2004

Overstock.com, Inc.  
6322 South 3000 East, Suite 100  
Salt Lake City, Utah 84121

Ladies and Gentlemen:

We have acted as counsel to Overstock.com, Inc., a Delaware corporation (the "Company"), in connection with the registration of the offer and sale by the Company of 1,200,000 shares of the Company's common stock (the "Stock") pursuant to the registration statement on Form S-3 (File No. 333-113104) filed by the Company with the Securities and Exchange Commission on February 26, 2004 (the "Registration Statement").

The offering and sale of the Stock is proposed to be made pursuant to an Underwriting Agreement dated May 13, 2004 by and among the Company, WR Hambrecht + Co., LLC and JMP Securities LLC (the "Underwriting Agreement").

We have examined originals or copies identified to our satisfaction of (a) the Underwriting Agreement, (b) the Amended and Restated Certificate of Incorporation and By-laws of the Company, each as amended to date, (c) certain resolutions adopted by the Board of Directors of the Company and by a committee thereof, and (d) such other documents and records as we have deemed necessary and relevant for the purposes hereof. In addition, we have relied on certificates of officers of the Company and of public officials and others as to certain matters of fact relating to this opinion and have made such investigations of law as we have deemed necessary and relevant as a basis hereof. In such examination, we have assumed the genuineness of all signatures, the authenticity of all documents and records submitted to us as originals, the conformity to authentic original documents and records of all documents and records submitted to us as copies, and the truthfulness of all statements of fact contained therein.

Based on the foregoing, subject to the limitations, assumptions and qualifications set forth herein, and having due regard for such legal considerations as we deem relevant, we are of the opinion that:

- (1) the Company is validly existing and in good standing as a corporation under the laws of the State of Delaware; and
- (2) the issuance of the Stock has been duly authorized, and when issued and delivered by the Company against payment therefor in accordance with the terms of the Underwriting Agreement, the Stock will be validly issued, fully paid and nonassessable.

The foregoing opinion is based on and limited to the General Corporation Law of the State of Delaware, including the applicable provisions of the Delaware Constitution and the reported judicial decisions interpreting such laws, and the relevant law of the United States of America, and we render no opinion with respect to the law of any other jurisdiction.

We hereby consent to the filing of this opinion with the Commission as an exhibit to a Current Report on Form 8-K which is incorporated by reference into the Registration Statement and to the references to our firm under the heading "Legal Matters" in the Prospectus Supplement and in the Registration Statement. By giving such consent, we do not admit that we are experts with respect to

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any part of the Registration Statement, including this Exhibit, within the meaning of the term "expert" as used in the Securities Act or the rules and regulations thereunder.

Very truly yours,

/s/ BRACEWELL & PATTERSON, L.L.P.

Bracewell & Patterson, L.L.P.

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**FOR IMMEDIATE RELEASE**

**Investor Contact:**  
Kathryn Huang Hadley  
Overstock.com, Inc.  
+1 (801) 947-3282  
khuang@overstock.com

**Media Contact:**  
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**Overstock.com, Inc. To Raise  
Approximately \$36.6 Million In  
Auction-Based  
Common Stock Offering**

SALT LAKE CITY—Overstock.com, Inc. (NASDAQ: OSTK) today announced that it expects to raise approximately \$36.6 million from its auction-based underwritten public offering of 1,200,000 shares of common stock at a price of \$30.50 per share. Subject to customary closing conditions, Overstock will receive net proceeds of approximately \$35.3 million from the offering under its existing shelf registration statement. The underwriters have an option to purchase up to an additional 100,000 shares to cover over-allotments, if any.

WR Hambrecht + Co LLC acted as the sole book-running manager. JMP Securities LLC acted as co-lead manager. The offering was made through WR Hambrecht + Co's OpenFollowOnsm auction process.

Overstock anticipates using the net proceeds of the offering primarily for general corporate purposes and working capital requirements, including sales and marketing activities and inventory purchases.

This press release does not constitute an offer to sell or the solicitation of an offer to buy any of the securities. A final prospectus supplement relating to these securities will be filed with the Securities and Exchange Commission. These securities may not be sold nor offers to buy be accepted prior to the time the prospectus supplement and related prospectuses are delivered in final form.

Copies of the final prospectus supplement and the accompanying prospectus can be obtained from WR Hambrecht + Co LLC, 539 Bryant St., San Francisco, California, 94107, (415) 551-8600 or from JMP Securities LLC, One Embarcadero Center, Suite 2100, San Francisco, California 94111, (415) 835-8900.

**About Overstock.com**

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

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Overstock.com is a registered trademark of Overstock.com, Inc. All other trademarks are the property of their respective owners.

This press release contains certain forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Such forward-looking statements include, but are not limited to, statements regarding our anticipated receipt of the proceeds of the offering as described herein and our intentions regarding the uses of the net proceeds of the offering. These forward-looking statements involve certain risks and uncertainties that could cause actual results to differ from those anticipated, including, but not limited to, the risks inherent in the process of offering common stock under a shelf registration statement, our limited operating

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history, the possibility of a general downturn in economic conditions, the possibility of a general downturn in the public equity markets or in the market for NASDAQ stocks or for internet retailers, as well as the other risks identified in our Form 10-K for the year ended December 31, 2003, our Form 10-Q for the quarter ended March 31, 2004, our preliminary prospectus supplement filed with the SEC on May 7, 2004 pursuant to Rule 424(b)(5) and all of our subsequent filings with the Securities and Exchange Commission, which identify important factors that could cause the actual results to differ materially from those contained in our forward-looking statements.

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## QuickLinks

[Overstock.com, Inc. To Raise Approximately \\$36.6 Million In Auction-Based Common Stock Offering](#)