

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

HIPCRICKET, INC.,<sup>1</sup>

Debtor.

Case No. 15-10104 (LSS)

Chapter 11

**Related Docket No. 293**

**PLAN SUPPLEMENT RELATING TO THE AMENDED PLAN OF  
REORGANIZATION OF THE DEBTOR**

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Hipcricket, Inc., the above-captioned debtor and debtor in possession (the “**Debtor**”), hereby submits this plan supplement (the “**Plan Supplement**”) in support of, and in accordance with, the *Amended Plan of Reorganization of the Debtor* [Docket No. 293] (the “**Plan**”). Capitalized terms used, but not defined herein have the meanings ascribed to them in the Plan. The documents contained in this Plan Supplement are integral to, part of, and incorporated by reference into the Plan. These documents have not yet been approved by the Court. If the Plan is approved, the documents contained in this Plan Supplement will be approved by the Court pursuant to the Confirmation Order.

**CONTENTS**

1. This Plan Supplement contains the following documents, as each may be amended, modified, or supplemented from time to time by the Debtor in accordance with the Plan, as set forth below:

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<sup>1</sup> The last four digits of the Debtor’s tax identification number are 2076. The location of the Debtor’s headquarters and the service address for the Debtor is 110 110th Avenue NE, Suite 410, Bellevue, WA 98004.

<b>Exhibit</b>	<b>Description</b>
A	Form of Amended and Restated Bylaws
B	Form of Amended and Restated Certificate of Incorporation
C	Form of Stock Purchase Agreement
D	Distribution Trust Agreement
E	Section 1129(a)(5) Disclosures

2. Certain documents, or portions thereof, contained in this Plan Supplement remain subject to continuing negotiations among the Debtor and interested parties with respect thereto. The Debtor reserves all rights to amend, revise, or supplement the Plan Supplement, and any of the documents and designations contained herein, at any time before the Effective Date of the Plan, or any such other date as may be provided for by the Plan or by order of the Bankruptcy Court.

Dated: April 27, 2015

PACHULSKI STANG ZIEHL & JONES LLP

/s/ James O' Neill

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Counsel to Debtor and Debtor in Possession

# **EXHIBIT A**

## **Form of Amended and Restated Bylaws**

**AMENDED AND RESTATED BYLAWS OF  
HIPCRICKET, INC.**

**Adopted April \_\_, 2015**

## AMENDED AND RESTATED BYLAWS

### ARTICLE I — MEETINGS OF STOCKHOLDERS

**1.1 Place of Meetings.** Meetings of stockholders of Hipcricket, Inc. (the “*Company*”) shall be held at any place, within or outside the State of Delaware, determined by the Company’s board of directors (the “*Board*”). The Board may, in its sole discretion, determine that a meeting of stockholders shall not be held at any place, but may instead be held solely by means of remote communication as authorized by Section 211(a)(2) of the General Corporation Law of the State of Delaware (the “*DGCL*”). In the absence of any such designation or determination, stockholders’ meetings shall be held at the Company’s principal executive office.

**1.2 Annual Meeting.** An annual meeting of stockholders shall be held for the election of directors at such date and time as may be designated by resolution of the Board from time to time. Any other proper business may be transacted at the annual meeting. The Company shall not be required to hold an annual meeting of stockholders, *provided* that (i) the stockholders are permitted to act by written consent under the Company’s certificate of incorporation and these bylaws, (ii) the stockholders take action by written consent to elect directors and (iii) the stockholders unanimously consent to such action or, if such consent is less than unanimous, all of the directorships to which directors could be elected at an annual meeting held at the effective time of such action are vacant and are filled by such action.

**1.3 Special Meeting.** A special meeting of the stockholders may be called at any time by the Board, Chairperson of the Board, Chief Executive Officer or President (in the absence of a Chief Executive Officer) or by one or more stockholders holding shares in the aggregate entitled to cast not less than 10% of the votes at that meeting.

If any person(s) other than the Board calls a special meeting, the request shall:

- (i) be in writing;
- (ii) specify the time of such meeting and the general nature of the business proposed to be transacted; and
- (iii) be delivered personally or sent by registered mail or by facsimile transmission to the Chairperson of the Board, the Chief Executive Officer, the President (in the absence of a Chief Executive Officer) or the Secretary of the Company.

The officer(s) receiving the request shall cause notice to be promptly given to the stockholders entitled to vote at such meeting, in accordance with these bylaws, that a meeting will be held at the time requested by the person or persons calling the meeting. No business may be transacted at such special meeting other than the business specified in such notice to stockholders. Nothing contained in this paragraph of this **Section 1.3** shall be construed as limiting, fixing, or affecting the time when a meeting of stockholders called by action of the Board may be held.

**1.4 Notice of Stockholders’ Meetings.** Whenever stockholders are required or permitted to take any action at a meeting, a written notice of the meeting shall be given which shall state the place, if any, date and hour of the meeting, the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such meeting, the record date for

determining the stockholders entitled to vote at the meeting, if such date is different from the record date for determining stockholders entitled to notice of the meeting, and, in the case of a special meeting, the purpose or purposes for which the meeting is called. Except as otherwise provided in the DGCL, the certificate of incorporation or these bylaws, the written notice of any meeting of stockholders shall be given not less than ten (10) nor more than sixty (60) days before the date of the meeting to each stockholder entitled to vote at such meeting as of the record date for determining the stockholders entitled to notice of the meeting.

**1.5 Quorum.** Except as otherwise provided by law, the certificate of incorporation or these bylaws, at each meeting of stockholders the presence in person or by proxy of the holders of shares of stock having a majority of the votes which could be cast by the holders of all outstanding shares of stock entitled to vote at the meeting shall be necessary and sufficient to constitute a quorum. Where a separate vote by a class or series or classes or series is required, a majority of the outstanding shares of such class or series or classes or series, present in person or represented by proxy, shall constitute a quorum entitled to take action with respect to that vote on that matter, except as otherwise provided by law, the certificate of incorporation or these bylaws.

If, however, such quorum is not present or represented at any meeting of the stockholders, then either (i) the chairperson of the meeting, or (ii) the stockholders entitled to vote at the meeting, present in person or represented by proxy, shall have the power to adjourn the meeting from time to time, in the manner provided in **Section 1.6**, until a quorum is present or represented.

**1.6 Adjourned Meeting; Notice.** Any meeting of stockholders, annual or special, may adjourn from time to time to reconvene at the same or some other place, and notice need not be given of the adjourned meeting if the time, place, if any, thereof, and the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such adjourned meeting are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the Company may transact any business which might have been transacted at the original meeting. If the adjournment is for more than thirty (30) days, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting. If after the adjournment a new record date for stockholders entitled to vote is fixed for the adjourned meeting, the Board shall fix a new record date for notice of such adjourned meeting in accordance with Section 213(a) of the DGCL and **Section 1.10** of these bylaws, and shall give notice of the adjourned meeting to each stockholder of record entitled to vote at such adjourned meeting as of the record date fixed for notice of such adjourned meeting.

**1.7 Conduct of Business.** Meetings of stockholders shall be presided over by the Chairperson of the Board, if any, or in his or her absence by the Vice Chairperson of the Board, if any, or in the absence of the foregoing persons by the Chief Executive Officer, or in the absence of the foregoing persons by the President, or in the absence of the foregoing persons by a Vice President, or in the absence of the foregoing persons by a chairperson designated by the Board, or in the absence of such designation by a chairperson chosen at the meeting. The Secretary shall act as secretary of the meeting, but in his or her absence the chairperson of the meeting may appoint any person to act as secretary of the meeting. The chairperson of any meeting of stockholders shall determine the order of business and the procedure at the meeting, including such regulation of the manner of voting and the conduct of business.

**1.8 Voting.** The stockholders entitled to vote at any meeting of stockholders shall be determined in accordance with the provisions of **Section 1.10** of these bylaws, subject to Section 217 (relating to voting rights of fiduciaries, pledgors and joint owners of stock) and Section 218 (relating to voting trusts and other voting agreements) of the DGCL.

Except as may be otherwise provided in the certificate of incorporation, each stockholder entitled to vote at any meeting of stockholders shall be entitled to one vote for each share of capital stock held by such stockholder which has voting power upon the matter in question. Voting at meetings of stockholders need not be by written ballot and, unless otherwise required by law, need not be conducted by inspectors of election unless so determined by the holders of shares of stock having a majority of the votes which could be cast by the holders of all outstanding shares of stock entitled to vote thereon which are present in person or by proxy at such meeting. If authorized by the Board, such requirement of a written ballot shall be satisfied by a ballot submitted by electronic transmission (as defined in **Section 7.2** of these bylaws), *provided* that any such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the stockholder or proxy holder.

Except as otherwise required by law, the certificate of incorporation or these bylaws, in all matters other than the election of directors, the affirmative vote of a majority of the voting power of the shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders. Except as otherwise required by law, the certificate of incorporation or these bylaws, directors shall be elected by a plurality of the voting power of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors. Where a separate vote by a class or series or classes or series is required, in all matters other than the election of directors, the affirmative vote of the majority of shares of such class or series or classes or series present in person or represented by proxy at the meeting shall be the act of such class or series or classes or series, except as otherwise provided by law, the certificate of incorporation or these bylaws.

**1.9 Stockholder Action by Written Consent Without a Meeting.** Unless otherwise provided in the certificate of incorporation, any action required by the DGCL to be taken at any annual or special meeting of stockholders of a corporation, or any action which may be taken at any annual or special meeting of such stockholders, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted.

An electronic transmission (as defined in **Section 7.2**) consenting to an action to be taken and transmitted by a stockholder or proxy holder, or by a person or persons authorized to act for a stockholder or proxy holder, shall be deemed to be written, signed and dated for purposes of this Section, *provided* that any such electronic transmission sets forth or is delivered with information from which the Company can determine (i) that the electronic transmission was transmitted by the stockholder or proxy holder or by a person or persons authorized to act for the stockholder or proxy holder and (ii) the date on which such stockholder or proxy holder or authorized person or persons transmitted such electronic transmission.

In the event that the Board shall have instructed the officers of the Company to solicit the vote or written consent of the stockholders of the Company, an electronic transmission of a stockholder written consent given pursuant to such solicitation may be delivered to the Secretary or the President of the Company or to a person designated by the Secretary or the President. The Secretary or the President of the Company or a designee of the Secretary or the President shall cause any such written consent by electronic transmission to be reproduced in paper form and inserted into the corporate records.

Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders who have not consented in writing and who, if the action had been taken at a meeting, would have been entitled to notice of the meeting if the record date for notice of such meeting had been the date that written consents signed by a sufficient number of

holders to take the action were delivered to the Company as provided in Section 228 of the DGCL. In the event that the action which is consented to is such as would have required the filing of a certificate under any provision of the DGCL, if such action had been voted on by stockholders at a meeting thereof, the certificate filed under such provision shall state, in lieu of any statement required by such provision concerning any vote of stockholders, that written consent has been given in accordance with Section 228 of the DGCL.

**1.10 Record Date for Stockholder Notice; Voting; Giving Consents.** In order that the Company may determine the stockholders entitled to notice of any meeting of stockholders or any adjournment thereof, the Board may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board and which record date shall not be more than sixty (60) nor less than ten (10) days before the date of such meeting. If the Board so fixes a date, such date shall also be the record date for determining the stockholders entitled to vote at such meeting unless the Board determines, at the time it fixes such record date, that a later date on or before the date of the meeting shall be the date for making such determination.

If no record date is fixed by the Board, the record date for determining stockholders entitled to notice of, and to vote at, a meeting of stockholders shall be at the close of business on the day next preceding the day on which notice is given, or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held.

A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; *provided, however*, that the Board may fix a new record date for determination of stockholders entitled to vote at the adjourned meeting, and in such case shall also fix as the record date for stockholders entitled to notice of such adjourned meeting the same or an earlier date as that fixed for determination of stockholders entitled to vote in accordance with the provisions of Section 213 of the DGCL and this Section 1.10 at the adjourned meeting.

In order that the Company may determine the stockholders entitled to consent to corporate action in writing without a meeting, the Board may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board, and which date shall not be more than ten (10) days after the date upon which the resolution fixing the record date is adopted by the Board. If no record date has been fixed by the Board, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting, when no prior action by the Board is required by law, shall be the first date on which a signed written consent setting forth the action taken or proposed to be taken is delivered to the Company in accordance with applicable law. If no record date has been fixed by the Board and prior action by the Board is required by law, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting shall be at the close of business on the day on which the Board adopts the resolution taking such prior action.

In order that the Company may determine the stockholders entitled to receive payment of any dividend or other distribution or allotment of any rights or the stockholders entitled to exercise any rights in respect of any change, conversion or exchange of stock, or for the purpose of any other lawful action, the Board may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted, and which record date shall be not more than sixty (60) days prior to such action. If no record date is fixed, the record date for determining stockholders for any such purpose shall be at the close of business on the day on which the Board adopts the resolution relating thereto.

**1.11 Proxies.** Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or



persons to act for such stockholder by proxy authorized by an instrument in writing or by a transmission permitted by law filed in accordance with the procedure established for the meeting, but no such proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period. The revocability of a proxy that states on its face that it is irrevocable shall be governed by the provisions of Section 212 of the DGCL.

**1.12 *List of Stockholders Entitled to Vote.*** The officer who has charge of the stock ledger of the Company shall prepare and make, at least ten days before every meeting of stockholders, a complete list of the stockholders entitled to vote at the meeting; *provided, however*, if the record date for determining the stockholders entitled to vote is less than ten (10) days before the meeting date, the list shall reflect the stockholders entitled to vote as of the tenth day before the meeting date, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. The Company shall not be required to include electronic mail addresses or other electronic contact information on such list. Such list shall be open to the examination of any stockholder for any purpose germane to the meeting for a period of at least ten days prior to the meeting: (i) on a reasonably accessible electronic network, *provided* that the information required to gain access to such list is provided with the notice of the meeting, or (ii) during ordinary business hours, at the Company's principal place of business. In the event that the Company determines to make the list available on an electronic network, the Company may take reasonable steps to ensure that such information is available only to stockholders of the Company. If the meeting is to be held at a place, then the list shall be produced and kept at the time and place of the meeting during the whole time thereof, and may be examined by any stockholder who is present. If the meeting is to be held solely by means of remote communication, then the list shall also be open to the examination of any stockholder during the whole time of the meeting on a reasonably accessible electronic network, and the information required to access such list shall be provided with the notice of the meeting.

## **ARTICLE II — DIRECTORS**

**2.1 *Powers.*** The business and affairs of the Company shall be managed by or under the direction of the Board, except as may be otherwise provided in the DGCL or the certificate of incorporation.

**2.2 *Number of Directors.*** The Board shall consist of one or more members, each of whom shall be a natural person. Unless the certificate of incorporation fixes the number of directors, the number of directors shall be determined from time to time by resolution of the Board. No reduction of the authorized number of directors shall have the effect of removing any director before that director's term of office expires.

**2.3 *Election, Qualification and Term of Office of Directors.*** Except as provided in **Section 2.4** of these bylaws, and subject to **Sections 1.2** and **1.9** of these bylaws, directors shall be elected at each annual meeting of stockholders. Directors need not be stockholders unless so required by the certificate of incorporation or these bylaws. The certificate of incorporation or these bylaws may prescribe other qualifications for directors. Each director shall hold office until such director's successor is elected and qualified or until such director's earlier death, resignation or removal.

**2.4 *Resignation and Vacancies.*** Any director may resign at any time upon notice given in writing or by electronic transmission to the Company. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a

specified vote for reelection as a director may provide that it is irrevocable. Unless otherwise provided in the certificate of incorporation or these bylaws, when one or more directors resign from the Board, effective at a future date, a majority of the directors then in office, including those who have so resigned, shall have power to fill such vacancy or vacancies, the vote thereon to take effect when such resignation or resignations shall become effective.

Unless otherwise provided in the certificate of incorporation or these bylaws:

(i) Vacancies and newly created directorships resulting from any increase in the authorized number of directors elected by all of the stockholders having the right to vote as a single class may be filled by a majority of the directors then in office, although less than a quorum, or by a sole remaining director.

(ii) Whenever the holders of any class or classes of stock or series thereof are entitled to elect one or more directors by the provisions of the certificate of incorporation, vacancies and newly created directorships of such class or classes or series may be filled by a majority of the directors elected by such class or classes or series thereof then in office, or by a sole remaining director so elected.

If at any time, by reason of death or resignation or other cause, the Company should have no directors in office, then any officer or any stockholder or an executor, administrator, trustee or guardian of a stockholder, or other fiduciary entrusted with like responsibility for the person or estate of a stockholder, may call a special meeting of stockholders in accordance with the provisions of the certificate of incorporation or these bylaws, or may apply to the Court of Chancery for a decree summarily ordering an election as provided in Section 211 of the DGCL.

If, at the time of filling any vacancy or any newly created directorship, the directors then in office constitute less than a majority of the whole Board (as constituted immediately prior to any such increase), the Court of Chancery may, upon application of any stockholder or stockholders holding at least 10% of the voting stock at the time outstanding having the right to vote for such directors, summarily order an election to be held to fill any such vacancies or newly created directorships, or to replace the directors chosen by the directors then in office as aforesaid, which election shall be governed by the provisions of Section 211 of the DGCL as far as applicable.

A director elected to fill a vacancy shall be elected for the unexpired term of his or her predecessor in office and until such director's successor is elected and qualified, or until such director's earlier death, resignation or removal.

**2.5 Place of Meetings; Meetings by Telephone.** The Board may hold meetings, both regular and special, either within or outside the State of Delaware.

Unless otherwise restricted by the certificate of incorporation or these bylaws, members of the Board, or any committee designated by the Board, may participate in a meeting of the Board, or any committee, by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and such participation in a meeting shall constitute presence in person at the meeting.

**2.6 Conduct of Business.** Meetings of the Board shall be presided over by the Chairperson of the Board, if any, or in his or her absence by the Vice Chairperson of the Board, if any, or in the absence of the foregoing persons by a chairperson designated by the Board, or in the absence of such designation by a chairperson chosen at the meeting. The Secretary shall act as secretary of the meeting,

but in his or her absence the chairperson of the meeting may appoint any person to act as secretary of the meeting.

**2.7 Regular Meetings.** Regular meetings of the Board may be held without notice at such time and at such place as shall from time to time be determined by the Board.

**2.8 Special Meetings; Notice.** Special meetings of the Board for any purpose or purposes may be called at any time by the Chairperson of the Board, the Chief Executive Officer, the President, the Secretary or any two directors.

Notice of the time and place of special meetings shall be:

- (i) delivered personally by hand, by courier or by telephone;
- (ii) sent by United States first-class mail, postage prepaid;
- (iii) sent by facsimile; or
- (iv) sent by electronic mail,

directed to each director at that director's address, telephone number, facsimile number or electronic mail address, as the case may be, as shown on the Company's records.

If the notice is (i) delivered personally by hand, by courier or by telephone, (ii) sent by facsimile or (iii) sent by electronic mail, it shall be delivered or sent at least 24 hours before the time of the holding of the meeting. If the notice is sent by United States mail, it shall be deposited in the United States mail at least four days before the time of the holding of the meeting. Any oral notice may be communicated to the director. The notice need not specify the place of the meeting (if the meeting is to be held at the Company's principal executive office) nor the purpose of the meeting.

**2.9 Quorum; Voting.** At all meetings of the Board, a majority of the total authorized number of directors shall constitute a quorum for the transaction of business. If a quorum is not present at any meeting of the Board, then the directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum is present. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for that meeting.

The vote of a majority of the directors present at any meeting at which a quorum is present shall be the act of the Board, except as may be otherwise specifically provided by statute, the certificate of incorporation or these bylaws.

If the certificate of incorporation provides that one or more directors shall have more or less than one vote per director on any matter, every reference in these bylaws to a majority or other proportion of directors shall refer to a majority or other proportion of the votes of the directors.

**2.10 Board Action by Written Consent Without a Meeting.** Unless otherwise restricted by the certificate of incorporation or these bylaws, any action required or permitted to be taken at any meeting of the Board, or of any committee thereof, may be taken without a meeting if all members of the Board or committee, as the case may be, consent thereto in writing or by electronic transmission and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the Board

or committee. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.

**2.11 Fees and Compensation of Directors.** Unless otherwise restricted by the certificate of incorporation or these bylaws, the Board shall have the authority to fix the compensation of directors.

**2.12 Removal of Directors.** Unless otherwise restricted by statute, the certificate of incorporation or these bylaws, any director or the entire Board may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors.

No reduction of the authorized number of directors shall have the effect of removing any director prior to the expiration of such director's term of office.

### ARTICLE III — COMMITTEES

**3.1 Committees of Directors.** The Board may designate one or more committees, each committee to consist of one or more of the directors of the Company. The Board may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not such member or members constitute a quorum, may unanimously appoint another member of the Board to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the Board or in these bylaws, shall have and may exercise all the powers and authority of the Board in the management of the business and affairs of the Company, and may authorize the seal of the Company to be affixed to all papers that may require it; but no such committee shall have the power or authority to (i) approve or adopt, or recommend to the stockholders, any action or matter (other than the election or removal of directors) expressly required by the DGCL to be submitted to stockholders for approval, or (ii) adopt, amend or repeal any bylaw of the Company.

**3.2 Committee Minutes.** Each committee shall keep regular minutes of its meetings and report the same to the Board when required.

**3.3 Meetings and Actions of Committees.** Meetings and actions of committees shall be governed by, and held and taken in accordance with, the provisions of:

- (i) **Section 2.5** (Place of Meetings; Meetings by Telephone);
- (ii) **Section 2.7** (Regular Meetings);
- (iii) **Section 2.8** (Special Meetings; Notice);
- (iv) **Section 2.9** (Quorum; Voting);
- (v) **Section 2.10** (Board Action by Written Consent Without a Meeting); and
- (vi) **Section 7.5** (Waiver of Notice)

with such changes in the context of those bylaws as are necessary to substitute the committee and its members for the Board and its members. *However:*

(i) the time of regular meetings of committees may be determined either by resolution of the Board or by resolution of the committee;

(ii) special meetings of committees may also be called by resolution of the Board; and

(iii) notice of special meetings of committees shall also be given to all alternate members, who shall have the right to attend all meetings of the committee. The Board may adopt rules for the government of any committee not inconsistent with the provisions of these bylaws.

Any provision in the certificate of incorporation providing that one or more directors shall have more or less than one vote per director on any matter shall apply to voting in any committee or subcommittee, unless otherwise provided in the certificate of incorporation or these bylaws.

**3.4 Subcommittees.** Unless otherwise provided in the certificate of incorporation, these bylaws or the resolutions of the Board designating the committee, a committee may create one or more subcommittees, each subcommittee to consist of one or more members of the committee, and delegate to a subcommittee any or all of the powers and authority of the committee.

#### ARTICLE IV — OFFICERS

**4.1 Officers.** The officers of the Company shall be a President and a Secretary. The Company may also have, at the discretion of the Board, a Chairperson of the Board, a Vice Chairperson of the Board, a Chief Executive Officer, one or more Vice Presidents, a Chief Financial Officer, a Treasurer, one or more Assistant Treasurers, one or more Assistant Secretaries, and any such other officers as may be appointed in accordance with the provisions of these bylaws. Any number of offices may be held by the same person.

**4.2 Appointment of Officers.** The Board shall appoint the officers of the Company, except such officers as may be appointed in accordance with the provisions of **Section 4.3** of these bylaws.

**4.3 Subordinate Officers.** The Board may appoint, or empower the Chief Executive Officer or, in the absence of a Chief Executive Officer, the President, to appoint, such other officers and agents as the business of the Company may require. Each of such officers and agents shall hold office for such period, have such authority, and perform such duties as are provided in these bylaws or as the Board may from time to time determine.

**4.4 Removal and Resignation of Officers.** Any officer may be removed, either with or without cause, by an affirmative vote of the majority of the Board at any regular or special meeting of the Board or, except in the case of an officer chosen by the Board, by any officer upon whom such power of removal may be conferred by the Board.

Any officer may resign at any time by giving written notice to the Company. Any resignation shall take effect at the date of the receipt of that notice or at any later time specified in that notice. Unless otherwise specified in the notice of resignation, the acceptance of the resignation shall not be necessary to make it effective. Any resignation is without prejudice to the rights, if any, of the Company under any contract to which the officer is a party.

**4.5 Vacancies in Offices.** Any vacancy occurring in any office of the Company shall be filled by the Board or as provided in **Section 4.3**.

**4.6 Representation of Shares of Other Corporations.** Unless otherwise directed by the Board, the President or any other person authorized by the Board or the President is authorized to vote, represent and exercise on behalf of the Company all rights incident to any and all shares of any other corporation or corporations standing in the name of the Company. The authority granted herein may be exercised either by such person directly or by any other person authorized to do so by proxy or power of attorney duly executed by such person having the authority.

**4.7 Authority and Duties of Officers.** Except as otherwise provided in these bylaws, the officers of the Company shall have such powers and duties in the management of the Company as may be designated from time to time by the Board and, to the extent not so provided, as generally pertain to their respective offices, subject to the control of the Board.

## **ARTICLE V — INDEMNIFICATION**

**5.1 Indemnification of Directors and Officers in Third Party Proceedings.** Subject to the other provisions of this **Article V**, the Company shall indemnify, to the fullest extent permitted by the DGCL, as now or hereinafter in effect, any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (a “*Proceeding*”) (other than an action by or in the right of the Company) by reason of the fact that such person is or was a director or officer of the Company, or is or was a director or officer of the Company serving at the request of the Company as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys’ fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person in connection with such Proceeding if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Company, and, with respect to any criminal action or proceeding, had no reasonable cause to believe such person’s conduct was unlawful. The termination of any Proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which such person reasonably believed to be in or not opposed to the best interests of the Company, and, with respect to any criminal action or proceeding, had reasonable cause to believe that such person’s conduct was unlawful.

**5.2 Indemnification of Directors and Officers in Actions by or in the Right of the Company.** Subject to the other provisions of this **Article V**, the Company shall indemnify, to the fullest extent permitted by the DGCL, as now or hereinafter in effect, any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Company to procure a judgment in its favor by reason of the fact that such person is or was a director or officer of the Company, or is or was a director or officer of the Company serving at the request of the Company as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys’ fees) actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Company; except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Company unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such

person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

**5.3 Successful Defense.** To the extent that a present or former director or officer of the Company has been successful on the merits or otherwise in defense of any action, suit or proceeding described in **Section 5.1** or **Section 5.2**, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

**5.4 Indemnification of Others.** Subject to the other provisions of this **Article V**, the Company shall have power to indemnify its employees and agents to the extent not prohibited by the DGCL or other applicable law. The Board shall have the power to delegate to such person or persons the determination of whether employees or agents shall be indemnified.

**5.5 Advanced Payment of Expenses.** Expenses (including attorneys' fees) incurred by an officer or director of the Company in defending any Proceeding shall be paid by the Company in advance of the final disposition of such Proceeding upon receipt of a written request therefor (together with documentation reasonably evidencing such expenses) and an undertaking by or on behalf of the person to repay such amounts if it shall ultimately be determined that the person is not entitled to be indemnified under this **Article V** or the DGCL. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents may be so paid upon such terms and conditions, if any, as the Company deems appropriate. The right to advancement of expenses shall not apply to any Proceeding for which indemnity is excluded pursuant to these bylaws.

**5.6 Limitation on Indemnification.** Subject to the requirements in **Section 5.3** and the DGCL, the Company shall not be obligated to indemnify any person pursuant to this **Article V** in connection with any Proceeding (or any part of any Proceeding):

(i) for which payment has actually been made to or on behalf of such person under any statute, insurance policy, indemnity provision, vote or otherwise, except with respect to any excess beyond the amount paid;

(ii) for an accounting or disgorgement of profits pursuant to Section 16(b) of the Securities Exchange Act of 1934, as amended, or similar provisions of federal, state or local statutory law or common law, if such person is held liable therefor (including pursuant to any settlement arrangements);

(iii) for any reimbursement of the Company by such person of any bonus or other incentive-based or equity-based compensation or of any profits realized by such person from the sale of securities of the Company, as required in each case under the Securities Exchange Act of 1934, as amended (including any such reimbursements that arise from an accounting restatement of the Company pursuant to Section 304 of the Sarbanes-Oxley Act of 2002 (the "**Sarbanes-Oxley Act**"), or the payment to the Company of profits arising from the purchase and sale by such person of securities in violation of Section 306 of the Sarbanes-Oxley Act), if such person is held liable therefor (including pursuant to any settlement arrangements);

(iv) initiated by such person, including any Proceeding (or any part of any Proceeding) initiated by such person against the Company or its directors, officers, employees, agents or other indemnitees, unless (a) the Board authorized the Proceeding (or the relevant part of the Proceeding) prior to its initiation, (b) the Company provides the indemnification, in its sole discretion, pursuant to the

powers vested in the Company under applicable law, (c) otherwise required to be made under **Section 5.7** or (d) otherwise required by applicable law; or

(v) if prohibited by applicable law.

**5.7 Determination; Claim.** If a claim for indemnification or advancement of expenses under this **Article V** is not paid by the Company or on its behalf within 90 days after receipt by the Company of a written request therefor, the claimant shall be entitled to an adjudication by a court of competent jurisdiction of his or her entitlement to such indemnification or advancement of expenses. To the extent not prohibited by law, the Company shall indemnify such person against all expenses actually and reasonably incurred by such person in connection with any action for indemnification or advancement of expenses from the Company under this **Article V**, to the extent such person is successful in such action. In any such suit, the Company shall, to the fullest extent not prohibited by law, have the burden of proving that the claimant is not entitled to the requested indemnification or advancement of expenses.

**5.8 Non-Exclusivity of Rights.** The indemnification and advancement of expenses provided by, or granted pursuant to, this **Article V** shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under the certificate of incorporation or any statute, bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office. The Company is specifically authorized to enter into individual contracts with any or all of its directors, officers, employees or agents respecting indemnification and advancement of expenses, to the fullest extent not prohibited by the DGCL or other applicable law.

**5.9 Insurance.** The Company may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the Company, or is or was serving at the request of the Company as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the Company would have the power to indemnify such person against such liability under the provisions of the DGCL.

**5.10 Survival.** The rights to indemnification and advancement of expenses conferred by this **Article V** shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

**5.11 Effect of Repeal or Modification.** Any amendment, alteration or repeal of this **Article V** shall not adversely affect any right or protection hereunder of any person in respect of any act or omission occurring prior to such amendment, alteration or repeal.

**5.12 Certain Definitions.** For purposes of this **Article V**, references to the "**Company**" shall include, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers, employees or agents, so that any person who is or was a director, officer, employee or agent of such constituent corporation, or is or was serving at the request of such constituent corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall stand in the same position under the provisions of this **Article V** with respect to the resulting or surviving corporation as such person would have with respect to such constituent corporation if its separate existence had continued. For purposes of this **Article V**, references to "**other enterprises**" shall include employee benefit plans; references to "**fines**" shall include any excise taxes assessed on a person with respect to an employee benefit plan; and



references to “*serving at the request of the Company*” shall include any service as a director, officer, employee or agent of the Company which imposes duties on, or involves services by, such director, officer, employee or agent with respect to an employee benefit plan, its participants or beneficiaries; and a person who acted in good faith and in a manner such person reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner “*not opposed to the best interests of the Company*” as referred to in this **Article V**.

## ARTICLE VI — STOCK

**6.1 *Stock Certificates; Partly Paid Shares.*** The shares of the Company shall be represented by certificates, *provided* that the Board may provide by resolution or resolutions that some or all of any or all classes or series of its stock shall be uncertificated shares. Any such resolution shall not apply to shares represented by a certificate until such certificate is surrendered to the Company. Every holder of stock represented by certificates shall be entitled to have a certificate signed by, or in the name of the Company by the Chairperson of the Board or Vice-Chairperson of the Board, or the President or a Vice-President, and by the Treasurer or an Assistant Treasurer, or the Secretary or an Assistant Secretary of the Company representing the number of shares registered in certificate form. Any or all of the signatures on the certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate has ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the Company with the same effect as if such person were such officer, transfer agent or registrar at the date of issue. The Company shall not have power to issue a certificate in bearer form.

The Company may issue the whole or any part of its shares as partly paid and subject to call for the remainder of the consideration to be paid therefor. Upon the face or back of each stock certificate issued to represent any such partly paid shares, or upon the books and records of the Company in the case of uncertificated partly paid shares, the total amount of the consideration to be paid therefor and the amount paid thereon shall be stated. Upon the declaration of any dividend on fully paid shares, the Company shall declare a dividend upon partly paid shares of the same class, but only upon the basis of the percentage of the consideration actually paid thereon.

**6.2 *Special Designation on Certificates.*** If the Company is authorized to issue more than one class of stock or more than one series of any class, then the powers, the designations, the preferences, and the relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights shall be set forth in full or summarized on the face or back of the certificate that the Company shall issue to represent such class or series of stock; *provided* that, except as otherwise provided in Section 202 of the DGCL, in lieu of the foregoing requirements there may be set forth on the face or back of the certificate that the Company shall issue to represent such class or series of stock, a statement that the Company will furnish without charge to each stockholder who so requests the powers, designations, preferences and relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights. Within a reasonable time after the issuance or transfer of uncertificated stock, the Company shall send to the registered owner thereof a written notice containing the information required to be set forth or stated on certificates pursuant to this **Section 6.2** or Sections 156, 202(a) or 218(a) of the DGCL or with respect to this **Section 6.2** a statement that the Company will furnish without charge to each stockholder who so requests the powers, designations, preferences and relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights. Except as otherwise expressly provided by law, the rights and obligations of the holders of uncertificated stock and

the rights and obligations of the holders of certificates representing stock of the same class and series shall be identical.

**6.3 Lost Certificates.** Except as provided in this **Section 6.3**, no new certificates for shares shall be issued to replace a previously issued certificate unless the latter is surrendered to the Company and cancelled at the same time. The Company may issue a new certificate of stock or uncertificated shares in the place of any certificate theretofore issued by it, alleged to have been lost, stolen or destroyed, and the Company may require the owner of the lost, stolen or destroyed certificate, or such owner's legal representative, to give the Company a bond sufficient to indemnify it against any claim that may be made against it on account of the alleged loss, theft or destruction of any such certificate or the issuance of such new certificate or uncertificated shares.

**6.4 Dividends.** The Board, subject to any restrictions contained in the certificate of incorporation or applicable law, may declare and pay dividends upon the shares of the Company's capital stock. Dividends may be paid in cash, in property, or in shares of the Company's capital stock, subject to the provisions of the certificate of incorporation.

The Board may set apart out of any of the funds of the Company available for dividends a reserve or reserves for any proper purpose and may abolish any such reserve.

**6.5 Stock Transfer Agreements.** The Company shall have power to enter into and perform any agreement with any number of stockholders of any one or more classes of stock of the Company to restrict the transfer of shares of stock of the Company of any one or more classes owned by such stockholders in any manner not prohibited by the DGCL.

**6.6 Registered Stockholders.** The Company:

(i) shall be entitled to recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends and to vote as such owner;

(ii) shall be entitled to hold liable for calls and assessments the person registered on its books as the owner of shares; and

(iii) shall not be bound to recognize any equitable or other claim to or interest in such share or shares on the part of another person, whether or not it shall have express or other notice thereof, except as otherwise provided by the laws of Delaware.

**6.7 Transfers.** Transfers of record of shares of stock of the Company shall be made only upon its books by the holders thereof, in person or by an attorney duly authorized, and, if such stock is certificated, upon the surrender of a certificate or certificates for a like number of shares, properly endorsed or accompanied by proper evidence of succession, assignation or authority to transfer.

## **ARTICLE VII — MANNER OF GIVING NOTICE AND WAIVER**

**7.1 Notice of Stockholder Meetings.** Notice of any meeting of stockholders, if mailed, is given when deposited in the United States mail, postage prepaid, directed to the stockholder at such stockholder's address as it appears on the Company's records. An affidavit of the Secretary or an Assistant Secretary of the Company or of the transfer agent or other agent of the Company that the notice has been given shall, in the absence of fraud, be *prima facie* evidence of the facts stated therein.

**7.2 Notice by Electronic Transmission.** Without limiting the manner by which notice otherwise may be given effectively to stockholders pursuant to the DGCL, the certificate of incorporation or these bylaws, any notice to stockholders given by the Company under any provision of the DGCL, the certificate of incorporation or these bylaws shall be effective if given by a form of electronic transmission consented to by the stockholder to whom the notice is given. Any such consent shall be revocable by the stockholder by written notice to the Company. Any such consent shall be deemed revoked if:

(i) the Company is unable to deliver by electronic transmission two consecutive notices given by the Company in accordance with such consent; and

(ii) such inability becomes known to the Secretary or an Assistant Secretary of the Company or to the transfer agent, or other person responsible for the giving of notice.

However, the inadvertent failure to treat such inability as a revocation shall not invalidate any meeting or other action.

Any notice given pursuant to the preceding paragraph shall be deemed given:

(i) if by facsimile telecommunication, when directed to a number at which the stockholder has consented to receive notice;

(ii) if by electronic mail, when directed to an electronic mail address at which the stockholder has consented to receive notice;

(iii) if by a posting on an electronic network together with separate notice to the stockholder of such specific posting, upon the later of (A) such posting and (B) the giving of such separate notice; and

(iv) if by any other form of electronic transmission, when directed to the stockholder.

An affidavit of the Secretary or an Assistant Secretary or of the transfer agent or other agent of the Company that the notice has been given by a form of electronic transmission shall, in the absence of fraud, be *prima facie* evidence of the facts stated therein.

An “*electronic transmission*” means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved, and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process.

Notice by a form of electronic transmission shall not apply to Sections 164, 296, 311, 312 or 324 of the DGCL.

**7.3 Notice to Stockholders Sharing an Address.** Except as otherwise prohibited under the DGCL, without limiting the manner by which notice otherwise may be given effectively to stockholders, any notice to stockholders given by the Company under the provisions of the DGCL, the certificate of incorporation or these bylaws shall be effective if given by a single written notice to stockholders who share an address if consented to by the stockholders at that address to whom such notice is given. Any such consent shall be revocable by the stockholder by written notice to the Company. Any stockholder who fails to object in writing to the Company, within sixty (60) days of having been given written notice

by the Company of its intention to send the single notice, shall be deemed to have consented to receiving such single written notice.

**7.4 Notice to Person with Whom Communication is Unlawful.** Whenever notice is required to be given, under the DGCL, the certificate of incorporation or these bylaws, to any person with whom communication is unlawful, the giving of such notice to such person shall not be required and there shall be no duty to apply to any governmental authority or agency for a license or permit to give such notice to such person. Any action or meeting which shall be taken or held without notice to any such person with whom communication is unlawful shall have the same force and effect as if such notice had been duly given. In the event that the action taken by the Company is such as to require the filing of a certificate under the DGCL, the certificate shall state, if such is the fact and if notice is required, that notice was given to all persons entitled to receive notice except such persons with whom communication is unlawful.

**7.5 Waiver of Notice.** Whenever notice is required to be given under any provision of the DGCL, the certificate of incorporation or these bylaws, a written waiver, signed by the person entitled to notice, or a waiver by electronic transmission by the person entitled to notice, whether before or after the time of the event for which notice is to be given, shall be deemed equivalent to notice. Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the stockholders need be specified in any written waiver of notice or any waiver by electronic transmission unless so required by the certificate of incorporation or these bylaws.

## **ARTICLE VIII — GENERAL MATTERS**

**8.1 Fiscal Year.** The fiscal year of the Company shall be fixed by resolution of the Board and may be changed by the Board.

**8.2 Seal.** The Company may adopt a corporate seal, which shall be in such form as may be approved from time to time by the Board. The Company may use the corporate seal by causing it or a facsimile thereof to be impressed or affixed or in any other manner reproduced.

**8.3 Annual Report.** The Company shall cause an annual report to be sent to the stockholders of the Company to the extent required by applicable law. If and so long as there are fewer than 100 holders of record of the Company's shares, the requirement of sending an annual report to the stockholders of the Company is expressly waived (to the extent permitted under applicable law).

**8.4 Construction; Definitions.** Unless the context requires otherwise, the general provisions, rules of construction, and definitions in the DGCL shall govern the construction of these bylaws. Without limiting the generality of this provision, the singular number includes the plural, the plural number includes the singular, and the term "*person*" includes both a corporation and a natural person.

## **ARTICLE IX – AMENDMENTS**

These bylaws may be adopted, amended or repealed by the stockholders entitled to vote. However, the Company may, in its certificate of incorporation, confer the power to adopt, amend or

repeal bylaws upon the directors. The fact that such power has been so conferred upon the directors shall not divest the stockholders of the power, nor limit their power to adopt, amend or repeal bylaws.

A bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the Board.

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President

# **EXHIBIT B**

## **Form of Amended and Restated Certificate of Incorporation**

**AMENDED AND RESTATED CERTIFICATE OF INCORPORATION**

**OF**

**HIPCRICKET, INC.**  
**A Delaware corporation**

The undersigned, hereby certifies that:

1. The undersigned is the duly elected and acting President of Hipcricket, Inc., a Delaware corporation.
2. The Certificate of Incorporation of this corporation was originally filed with the Secretary of State of Delaware on March 10, 2000.
3. The Amended and Restated Certificate of Incorporation of this corporation shall be amended and restated to read in full as follows:

**FIRST.** The name of the corporation is Hipcricket, Inc. (the “*Corporation*”).

**SECOND.** The address of the registered office of the Corporation in the State of Delaware is 1675 South State St., Ste. B, Dover, County of Kent, Delaware 19901. The name of its initial registered agent at such address is Capitol Services, Inc.

**THIRD.** The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may organize under the Delaware General Corporation Law, as amended (the “*DGCL*”).

**FOURTH.** The total number of shares of stock which the Corporation is authorized to issue is ten thousand (10,000) shares of common stock, having a par value of \$0.0001 per share.

**FIFTH.** Pursuant to Section 6.2 of the *Amended Plan of Reorganization of the Debtor*, dated March 31, 2015 (the “*Plan*”) and as confirmed by order dated April [●], 2015 of the United States Bankruptcy Court for the District of Delaware, the initial members of the Board of Directors appointed by the plan sponsor shall be: [●].

**SIXTH.** The business and affairs of the Corporation shall be managed by or under the direction of the board of directors, and the directors need not be elected by written ballot unless required by the bylaws of the Corporation.

**SEVENTH.** In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware, the board of directors is expressly authorized to make, amend and repeal the bylaws.

**EIGHTH.** The Corporation is to have perpetual existence.

**NINTH.** The Corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation in the manner now or hereafter prescribed by the laws of the State of Delaware. All rights conferred upon stockholders herein are granted subject to this reservation.

**TENTH.** A director of the Corporation shall not be personally liable to the Corporation or its shareholders for monetary damages for breach of fiduciary duty as director, except for liability (i) for any breach of the director’s duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the DGCL, or (iv) for any transaction from which the director derived any improper personal benefit. If the DGCL is amended after the filing of the Certificate of Incorporation of which this article is a

part to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the DGCL, as so amended.

Any repeal or modification of the foregoing paragraph by the stockholders of the Corporation shall not adversely affect any right or protection of a director or the Corporation existing at the time of such repeal or modification.

On January 20, 2015, the Corporation filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code and this Amended and Restated Certificate of Incorporation was duly adopted in accordance with Sections 242, 245, and 303 of the Delaware General Corporation Law in accordance with a Chapter 11 Plan of Reorganization of the Corporation approved by Order dated May \_\_, 2015 of the United States Bankruptcy Court for the District of Delaware in In re: Hipcricket, Inc., Chapter 11 Case No. 15-10104-LSS.

**HIPCRICKET, INC.**

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



# **EXHIBIT C**

## **Form of Stock Purchase Agreement**

**STOCK PURCHASE AGREEMENT**

**between**

**ESW CAPITAL, LLC**

**(the “Buyer”)**

**and**

**HIPCRICKET, INC.**

**(the “Debtor”)**

**Dated April \_\_ 2015**

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## **LIST OF EXHIBITS**

Exhibit A	Plan of Reorganization
Exhibit B	Disclosure Statement
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**LIST OF SCHEDULES**

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## STOCK PURCHASE AGREEMENT

**THIS STOCK PURCHASE AGREEMENT** (the “**Agreement**”) is entered into as of April \_\_, 2015 between Hipcricket, Inc., a Delaware corporation (the “**Debtor**” prior to the Effective Date and the “**Reorganized Debtor**” following the Effective Date) and ESW Capital, LLC, a [Delaware] limited liability company (“**Buyer**”).

### WITNESSETH:

**WHEREAS**, Debtor is in the business of providing end-to-end, data driven mobile advertising and marketing solutions through its proprietary AD LIFE® software-as-a service platform (the “**Business**”);

**WHEREAS**, Debtor filed a voluntary petition for relief in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**”), commencing voluntary proceeding Case No. 15-10104 (LSS) (the “**Bankruptcy Case**”) pursuant to chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the “**Bankruptcy Code**”) on the Petition Date;

**WHEREAS**, Buyer has determined that the acquisition of the Debtor in its current structure would best complement Buyer’s existing and future lines of business;

**WHEREAS**, as part of the Bankruptcy Case, Debtor has filed (i) a plan of reorganization for the Debtor in the form attached hereto as **Exhibit A** (as the same may be amended, modified or supplemented from time to time in accordance with the provisions hereof and thereof, the “**Plan**”), and (ii) a disclosure statement for the Plan intended to meet the requirements of Section 1125(b) of the Bankruptcy Code in the form attached as **Exhibit B** (as the same may be amended, modified or supplemented from time to time in accordance with the provisions hereof, the “**Disclosure Statement**”), which has been approved by the Bankruptcy Court;

**WHEREAS**, pursuant to the terms of the Plan, the Reorganized Debtor (as defined below) shall issue and sell to Buyer, and Buyer shall purchase from the Reorganized Debtor for the consideration stated herein, 1,000 shares of common stock, par value \$0.0001 per share, of the Reorganized Debtor (the “**New Reorganized Debtor Shares**”) in accordance with the terms and subject to the conditions set forth therein, which New Reorganized Debtor Shares shall constitute, immediately following the Closing (as defined below), all of the issued and outstanding Equity Interests of the Reorganized Debtor;

**WHEREAS**, the Bankruptcy Court has entered a Confirmation Order approving the Plan, and the Buyer and Reorganized Debtor have entered into this Agreement on or promptly after the Effective Date to, among other things, evidence the issuance of the New Reorganized Debtor Shares to Buyer;

**NOW, THEREFORE**, in consideration of the mutual promises and covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto covenant and agree as follows:

## ARTICLE 1

### DEFINITIONS

1.1 Definitions. In this Agreement, the following terms have the meanings specified or referred to in this Section 1.1 and shall be equally applicable to both the singular and plural forms. Any other capitalized terms not defined herein shall have the meaning ascribed to them in the Plan and Disclosure Statement.

**“1933 Act”** means the Securities Act of 1933, as amended, and the rules and regulations as promulgated thereunder.

**“1934 Act”** means the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder.

**“Administrative Claim”** has the meaning set forth in the Plan.

**“Affiliate”** means with respect to any Person, any other Person that directly or indirectly controls, is controlled by or is under common control with such Person. For the purposes of this definition, the term **“control”** (including the terms **“controlled by”** and **“under common control”**) means the possession of the power to direct the management and policies of a Person whether through ownership of voting securities, contract or otherwise.

**“Allowed Claim”** has the meaning set forth in the Plan.

**“Allowed DIP Claim”** has the meaning set forth in the Plan.

**“Allowed Equity Interests”** has the meaning set forth in the Plan.

**“Assumed Contracts”** means those Executory Contracts and Unexpired Leases which have been assumed by the Buyer pursuant to the Plan and pursuant to Bankruptcy Code sections 365 and 1129, as set forth in the Schedule of Assumed Contracts.

**“Bankruptcy Code”** means Title 11 of the United States Code, as amended.

**“Bankruptcy Court”** means the United States Bankruptcy Court for the District of Delaware or any other court having jurisdiction over the Bankruptcy Case from time to time.

**“Business”** has the meaning specified in the first recital of this Agreement.

**“Business Day”** means any day in which the New York Stock Exchange is open for trading in the United States of America.

**“Buyer”** has the meaning specified in the first paragraph of this Agreement.

**“Claim”** has the meaning ascribed by Bankruptcy Code §101(5), including all rights, claims, causes of action, defenses, debts, demands, damages, offset rights, setoff rights, recoupment rights, obligations, and liabilities of any kind or nature under contract, at Law or in

equity, known or unknown, contingent or matured, liquidated or unliquidated, and all rights and remedies with respect thereto.

“**Closing**” means the closing of the transfer of the New Reorganized Debtor Shares from the Reorganized Debtor to Buyer on the Closing Date.

“**Closing Date**” has the meaning specified in Section 2.3.

“**Confirmation Order**” means a Final Order of the Bankruptcy Court confirming the Plan and approving the final Disclosure Statement.

“**Consideration**” means \$8,250,000 less [\$3,000,000], the latter representing the full exercise of the Subscription Option. In accordance with the terms of the Plan, the Consideration has been reduced on a dollar-for-dollar basis by the above referenced [\$3,000,000] to reflect the amount of the Allowed DIP Claim exchanged for New Reorganized Debtor Shares pursuant to the Subscription Option.

“**Contract**” means, whether written or oral, any contract, obligation, license, plan, undertaking, arrangement, commitment, note, franchise, bond, letter of intent, term sheet, mortgage, indenture, agreement, lease, or other instrument.

“**Cure Amounts**” means all amounts, costs and expenses required by the Bankruptcy Court to cure all defaults under the Assumed Contracts so that they may be sold and assigned to Buyer pursuant to Sections 1129 and 365 of the Bankruptcy Code, as such amounts may be adjusted, if applicable, by agreement of Buyer and the other party or parties to such Assumed Contracts (other than Debtor).

“**Debtor**” has the meaning specified in the first paragraph of this Agreement.

“**Debtor Assets**” means all of Debtor’s right, title and interest in, to and under all of Debtor’s tangible and intangible assets, properties, rights and claims, including those owned, leased, licensed, used or held for use in or relating to the Business, as the same shall exist as of the Effective Date, of whatever kind or nature and wherever situated or located, free and clear of all Liens, Claims, Interests or Encumbrances (other than Permitted Liens).

“**Debtor Owned IP**” means all Intellectual Property owned or purported to be owned directly or indirectly by the Debtor.

“**DIP Financing**” means the debtor-in-possession financing and/or cash collateral arrangements (including all loan and related documents and the DIP Orders) made available by Buyer or its Affiliates to Debtor as approved by the Bankruptcy Court and containing terms and conditions acceptable to Buyer.

“**DIP Lender**” means the Buyer, in its capacity as debtor-in-possession lender under the DIP Note.

**“DIP Note”** means the Debtor-In-Possession Note, dated as of March 18, 2015, by and between the Debtor and the DIP Lender and approved by the Bankruptcy Court, as subsequently amended or modified.

**“DIP Order”** means (a) in the period prior to entry of a Final Order as contemplated by clause (b) of this definition, an interim Order entered by the Bankruptcy Court approving the DIP Financing, and (b) a Final Order entered by the Bankruptcy Court approving the DIP Financing.

**“Distribution Trust”** means the Distribution Trust as defined in the Plan.

**“Distribution Trust Agreement”** means the Distribution Trust Agreement in the form filed as part of the Plan supplement.

**“Distribution Trustee”** means the person appointed to serve as the trustee of the Distribution Trust.

**“Effective Date”** means the effective date of the Plan.

**“Encumbrance”** means any lien, claim, charge, security interest, mortgage, pledge, easement, conditional sale or other title retention agreement, defect in title, restrictive covenant or other material restrictions of any kind.

**“Equity Interests”** means (i) with respect to a corporation, any and all shares of capital stock of such corporation, (ii) with respect to a partnership, limited liability company, trust, or similar Person, any and all units, interests, or other partnership/limited liability company interests, (iii) any other direct or indirect equity, ownership or participation in a Person or rights convertible thereto or exchangeable therefor, or (iv) options, warrants or other rights to acquire, sell or exchange the securities described in clauses (i) through (iii), whether fixed or contingent, matured or unmatured, contractual, legal, equitable or otherwise.

**“Executory Contracts and Unexpired Leases”** means executory contracts and unexpired leases as such terms are used in 11 U.S.C. § 365, including all operating leases, capital leases, and contracts to which the Debtor is a party or beneficiary on the Confirmation Date.

**“Final Order”** means an Order of the Bankruptcy Court, or other court of competent jurisdiction with respect to the subject matter, (i) which has not been reversed, stayed, modified, amended, enjoined, set aside, annulled or suspended or (ii) with respect to which no stay shall have been issued in connection with any notice of appeal or petition for certiorari filed within any deadline provided by applicable statute or regulation.

**“Governmental Authority”** means any domestic, foreign, supranational, federal, national, state, or local government or regulator or any tribunal, court, arbitrator, administrative agency or commission, public international body or other governmental, quasi-governmental, taxing or regulatory (including a stock exchange or other self-regulatory body) authority, entity, agency or public body (including a public utility commission, public services commission or similar regulatory body), in each case, whether domestic, foreign or supranational.

**“Intellectual Property”** has the meaning specified in Section 3.8.



**“Interest”** means “interest” as that term is used in Bankruptcy Code Section 363(f).

**“Laws”** means any foreign, federal, state and local laws, statutes, regulations, rules, codes or ordinances enacted, adopted, issued or promulgated by any Governmental Authority (including, without limitation, those pertaining to electrical, building, zoning, environmental and occupational safety and health requirements) or common law.

**“Liens”** has the meaning given to that term in the Bankruptcy Code.

**“Order”** means an order, writ, judgment, preliminary or permanent injunction, ruling, decree, determination or award of any Governmental Authority or Government Official.

**“Parties”** means collectively the Buyer and the Debtor and **“Party”** means any one of the Parties individually.

**“Permitted Liens”** means (a) zoning, entitlement, conservation restriction and other land use and environmental regulations by Governmental Authorities which do not materially interfere with the present use of the Debtor Assets, (b) all covenants, conditions, restrictions, easements, charges, rights-of-way, other Encumbrances and other similar matters of record set forth in any state, local or municipal franchise under which the Business is conducted as to which no material violation or encroachment exists or, if such violation or encroachment exists, as to which do not materially impair the use or occupancy of the Debtor Leased Real Property, and (c) Claims, Liens and Encumbrances that will be released and/or discharged pursuant to the Confirmation Order.

**“Person”** means any individual, corporation, partnership, joint venture, association, joint-stock company, limited liability company, trust, unincorporated organization or Governmental Authority.

**“Petition Date”** means January 20, 2015.

**“Reorganized Debtor”** means Debtor as of and after the Effective Date.

**“Schedule of Assumed Contracts”** means the schedule identifying the Executory Contracts and Unexpired Leases that have been assumed by the Reorganized Debtor under the Plan, as set forth in Schedule 3.6 hereto.

**“Subscription Option”** means the ability of the DIP Lender to, at its option, exchange a total of up to \$3,000,000 of its Allowed DIP Claim for up to a total of 600 of the New Reorganized Debtor Shares at a rate of \$5,000 of its Allowed DIP Claim for one (1) New Reorganized Debtor Share.

**“Transaction Court Documents”** means the Plan, the Disclosure Statement, this Agreement and the Confirmation Order.

**“Transaction Documents”** means this Agreement, the Transaction Court Documents and such other documents, certificates and agreements contemplated by any of the foregoing.

“**Transaction Expenses**” means any and all fees and expenses that have been incurred or are payable, or will be incurred or payable, in connection with this Agreement and the consummation of the transactions contemplated hereby, including but not limited to fees and expenses of attorneys, accountants, advisors or any other third party, filing fees, commissions, costs, brokers’ fees and finders’ fees.

“**Transactions**” means the transactions contemplated by this Agreement and the other Transaction Documents.

## ARTICLE 2

### AGREEMENT OF PURCHASE AND SALE; CLOSING

2.1 Agreement to Sell and Purchase. Upon the terms and subject to the conditions of this Agreement, the Reorganized Debtor shall issue and sell to Buyer, and Buyer will purchase from the Reorganized Debtor, all of the New Reorganized Debtor Shares at the Closing, free and clear of all Liens, Interests, Encumbrances and Claims.

2.2 Purchase Price. In accordance with the terms of the Plan, in consideration for the New Reorganized Debtor Shares and the fulfillment of the obligations set forth herein, (i) Buyer, in its capacity as DIP Lender, has fully exercised the Subscription Option on the Closing Date, resulting in the cancellation of [\$3,000,000] of debt under the DIP Note, in exchange for 600 New Reorganized Debtor Shares and (ii) Buyer, in its capacity as co-Plan sponsor, shall pay to the Distribution Trust (or its designee) the Consideration on the Closing Date, in immediately available funds, in exchange for 400 New Reorganized Debtor Shares. The Allowed Equity Interests shall be terminated and cancelled and the holders of the Allowed Equity Interests shall neither retain nor receive any Consideration or other property in accordance with the Plan. The Consideration shall be used to fund distributions under the Distribution Trust.

#### 2.3 Closing.

(a) Date and Place. The closing (the “**Closing**”) of the purchase and sale of the New Reorganized Debtor Shares hereunder shall take place at the offices of Haynes and Boone, LLP located at 30 Rockefeller Plaza, 26th Floor, New York, New York 10112, on the Effective Date or at such other time or place as Buyer and Debtor may agree in writing in accordance with the Plan (the “**Closing Date**”).

(b) Actions at the Closing. At the Closing, (i) the Debtor will deliver to Buyer the various certificates, instruments, and documents referred to in Section 4.1 below, (ii) Buyer will deliver to the Debtor the various certificates, instruments, and documents referred to in Section 4.2 below, (iii) Reorganized Debtor shall issue the New Reorganized Debtor Shares to Buyer, and shall deliver to Buyer certificates for the New Reorganized Debtor Shares, which, immediately following the Closing, shall constitute all of the issued and outstanding Equity Interests of the Reorganized Debtor and no other Equity Interests of the Reorganized Debtor shall be issued and outstanding, and (iv) Buyer shall deliver the Consideration by wire transfer of immediately available funds, to an account of the Distribution Trustee designated by the Distribution Trustee for

distribution in accordance with the Plan. Certificates evidencing the New Reorganized Debtor Shares will bear the following legend: “These securities have not been registered under the Securities Act of 1933, as amended, or any state securities law. These securities may not be sold, offered for sale, pledged or hypothecated in the absence of a registration statement in effect with respect to the securities under the Securities Act and any such state securities laws or the issuer has received documentation reasonably satisfactory to it that such transaction does not require registration under such Act and state securities laws.”

2.4 Plan Treatment. Certain Claims shall be dealt with in accordance with the terms of the Plan, as approved by the Confirmation Order, as set forth below.

(a) Administrative and Priority Claims. Administrative and priority claims shall be paid in full in cash on the Effective Date, or as otherwise provided in the Bankruptcy Code, except to the extent that a holder of such claims agrees to different treatment, and except for the Allowed DIP Claim, which shall be paid in the form of New Reorganized Debtor Shares as set forth in the Plan and this Agreement.

(b) Priority Tax Claims. Priority tax claims shall be paid in full on (i) in cash on the Effective Date or (ii) over a period through the fifth anniversary of the Petition Date, plus interest. All allowed priority tax claims which are not due and payable on or before the Effective Date shall be paid in the ordinary course of business in accordance with the terms thereof.

(c) Secured or Priority Claims. Each allowed secured or priority claim will be paid in full and treated as follows under the Plan: (a) reinstated and rendered unimpaired in accordance with section 1124(2) of the Bankruptcy Code; (b) the holder of an allowed other secured claim shall receive the collateral securing such claim and any interest required to be paid pursuant to section 506(b) of the Bankruptcy Code; or (c) receive such other treatment as Buyer, as Plan co-sponsor and the applicable holder of an allowed other secured claim may agree. Prepetition Liens with respect to allowed secured claims that are rendered unimpaired shall survive the Effective Date and shall continue in accordance with contractual or statutory terms until such claims have been paid in full.

(d) General Unsecured Claims. General unsecured claims will receive their pro-rata share of the amount remaining from the Consideration, after claims in higher priority have been paid. Further, general unsecured claims will retain claims and causes of action of the Debtor and its estate under chapter 5 of the Bankruptcy Code and/or other similar applicable non-bankruptcy law.

(e) Equity Interests. Prepetition Equity Interests of the Debtor arising from any form of equity securities, as defined in 11 U.S.C. § 101(16), including, without limitation, any prepetition common and preferred stock or member interests issued and outstanding and all options, warrants and other rights relating thereto, shall be retired, cancelled, extinguished and/or discharged on the Effective Date in accordance with the Plan immediately prior to the issuance of the New Reorganized Debtor Shares.

### ARTICLE 3

#### REPRESENTATIONS AND WARRANTIES OF THE REORGANIZED DEBTOR

The Reorganized Debtor represents and warrants to Buyer that, as of the Closing Date:

3.1 Due Authorization. The Confirmation Order has been issued by the Bankruptcy Court, thereby approving the Plan, which is in full force and effect. Pursuant to the confirmed Plan, the Reorganized Debtor has full power, right and authority to enter into and perform its obligations under this Agreement and each of the Transaction Documents to which it is a party. Each of the matters provided for under the Plan involving the corporate structure of the Reorganized Debtor or corporate action to be taken by or required of the Reorganized Debtor has, as of the Effective Date, been deemed to have occurred and is effective as provided in the Plan, and shall be authorized, approved, and (to the extent taken before the Effective Date) ratified in all respects without any requirement of further action by stockholders, creditors, or directors of the Debtor. As such, the execution, delivery, and performance of this Agreement, the Transaction Documents and the Transactions have been duly and validly authorized. This Agreement and each of the Transaction Documents to which the Reorganized Debtor is a party have been duly executed and delivered by the Reorganized Debtor and constitutes the valid and binding obligations of the Reorganized Debtor and are enforceable against the Reorganized Debtor in accordance with their respective terms. Except for the Confirmation Order, no Governmental Permits, approvals or consents of or notifications to (i) any Governmental Authority or (ii) any other Persons are necessary in connection with the execution, delivery and performance by the Reorganized Debtor of this Agreement and the Transaction Documents and the consummation by the Reorganized Debtor and of the Transactions.

3.2 Title to New Reorganized Debtor Shares. Upon issuance of the New Reorganized Debtor Shares to Buyer in accordance with the terms hereof, Buyer will hold good, valid and marketable title to all of the New Reorganized Debtor Shares, free and clear of any Liens, Claims, Interests and Encumbrances.

3.3 Organization and Qualification. The Reorganized Debtor is a corporation duly organized, validly existing and in good standing under the Laws of the State of Delaware.

3.4 Capitalization.

(a) On the Closing Date, there are no voting agreements, voting trusts, commitments, understandings or agreements of any kind with respect to the voting, issuance or transfer of any Equity Interests of Reorganized Debtor, except with respect to the New Reorganized Debtor Shares issued to Buyer under this Agreement.

(b) On the Closing Date, (i) Buyer will own the New Reorganized Debtor Shares, which shall constitute 100% of the issued and outstanding Equity Interests of the Reorganized Debtor, free and clear of all Liens, Claims, Interests, and Encumbrances of any kind and (ii) the New Reorganized Debtor Shares shall be duly authorized and validly issued, fully paid, and non-assessable.

(c) The New Reorganized Debtor Shares have been offered and issued in compliance with all applicable securities laws, including the 1933 Act, as amended, and applicable “blue sky” laws. The New Reorganized Debtor Shares have been duly authorized and validly issued free of all preemptive (or similar) rights. None of the New Reorganized Debtor Shares are unvested or subject to a repurchase option, risk of forfeiture or other similar condition under any applicable Contract with the Reorganized Debtor.

3.5 Transaction Not a Breach. Neither the execution and delivery of this Agreement and the Transaction Documents by the Reorganized Debtor nor the performance by the Reorganized Debtor of the Transactions will (a) violate or conflict with or result in a breach of any provision of any Laws binding on the Reorganized Debtor or its properties, or conflict with or result in the breach of any of the terms, conditions or provisions thereof; (b) constitute a default under the amended and restated certificate of incorporation or bylaws of the Reorganized Debtor or under any Assumed Contract applicable to the Reorganized Debtor; (c) constitute a default or an event which would permit any party to terminate, or accelerate the maturity of any indebtedness or other obligation under any Assumed Contract; (d) result in the creation or imposition of any Lien, Claim, Interest or Encumbrance upon the New Reorganized Debtor Shares or any of the Debtor Assets; or (e) except for the Confirmation Order, require any authorization, consent, approval, exemption or other action by or notice to (i) any Governmental Authority or (ii) any other Person (including consents from parties to loans, contracts, leases and other agreements to which the Debtor is a party).

3.6 Assumed Contracts.

(a) On the Effective Date, all Executory Contracts and Unexpired Leases identified on the Schedule of Assumed Contracts set forth on Schedule 3.6 were assumed by the Reorganized Debtor in accordance with the Plan, following entry of the Confirmation Order. Entry of the Confirmation Order constitutes approval of the assumption of such Executory Contracts and Unexpired Leases under sections 365 and 1123 of the Bankruptcy Code.

(b) All Executory Contracts and Unexpired Leases not identified on the Schedule of Assumed Contracts (or assumed by the Debtor previously with approval of the Bankruptcy Court) were rejected on the Effective Date. Entry of the Confirmation Order constitutes approval of such rejections under sections 365 and 1123 of the Bankruptcy Code. For the avoidance of doubt, the Hipcricket, Inc. 401(k) Retirement Plan (the “**401(k) Plan**”) was rejected on the Effective Date. Accordingly, the Buyer will assume no liabilities or fiduciary duties with respect to the 401(k) Plan, and the Debtor shall have terminated the 401(k) Plan prior to the Closing Date.

3.7 Property. On the Effective Date, Reorganized Debtor (in accordance with the Transaction Court Documents) will be vested to the maximum extent permitted by the Bankruptcy Code with good and valid title to all of the Debtor Assets, free and clear of all Liens, Claims, Interests and Encumbrances, other than Permitted Liens. Reorganized Debtor owns, leases and has (as applicable) the full legal right to use all the Debtor Assets.

3.8 Intellectual Property. (i) The Reorganized Debtor owns or has the right to use all Intellectual Property used in its Business as currently conducted (collectively, the “**Debtor IP**”); and (ii) the Debtor Owned IP that is registered with or issued by a governmental entity is valid, unexpired, enforceable, has not been abandoned and is free and clear of any Claims, Liens or Encumbrances. Notwithstanding the above, the Debtor IP is subject to Yahoo!’s reservation of rights in section 10.3 of the Plan.

3.9 Employee Benefit Plan Matters.

(a) Reorganized Debtor has only assumed the following employee benefit plans: (1) Aetna medical and dental PPO plans, (2) flexible spending arrangements, (3) VSP vision plan, (4) Short/Long Term Disability, Basic Life, Voluntary Term Life, Accident, Cancer and Critical Illness insurance coverage, and (5) group health insurance coverage continuation through COBRA. Vacation and/or paid time off policies will be available on the Effective Date for employees of the Reorganized Debtor employed on the Effective Date that have not received a notice of termination prior to or on the Effective Date, subject to the Reorganized Debtor’s right to modify or terminate such policies at any time or to substitute other policies, in accordance with applicable non-bankruptcy law.

(b) Reorganized Debtor has not assumed any employment, severance, bonus, incentive, commission, compensation or similar agreement (or any agreement outside the ordinary course of business) with any employees, officers or directors. The Reorganized Debtor has rejected the Debtor’s 401(k) plan, and the Debtor has taken all steps necessary prior to the Effective Date to effectuate termination of such 401(k) plan. Reorganized Debtor has not assumed the Debtor’s Employee Handbook.

(c) On the Effective Date, any and all equity based incentive plans or stock ownership plans of the Debtor entered into before the Effective Date, or other agreements or documents giving rise to Equity Interests, including the contingent cash components of any such plans, agreements, or documents, were terminated in accordance with the Plan without any action of Debtor, Reorganized Debtor or Buyer. To the extent such plans, agreements or documents are considered to be executory contracts, such plans, agreements or documents are deemed to be, and shall be treated as though they are, executory contracts that were rejected pursuant to section 365 of the Bankruptcy Code under the Plan. From and after the Effective Date, all stock options and other equity awards outstanding or issued at such time, whether included in a contract, agreement or otherwise, have no value, are cancelled and expired and shall not entitle any holder thereof to purchase or otherwise acquire any Equity Interests in the Reorganized Debtor.

3.10 Exemption from Registration. The offering and issuance by Reorganized Debtor of the New Reorganized Debtor Shares is exempt from registration pursuant to Section 1145 of the Bankruptcy Code (except with respect to an entity that is an underwriter as defined in Section 1145(b) of the Bankruptcy Code) or Section 4(2) of the 1933 Act, as applicable.

3.11 Exemption from Transfer Taxes. Pursuant to Section 1146 of the Bankruptcy Code, the issuance, transfer, or exchange of notes or Equity Interests under the Plan, the creation of any mortgage, deed of trust, lien, pledge or other security interest, the making or assignment of any lease or sublease, or the making or delivery of any deed or other instrument of transfer under, in furtherance of, or in connection with the Plan, are not be subject to any stamp, real estate transfer, mortgage record, or other similar tax.

## **ARTICLE 4**

### **CONDITIONS TO OBLIGATION OF PARTIES TO CONSUMMATE CLOSING**

4.1 Conditions to Buyer's Obligations. The obligation of Buyer under this Agreement to consummate the Closing is subject to satisfaction of the following:

(a) No Actions. No claim, action, suit or proceeding shall be pending or threatened before any Governmental Authority (with applicable jurisdiction) of any federal, state, local or foreign jurisdiction wherein an unfavorable Order would (i) prevent consummation of any of the Transactions contemplated by this Agreement, (ii) cause any of the Transactions contemplated by this Agreement to be rescinded following consummation or (iii) materially and adversely affect the right of the Buyer to own, operate or control the Reorganized Debtor.

(b) Bankruptcy Court Documents. The Bankruptcy Court shall have entered the Confirmation Order, confirming the Plan and approving the final Disclosure Statement, and entered all other Orders included in the Transaction Court Documents, each of which Orders shall not have been subsequently modified without Buyer's prior written consent, reversed or vacated, and each such Transaction Court Document shall be in effect and not be stayed.

(c) Effective Date. The Effective Date shall have occurred.

(d) No Violation of Orders. No preliminary or permanent Order of any Governmental Authority or Law that prevents the consummation of the Transactions contemplated hereby shall be in effect.

(e) Termination of Registration Statements. The Debtor shall have filed with the Securities and Exchange Commission post-effective amendments to terminate all of its active Registration Statements on Form S-1, Form S-3 and Form S-8, including the Registration Statements set forth on Exhibit C.

(f) Documents to be Delivered by Reorganized Debtor. The following documents shall be delivered at the Closing by Reorganized Debtor:



(i) Stock Certificates. The Reorganized Debtor shall have delivered to Buyer the certificates for the New Reorganized Debtor Shares.

(ii) Amended and Restated Certificate of Incorporation and Amended and Restated By-Laws of the Reorganized Debtor. Reorganized Debtor shall designate and cause, prior to the Effective Date, or as promptly thereafter as possible, an authorized Person approved by the Bankruptcy Court to execute and file with the Secretary of State of Delaware the Reorganized Debtor's Amended and Restated Certificate of Incorporation (the "**Certificate**") as set forth in Exhibit D. Reorganized Debtor shall also designate and cause an authorized Person approved by the Bankruptcy Court to execute the Amended and Restated By-Laws (the "**By-Laws**") as set forth in Exhibit E hereto. The Certificate and By-Laws, shall be the certificate of incorporation and the by-laws of the Reorganized Debtor, until thereafter duly amended as provided therein or by applicable Law.

(iii) 401(K) Termination. Reorganized Debtor has delivered evidence of the termination of the Debtor's 401(k) plan prior to the Effective Date.

4.2 Conditions to the Debtor's Obligations. The obligation of the Reorganized Debtor under this Agreement to consummate the Closing is subject to the satisfaction of the following:

(a) No Actions. No claim, action, suit or proceeding shall be pending or threatened before any Governmental Authority (with applicable jurisdiction) of any federal, state, local or foreign jurisdiction wherein an unfavorable Order would (i) prevent consummation of any of the Transactions contemplated by this Agreement, or (ii) cause any of the Transactions contemplated by this Agreement to be rescinded following consummation.

(b) Bankruptcy Court Documents. The Bankruptcy Court shall have entered the Confirmation Order, confirming the Plan and approving the final Disclosure Statement, and entered all other Orders included in the Transaction Court Documents, each of which Orders shall not have been subsequently modified without Debtor's prior written consent, reversed or vacated, and each such Transaction Court Document shall be in effect and not be stayed.

(c) Effective Date. The Effective Date shall have occurred.

(d) No Violation of Orders. No preliminary or permanent Order of any Governmental Authority or Law that prevents the consummation of the Transactions contemplated hereby shall be in effect.

(e) Consideration. Buyer shall have delivered the Consideration as contemplated in Section 2.3(b).



## ARTICLE 5

### MISCELLANEOUS

5.1 Notices. All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given when personally delivered, or if sent by United States certified mail, return receipt requested, postage prepaid, shall be deemed duly given on the first attempted delivery by United States Postal Service, or if sent by facsimile or receipted overnight courier services shall be deemed duly given on the Business Day received if received prior to 5:00 p.m. local time or on the following Business Day if received after 5:00 p.m. local time or on a non-Business Day, addressed to the respective Parties hereto as follows:

If to Debtor:

Hipcricket, Inc.  
110 110th Avenue NE,  
Suite 410  
Bellevue, WA 98005  
Attn: Chief Executive Officer  
Email: twilson@hipcricket.com  
Facsimile: (425) 449-4286

With a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP  
10100 Santa Monica Blvd., Suite 1300  
Los Angeles, CA 90067  
Attn: Ira D. Kharasch, Esq.  
Email: ikharasch@pszjlaw.com  
Facsimile: (310) 201-0760

and

Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101  
Attn: Faith M. Wilson, Esq.  
Email: fwilson@perkinscoie.com  
Facsimile: (206) 359-4237

If to Buyer:

ESW Capital, LLC  
401 Congress Ave., Suite 2650  
Attention: Andrew Price  
Email: andy.price@trilogy.com  
Facsimile: 512-874-3300

With a copy (which shall not constitute notice) to:

Haynes and Boone, LLP  
1221 McKinney Street, Suite 2100  
Houston, Texas  
Attention: Charles A. Beckham, Jr., Esq.  
Email: Charlie.Beckham@haynesboone.com  
Facsimile: (713) 547-2208

and

Haynes and Boone, LLP  
30 Rockefeller Plaza, 26th Floor,  
New York, New York 10112  
Attention: Trevor Hoffmann, Esq.  
Email: trevor.hoffmann@haynesboone.com  
Facsimile: (212) 884-9558

or to such other address as to any Party hereto as such Party shall designate by like notice to the other Parties hereto.

5.2 Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of Buyer, the Debtor, their representatives, successors, and permitted assigns, in accordance with the terms hereof.

5.3 Entire and Sole Agreement. This Agreement and the other schedules and agreements referred to herein, constitute the entire agreement between the Parties hereto and supersede all prior agreements, representations, warranties, statements, promises, information, arrangements and understandings, whether oral or written, express or implied, with respect to the subject matter hereof, reliance on which is hereby disclaimed.

5.4 Governing Law. This Agreement shall be construed, performed and enforced in accordance with, and governed by, the Laws of the State of Delaware (without giving effect to the principles of conflicts of laws thereof), except to the extent that the Laws of such State are superseded by the Bankruptcy Code or other applicable federal Law. To the extent that the Reorganized Debtor, or the Agreement, is subject to the jurisdiction of the Bankruptcy Court, the parties irrevocably elect, as the sole judicial forum for the adjudication of any matters arising under or in connection with this Agreement, and consent as to the foregoing to the exclusive jurisdiction of, the Bankruptcy Court. To the extent that the Reorganized Debtor, or the Agreement, is not subject to the jurisdiction of the Bankruptcy Court, the parties irrevocably elect, as the sole judicial forum for the adjudication of any matters arising under or in connection with this Agreement, and consent to the jurisdiction of, any state or federal court having competent jurisdiction in Austin, Texas.

5.5 No Third Party Beneficiaries. This Agreement is intended for the benefit of the Parties and their respective permitted successors, Affiliates and assigns, and is not for the benefit of, nor may any provision hereof be enforced by, any other Person.

*[Remainder of page intentionally left blank]*

**IN WITNESS WHEREOF**, each of the parties hereto has caused this Agreement to be duly executed as of the date and year first above written.

**BUYER:**

**ESW CAPITAL, LLC**

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

Name:

Title:

**THE REORGANIZED DEBTOR:**

**HIPCRICKET, INC.**

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

Name:

Title:

**Exhibit A**

**Plan of Reorganization**

**Exhibit B**

**Disclosure Statement**

**Exhibit C**

**Post-effective Registration Statements**

**[to be provided]**

**Exhibit D**

**Amended and Restated Certificate of Incorporation**



**Exhibit E**

**Amended and Restated By-Laws**

# **EXHIBIT D**

## **Form of Distribution Trust Agreement**

## **DISTRIBUTION TRUST AGREEMENT**

This DISTRIBUTION TRUST AGREEMENT (the “Agreement” or “Distribution Trust Agreement”) is made and entered into, as of [\_\_\_], 2015 by and among Hipcricket, Inc., (the “Debtor”), the official committee of unsecured creditors appointed in the Debtor’s Bankruptcy Case (the “Committee”), and Hal L. Baume (the “Distribution Trustee”). Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Plan (as hereinafter defined).

### **RECITALS**

WHEREAS, on January 20, 2015, the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”); and

WHEREAS, on March 31, 2015, the Debtor filed its Amended Plan of Reorganization (as amended or modified from time to time, the “Plan”); and

WHEREAS, by order dated [\_\_\_], 2015, the Bankruptcy Court confirmed the Plan; and

WHEREAS, under the terms of the Plan, certain property of the Debtor as of the Effective Date of the Plan will be transferred to and held by the Distribution Trust created under the Plan confirmed by the Bankruptcy Court so that, among other things: (i) the Trust Assets (defined below) can be pursued and/or disposed of in an orderly and expeditious manner; (ii) objections to claims can be pursued, and Disputed Claims can be resolved; and (iii) distributions can be made to the beneficiaries of the Distribution Trust in accordance with the Plan; and

WHEREAS, this Distribution Trust is established under and pursuant to the Plan which provides for the appointment of the Distribution Trustee to administer the Distribution Trust for the benefit of creditors of the Debtor, and to provide administrative services relating to the implementation of the Plan; and

WHEREAS, the Distribution Trustee has agreed to serve as such upon the terms and subject to the conditions set forth in this Distribution Trust Agreement.

NOW, THEREFORE, in accordance with the Plan and in consideration of the promises and of the mutual covenants and agreements contained herein, the parties hereto agree as follows:

### **DECLARATION OF TRUST**

Effective as of the Effective Date, the Debtor hereby absolutely assigns to the Distribution Trust, and to its successors in trust and its successors and assigns, all right, title and interest of the Debtor in and to the Trust Assets (as defined below);

TO HAVE AND TO HOLD unto the Distribution Trust and its successors in trust and its successors and assigns forever;

IN TRUST NEVERTHELESS upon the terms and subject to the conditions set forth herein and for the benefit of the holders of Allowed Claims, as and to the extent provided in the Plan, and for the performance of and compliance with the terms hereof and of the Plan;

PROVIDED, HOWEVER, that upon termination of the Distribution Trust in accordance with Article V hereof, this Distribution Trust Agreement shall cease, terminate and be of no further force and effect; and

IT IS HEREBY FURTHER COVENANTED AND DECLARED that the Trust Assets are to be held and applied by the Distribution Trustee upon the further covenants and terms and subject to the conditions herein set forth.

## **I NAME; PURPOSE; TRUST ASSETS**

1.1 Name of Trust. The trust created by this Distribution Trust Agreement shall be known as the “Hipcricket Distribution Trust” or sometimes herein as the “Distribution Trust”.

1.2 Transfer of Trust Assets. In accordance with the provisions of the Plan, on the Effective Date, the Debtor and its Estate shall be deemed and by this Declaration of Trust do hereby transfer, assign and convey to the beneficiaries of the Distribution Trust (i) the Distribution Trust Fund, (ii) the Distribution Trust Avoidance Actions, and (iii) the D&O Policies (collectively, the “Trust Assets”), followed by a deemed transfer by such beneficiaries to the Distribution Trust, to be held by the Distribution Trustee in trust for the holders, from time to time, of Allowed Claims as and to the extent provided in the Plan (such holders collectively, the “Trust Beneficiaries”), on the terms and subject to the conditions set forth herein and in the Plan.

1.3 Purposes. The purposes of the Distribution Trust are to hold and effectuate an orderly disposition of the Trust Assets and to distribute or pay over the Trust Assets or proceeds thereof in accordance with this Distribution Trust Agreement and the Plan, with no objective or authority to engage in any trade or business. This Trust Agreement is intended to create a trust and a trust relationship and to be governed and construed in all respects as a trust. The Distribution Trust is not intended to be, and shall not be deemed to be or treated as, a general partnership, limited partnership, joint venture, corporation, joint stock company or association, nor shall the Distribution Trustee or the Trust Beneficiaries, or any of them, for any purpose be, or be deemed to be or be treated in any way whatsoever to be, liable or responsible hereunder as partners or joint ventures. The relationship of the Trust Beneficiaries to the Distribution Trustee shall be solely that of beneficiaries of a trust and shall not be deemed a principal or agency relationship, and their rights shall be limited to those conferred upon them by this Trust Agreement.

1.4 Acceptance by the Distribution Trustee. The Distribution Trustee is willing and hereby accepts the appointment to serve as Distribution Trustee pursuant to this Distribution Trust Agreement and the Plan and agrees to observe and perform all duties and obligations imposed upon the Distribution Trustee by this Distribution Trust Agreement and the Plan, including, without limitation, to accept and hold and administer the Trust Assets and otherwise to carry out the purpose of the Distribution Trust in accordance with the terms and subject to the conditions set forth herein.

1.5 Valuation of Trust Assets. As soon as possible after the Effective Date, the Distribution Trustee shall make or cause to be made a good faith valuation of the Distribution Trust Assets. Such valuation shall be made available from time to time, to the extent relevant, and used consistently by all parties (including the Debtor, the Distribution Trustee and the Holders of Allowed Claims—including Professional Claims), including, for the avoidance of doubt, for all federal income tax purposes.

1.6 Further Assurances. The Debtor and any successors in interest will, on request of the Distribution Trustee, execute and deliver such further documents and perform such further acts as may be reasonably necessary or proper to transfer to the Distribution Trustee any portion of the Trust Assets or to vest in the Distribution Trust the powers or property hereby conveyed. Such obligation shall be limited to reasonable requests and reasonable expenses in connection therewith related to the reconciliation of Claims and the Distribution Trust Avoidance Actions. Any requests exceeding such scope shall be performed at the sole expense of the Distribution Trustee. The Debtor, for itself and its predecessors and successors, disclaims any right to any reversionary interest in any of the Trust Assets.

## **II THE OVERSIGHT BOARD**

2.1 General. The Oversight Board shall consult with the Distribution Trustee from time to time on matters including, without limitation, objections to Claims and any other pending litigation, and shall oversee and provide direction to the Distribution Trustee, monitor distributions and other matters affecting the administration of the Distribution Trust, and if necessary or desirable in its sole discretion, in accordance with the terms hereof, replace the Distribution Trustee, as set forth in Section 5.2 of this Distribution Trust Agreement.

2.2 Membership. The Oversight Board shall initially consist of two (2) members, Ken Harlan of MobileFuse LLC and Jay Hirschson of StrikeAd U.S. Inc. The Oversight Board shall at all times consist of at least one (1) member but not more than three (3) members.

2.3 Duties. Members of the Oversight Board shall have fiduciary duties to the Trust Beneficiaries in the same manner that members of an official committee of creditors appointed pursuant to section 1102 of the Bankruptcy Code have fiduciary duties to the constituents represented by such a committee and shall be entitled to indemnification from the Trust Assets in the same manner as the Distribution Trustee for service as members of the Oversight Board from and after the Effective Date of the Plan under or in connection with this Distribution Trust Agreement. Except in the case of a violation of their fiduciary duties, gross negligence, willful misconduct or, in the case of an attorney professional and as required under Rule 1.8(h)(1) of the Delaware Lawyers' Rules of Professional Conduct, malpractice, the Oversight Board and its retained professional Persons shall not be liable for any loss or damage by reason of any action taken or omitted by them pursuant to the discretion, powers and authority conferred, or in good faith believed by the Oversight Board to be conferred, on the Oversight Board by this Agreement or the Plan.

2.4 Professionals. The Oversight Board is authorized to retain Cooley LLP and Pepper Hamilton LLP as counsel and such other professional Persons it deems necessary and appropriate, including, without limitation, Persons who have previously been approved by the

Bankruptcy Court to be retained by the Debtor and the Committee. Professionals shall be compensated from the Trust Assets on a monthly basis.

2.5 Resignation. Any member of the Oversight Board may resign upon reasonable notice to the Distribution Trustee and other members of the Oversight Board may be removed by the Bankruptcy Court for cause. Fourteen (14) days prior written notice shall constitute reasonable notice under this section. In the event that all members of the Oversight Board resign prior to the expiration of the initial term, the Distribution Trustee shall appoint a new member.

2.6 Duration. The Oversight Board shall continue in existence for so long as the Distribution Trust remains in existence.

2.7 Reporting. The Distribution Trustee shall report to the Oversight Board on at least a monthly basis, or such other period as subsequently agreed to between the Oversight Board and the Distribution Trustee, as to the status of all material litigation, Claims objections, and all other material matters affecting the Distribution Trust.

2.8 Actions Requiring Approval of the Oversight Board. Subject to Section 2.9 below, the Distribution Trustee shall obtain the approval of the Oversight Board by at least a majority vote prior to taking any action regarding any of the following matters:

(i) The commencement, prosecution, settlement, compromise, withdrawal or other resolution of any cause of action by the Distribution Trust where the amount sought to be recovered in the complaint or other document initiating such cause of action exceeds \$50,000;

(ii) The sale, transfer, assignment, or other disposition of any Trust Assets, other than Cash, having a valuation in excess of \$50,000;

(iii) The abandonment of any Trust Assets having a valuation of at least \$50,000;

(iv) The settlement, compromise, or other resolution of any Disputed Claim, wherein the allowed amount of the asserted Claim exceeds \$50,000;

(v) The borrowing of any funds by the Distribution Trust or pledge of any portion of the Trust Assets;

(vi) Any matter which could reasonably be expected to have a material adverse effect on the amount of distributions to be made by the Distribution Trust;

(vii) The exercise of any right or action set forth in this Distribution Trust Agreement that expressly requires approval of the Oversight Board;

(viii) All investments authorized to be made by the Distribution Trustee under this Distribution Trust Agreement.

2.9 Deemed Approval of the Oversight Board. Distribution Trustee's failure to receive objections from members of the Oversight Board within seven (7) days after written (including facsimile or electronic) notice is provided to the Oversight Board of a proposed action shall be deemed approval of the Oversight Board for purposes of Section 2.8 above. In the event that the Distribution Trustee and counsel for the Oversight Board agree that urgent circumstances require an expedited decision, such decision may be made upon less than seven (7) days' notice, and with the mutual agreement of the Distribution Trustee and counsel to the Oversight Board, without notice, provided that the Distribution Trustee and the counsel to the Oversight Board are in agreement on the course of action to be pursued.

### **III RIGHTS, POWERS AND DUTIES OF DISTRIBUTION TRUSTEE**

3.1 General. As of the Effective Date, the Distribution Trustee shall take possession and charge of the Trust Assets and, subject to the provisions hereof and in the Plan, shall have full right, power and discretion to manage the affairs of the Distribution Trust, subject to Section 2.8 above. Except as otherwise provided herein and in the Plan, the Distribution Trustee shall have the right and power to enter into any covenants or agreements binding the Distribution Trust and in furtherance of the purpose hereof and of the Plan and to execute, acknowledge and deliver any and all instruments that are necessary or deemed by the Distribution Trustee to be consistent with and advisable in connection with the performance of his or her duties hereunder. On and after the Effective Date, the Distribution Trustee, at the direction and with the consent of the Oversight Board in each instance, shall have the power and responsibility to do all acts contemplated by the Plan to be done by the Distribution Trustee and all other acts that may be necessary or appropriate in connection with the disposition of the Trust Assets and the distribution of the proceeds thereof, as contemplated by the Plan, including:

(a) To open and maintain deposit accounts, escrows and other accounts, make distributions and take other actions consistent with the Plan and the implementation thereof, including the establishment, re-evaluation, adjustment and maintenance of appropriate reserves;

(b) Subject to the applicable provisions of and any limitations contained in the Plan, to collect the Trust Assets in accordance with the Plan;

(c) To make all distributions to holders of Allowed Claims as provided for or contemplated by the Plan;

(d) To object to or request estimation of any Claims (Disputed or otherwise) and to defend, compromise and/or settle any Claims prior to or following objection without the necessity of approval of the Bankruptcy Court, and/or to seek Bankruptcy Court approval for any Claims settlement, to the extent thought appropriate by the Distribution Trustee or to the extent such approval is required by prior order of the Bankruptcy Court;

(e) To make decisions in consultation with the Oversight Board, without further Bankruptcy Court approval, regarding the retention or engagement of professionals, employees and consultants by the Distribution Trust and to pay, from the Distribution Trust Operating Reserve, as defined in Section 3.2 of this Distribution Trust Agreement, the charges incurred by the Distribution Trust on or after the Effective Date for services of professionals,

disbursements, and any other expenses associated with the liquidation or preservation of the Trust Assets, without application to the Bankruptcy Court;

(f) To cause, on behalf of the Distribution Trust, all necessary tax returns and all other appropriate or necessary documents related to municipal, state, federal or other tax law to be prepared or filed timely;

(g) To pay, from the Distribution Trust Operating Reserve, any municipal, state, federal or other tax imposed on the Distribution Trust or the Trust Assets;

(h) To invest Cash in accordance with section 345 of the Bankruptcy Code or as otherwise permitted by a Final Order of the Bankruptcy Court and as deemed appropriate by the Distribution Trustee in accordance with the investment and deposit guidelines set forth in Section 3.4 of this Distribution Trust Agreement;

(i) To enter into any agreement or execute any document required by or consistent with the Plan and perform all of the obligations of the Distribution Trustee thereunder;

(j) To abandon in any commercially reasonable manner, including abandonment or donation to a charitable organization approved by the Oversight Board, any assets that the Distribution Trustee concludes are of no benefit to creditors of the Debtor or, at the conclusion of the Bankruptcy Case, are determined to be too impractical to distribute;

(k) To investigate, prosecute and/or settle Distribution Trust Avoidance Actions, participate in or initiate any proceeding before the Bankruptcy Court or any other court of appropriate jurisdiction, participate as a party or otherwise in any administrative, arbitral or other non-judicial proceeding, litigate or settle such Distribution Trust Avoidance Actions on behalf of the Distribution Trust and pursue to settlement or judgment such actions;

(l) To use Trust Assets to purchase or create and carry all appropriate insurance policies, bonds or other means of assurance and protection of the Trust Assets and to pay all insurance premiums and other costs he or she deems necessary or advisable to insure the acts and omissions of the Distribution Trustee, and if appropriate, the Oversight Board;

(m) To maintain appropriate books and records (including financial books and records);

(n) In accordance with the provisions of the Plan, to collect all assets of the Estate transferred to the Distribution Trust pursuant to the Plan and this Distribution Trust Agreement;

(o) To pay fees incurred pursuant to 28 U.S.C. § 1930(a)(6) and to file with the Bankruptcy Court and serve on the U.S. Trustee quarterly financial reports until such time as such reports are no longer required, a final decree is entered closing this Case or the Case is converted or dismissed, or the Bankruptcy Court orders otherwise;

(p) To file with the Bankruptcy Court and serve upon the Oversight Board, within 25 days after the end of each quarter, a report setting forth (i) the receipt and disposition



of Trust Assets, including funds in the Distribution Trust Operating Reserve; (ii) any Disputed Claims resolved by the Distribution Trustee during such period; (iii) the status of Distribution Trust Avoidance Actions transferred to the Distribution Trust; (iv) an itemization of all expenses the Distribution Trustee anticipates will become due and payable within the subsequent quarter; and (v) the Distribution Trustee's forecast of cash receipts and expenses for the subsequent quarter;

(q) To dissolve the Distribution Trust, in accordance with section 7.5(g) of the Plan, if the Distribution Trustee determines, in reliance on such professionals as it may retain, that the expense of administering the Distribution Trust so as to make a final distribution to Trust Beneficiaries is likely to exceed the value of the remaining Trust Assets;

(r) To seek a final decree closing the Bankruptcy Case; and

(s) To do all other acts or things consistent with the provisions of the Plan that the Distribution Trustee deems reasonably necessary or desirable.

Other than the obligations of the Distribution Trustee enumerated or referred to herein or under the Plan, the Distribution Trustee shall have no duties or obligations of any kind or nature respecting the implementation and administration of the Plan or this Distribution Trust Agreement.

3.2 Costs. On and after the Effective Date, the Distribution Trustee, with the consent of the Committee, or the Oversight Board, as the case may be, shall reserve Cash reserves (as defined in the Plan, the "Distribution Trust Operating Reserve") from the Trust Assets to be held in a Distribution Trust wind-down fund. The Distribution Trust Operating Reserve shall be used to pay amounts due to the Distribution Trustee pursuant to Section 3.8 hereof and the fees and expenses of any counsel, accountant, consultant or other advisor or agent retained, or to be retained, by the Distribution Trustee pursuant to this Distribution Trust Agreement as well as other expenses related to the liquidation or recovery of Trust Assets. In the event that amounts held in the Distribution Trust Operating Reserve, together with proceeds of any disposition of Trust Assets available for such purpose, are insufficient to make payments as provided in this Section 3.2, the Distribution Trustee shall, unless Reserves sufficient for such purpose have otherwise been made available from any other sources including other accounts of the Distribution Trust, have no obligation to make such payments.

### 3.3 Distributions.

(a) Periodic Distribution. The Distribution Trustee shall make distributions to the Trust Beneficiaries in accordance with and subject to sections 7.5 and 7.6 of the Plan as soon as reasonably practicable, and on at least an annual basis, following receipt of the Distribution Trust Assets subject to maintaining Trust Assets in an amount sufficient to satisfy Distribution Trust Operating expenses and Disputed Claims.

(b) Manner of Payment or Distribution. All distributions made by the Distribution Trustee to Trust Beneficiaries shall be payable to the Trust Beneficiaries of record as of the fifth (5<sup>th</sup>) Business Day prior to the date scheduled for the distribution, unless such day is not a Business Day, in which case such day shall be the following Business Day. If the

distribution shall be in Cash, the Distribution Trustee shall distribute such Cash by wire, check, or such other method as the Distribution Trustee deems appropriate under the circumstances.

(c) **Delivery of Trust Distributions.** All distributions under this Trust Agreement to any Distribution Trust Beneficiary shall be made at the address of such Distribution Trust Beneficiary as set forth in the Claims Register maintained in the Bankruptcy Case (subject to any transfer effectuated pursuant to Bankruptcy Rule 3001(e)) or, in the absence of a filed-proof of claim, the Schedules. The Distribution Trustee is under no obligation to take any action to locate updated address information for any Distribution Trust Beneficiary.

(d) **Disputed Claims Reserve.** On or after the Effective Date, the Distribution Trustee, with the consent of the Committee or the Oversight Committee, as the case may be, shall reserve cash reserves for the treatment of Disputed Claims (the “Disputed Claim Reserve”). On each Distribution date after the Effective Date in which the Distribution Trustee makes Distributions to holders of Allowed Claims, the Distribution Trustee shall retain on account of Disputed Claims an amount the Distribution Trustee estimates is necessary to fund the Pro Rata Share of such Distributions to holders of Disputed Claims if such Claims were Allowed, with any Disputed Claims that are unliquidated or contingent being reserved in an amount reasonably determined by the Distribution Trustee. Cash retained on account of such Disputed Claims shall be retained in the Disputed Claims Reserve for the benefit of the holders of Disputed Claims pending a determination of their entitlement thereto under the terms of the Plan.

3.4 **Limitations on Investment Powers of Distribution Trustee.** Funds in the Distribution Trust shall be invested in demand and time deposits in banks or other savings institutions, or in other temporary, liquid investments, such as Treasury bills, consistent with the liquidity needs of the Distribution Trust as determined by the Distribution Trustee and the Oversight Board, and in accordance with section 345 of the Bankruptcy Code, unless the Bankruptcy Court otherwise requires.

3.5 **Limits on Retained Cash.** The Distribution Trust may not receive or retain Cash or Cash equivalents in excess of an amount reasonably necessary to meet expenses, pay contingent liabilities (including Disputed Claims) and maintain the value of the Trust Assets. Without limiting the foregoing, and subject to the terms of the Plan, the Distribution Trustee shall distribute to the Trust Beneficiaries on account of their interests in the Distribution Trust, at least annually, its net income plus all net proceeds from the sale of assets, except that the Distribution Trust may retain an amount of net proceeds or net income reasonably necessary to maintain the value of the Distribution Trust or to meet claims and contingent liabilities, which amount shall be used to fund the Trust Expenses Reserve and the Disputed Claim Reserve.

### 3.6 **Liability of Distribution Trustee.**

(a) **Standard of Care.** Except in the case of bad faith, willful misconduct, reckless disregard of duty, criminal conduct, gross negligence, fraud or self-dealing, or in the case of an attorney professional and as required under Rule 1.8(h)(1) of the Delaware Lawyers’ Rules of Professional Conduct, malpractice, the Distribution Trustee shall not be liable for any loss or damage by reason of any action taken or omitted by it pursuant to the discretion, powers

and authority conferred, or in good faith believed by the Distribution Trustee to be conferred, on the Distribution Trustee by this Distribution Trust Agreement or the Plan.

(b) **No Liability for Acts of Predecessors.** No successor Distribution Trustee shall be in any way responsible for the acts or omissions of any Distribution Trustee in office prior to the date on which such successor becomes the Distribution Trustee, unless a successor Distribution Trustee expressly assumes such responsibility.

(c) **No Implied Obligations.** The Distribution Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth herein, and no implied covenants or obligations shall be read into this Distribution Trust Agreement against the Distribution Trustee.

(d) **No Liability for Good Faith Error of Judgment.** The Distribution Trustee shall not be liable for any error of judgment made in good faith, unless it shall be proved that the Distribution Trustee was grossly negligent in ascertaining the pertinent facts.

(e) **Reliance by Distribution Trustee on Documents or Advice of Counsel or Other Persons.** Except as otherwise provided herein, the Distribution Trustee may rely and shall be protected in acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order or other paper or document believed by the Distribution Trustee to be genuine and to have been signed or presented by the proper party or parties. The Distribution Trustee also may engage and consult with legal counsel for the Distribution Trust and other agents and advisors and shall not be liable for any action taken or suffered by the Distribution Trustee in reliance upon the advice of such counsel, agents or advisors. The Distribution Trustee or the Oversight Board shall have the right at any time to seek instructions from the Bankruptcy Court concerning the administration or disposition of the Trust Assets.

(f) **No Personal Obligation for Trust Liabilities.** Persons dealing with the Distribution Trustee, or seeking to assert Claims against the Debtor, shall look only to the Trust Assets to satisfy any liability incurred by the Distribution Trustee to any such Person in carrying out the terms of this Distribution Trust Agreement, and neither the Distribution Trustee nor his or her company or organization shall have a personal or individual obligation to satisfy any such liability.

**3.7 Selection of Agents.** The Distribution Trustee may engage or retain brokers, banks, custodians, investment and financial advisors, attorneys (including existing counsel to the Oversight Board and the Debtor), accountants (including existing accountants for the Oversight Board or the Debtor) and other advisors and agents, in each case without Bankruptcy Court approval. The Distribution Trustee may pay the salaries, fees and expenses of such persons from amounts in the Distribution Trust Operating Reserve, or, if such amounts are insufficient therefor, out of the Trust Assets or proceeds thereof. In addition, the parties acknowledge that Trust Assets may be advanced to satisfy such salaries, fees and expenses. The Distribution Trustee shall not be liable for any loss to the Distribution Trust or any person interested therein by reason of any mistake or default of any such Person referred to in this Section 3.6 selected by the Distribution Trustee in good faith and without either gross negligence or intentional malfeasance.

3.8 Distribution Trustee's Compensation, Indemnification and Reimbursement.

(a) As compensation for services in the administration of this Distribution Trust, the Distribution Trustee shall be compensated as specified on **Schedule A** attached hereto. The Distribution Trustee shall also be reimbursed for all documented actual, reasonable and necessary out-of-pocket expenses incurred in the performance of its duties hereunder.

(b) In addition, the Distribution Trustee shall be indemnified by and receive reimbursement from the Trust Assets against and from any and all loss, liability, expense (including attorneys' fees) or damage which the Distribution Trustee incurs or sustains, in good faith and without either gross negligence or intentional malfeasance, acting as Distribution Trustee under or in connection with this Distribution Trust Agreement.

(c) The Distribution Trustee is hereby authorized to use Trust Assets to obtain all reasonable insurance coverage for himself, his agents, representatives, employees or independent contractors, including, without limitation, coverage with respect to the liabilities, duties and obligations of the Distribution Trustee and his agents, representatives, employees or independent contractors under the Plan and this Distribution Trust Agreement.

3.9 Tax Provisions.

(a) It is intended that the Distribution Trust qualify as a grantor trust for federal income tax purposes, and that the Trust Beneficiaries are treated as grantors. As described more fully in the Plan and Disclosure Statement, the transfer of the Trust Assets will be treated for tax purposes as a transfer to the Trust Beneficiaries, followed by a deemed transfer from such Trust Beneficiaries to the Distribution Trust, provided, however, that the Trust Assets will be subject to any post-Effective Date obligations incurred by the Distribution Trust relating to the pursuit of Trust Assets. Accordingly, the Trust Beneficiaries shall be treated for United States federal income tax purposes as the grantors and owners of their respective share of the Trust Assets. The foregoing treatment shall also apply, to the extent permitted by applicable law, for state and local income tax purposes. Subject to Section 3.9(c)(iv), all items of income, gain, loss, deduction and credit will be included in the income of the Trust Beneficiaries as if such items had been recognized directly by the Trust Beneficiaries in the proportions in which they own beneficial interests in the Distribution Trust.

(b) The Distribution Trustee shall comply with all tax reporting requirements and, in connection therewith, the Distribution Trustee may require Trust Beneficiaries to provide certain tax information, including, but not limited to, tax identification numbers, as a condition to receipt of distributions, including, without limitation, filing returns for the Distribution Trust as a grantor trust pursuant to Treasury Regulation § 1.6714(a).

(c) Income Tax Status.

(i) Under the guidelines set forth in Revenue Procedure 94-95, 1994-2 C.B. 684 and Treasury Regulation § 1.671-4(a), the Distribution Trustee will file returns for the Distribution Trust as a grantor trust.

(ii) Except to the extent definitive guidance from the Internal Revenue Service or a court of competent jurisdiction (including the issuance of applicable Treasury Regulations or the receipt by the Distribution Trustee of a private letter ruling if the Distribution Trustee so requests one) indicates that such valuation is not necessary to maintain the treatment of the Distribution Trust as a liquidating trust for purposes of the Internal Revenue Code and applicable Treasury Regulations, as soon as reasonably practicable after the Trust Assets are transferred to the Distribution Trust, the Distribution Trustee shall make a good faith valuation of the Trust Assets. Such valuation shall be made available from time to time to all parties to the Distribution Trust Agreement and to all Trust Beneficiaries, to the extent relevant to such parties for tax purposes, and shall be used consistently by such parties for all United States federal income tax purposes.

(iii) In accordance with the provisions of section 6012(b)(3) of the Internal Revenue Code of 1986, as amended, the Distribution Trustee shall cause to be prepared, at the cost and expense of the Distribution Trust, the corporate income tax returns (federal, state and local) that the Debtor is required to file (to the extent such returns have not already been filed by the Effective Date). The Distribution Trustee shall timely file each such tax return with the appropriate taxing authority and shall pay out of the Trust Assets all taxes due with respect to the period covered by each such tax return. The Debtor hereby agrees to furnish to the Distribution Trustee all information required by the Distribution Trustee, and generally to cooperate with the Distribution Trustee, so as to enable the Distribution Trustee to accurately and timely prepare such tax returns.

(iv) The Distribution Trustee shall timely file all tax returns required to be filed with respect to the Disputed Claim Reserve, if any, on the basis that the Disputed Claim Reserve is a discrete trust pursuant to Section 641 et seq. of the Internal Revenue Code of 1986, as amended. The Distribution Trustee shall pay from the Trust Assets any taxes required to be paid with respect to the Disputed Claim Reserve's undistributed income or gains.

(d) Allocation. Subject to definitive guidance from the Internal Revenue Service or a court of competent jurisdiction to the contrary (including the issuance of applicable Treasury Regulations, the receipt by the Distribution Trustee of a private letter ruling if the Distribution Trustee so requests one, or the receipt of an adverse determination by the IRS upon audit if not contested by the Distribution Trustee), allocations of Distribution Trust taxable income or loss shall be allocated by reference to the manner in which any economic gain or loss would be borne immediately after a hypothetical liquidating distribution of the remaining Trust Assets. The tax book value of the Trust Assets for purpose of this paragraph shall equal their fair market value on the date the Trust Assets are transferred to the Distribution Trust, adjusted in accordance with tax accounting principles prescribed by the Internal Revenue Code, the applicable Treasury Regulations, and other applicable administrative and judicial authorities and pronouncements.

(e) Current Basis. All income of the Distribution Trust will be subject to tax on a current basis.

(f) **Withholding.** The Distribution Trustee may withhold from the amount distributable from the Distribution Trust at any time to any Trust Beneficiary such sum or sums as may be sufficient to pay any tax or taxes or other charge or charges which have been or may be imposed on such Trust Beneficiary or upon the Distribution Trust with respect to the amount distributable or to be distributed under the income tax laws of the United States or of any state or political subdivision or entity by reason of any Distribution provided for by any law, regulation, rule, ruling, directive, or other governmental requirement. Any tax withheld shall be treated as distributed to the Trust Beneficiary for purposes of this Agreement.

(g) **Tax Identification Numbers.** The Distribution Trustee may require any Trust Beneficiary to furnish to the Distribution Trustee its Employer or Taxpayer Identification Number as assigned by the Internal Revenue Service or certify to the Distribution Trustee's satisfaction that Distributions to the Trust Beneficiary are exempt from backup withholding. The Distribution Trustee may condition any Distribution to any Trust Beneficiary upon receipt of such identification number. If after reasonable inquiry, any Trust Beneficiary fails to provide such identification number to the Distribution Trustee, the Distribution Trustee shall deem such Trust Beneficiary's claim as disallowed and no Distribution shall be made on account of such Trust Beneficiary's claim.

(h) **Annual Statements.** The Distribution Trustee shall annually (for tax years in which Distributions from the Distribution Trust are made) send to each Trust Beneficiary a separate statement setting forth the Trust Beneficiary's share of items of income, gain, loss, deduction or credit and all such holders shall report such items on their federal income tax returns.

(i) **Notices.** The Distribution Trustee shall distribute such notices to the Trust Beneficiaries as the Distribution Trustee determines are necessary or desirable.

(j) **Expedited Determination.** The Distribution Trustee may request an expedited determination of taxes of the Distribution Trust under Bankruptcy Code section 505(b) for all tax returns filed for, or on behalf of, the Debtor and the Distribution Trust for all taxable periods through the dissolution of the Distribution Trust.

3.10 **Conflicting Claims.** If the Distribution Trustee becomes aware of any disagreement or conflicting claims with respect to the Trust Assets, or in good faith has any doubts as to any action that should be taken under this Distribution Trust Agreement, the Distribution Trustee may take any or all of the following actions as reasonably appropriate:

(i) to the extent of such disagreement or conflict, or to the extent deemed by the Distribution Trustee necessary or appropriate in light of such disagreement or conflict, withhold or stop all further performance under this Distribution Trust Agreement with respect to the matter of such dispute (except, in all cases, the safekeeping of the Trust Assets) until the Distribution Trustee is reasonably satisfied that such disagreement or conflicting claims have been fully resolved; or

(ii) file a suit in interpleader or in the nature of interpleader in the Bankruptcy Court (or any other court of competent jurisdiction) and obtain an order

requiring all Persons involved to litigate in the Bankruptcy Court their respective claims arising out of or in connection with this Distribution Trust Agreement; or

(iii) file any other appropriate motion for relief in the Bankruptcy Court (or any other court of competent jurisdiction).

3.11 Records of Distribution Trustee. The Distribution Trustee shall maintain accurate records of receipts and disbursements and other activity of the Distribution Trust, and duly authorized representatives of the Oversight Board shall have reasonable access to the records of the Distribution Trust. The books and records maintained by the Distribution Trustee, as well as any and all other books and records of the Debtor in the possession of the Distribution Trustee, may be disposed of by the Distribution Trustee at such time as the Distribution Trustee determines that the continued possession or maintenance of such books and records is no longer necessary for the benefit of the Distribution Trust or its beneficiaries, or upon the termination of the Distribution Trust, provided that at least (30) thirty days' notice of the intention to dispose of such books and records has been provided to the Oversight Board and to all persons entitled to notice under the Plan.

#### **IV INTERESTS OF TRUST BENEFICIARIES**

4.1 Interests of Beneficiaries. The Trust Beneficiaries shall have beneficial interests in the Trust Assets as provided in the Plan. The Trust Beneficiaries' proportionate interests in the Trust Assets shall not be certificated and shall not be transferable, assignable, pledged, or hypothecated, in whole or in part, except with respect to: (a) the transfer of an Allowed Claim in accordance with Bankruptcy Rule 3001(e); or (b) a transfer by will or under the laws of descent and distribution, provided that such permitted transfer will not be effective until and unless the Distribution Trustee receives written notice of such transfer.

4.2 Interests Beneficial Only. The ownership of a beneficial interest hereunder shall not entitle any Trust Beneficiary to any title in or to the Trust Assets as such (which title shall be vested in the Distribution Trustee) or to any right to call for a partition or division of Trust Assets or to require an accounting.

#### **V AMENDMENT OF TRUST OR CHANGE IN TRUSTEE**

5.1 Resignation of the Distribution Trustee. The Distribution Trustee may resign by an instrument in writing signed by the Distribution Trustee and filed with the Bankruptcy Court with notice to the Oversight Board, provided that the Distribution Trustee shall continue to serve as such after his resignation for thirty (30) days or, if longer, until the time when appointment of his successor shall become effective in accordance with Section 5.3 hereof, or as otherwise agreed with the Oversight Board.

5.2 Removal of the Distribution Trustee. The Oversight Board may remove the Distribution Trustee with or without cause at any time by majority vote. Upon removal of the Distribution Trustee by the Oversight Board in accordance with this Section 5.2 other than for cause, the Distribution Trustee shall be entitled to all compensation that has accrued through the effective date of termination, but remains unpaid as of such date which payment shall be made promptly from the Distribution Trust Operating Reserve. For the purposes of this Distribution

Trust Agreement, “cause” shall mean (a) the willful and continued refusal by the Distribution Trustee to perform his duties as set forth herein; (b) gross negligence, gross misconduct, fraud, embezzlement or theft; or (c) such other cause as the Oversight Board shall in good faith determine.

5.3 Appointment of Successor Distribution Trustee. In the event of the death, resignation, termination, incompetence or removal of the Distribution Trustee, the Oversight Board may appoint a successor Distribution Trustee without the approval of the Bankruptcy Court, which the parties acknowledge shall nevertheless retain jurisdiction to resolve any disputes in connection with the service of the Distribution Trustee or his successor. If the Oversight Board fails to appoint a successor Distribution Trustee within 30 days of the occurrence of a vacancy, any Trust Beneficiary or the outgoing Distribution Trustee may petition the Bankruptcy Court for such appointment. Every successor Distribution Trustee appointed hereunder shall execute, acknowledge and deliver to the Bankruptcy Court and to the predecessor Distribution Trustee (if practicable) an instrument accepting such appointment and the terms and provisions of this Distribution Trust Agreement, and thereupon such successor Distribution Trustee, without any further act, deed or conveyance, shall become vested with all the rights, powers and duties of the retiring Distribution Trustee.

5.4 Continuity. Unless otherwise ordered by the Bankruptcy Court, the death, resignation, incompetence or removal of the Distribution Trustee shall not operate to terminate or to remove any existing agency created pursuant to the terms of this Distribution Trust Agreement or invalidate any action theretofore taken by the Distribution Trustee. In the event of the resignation or removal of the Distribution Trustee, the Distribution Trustee shall promptly execute and deliver such documents, instruments, final reports, and other writings as may be reasonably requested from time to time by the Bankruptcy Court, the Oversight Board or the successor Distribution Trustee.

5.5 Amendment of Agreement. This Distribution Trust Agreement may be amended, modified, terminated, revoked or altered only upon (a) agreement of the Distribution Trustee and the Oversight Board or (b) if no agreement has been reached between the foregoing, upon order of the Bankruptcy Court.

## **VI TERMINATION OF TRUST**

The Distribution Trust shall terminate upon the earliest to occur of (a) the fulfillment of the Distribution Trust’s purpose by the liquidation of all of the Trust Assets and the distribution of the proceeds of the liquidation thereof in accordance with the Plan; or (b) the third anniversary of the creation of the Distribution Trust (the “Termination Date”), provided, however, that the Bankruptcy Court, upon a motion within the six-month period prior to the third anniversary (or the six-month period prior to the end of an extension period), may extend the term of the Distribution Trust for a fixed period if it determines that such extension is necessary to facilitate or complete the liquidation of Trust Assets. The combined term of extensions may not exceed three years without a favorable private letter ruling from the Internal Revenue Service or an opinion of counsel satisfactory to the Distribution Trustee that any further extension would not adversely affect the status of the trust as a Distribution Trust for United States federal income tax purposes. Reasonable efforts shall be made to see to it that the Termination Date shall be no



later than the time reasonably necessary to accomplish the Distribution Trust's purpose of liquidating assets and satisfying liabilities under the Plan.

## **VII RETENTION OF JURISDICTION**

Subject to the following sentence, the Bankruptcy Court shall have exclusive jurisdiction over the Distribution Trust, the Distribution Trustee and the Trust Assets as provided in the Plan, including the determination of all controversies and disputes arising under or in connection with the Distribution Trust or this Distribution Trust Agreement. However, if the Bankruptcy Court abstains or declines to exercise such jurisdiction or is without jurisdiction under applicable law, any other court of competent jurisdiction may adjudicate any such matter. All Trust Beneficiaries consent to the jurisdiction of the U.S. District Court for the District of Delaware and the state courts sitting in Wilmington, Delaware over all disputes related to this Distribution Trust Agreement.

## **VIII MISCELLANEOUS**

8.1 Applicable Law. The Distribution Trust created by this Distribution Trust Agreement shall be construed in accordance with and governed by the laws of the State of Delaware without giving effect to principles of conflict of laws, but subject to any applicable federal law.

8.2 Waiver. No failure or delay of any party to exercise any right or remedy pursuant to this Distribution Trust Agreement shall affect such right or remedy or constitute a waiver thereof.

8.3 Relationship Created. Nothing contained herein shall be construed to constitute any relationship created by this Distribution Trust Agreement as an association, partnership or joint venture of any kind.

8.4 Interpretation. Section and paragraph headings contained in this Distribution Trust Agreement are for convenience of reference only and shall not affect the meaning or interpretation of any provision hereof.

8.5 Savings Clause. If any clause or provision of this Distribution Trust Agreement shall for any reason be held invalid or unenforceable by the Bankruptcy Court, such invalidity or unenforceability shall not affect any other clause or provision hereof, but this Distribution Trust Agreement shall be construed, insofar as reasonable to effectuate the purpose hereof, as if such invalid or unenforceable provision had never been contained herein.

8.6 Entire Agreement. This Distribution Trust Agreement and the Plan constitute the entire agreement by and among the parties and there are no representations, warranties, covenants or obligations with respect to the subject matter hereof except as set forth herein or therein. This Distribution Trust Agreement together with the Plan supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions, written or oral, of the parties hereto, relating to such subject matter. Except as otherwise authorized by the Bankruptcy Court or specifically provided in this Distribution Trust Agreement or in the Plan, nothing in this Distribution Trust Agreement is intended or shall be construed to confer upon or

to give any Person other than the parties hereto, the Oversight Board, and the Trust Beneficiaries any rights or remedies under or by reason of this Distribution Trust Agreement.

8.7 Counterparts. This Distribution Trust Agreement may be executed by facsimile or electronic transmission and in counterparts, each of which when so executed and delivered shall be an original document, but all of which counterparts shall together constitute one and the same instrument.

8.8 Notices.

(a) All notices, requests or other communications required or permitted to be made in accordance with this Distribution Trust Agreement shall be in writing and shall be deemed given five Business Days after first-class mailing, one Business Day after sending by overnight courier, or on the first Business Day after facsimile or electronic transmission.

(i) if to the Distribution Trustee:

Fox Rothschild LLP  
997 Lenox Drive – Building 3  
Lawrenceville, New Jersey 08648  
Attn: Hal L. Baume, Esq.  
Email: hbaume@foxrothschild.com

(ii) if to the Debtor:

Hipcricket, Inc.  
c/o Pachulski Stang Ziehl & Street  
10100 Santa Monica Blvd., 13th Floor  
Los Angeles, California 90067  
Attn: Ira Kharasch, Esq.  
Linda Cantor, Esq.  
Email: ikharasch@pszjlaw.com  
Email: lcantor@pszjlaw.com

(iii) if to the Reorganized Debtor:

Haynes and Boone, LLP  
1221 McKinney Street, Suite 2100  
Houston, Texas 77010  
Attention: Charles A. Beckham, Jr., Esq.  
Email: charles.beckham@haynesboone.com  
Fax: 713-236-5638

and

Haynes and Boone, LLP  
30 Rockefeller Plaza, 26th Floor  
New York, NY 10112  
Attention: Trevor R. Hoffmann, Esq.  
Email: trevor.hoffmann@haynesboone.com  
Fax: 212-884-9558

(iv) If to the Oversight Board:

COOLEY LLP  
1114 Avenue of the Americas  
New York, NY 10036-7798  
Attn: Jay R. Indyke, Esq.  
Jeffrey L. Cohen, Esq.  
Tel: (212) 479-6000  
Fax: (212) 479-6275  
Email: jindyke@cooley.com  
Email: jcohen@cooley.com

(v) if to any Trust Beneficiary, to such address as such Trust Beneficiary shall have furnished to the Debtor in writing prior to the Effective Date.

(b) Any Person may change the address at which it is to receive notices under this Distribution Trust Agreement by furnishing written notice to the Distribution Trustee in the same manner as above.

8.9 Effective Date. This Distribution Trust Agreement shall become effective as of the Effective Date.

8.10 Successors and Assigns. This Distribution Trust Agreement shall be binding upon each of the parties hereto and their respective successors and assigns and shall inure to the benefit of the parties, Committee, the Trust Beneficiaries and, subject to the provisions hereof, their respective successors and assigns.

8.11 Conflict with the Plan. In the event of any conflict between the terms of this Distribution Trust Agreement and the Plan, the terms of this Distribution Trust Agreement shall govern.

IN WITNESS WHEREOF the undersigned have caused this Distribution Trust Agreement to be executed as of the day and year first above written.

HIPCRICKET, INC.

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

Title:

HAL L. BAUME, DISTRIBUTION TRUSTEE OF  
HIPCRICKET DISTRIBUTION TRUST

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

Name: Hal L. Baume, Esq.

Title: Distribution Trustee of Hipcricket  
Distribution Trust

OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS OF HIPCRICKET, INC.

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

Name: Ken Harlan

Title: Chairperson

## **SCHEDULE A**

### **TERMS OF COMPENSATION AND REIMBURSEMENT OF EXPENSES OF THE DISTRIBUTION TRUSTEE**

#### **1. COMPENSATION**

Beginning at the Effective Date (as defined in the Plan), the Distribution Trustee and Fox Rothschild LLP shall be employed and compensated in accordance with their standard hourly rates, subject to a cap of \$75,000 (the “Trustee Fee Cap”). The Trustee Fee Cap shall apply to the fees of the Distribution Trustee, Fox Rothschild LLP, and any accountants employed by the Distribution Trustee, subject to the following paragraph.

The Trustee Fee Cap shall not apply to reasonable out of pocket costs and expenses of the Distribution Trustee and its retained professionals, reasonable professional fees incurred by the Distribution Trustee, or fees for services rendered by the Distribution Trustee and its retained professionals in connection with the review, analysis, prosecution, or settlement of (i) the Distribution Trust Avoidance Actions or other causes of action assigned to the trust, (ii) any directors and officers liability claims and causes of action, (iii) any claims or causes of action to receive or share in any proceeds the litigation captioned Ronald Leibsohn, et al. v. HipCricket Technologies, Inc., et al., pending in the Superior Court of the State of Washington for King County. In the event that the Distribution Trustee and/or its retained professionals are asked to provide the foregoing services, the Distribution Trustee and its retained professionals shall be obligated to provide such services only if Distribution Trustee and the Oversight Board agree to a separate fee arrangement, which arrangement shall not be subject to the Trustee Fee Cap. For the avoidance of doubt, the Trustee Fee Cap shall not apply to (i) the fees and expenses of professionals retained by the Oversight Board or (ii) the fees and expenses of any professional representing a party-in-interest in the Bankruptcy Case whose fees are to be paid from the Trust Assets pursuant to the Plan.

#### **2. REIMBURSEMENT OF EXPENSES**

The Distribution Trustee shall be entitled to reimbursement for documented actual and reasonable expenses incurred in performing his duties as the Distribution Trustee, and may submit a report of quarterly expenses, if any, with each quarterly report provided to the Oversight Board under the Distribution Trust Agreement.

# **EXHIBIT E**

## **Section 1129(a)(5) Disclosures**

## **Hipcricket, Inc.**

Hipcricket, Inc., a Delaware corporation  
110 110th Avenue NE, Suite 410  
Bellevue, WA 98004

### Directors:

Andrew Price

### Officers:

Scott Brighton	President / Secretary
Andrew Price	Chief Financial Officer

### Insiders Being Retained by the Reorganized Debtor:

Doug Stovall	Terms of compensation will be similar to existing compensation.
David Hostetter	Terms of compensation will be similar to existing compensation.

<u>Date of Incorporation:</u>	Effective Date
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### Capital Structure:

Authorized Shares:	10,000
Par Value:	\$0.0001
Issued Shares:	1,000

### Ownership:

ESW Capital, LLC	1,000 shares (100%)
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