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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**
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12 CATHY O'BRIEN and LAURA ADNEY, on
behalf of themselves and all others similarly
13 situated,

14 Plaintiffs,

15 vs.

16 POPSUGAR INC. and POPSUGAR MEDIA
17 INC.,

18 Defendants.

Case No. 2018-1-CV-329645

**ORDER RE: MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

19 The above-entitled matter came on for hearing on Friday, August 9, 2019, at 9:00 a.m. in
20 Department 5 (Complex Civil Litigation), the Honorable Thomas E. Kuhnle presiding. Having
21 reviewed and considered the written submissions filed by the parties, including the Amended
22 Class Action Settlement Agreement and related materials, and having listened carefully to
23 arguments of counsel, the Court rules as follows:

24 **I. INTRODUCTION**

25 This is a putative class action. Plaintiffs Cathy O'Brien and Laura Adney (together,
26 "Plaintiffs") are social media influencers. (Amended Class Action Complaint ("Complaint"),
27 ¶¶ 4-5.) Thousands of influencers across the country recently learned that defendant PopSugar, a
28 pop culture website focusing on celebrity news, entertainment, fashion, which has its own

1 shopping platform, impersonated and misappropriated the influencers' internet identities without
2 their consent from early or mid-2017 through early or mid-2018. (Complaint, ¶ 2.) PopSugar
3 scraped influencers' content, photos, brand, likenesses, and logos and used them to create
4 profiles for each influencer on the PopSugar website for PopSugar's own commercial gain.
5 (*Ibid.*) PopSugar also removed influencers' affiliate links from the posts replicated on its
6 website and replaced them with ShopStyle links that would instead pay PopSugar for every click
7 made on the influencers' posts. (*Ibid.*)

8 The Complaint, filed on June 10, 2019, sets forth the following causes of action:

9 (1) Violation of California's Unfair Competition Law; (2) Violation of California's Common
10 Law Right of Publicity; (3) Violation of California's Right of Publicity Statute; (4) Common
11 Law Intentional Interference with Contractual Relationship; (5) Unjust Enrichment; and
12 Violation of the Lanham Act (15 U.S.C. § 1125.)

13 The parties reached a settlement. At the August 9, 2019 hearing the Court expressed
14 concerns about a separate "Dispute Resolution Fund." In response to the Court's concerns, the
15 parties met and conferred and submitted to the Court an Amended Class Action Settlement
16 Agreement, along with revised notices and a proposed timetable.

17 **II. LEGAL STANDARD**

18 Generally, "questions whether a settlement was fair and reasonable, whether notice to the
19 class was adequate, whether certification of the class was proper, and whether the attorney fee
20 award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple*
21 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co.* (1996) 48
22 Cal.App.4th 1794.)

23 In determining whether a class settlement is fair, adequate and reasonable, the
24 trial court should consider relevant factors, such as "the strength of plaintiffs'
25 case, the risk, expense, complexity and likely duration of further litigation, the
26 risk of maintaining class action status through trial, the amount offered in
27 settlement, the extent of discovery completed and the stage of the proceedings, the
28 experience and views of counsel, the presence of a governmental participant, and
the reaction of the class members to the proposed settlement."

1 (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*, 48
2 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688
3 F.2d 615, 624.)

4 “The list of factors is not exclusive and the court is free to engage in a balancing and
5 weighing of factors depending on the circumstances of each case.” (*Wershba v. Apple*
6 *Computer, Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine the “proposed
7 settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is
8 not the product of fraud or overreaching by, or collusion between, the negotiating parties, and
9 that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*,
10 quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n,*
11 *etc., supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

12 The burden is on the proponent of the settlement to show that it is fair and
13 reasonable. However “a presumption of fairness exists where: (1) the settlement
14 is reached through arm’s-length bargaining; (2) investigation and discovery are
15 sufficient to allow counsel and the court to act intelligently; (3) counsel is
16 experienced in similar litigation; and (4) the percentage of objectors is small.”
17 (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk, supra*,
18 48 Cal.App.4th at p. 1802.)

17 **III. DISCUSSION**

18 **A. Provisions of the Amended Settlement Agreement**

19 The case has been settled on behalf of the following class:

20 [A]ll natural persons for whom POPSUGAR’s records indicate that
21 (i) POPSUGAR displayed a Profiled Page during the Class Period, or (ii) whose
22 image(s), after being posted to a POPSUGAR webpage, generated a Commission
23 during the Class Period.

23 (Stipulation Concerning Amended Settlement Agreement, Ex. B (“Amended Settlement
24 Agreement”), § I(33).) The class period is May 1, 2017, through June 7, 2018. (*Id.* at § I(10).)

25 This is a non-reversionary settlement requiring class members to submit claims. Pursuant
26 to the settlement, defendants PopSugar, Inc. and PopSugar Media, Inc. (collectively,
27 “PopSugar”) will pay a total amount of \$2,115,000. (Amended Settlement Agreement,
28 § III(2)(a).) Out of this amount, payments will be made for attorneys’ fees (\$705,000), costs

1 (\$28,254), incentive awards (\$7,500 to each class representative), and claims administration
2 expenses (\$57,361). (*Id.* at § VI(3).)

3 Reminders will be sent to class members who have not cashed their checks after
4 120 days. (Amended Settlement Agreement, § VI(4)(b).) Checks remaining uncashed after
5 180 days will be awarded to a *cy pres* recipient – the International Women’s Media Foundation.
6 (*Id.* at § VI(5)(c).)

7 **B. Fairness of the Amended Settlement**

8 Plaintiffs state the proposed settlement is the product of serious, informed, and
9 arm’s-length negotiations conducted by experienced counsel. There are approximately 5500
10 class members and they will receive an estimated average net recovery of at least \$230 each if all
11 class members submit claims. The settlement generally appears to be fair. It provides for a good
12 recovery for class members and eliminates the risk and expense of further litigation.

13 **C. Incentive Award, Fees, and Costs**

14 The Amended Settlement Agreement provides for incentive awards of \$7,500 for each of
15 the two class representatives – Cathy O’Brien and Laura Adney.

16 The rationale for making enhancement or incentive awards to named plaintiffs is
17 that they should be compensated for the expense or risk they have incurred in
18 conferring a benefit on other members of the class. An incentive award is
19 appropriate if it is necessary to induce an individual to participate in the suit.
20 Criteria courts may consider in determining whether to make an incentive award
21 include: 1) the risk to the class representative in commencing suit, both financial
22 and otherwise; 2) the notoriety and personal difficulties encountered by the class
23 representative; 3) the amount of time and effort spent by the class representative;
24 4) the duration of the litigation and; 5) the personal benefit (or lack thereof)
25 enjoyed by the class representative as a result of the litigation. These “incentive
26 awards” to class representatives must not be disproportionate to the amount of
27 time and energy expended in pursuit of the lawsuit.

28 (*Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1394-1395, quotation marks,
brackets, ellipses, and citations omitted.) Prior to the final approval hearing, the class
representatives shall submit declarations detailing their participation in this action. The Court
will make a determination regarding incentive awards at that time.

The Court also has an independent right and responsibility to review the requested
attorneys’ fees and only award so much as it determines reasonable. (See *Garabedian v.*

1 *Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel
2 should submit lodestar information (including hourly rates and hours worked) prior to the final
3 approval hearing so the Court can compare the lodestar information with the requested fees.
4 Plaintiffs' counsel should also submit information regarding actual costs incurred.

5 **D. Conditional Certification of Class**

6 Plaintiffs request the putative class be conditionally certified for purposes of the
7 settlement. Rule 3.769(d) of the California Rules of Court states that “[t]he court may make an
8 order approving or denying certification of a provisional settlement class after [a] preliminary
9 settlement hearing.” California Code of Civil Procedure Section 382 authorizes certification of a
10 class “when the question is one of a common or general interest, of many persons, or when the
11 parties are numerous, and it is impracticable to bring them all before the court” As
12 interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and
13 (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v.*
14 *Superior Court* (2004) 34 Cal.4th 319, 326.)

15 The “community-of-interest” requirement encompasses three factors: (1) predominant
16 questions of law or fact; (2) class representatives with claims or defenses typical of the class;
17 and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc.*
18 *v. Superior Court, supra*, 34 Cal.4th at p. 326.) “Other relevant considerations include the
19 probability that each class member will come forward ultimately to prove his or her separate
20 claim to a portion of the total recovery and whether the class approach would actually serve to
21 deter and redress alleged wrongdoing.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)
22 The plaintiff has the burden of establishing that class treatment will yield “substantial benefits”
23 to both “the litigants and to the court.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d
24 381, 385.)

25 As explained by the California Supreme Court:

26 The certification question is essentially a procedural one that does not ask whether
27 an action is legally or factually meritorious. A trial court ruling on a certification
28 motion determines whether the issues which may be jointly tried, when compared
with those requiring separate adjudication, are so numerous or substantial that the
maintenance of a class action would be advantageous to the judicial process and
to the litigants.

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2 (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326, internal quotation
3 marks, ellipses, and citations omitted.)

4 Class members can be ascertained from PopSugar’s records. There are common issues in
5 this case regarding whether PopSugar misappropriated class members’ identities and likenesses,
6 posted profiles of class members on PopSugar.com, and placed affiliate links on profiles of class
7 members that PopSugar created. No issue has been raised regarding the typicality or adequacy
8 of Plaintiffs as class representatives. In sum, the Court finds the proposed class should be
9 conditionally certified.

10 **E. Class Notice**

11 The content of a class notice is subject to court approval. (Cal. Rules of Court, rule
12 3.769(f).) Class members will receive a short form notice by email, with a link to a long form
13 notice. To the extent the settlement administrator is unable to obtain a particular class member’s
14 email address from their social media profiles and blogs, the notice will be provided via
15 Instagram’s Direct Message function.

16 The short-form and long-form notices generally comply with the requirements for class
17 notice. (See Stipulation Concerning Amended Settlement Agreement, Exs. D & F) The
18 long-form notice provides basic information about the settlement, including the settlement terms,
19 and procedures to object or request exclusion. The notices are approved.

20 **F. Schedule of Activities Before the Final Approval Hearing**

21 The parties have provided to the Court a [Proposed] Order Granting Stipulation
22 Concerning Amended Settlement Agreement. The Court has reviewed the schedule of activities
23 set forth in that Order. That schedule is approved. The Court does not believe it is necessary to
24 execute and file the [Proposed] Order.

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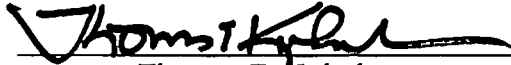
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1 **G. Conclusion**

2 The motion for preliminary approval of class settlement is GRANTED. The final
3 approval hearing is set for **January 10, 2020, at 9:00 a.m. in Department 5.**

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5 Dated: August 16, 2019


Thomas E. Kuhnle
Judge of the Superior Court

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