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8 Attorneys for Plaintiff  
9 CRICKET COMMUNICATIONS, INC.

10 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA

12 CRICKET COMMUNICATIONS, INC.,

13 Plaintiff,

14 v.

15 HIPCRICKET, INC.

16 Defendant.

Case No. 3:07-cv-01809-JAH-CAB

**FIRST AMENDED COMPLAINT FOR:**

1. Trademark Infringement - 15 U.S.C. § 1114(1)
2. Trademark Infringement, Unfair Competition, and False Designation of Origin – 15 U.S.C. § 1125(a)
3. Cybersquatting in Violation of 15 U.S.C. § 1125(d)
4. Trademark Dilution – Cal. Bus. & Prof. Code § 14330
5. Unfair Competition – Cal. Bus. & Prof. Code §§ 17200 *et seq.*
6. Common Law Trademark Infringement

**JURY TRIAL DEMANDED**

22 For its First Amended Complaint, Plaintiff CRICKET COMMUNICATIONS,  
23 INC. hereby states and alleges as follows:

24 **NATURE OF THE ACTION**

25 1. This action seeks permanent injunctive relief and damages against  
26 Defendant's willful infringement and dilution of Plaintiff's trademark CRICKET, under  
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1 the Lanham Trademark Act of 1946, as amended, Title 15, United States Code, §§ 1051  
2 *et seq.* (the “Lanham Act”), and for infringement, dilution and unfair competition under  
3 California Business & Professions Code §§14330, 14335, and 17200.

4         2.         CRICKET COMMUNICATIONS, INC. (“Cricket” or “Plaintiff”) is a  
5 corporation organized under the laws of Delaware, with a business address at 10307  
6 Pacific Center Court, San Diego, California 92121. Cricket is a leading provider of  
7 unlimited wireless services, and has revolutionized the telecommunications industry  
8 through its development of a simple, affordable wireless service offering consumers and  
9 local businesses a flat-rate unlimited service over the latest technology, high-quality, all-  
10 digital wireless network. Cricket’s total revenues in the United States in 2006 were \$1.13  
11 billion. Cricket had approximately 2.67 million subscribers to its CRICKET branded  
12 wireless telecommunications services by the end of the second fiscal quarter of 2007.

13         3.         On information and belief, defendant HIPCRICKET, INC. (“Defendant”)  
14 is a corporation organized under the laws of Delaware, with a business address at 3006  
15 Northup Way, Suite 300, Bellevue, Washington 98004.

16         4.         On information and belief, Defendant is in the business of using  
17 interactive text messaging programs to deliver advertising to the cellular telephones of  
18 consumers. Defendant promotes its services on the Internet at <http://www.hipcricket.com>  
19 and uses the trademark and service mark HIPCRICKET in connection with its services.

20         5.         Defendant’s mark, trade name, and domain name is highly similar to and  
21 confusingly similar to Cricket’s famous trademark as it is used in the marketplace, and  
22 Defendant has intentionally sought to imply an association with Cricket in its marketing  
23 and advertising. Unless Defendant is enjoined from continuing to use a mark which is  
24 confusingly similar to Cricket’s famous CRICKET mark, and any other confusing signs  
25 or indicia, to promote its services, the CRICKET mark will continue to be infringed and  
26 diluted, thereby destroying the distinctive quality that Cricket has developed over the  
27 years, to the detriment of Cricket and the public.

1 **JURISDICTION AND VENUE**

2 6. This is a civil action arising under the Lanham Act, Title 15, United  
3 States Code, §§ 1114, 1125(a) and 1125(d), and under the statutory law and common law  
4 of the State of California. This Court has subject matter jurisdiction pursuant to 28  
5 U.S.C. §§ 1331 (federal question jurisdiction), 1338 (trademark and unfair competition),  
6 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

7 7. Personal jurisdiction over the defendant is vested and venue is proper in  
8 the United States District Court for the Southern District of California pursuant to 28  
9 U.S.C. § 1391 because a substantial part of the events giving rise to the claims herein  
10 occurred in this District, and Defendant owns and operates an interactive website that  
11 displays and promotes the infringing mark and attempts to establish communication on-  
12 line with parties who are interested in Defendant's services, including parties in this  
13 District. On information and belief, Defendant solicits and has done business using  
14 Cricket's marks, or marks infringing Cricket's marks in this State with customers located  
15 within this State and in this District and thereby purposefully availed itself of the  
16 privilege of doing business in this State and in this District. The claims alleged herein  
17 arise out of or are related to the defendant's forum-related activities and the exercise of  
18 jurisdiction herein is otherwise reasonable. Personal jurisdiction is also proper over the  
19 Defendant in that the intentional and wrongful conduct described herein was directed at  
20 this District and at Cricket, whom Defendant knew to be a resident of this District, and  
21 who is a resident of this State, and who suffered damage in this District as a result of  
22 Defendant's intentional conduct.

23 8. Venue is proper in the United States District Court for the Southern  
24 District of California pursuant to 28 U.S.C. §§ 1391(b) and (c), as the claims arise in this  
25 District and Defendant, a corporation, is subject to personal jurisdiction in this District.  
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1 **BACKGROUND**

2 **Cricket's Valuable Trademark Rights**

3 9. Cricket is the pioneer of unlimited wireless services with no long-term  
4 commitments or credit checks required, and has become a market leader through its  
5 development of a simple, affordable wireless service offering consumers and local  
6 businesses a flat-rate unlimited service over the latest technology, high-quality, all-digital  
7 wireless network.

8 10. Cricket also offers customers access to a variety of the latest wireless  
9 telephones and devices and feature-rich mobile applications such as unlimited text,  
10 instant and picture messaging, Mobile Web, popular games, ringtones and wallpapers.

11 11. Since its first use in commerce in March 1999, the CRICKET trademark  
12 for wireless telecommunications products and services has become an extremely popular  
13 and widely recognized brand, with approximately 2.67 million subscribers to its  
14 CRICKET branded wireless telecommunications services by the end of the second fiscal  
15 quarter of 2007.

16 12. Cricket engages in extensive text message advertising, both for its own  
17 products and services as well as in conjunction with corporate partners, who offer  
18 discounts and coupons via text message to individual consumers of Cricket's wireless  
19 telecommunications services. Cricket also conducts text message campaigns in which  
20 users of other wireless services may participate through arrangements, for instance, with  
21 Larry H. Miller Theaters and the Pittsburgh Steelers, and intends to continue to expand its  
22 text message advertising campaigns in the future.

23 13. Cricket advertises its products and services extensively through various  
24 media outlets, including television, the Internet, and radio. The following represent the  
25 radio companies used most often by Cricket in promoting its products and services: Clear  
26 Channel Communications; UNI Radio Corp.; CBS Radio, Inc.; EnterCom; Citadel  
27 Communications Corp.; and Radio One.

1           14.       Cricket regularly partners with its fellow telecommunications providers  
2 such as Sprint, NTelos, Verizon and Alltel in connection with providing roaming  
3 services.

4           15.       Since March 1999, Cricket has continuously and extensively promoted,  
5 offered and sold wireless telecommunications products and services in interstate  
6 commerce under the CRICKET mark. The CRICKET products and services are  
7 available in retail stores and on-line at various websites, including *mycricket.com*.

8           16.       Cricket owns the *mycricket.com* website, and has spent considerable  
9 time, money and effort promoting and developing customer recognition and goodwill in  
10 its CRICKET trademarks and “mycricket” series of domain names nationwide.

11          17.       On September 11, 1998, Cricket filed United States Trademark  
12 Application Serial No. 75/551,094 for the CRICKET mark. On June 20, 2000, the  
13 United States Patent and Trademark Office issued Registration No. 2,359,370 to Plaintiff  
14 for the CRICKET mark for use on “wireless communication apparatus, namely, cellular  
15 telephones, telephone accessories, namely, fitted carrying cases, belt clips, battery  
16 chargers integrated wireless communication and computing apparatus, namely, cellular  
17 telephones, and telephone accessories, namely, fitted carrying cases, belt clips, battery  
18 chargers.” A true and correct copy of the USPTO online record for Registration No.  
19 2,359,370 is attached hereto as Exhibit A.

20          18.       On September 11, 1998, Cricket filed United States Trademark  
21 Application Serial No. 75/551,093 for the CRICKET mark. On July 4, 2000, the United  
22 States Patent and Trademark Office issued Registration No. 2,363,821 to Plaintiff for the  
23 CRICKET mark for use in connection with “retail store services featuring wireless  
24 communication apparatus, namely, modems, cellular telephones, wireless local loop  
25 telephones and personal communication services (PCS) handsets with manuals and  
26 accessories sold as a unit therewith, telephone accessories, namely, fitted carrying cases,  
27 belt clips, battery chargers and batteries, and car kits consisting of audio speakers,

1 microphones, and external antenna connectors; integrated wireless communication and  
2 computing apparatus namely, cellular telephones, wireless local loop telephones and  
3 personal communication handsets combined with a computer or personal digital assistant  
4 (PDA) device with manuals and accessories sold as a unit therewith; and telephone  
5 accessories, namely, fitted carrying cases, belt clips, battery chargers and batteries, and  
6 car kits consisting of audio speakers, microphones, and external antenna connectors.” A  
7 true and correct copy of the USPTO online record for Registration No. 2,363,821 is  
8 attached hereto as Exhibit B.

9         19.       On September 11, 1998, Cricket filed United States Trademark  
10 Application Serial No. 75/551,090 for the CRICKET mark. On June 20, 2000, the  
11 United States Patent and Trademark Office issued Registration No. 2,359,369 to Plaintiff  
12 for the CRICKET mark for use in connection with “telecommunications services,  
13 namely, offering personal communications services via wireless networks; and providing  
14 cellular telephone services and personal communication network (PCN) services.” A true  
15 and correct copy of the USPTO online record for Registration No. 2,359,369 is attached  
16 hereto as Exhibit C.

17         20.       Cricket has used and is using its CRICKET mark in commerce on and in  
18 connection with offering and selling its wireless telecommunications goods and services  
19 continuously since at least as early as March 1999.

20         21.       Since at least as early as March 1999, Cricket has used a green and  
21 orange color scheme in connection with its telecommunications services and related  
22 goods and services. Since at least as early as 1999, Cricket’s use of the green and orange  
23 color scheme has been exclusive in the field of telecommunications. Consumers  
24 recognize Cricket’s green and orange color scheme as a designator of source.  
25 Accordingly, Cricket owns valid and enforceable trade dress rights in its green and  
26 orange color scheme as used in connection with Cricket’s telecommunications services  
27 and related goods and services.

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1 advertisements to the cellular telephones of customers.

2       26. Defendant also uses the HIPCRICKET name in connection with a  
3 domain name and website located at *<http://www.hipcricket.com>*.

4       27. On information and belief, Defendant did not begin using the  
5 HIPCRICKET mark in commerce until August of 2004, long after Plaintiff had  
6 established valid and enforceable trademark rights in the CRICKET mark.

7       28. On information and belief, Defendant did not register the  
8 *<http://www.hipcricket.com>* domain name until on or about March 18, 2004, long after  
9 Plaintiff had established valid and enforceable trademark rights in the CRICKET mark.

10       29. On information and belief, Defendant works closely with a “carrier  
11 network” to facilitate its advertising programs. On information and belief, this carrier  
12 network consists of large telecommunication providers such as Sprint, NTelos, Verizon  
13 and Alltel. These companies regularly partner with Cricket to provide roaming services  
14 and are well aware of Plaintiff’s CRICKET mark and the services provided thereunder.

15       30. On information and belief, many of Defendant’s clients are in the media  
16 industry, and include some of the same television and radio companies used by Cricket to  
17 broadcast advertisements for Plaintiff’s products and services marketed and sold under  
18 the CRICKET mark.

19       31. On information and belief, Defendant’s advertisements are ultimately  
20 accessed by individual cell phone users through interactive text messaging campaigns,  
21 which Defendant provides to consumers. On information and belief, many of these  
22 consumers are the very same customers who comprise Cricket’s customer base.

23       32. Defendant uses its HIPCRICKET mark in such a way as to separate and  
24 emphasize the “CRICKET” portion of the mark. For example, on Defendant’s website at  
25 *<http://www.hipcricket.com>*, the “hip” and “cricket” portions of the mark are set apart  
26 through use of the colors orange and green, colors which have come to be associated with  
27 Cricket’s brand. The overall effect is to make Defendant’s mark appear merely to be a  
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1 part of Cricket's family of marks. A true and correct reproduction of Defendant's mark  
2 as used on Defendant's website at <<http://www.hipcricket.com>> is set forth below.



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7 33. On information and belief, Defendant only recently changed its mark to  
8 an orange-and-green color scheme. On information and belief, until recently, Defendant  
9 depicted its mark in the color yellow. A true and correct reproduction of Defendant's  
10 mark as used on prior versions of Defendant's website at <<http://www.hipcricket.com>> is  
11 set forth below.



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15 34. The HIPCRICKET name wholly and prominently incorporates the  
16 famous, widely recognized, and/or distinctive CRICKET trademark. CRICKET, as used  
17 by Defendant, and Plaintiff's CRICKET mark are identical in sound and in sight, and the  
18 addition of the descriptive term "hip" does little to add distinctive value to Defendant's  
19 name. Moreover, because the term "hip" is descriptive, CRICKET is the dominant and  
20 only distinctive element of the mark and trade name.

21 35. On information and belief, Defendant's recent change from a yellow  
22 color scheme to an orange and green color scheme nearly identical to Cricket's clearly  
23 evidences an intention to trade off of the recognition and goodwill Plaintiff has built in  
24 the CRICKET mark.

25 36. Defendant's use of the HIPCRICKET name and mark is likely to cause  
26 confusion as to whether Defendant's services originate from or are sponsored by Cricket,  
27 or whether there is an association or affiliation between Defendant and Cricket.

1 Defendant's acts also are likely to dilute the distinctive quality of the famous, widely  
2 recognized, and/or distinctive CRICKET trademark.

3 37. After learning of Defendant's use of HIPCRICKET, Cricket contacted  
4 Defendant and expressed its concerns, and since that time, Cricket has repeatedly tried to  
5 resolve this matter with Defendant. However, despite Cricket's efforts, Defendant has  
6 refused to suitably change its name, leaving Cricket no choice but to file this Complaint.

7 38. Subsequent to the service of the original Complaint, Defendant filed two  
8 new trademark applications with the U.S. Patent and Trademark Office ("PTO") for the  
9 mark HIPCRICKET & Cricket Design. As shown below, Defendant accentuates the  
10 "cricket" portion of the mark by displaying it in a bolder font than the "hip" portion of  
11 the mark.



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16 39. On October 11, 2007, Defendant filed Application Serial No. 77/302,104  
17 with the PTO for the mark HIPCRICKET & Cricket Design in connection with virtually  
18 identical services to those registered under the CRICKET mark: "telecommunications  
19 services, namely, the electronic transmission of data, video, and audio information over  
20 wireless networks; telecommunications services, namely, electronic transmission of  
21 messages, applications, data and computer and wireless digital content and updates for  
22 upload or download to telecommunications devices; transmission of advertising and  
23 marketing information with the help of telecommunications media," in International  
24 Class 38.

25 40. Also on October 11, 2007, Defendant filed Application Serial No.  
26 77/302,094 with the PTO for the mark HIPCRICKET & Cricket Design in connection  
27 with "advertising and commercial information services via the internet; online advertising  
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1 and marketing services; promoting the goods and services of others by preparing and  
2 placing advertisements and promotional displays on mobile telephones, personal digital  
3 assistants, web sites, electronic magazines, print media, broadcast media, outdoor media,  
4 promotional items; electronic commerce services, namely providing information about  
5 products and services via telecommunication networks for advertising and sales purposes;  
6 publicity and sales promotion relating to goods and services offered over mobile devices;  
7 advertising and marketing services; consulting services in the field of advertising and  
8 marketing directed to brand marketers and advertising agencies,” in International Class  
9 35.

10 41. Cricket has not consented to any of Defendant’s uses of its CRICKET  
11 mark, nor any mark comprised in whole or part of CRICKET, nor has Cricket sponsored,  
12 endorsed or approved the services offered and promoted by Defendant. Nor is there any  
13 affiliation between Cricket and Defendant.

14 42. On information and belief, Cricket, the famous, widely recognized,  
15 and/or distinctive CRICKET mark, and the business of Cricket are known to Defendant  
16 and were known to Defendant at the time it adopted the HIPCRICKET mark and began  
17 offering its services under the HIPCRICKET mark.

18 43. Defendant’s first commercial use of the HIPCRICKET mark for its  
19 services occurred much later than Cricket’s first use of the CRICKET mark for its goods  
20 and services, and well after the CRICKET mark had become famous, widely recognized,  
21 and/or distinctive.

22 44. Defendant’s trademark applications for the HIPCRICKET mark were  
23 filed subsequent to the application date for the CRICKET registrations.

24 45. On information and belief, Defendant adopted the “CRICKET” portion  
25 of its mark to make a direct reference to the CRICKET goods and services.

26 46. Defendant uses the HIPCRICKET mark on services that are highly  
27 related to the CRICKET goods and services.

1           47.       Defendant's promotion and sales of its services under the HIPCRICKET  
2 mark are directed to business partners of Cricket as well as to consumers of Cricket's  
3 products and services, and are conducted through the same channels of trade as are used  
4 by Cricket to promote and sell its CRICKET goods and services.

5           48.       Defendant's use of the HIPCRICKET mark and Defendant's actions  
6 described herein are likely to cause confusion, deception and/or mistake in the  
7 marketplace, the relevant industry, and all channels of trade for Cricket's goods and  
8 services.

9           49.       Defendant's use of the HIPCRICKET mark and Defendant's actions  
10 described herein are likely to dilute the distinctive quality of Plaintiff's CRICKET mark.

11           50.       Defendant's use of the HIPCRICKET mark and its actions described  
12 herein have been, and continue to be, deliberate, willful, and with disregard to the rights  
13 of Cricket.

14           51.       Defendant's continuing conduct constitutes an ongoing threat to Cricket  
15 and the public. Cricket has sustained and will continue to sustain irreparable injury as a  
16 result of Defendant's conduct, which injury is not compensable by the award of monetary  
17 damages. Unless Defendant is restrained and enjoined from engaging in its infringing  
18 and diluting conduct, Cricket will continue to suffer irreparable injury.

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20                           **FIRST CAUSE OF ACTION**  
                          **(Trademark Infringement – 15 U.S.C. § 1114(1))**

21           52.       Cricket incorporates herein by reference each and every allegation in the  
22 preceding paragraphs.

23           53.       Prior to Defendant's adoption of the HIPCRICKET mark and use of the  
24 HIPCRICKET mark, Defendant either had actual notice and knowledge, or constructive  
25 notice (pursuant to 15 U.S.C. § 1072), of Cricket's ownership and registrations of the  
26 CRICKET mark.

27           54.       On information and belief, Defendant was aware of Cricket's business  
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1 and its CRICKET mark and registrations prior to Defendant's adoption of the  
2 HIPCRICKET mark and use of the HIPCRICKET mark in connection with its business.

3 55. On information and belief, Defendant deliberately and willfully used and  
4 is using the HIPCRICKET mark in an attempt to trade on the enormous goodwill,  
5 reputation and selling power established by Cricket under the CRICKET mark, and to  
6 create a false impression of association with Cricket.

7 56. On information and belief, the services offered by Defendant under the  
8 HIPCRICKET mark are moving and will continue to move through the same channels of  
9 trade, and are being offered and/or sold through the same channels of advertising and to  
10 the same consumer groups, as the goods and services that are offered and sold by Cricket  
11 under the CRICKET mark.

12 57. Cricket has not consented to Defendant's use of the HIPCRICKET mark.

13 58. Defendant's unauthorized use of term "CRICKET" as a key component  
14 of its HIPCRICKET mark falsely indicates to consumers that Defendant's services are in  
15 some manner connected with, sponsored by, affiliated with, or related to Cricket, and/or  
16 the products and services of Cricket.

17 59. Defendant's unauthorized use of the HIPCRICKET mark is also likely to  
18 cause consumers to be confused as to the source, nature and quality of the services that  
19 Defendant is offering in connection with the HIPCRICKET mark.

20 60. Defendant's unauthorized use of the HIPCRICKET mark, as set forth  
21 herein, facilitates the acceptance of Defendant's services throughout the marketplace, not  
22 based on the quality of the services provided by Defendant, but on the association that the  
23 public is likely to make with Cricket and the reputation and goodwill associated with  
24 Cricket's goods and services.

25 61. Defendant's unauthorized use of the HIPCRICKET mark deprives  
26 Cricket of the ability to control the quality of the goods and services marketed under the  
27 CRICKET mark, and instead, places Cricket's valuable reputation and goodwill into the  
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1 hands of Defendant, over whom Cricket has no control.

2 62. The aforementioned activities of Defendant are likely to cause confusion  
3 or mistake, or to deceive consumers or potential consumers wishing to purchase Cricket's  
4 products and services, and is also likely to confuse consumers as to an affiliation between  
5 Cricket and Defendant.

6 63. On information and belief, the aforementioned activities of Defendant  
7 have already caused actual consumer confusion as to an affiliation between Cricket and  
8 Defendant.

9 64. The aforementioned acts of Defendant constitute federal trademark  
10 infringement in violation of 15 U.S.C. § 1114.

11 65. The intentional and willful nature of Defendant's acts makes this an  
12 exceptional case under 15 U.S.C. § 1117(a).

13 66. Cricket has been, is now, and will be irreparably harmed by Defendant's  
14 aforementioned acts of infringement, and unless enjoined by the Court, Defendant will  
15 continue to infringe upon the CRICKET mark. There is no adequate remedy at law for  
16 the harm caused by the acts of infringement alleged herein.

17 **SECOND CAUSE OF ACTION**  
18 **(Trademark Infringement, Unfair Competition, and False**  
19 **Designation of Origin – 15 U.S.C. § 1125(a))**

20 67. Cricket incorporates herein by reference each and every allegation in the  
21 preceding paragraphs.

22 68. Cricket is informed and believes that Defendant chose its trade name,  
23 domain name and the HIPCRICKET mark, and took the other actions alleged above, to  
24 cause confusion or mistake, or to deceive the public as to the origin, sponsorship,  
25 association or approval of the services of Defendant, deliberately to pass off Defendant's  
26 services as those of Cricket, and/or to falsely imply an association with Cricket.

27 69. Defendant's acts as alleged herein constitute, among other things, false  
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1 designations of origin, false or misleading descriptions of fact, or false or misleading  
2 representations of fact which are likely to cause confusion or mistake, or to deceive the  
3 public as to the origin, sponsorship, association or approval of the services of Defendant.

4 70. Defendant's conduct constitutes trademark infringement and unfair  
5 competition in violation of 15 U.S.C. § 1125(a).

6 71. Unless enjoined, Defendant will continue its infringing conduct.

7 72. As a direct and proximate result of Defendant's infringing conduct,  
8 Cricket has suffered and will continue to suffer irreparable injury to its business  
9 reputation and goodwill for which no adequate remedy exists at law, and has lost sales  
10 and profits in an amount not yet fully ascertained.

11 73. Defendant's conduct complained of herein is malicious, fraudulent,  
12 knowing, willful, and deliberate entitling Cricket to an accounting of Defendant's profits,  
13 increased damages, and an award of its attorneys' fees and costs incurred in prosecuting  
14 this action under 15 U.S.C. § 1117.

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17 **THIRD CAUSE OF ACTION**  
**(Cybersquatting – 15 U.S.C. § 1125(d))**

18 74. Cricket incorporates herein by reference each and every allegation in the  
19 preceding paragraphs.

20 75. Defendant's *www.hipcricket.com* domain name is confusingly similar to  
21 Plaintiff's CRICKET mark. Defendant has registered, has used, and/or is using the  
22 *www.hipcricket.com* domain name with the bad faith intent to profit from Plaintiff's  
23 CRICKET mark.

24 76. Defendant's actions constitute a violation of Lanham Act § 43(d), 15  
25 U.S.C. § 1125(d).

26 77. Cricket has been, is now, and will be irreparably harmed by Defendant's  
27 aforementioned acts, and, unless enjoined by the Court, Defendant's unauthorized use of

1 the *www.hipcricket.com* domain name will continue, and there is no adequate remedy at  
2 law for the harm caused by the acts alleged herein.

3  
4 **FOURTH CAUSE OF ACTION**  
**(Trademark Dilution - Cal. Bus. & Prof. Code § 14330)**

5 78. Cricket incorporates herein by reference each and every allegation in the  
6 preceding paragraphs.

7 79. The CRICKET mark has been and continues to be extensively promoted  
8 and marketed nationwide. As a result, the CRICKET mark has gained strong national  
9 public recognition and is eligible for protection against dilution as a distinctive and  
10 famous mark.

11 80. Defendant's use of the HIPCRICKET mark in the advertising and  
12 promotion of its services dilutes the distinctive quality of the CRICKET mark.

13 81. The above acts by Defendant constitute trademark dilution under  
14 California Business & Professions Code § 14330, the analogous statutes of other states,  
15 and under California common law.

16 82. Without injunctive relief, Cricket has no means by which to control the  
17 continuing injury to its reputation and goodwill or of the continuing dilution of its  
18 trademark. Cricket has been and will continue to be irreparably harmed. No amount of  
19 money damages can adequately compensate Cricket if it loses the ability to control the  
20 use of its CRICKET mark and the reputation and goodwill attendant thereto through the  
21 false and unauthorized use of its trademark.

22 **FIFTH CAUSE OF ACTION**  
23 **(Unfair Unlawful and Deceptive Business Practices - Cal. Bus. & Prof. Code § 17200**  
***et seq.*)**

24 83. Cricket incorporates herein by reference each and every allegation in the  
25 preceding paragraphs.

26 84. Defendant's business practices alleged above are unfair and offend  
27 public policy as they were unlawful, unfair, unscrupulous, and substantially injurious to  
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1 Cricket and consumers.

2 85. The above acts by Defendant constitute unfair competition and unfair  
3 business practices in violation of the Section 17200 *et seq.* of the California Business &  
4 Professions Code, prohibiting unfair, unlawful and deceptive business acts.

5 86. Pursuant to California Business and Professions Code § 17203, Cricket is  
6 entitled to enjoin these practices.

7 87. Without injunctive relief, Cricket has no means by which to control  
8 Defendant's deceptive and confusing use and advertising of its marks. Cricket is  
9 therefore entitled to injunctive relief prohibiting Defendant from continuing such acts of  
10 unfair competition, and appropriate restitution remedies, pursuant to California Business  
11 and Professions Code § 17203.

12  
13 **SIXTH CAUSE OF ACTION**  
**(Common Law Trademark Infringement)**

14 88. Cricket incorporates herein by reference each and every allegation in the  
15 preceding paragraphs.

16 89. Defendant's unauthorized use of the HIPCRICKET mark in interstate  
17 commerce and in this judicial District in connection with the promotion and offering of  
18 Defendant's services constitutes a false designation of origin, a false and/or misleading  
19 description of fact, and/or a false or misleading representation of fact which constitutes  
20 an infringement of Cricket's trademark rights in and to the CRICKET mark, and is likely  
21 to cause confusion, and mistake, and/or deception as to the affiliation, connection or  
22 association of Defendant and Cricket, and/or as to the origin, sponsorship, or approval of  
23 Defendant's goods by Cricket. Defendant's actions have caused, and will continue to  
24 cause, irreparable harm to Cricket.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, in consideration of the foregoing, Cricket respectfully requests  
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1 that this Court enter an Order granting the following relief:

- 2 a) For judgment that the CRICKET mark has been and continues to be infringed by  
3 Defendant;
- 4 b) For judgment that the CRICKET mark has been and continues to be diluted by  
5 Defendant;
- 6 c) Permanently enjoining Defendant and each of its agents, employees, servants,  
7 officers, directors, successors in interest, heirs, assigns and all persons, firms or  
8 corporations, acting by or under their authority, in active concert or privity or in  
9 participation with it, from using the CRICKET mark, a green and orange color  
10 scheme, or any confusingly similar marks in any way or using any word, words,  
11 phrases, symbols, logos, or any combination of words or symbol that would create  
12 a likelihood of confusion, mistake, or deception therewith, including, without  
13 limitation, the HIPCRICKET mark, trade name, and domain name, in connection  
14 with or in the marketing, offering, selling, licensing, displaying, advertising, or  
15 developing of Defendant's services;
- 16 d) Permanently enjoining Defendant to recall from all its offices and all others,  
17 whether persons, firms, or corporations, acting by or under their authority, in  
18 active concert or privity or in participation with it, any material containing the  
19 CRICKET mark in any way and any word, words, phrases, symbols, logos, any  
20 combination of words or symbols that would create a likelihood of confusion,  
21 mistake and/or deception therewith, including, without limitation, the  
22 HIPCRICKET mark, in connection with or in the marketing, offering, selling,  
23 licensing, displaying, advertising, or developing of Defendant's business services;
- 24 e) Permanently enjoining Defendant, its officers, agents, employees, and all persons  
25 acting in concert with them, from infringing the CRICKET mark and/or engaging  
26 in further such unlawful acts and from reaping any additional commercial  
27 advantage from its misappropriation of the rights of Cricket and all affiliated and  
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- 1 related companies of Cricket in the CRICKET mark and the registrations of this  
2 mark;
- 3 f) Requiring Defendant to destroy, at its sole and exclusive cost, all materials in its  
4 possession or under its control that contain infringements of the CRICKET mark;
- 5 g) Ordering the Director of the United States Patent and Trademark Office to order  
6 that Defendant is not entitled to any trademark registrations for the HIPCRICKET  
7 mark and any word, words, phrases, symbols, logos, or any combination of words  
8 or symbols that would create a likelihood of confusion, mistake, and/or deception  
9 therewith, including, without limitation, Defendant's Trademark Registration  
10 Number 3,114,097, Trademark Application Serial No. 77/302,094, and  
11 Trademark Application Serial No. 77/302,104.
- 12 h) Ordering that the <www.hipcricket.com> domain name be transferred to Cricket;
- 13 i) For all actual damages sustained by Cricket as the result of Defendant's acts of  
14 infringement and/or dilution, together with prejudgment interest, according to  
15 proof, pursuant to 15 U.S.C. § 1117;
- 16 j) For an accounting of the profits of Defendant resulting from its acts of  
17 infringement and/or dilution pursuant to 15 U.S.C. § 1117;
- 18 k) For enhanced damages pursuant to 15 U.S.C. § 1117, including but not limited to  
19 statutory damages up to \$100,000 for Defendant's violation of 15 U.S.C.  
20 § 1125(d);
- 21 l) For an award of attorneys' fees pursuant to 15 U.S.C. § 1117 or as otherwise  
22 permitted by law;
- 23 m) For Cricket's costs of suit, including its reasonable litigation expenses, pursuant  
24 to 15 U.S.C. § 1117; and
- 25 n) Granting Cricket such additional, other, or further relief as the Court deems just  
26 and proper.
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**DEMAND FOR JURY TRIAL**

Plaintiff demands trial by jury on all issues so triable.

DATED: November 6, 2007

Respectfully submitted,

FISH & RICHARDSON P.C.

By: s/ Lisa M. Martens

Lisa M. Martens, Esq.

Andrew M. Abrams, Esq.

Attorneys for Plaintiff

CRICKET COMMUNICATIONS, INC

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**PROOF OF SERVICE**

I am employed in the County of San Diego. My business address is Fish & Richardson P.C., 12390 El Camino Real, San Diego, California 92130. I am over the age of 18 and not a party to the foregoing action.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for personal delivery, for mailing with United States Postal Service, for facsimile, and for overnight delivery by Federal Express, Express Mail, or other overnight service.

On November 6, 2007, I caused a copy of the following document(s):

**FIRST AMENDED COMPLAINT**

to be served on the interested parties in this action by placing a true and correct copy thereof, enclosed in a sealed envelope, and addressed as follows:

Charles G. LaBella  
Steven T. Coopersmith  
La Bella & McNamara, LLP  
401 West A Street Suite 1150  
Sand Diego, CA 92101  
Telephone: (619) 696-9200  
Facsimile: (619) 696-9269

Attorneys For Defendant  
HIPCRICKET, INC.

☒ **MAIL:** Such correspondence was deposited, postage fully paid, with the United States Postal Service on the same day in the ordinary course of business.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury that the above is true and correct. Executed on November 6, 2007, at San Diego, California.

s/Nicole C. Pino

Nicole C. Pino