

**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. 361, 402

**NOTICE OF FILING OF AMENDED EXHIBIT D  
TO PLAN SUPPLEMENT RELATING TO THE AMENDED PLAN OF  
REORGANIZATION OF DEBTOR, AS MODIFIED**

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**PLEASE TAKE NOTICE** that on April 27, 2015, the above-captioned debtor and debtor in possession (the “**Debtor**”) filed the *Plan Supplement Relating to the Amended Plan of Reorganization of the Debtor* (the “**Plan Supplement**”) with the United States Bankruptcy Court for the District of Delaware.

**PLEASE TAKE FURTHER NOTICE** that attached to the Plan Supplement as Exhibit D was a *Form of Distribution Trust Agreement*.

**PLEASE TAKE FURTHER NOTICE** that on May 12, 2015 the Debtor filed the *Notice of Filing of Amended Exhibit D to Plan Supplement Relating to the Amended Plan of Reorganization of Debtor, As Modified* [Docket No. 402] which reflected changes from the earlier filed *Form of Distribution Trust Agreement*.

**PLEASE TAKE FURTHER NOTICE** that attached hereto as **Exhibit A** is a further revised *Form of Distribution* which makes changes to Schedule A regarding the Distribution Trustee’s right to seek an increase in the amount of the Trustee Fee Cap from the Oversight Board.

**PLEASE TAKE FURTHER NOTICE** that attached hereto as **Exhibit B** is a blackline of the *Form of Distribution Trust Agreement* compared to the *Form of Distribution Trust Agreement* that was filed with the Plan Supplement on May 12, 2015.

**PLEASE TAKE FURTHER NOTICE** that the Debtor reserves all rights to amend, revise, or supplement the Plan Supplement, and any of the documents and designations contained therein, 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.

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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.

Dated: May 14, 2015

PACHULSKI STANG ZIEHL & JONES LLP

*/s/ James E. O'Neill*

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Counsel for Debtor and Debtor in Possession

# **EXHIBIT A**

## **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 Peter S. Kravitz of Province Inc. (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;

(s) To effectuate the termination of the 401(k) Plan pursuant to the *Order Approving (I) the Debtor's Termination of its 401(k) Plan and (II) the Implementation of Certain Procedures in Connection Therewith*; and

(t) 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.** The timing of all Distributions made by the Distribution Trustee to Trust Beneficiaries shall be at the discretion of the Distribution Trustee. 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. If a Distribution is returned as undeliverable, the Distribution Trustee shall use reasonable efforts to determine such Creditor's then-current address. If the Distribution Trustee cannot determine, or is not notified of, a Creditor's then-current address within six months after the Effective Date, the Distribution reserved for such Creditor shall be deemed an unclaimed Distribution.

(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.

(e) **No Distributions of Less Than \$25 on Account of Allowed General Unsecured Claims.** Notwithstanding anything to the contrary in the Plan, if a Distribution to be received by the Holder of an Allowed General Unsecured Claim would be less than \$25, no such payment will be made to such Holder.

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.

(g) **No Bond.** The Distribution Trustee shall not be required to post a bond or other security in connection with its obligations under this Distribution Trust Agreement.

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 may, in the Distribution Trustee's sole discretion, determine the best way to report for tax purposes with respect to any reserve for Disputed General Unsecured Claims, including (i) filing a tax election to treat any and all reserves for Disputed General Unsecured Claims as a Disputed Ownership Fund ("DOF") within the meaning of Treasury Income Tax Regulation Section 1.468B-9 for federal income tax purposes rather than to tax such reserve as a part of the Trust or (ii) electing to report as a separate trust or sub-trust or other entity. If an election is made to report any reserve for disputed claims as a DOF, the Distribution Trust shall comply with all federal and state tax reporting and tax compliance requirements of the DOF, including but not limited to the filing of a separate federal tax return for the DOF and the payment of federal and/or state income tax due.

(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:

Province Inc.  
5915 Edmond Street, Suite 102  
Las Vegas, Nevada 89118  
Attn: Peter S. Kravitz  
Tel: (702) 685-5555  
Fax: (702) 685-5556  
Email: pkravitz@provincefirm.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:

PETER S. KRAVITZ, DISTRIBUTION TRUSTEE  
OF HIPCRICKET DISTRIBUTION TRUST

By: \_\_\_\_\_  
Name: Peter S. Kravitz  
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 shall be employed and compensated on a monthly basis at \$5,000 per month,<sup>1</sup> subject to a cap of \$75,000 (the "Trustee Fee Cap"), subject to the Distribution Trustee's right to seek an increase in the amount of the Trustee Fee Cap from the Oversight Board (which request may be granted without notice to any parties-in-interest in the Bankruptcy Case and/or Bankruptcy Court approval). The Trustee Fee Cap shall apply to the fees of the Distribution Trustee, Province Inc., 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.

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<sup>1</sup> The monthly fees of the Distribution Trustee shall not include services rendered by the Distribution Trustee and its retained professionals in connection with the preparation or filing of applicable tax returns or other tax documents required under the plan.

# **EXHIBIT B**

## **Blackline of 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 Peter S. Kravitz of Province Inc. (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;

(s) To effectuate the termination of the 401(k) Plan pursuant to the *Order Approving (I) the Debtor's Termination of its 401(k) Plan and (II) the Implementation of Certain Procedures in Connection Therewith*; and

(t) 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.** The timing of all Distributions made by the Distribution Trustee to Trust Beneficiaries shall be at the discretion of the Distribution Trustee. 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. If a Distribution is returned as undeliverable, the Distribution Trustee shall use reasonable efforts to determine such Creditor's then-current address. If the Distribution Trustee cannot determine, or is not notified of, a Creditor's then-current address within six months after the Effective Date, the Distribution reserved for such Creditor shall be deemed an unclaimed Distribution.

(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.

(e) **No Distributions of Less Than \$25 on Account of Allowed General Unsecured Claims.** Notwithstanding anything to the contrary in the Plan, if a Distribution to be received by the Holder of an Allowed General Unsecured Claim would be less than \$25, no such payment will be made to such Holder.

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.

(g) **No Bond.** The Distribution Trustee shall not be required to post a bond or other security in connection with its obligations under this Distribution Trust Agreement.



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 may, in the Distribution Trustee's sole discretion, determine the best way to report for tax purposes with respect to any reserve for Disputed General Unsecured Claims, including (i) filing a tax election to treat any and all reserves for Disputed General Unsecured Claims as a Disputed Ownership Fund ("DOF") within the meaning of Treasury Income Tax Regulation Section 1.468B-9 for federal income tax purposes rather than to tax such reserve as a part of the Trust or (ii) electing to report as a separate trust or sub-trust or other entity. If an election is made to report any reserve for disputed claims as a DOF, the Distribution Trust shall comply with all federal and state tax reporting and tax compliance requirements of the DOF, including but not limited to the filing of a separate federal tax return for the DOF and the payment of federal and/or state income tax due.

(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:

Province Inc.  
5915 Edmond Street, Suite 102  
Las Vegas, Nevada 89118  
Attn: Peter S. Kravitz  
Tel: (702) 685-5555  
Fax: (702) 685-5556  
Email: pkravitz@provincefirm.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:

PETER S. KRAVITZ, DISTRIBUTION TRUSTEE  
OF HIPCRICKET DISTRIBUTION TRUST

By: \_\_\_\_\_  
Name: Peter S. Kravitz  
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 shall be employed and compensated on a monthly basis at \$5,000 per month,<sup>1</sup> subject to a cap of \$75,000 (the "Trustee Fee Cap"), subject to the Distribution Trustee's right to seek an increase in the amount of the Trustee Fee Cap from the Oversight Board (which request may be granted without notice to any parties-in-interest in the Bankruptcy Case and/or Bankruptcy Court approval). The Trustee Fee Cap shall apply to the fees of the Distribution Trustee, Province Inc., 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.

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<sup>1</sup> The monthly fees of the Distribution Trustee shall not include services rendered by the Distribution Trustee and its retained professionals in connection with the preparation or filing of applicable tax returns or other tax documents required under the plan.