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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 POP MIDDLE EAST, INC., a foreign
19 corporation,

20 Plaintiff,

21 v.

22 POPSUGAR INC., a Delaware corporation;
23 EBATES INC., a Delaware corporation,

24 Defendants.

Case No:

**COMPLAINT FOR BREACH OF
CONTRACT, BREACH OF IMPLIED
COVENANT OF GOOD FAITH AND
FAIR DEALING AND FRAUD**

DEMAND FOR JURY TRIAL

25 Plaintiff alleges:

INTRODUCTION

26 1. Defendant PopSugar Inc., is a media and technology company that until recently
27 owned and operated the online shopping platform ShopStyle. ShopStyle is a popular online
28 fashion marketplace selling apparel, accessories, beauty products, home furnishings and
children’s items from a range of designers and brands. In Feb. 2017, Defendant Ebates Inc.,
announced that it had acquired ShopStyle from PopSugar.

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1 2. In mid-2015, to market ShopStyle more effectively to the Middle East region of
2 the world, PopSugar entered into negotiations for a license with Plaintiff Pop Middle East, Inc.
3 The parties’ license agreement contemplated that PopSugar would develop and deploy an Arabic
4 version of ShopStyle, which Pop Middle East would manage and promote to drive revenue from
5 the site, and that Pop Middle East would have exclusive rights to ShopStyle in the territory in
6 question.

7 3. During the course of the parties’ contract negotiations from June to Oct. 2015,
8 PopSugar repeatedly emphasized to Pop Middle East ShopStyle’s steady and consistent revenue
9 growth. PopSugar eventually induced Pop Middle East to enter into a license agreement to be
10 the Middle East licensee for ShopStyle based in material part on financial data provided by
11 PopSugar reflecting ShopStyle’s revenue growth and on PopSugar’s representations that such
12 growth showed “no signs of slowing down.”

13 4. PopSugar’s representations about its revenue growth were knowingly and
14 demonstrably false. In fact, as Pop Middle East later came to learn, ShopStyle’s revenue growth
15 had not only slowed by June 2015, its revenue had begun a precipitous decline.

16 5. Moreover, PopSugar failed to develop the ShopStyle website in Arabic, as
17 required under the parties’ license agreement, even after inducing Pop Middle East to agree to
18 an extension of the contractual deadline for its launch, thereby robbing Pop Middle East of the
19 opportunity to effectively address the Arab-speaking market and rendering the license far less
20 valuable – and its revenue milestones far more difficult to meet.

21 6. Before the parties could reach a mutually agreeable solution to these issues,
22 PopSugar purported to unilaterally terminate the parties’ license agreement, giving no reason.
23 This action followed shortly after the public announcement of Ebates’ acquisition of ShopStyle.

24 7. Pop Middle East seeks to hold PopSugar and Ebates accountable for their willful
25 misconduct in these breaches of contract and fraud, and to vindicate its rights under the parties’
26 license agreement.

27
28

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JURISDICTION AND VENUE

8. Pop Middle East is a corporation organized and existing under the laws of the British Virgin Islands, with its principal place of business in Dubai, UAE. It is a wholly owned subsidiary of Nervora, Inc., a Dubai-based publisher specializing in premier digital content and advertising experiences in the fashion and lifestyle sectors.

9. PopSugar is incorporated under the laws of the State of Delaware, with its principal place of business in San Francisco, California. PopSugar is an online platform featuring lifestyle content targeted towards women aged 18-34, covering topics such as fitness, fashion, beauty, food and entertainment.

10. Ebates, a leader in online cash-back shopping, is incorporated under the laws of the State of Delaware, with its principal place of business in San Francisco, California.

11. This Court has subject matter jurisdiction over the claims asserted in this action under 28 U.S.C. § 1332(a)(2). The parties are completely diverse, as reflected above, and the amount in controversy exceeds \$75,000, exclusive of interest and costs, as reflected below.

12. Venue is proper under 28 U.S.C. § 1391(b)(1) because both PopSugar’s and Ebates’ principal executive offices are located within this District. In addition, the parties’ license agreement calls for application of California law and venue in this District.

FACTUAL ALLEGATIONS

Agreement Structure

13. On or about Oct. 28, 2015, Pop Middle East and PopSugar entered into a written license agreement (the “Agreement”) making Pop Middle East the exclusive Middle East and North Africa licensee for the ShopStyle Middle East website (“ShopStyle”).

14. The parties structured the financial terms of the Agreement around actual and expected revenue collected by either party from merchants/retailers as a result of an end user clicking on links on ShopStyle or any other revenue from merchant/retailers in connection with ShopStyle (“Ecommerce Revenues”). Pop Middle East would be paid only if ShopStyle’s revenue exceeded a certain annual target in Ecommerce Revenue (the “Revenue Baseline”).

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1 15. Revenue Baselines for the first five years under the Agreement were set out in a
2 schedule to the Agreement. If ShopStyle’s revenue fell below the Revenue Baseline for any
3 given year, Pop Middle East would not benefit under the Agreement for that year. The
4 Agreement also gave PopSugar the right to terminate if the parties failed to generate
5 predetermined Ecommerce Revenue milestones for years four and six of the Agreement’s term
6 (Section 12.4) and, in the event of termination for reasons other than those stated in Section 12
7 of the Agreement, a provision for payment of a sum equivalent to two times the aggregate
8 Ecommerce Revenues in excess of the Revenue Baseline generated by Pop Middle East during
9 the trailing 12 month period (Section 12.6).

10 16. The Revenue Baselines and milestones as well as the termination payment
11 provision were all predicated on accurate and complete data reflecting ShopStyle’s revenue for
12 the periods up to the date of the Agreement. PopSugar’s complete and accurate disclosure of
13 such data was therefore a prerequisite to the Agreement.

14 17. Section 15.5 of the Agreement, limiting liability and recoverable damages as
15 between the parties, does not apply in the event of “willful misconduct.” PopSugar’s intentional
16 misrepresentations and breach of contract, as detailed below, constitute willful misconduct. For
17 this reason among others, any limitation of liability contained in the Agreement does not apply
18 to the claims stated herein.

19 **Pre-Contractual Misrepresentations Relating to ShopStyle’s Revenue Growth**

20 18. The parties to the Agreement were first introduced in 2013 and discussed various
21 business opportunities before negotiating the terms and conditions of the Agreement from
22 approximately June through Oct. 2015.

23 19. An important change took place during those negotiations when Google adjusted
24 its search algorithm with the publicly known release of Panda 4.2. This development was highly
25 relevant to ShopStyle’s business model. Like all online aggregator-type businesses, ShopStyle
26 relied heavily on search engine traffic to generate revenue. Traffic constitutes ShopStyle’s
27 biggest proxy for revenue.
28

1 20. Like any business reliant on search engine traffic, the e-commerce market is
2 influenced by algorithm changes and how users shop online. For these reasons, during the
3 course of negotiations, Pop Middle East expressed its misgivings about using set revenue
4 milestones in the Agreement.

5 21. Indeed, on July 30, 2015, Pop Middle East proposed a model to avoid setting in
6 stone a “highly sensitive growth rate.” It reiterated this proposal on Aug. 7, 2015. Despite these
7 clearly communicated concerns as well as the upfront financial risk such a fixed structure would
8 present for Pop Middle East, PopSugar insisted on an annual Revenue Baseline and revenue
9 milestones for years four and six.

10 22. On Oct. 22, 2015, to justify these contractual provisions, PopSugar’s Jo Bargioni
11 sent to Pop Middle East actual revenue data. This revenue data showed a sharply positive trend.
12 While provided at a late stage in the parties’ negotiations, the sharing of that data was a crucial
13 step toward conclusion of those negotiations and constituted the only real opportunity for Pop
14 Middle East to test PopSugar’s claims regarding ShopStyle’s financial performance. Prior to
15 that point, all such figures were provided anecdotally by PopSugar through email or telephone
16 calls.

17 23. When Pop Middle East reacted to this data, repeating its concerns, Pop Sugar’s
18 Liz Gough replied in an Oct. 23, 2015 email, underscoring that data’s upward trend and
19 representing: “*our current SS business in the region is growing 15% a year – with no effort on*
20 *our part*” and “*projections for e-commerce growth in the region show CAGRs [compound*
21 *annual growth rates] above 20% in all years with no signs of slowing down.*” (Emphasis added.)
22 In reliance on these representations, Pop Middle East agreed to Liz Gough’s proposal to raise
23 the year four CAGR from 2.5% to 12%. PopSugar reassured Pop Middle East that 12% annual
24 growth rate was a “reasonable benchmark *given our existing business* as well as the overall
25 market conditions.” (Emphasis added.)

26 24. The parties signed the Agreement five days later, on or about Oct. 28, 2015. Pop
27 Middle East immediately undertook to meet its obligations under the Agreement, eventually
28 spending hundreds of thousands of dollars in connection therewith.

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1 31. The downward trend continued into 2016 and worsened, however. With the
2 exception of Jan. 2016, all months in 2016 showed sharp, double digit declines in revenue from
3 the corresponding months in 2015.

4 32. On April 22, 2016, Pop Middle East reiterated its concern, asking PopSugar for
5 an explanation regarding these revenue declines. PopSugar showed no interest in addressing the
6 Revenue Baseline despite additional requests made by Pop Middle East during Skype
7 conversations and in-person meetings in London.

8 33. To substantiate its concern, on Aug. 12, 2016, Pop Middle East provided
9 PopSugar with a month-to-month comparison of ShopStyle’s revenue performance since
10 commencement of the Agreement’s term, plotted against the data it received in Oct. 2015. This
11 comparison highlighted the data discrepancies and Pop Middle East asked again for changes to
12 the Revenue Baseline to make the contractual arrangement between the parties viable.

13 34. On Dec. 29, 2016, following repeated requests, PopSugar’s General Counsel, Su-
14 Jin Lee, shared new “confirmed” financial data with Pop Middle East, detailing revenue from
15 2014 to 2016. The data differed from the data Pop Middle East received from PopSugar in Oct.
16 2015, which now appeared to selectively showcase revenue through June 2015, having the effect
17 of hiding ShopStyle’s revenue declines. According to this new data, ShopStyle’s revenue trend
18 changed beginning in June 2015, first to single digit growth (June-July 2015) and then to decline
19 (Aug.-Sept. 2015). PopSugar did not disclose this downward revenue trend to Pop Middle East
20 at any point prior to the signing of the Agreement.

21 35. Notwithstanding the above, PopSugar refused to renegotiate and began to
22 threaten termination of the Agreement. On April 4, 2017, PopSugar followed through on its
23 threat, serving a notice of termination of the Agreement, effective immediately, citing Section
24 12.6 of the Agreement, but giving no reason therefor.

25 36. On information and belief, during this same time period, and unknown to Pop
26 Middle East, PopSugar was negotiating with one or more parties for the sale of ShopStyle.
27 Ebates announced its acquisition of ShopStyle on Feb. 23, 2017. Business Wire, among others,
28 reported the announcement, quoting Kevin H. Johnson, CEO of Ebates as follows: “We’re

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1 thrilled to work with ShopStyle and PopSugar to connect even more shoppers with the right
2 retailers through unique digital content. Content commerce is critical to the future of
3 ecommerce, and ShopStyle is the natural fit to help us reach the next level of market
4 leadership.” Business Wire also quoted Brian Sugar, CEO of PopSugar, as follows: “We are
5 excited that ShopStyle will accelerate its growth by leveraging Ebates’ expertise in ecommerce.
6 At the same time, this will provide PopSugar the opportunity to further invest in and double
7 down on our position as the leading global media lifestyle company for young women.”

8 37. Since then, Ebates set about to inform ShopStyle consumers and potential
9 employees that ShopStyle was now part of Ebates. The careers section of the Ebates careers
10 website currently lists 17 job positions with ShopStyle, namely in Business Development,
11 Engineering, Marketing, Operations, Product Management and Sales. Ebates’ advertisement of
12 job opportunities with ShopStyle is indicative of a consolidation between Ebates and
13 ShopStyle’s former owner, PopSugar.

14 **Translation of ShopStyle into Arabic**

15 38. The digital market in the Middle East is heavily driven by Arabic. In Saudi
16 Arabia, for example, upwards of 80-90% of daily Google searches are conducted in Arabic.
17 Online retailers such as MyTheresa.com that have launched Arabic interfaces have reported
18 significant increases in traffic and revenue. The largest ecommerce site in the region, Souq.com,
19 which was recently acquired by Amazon.com, also heavily relied on its Arabic site.

20 39. Recognizing the importance of a website in Arabic, ShopStyle was due to launch
21 in Arabic on July 1, 2016 (Schedule 3 of the Agreement (the “Development Schedule”). It was
22 incumbent upon PopSugar to deliver adequate technical staff and resources to meet the
23 deadlines in the Development Schedule – namely, the launch of the ShopStyle website in Arabic
24 – and use commercially reasonable efforts to deliver in advance of such deadlines.

25 40. By Dec. 2015, it was clear PopSugar would not meet this contractual obligation.
26 Accordingly, in good faith, Pop Middle East agreed to extend the deadline to Sept. 30, 2016, as
27 part of an addendum to the initial Agreement.
28

1 41. PopSugar nevertheless failed to make any progress on the rollout of the Arabic
2 website. By the revised deadline, the Arabic ShopStyle website had not been launched, placing
3 PopSugar in breach of the Agreement by that date. The website to date exists in English only.

4 42. Given that ShopStyle’s business model depends so heavily on search engine
5 traffic, the translation of the website into Arabic was material to Pop Middle East’s ability to
6 meet the Revenue Baselines and to otherwise generate Ecommerce Revenue.

7 **CLAIMS FOR RELIEF**

8 **FIRST CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS**

9 **(BREACH OF CONTRACT)**

10 43. Pop Middle East incorporates by reference the allegations in paragraphs 1 to 42
11 as if fully set forth herein.

12 44. The Agreement placed the obligation to develop and launch the ShopStyle
13 website in Arabic on PopSugar.

14 45. Pop Middle East performed all obligations and conditions required by it in the
15 Agreement. Indeed, it went beyond those obligations by granting PopSugar a good faith three-
16 month extension to develop the ShopStyle website in Arabic.

17 46. PopSugar breached the Agreement by failing to develop and launch the
18 ShopStyle website in Arabic.

19 47. Based on PopSugar’s conduct described in this Complaint, PopSugar also waived
20 its right and/or is estopped to deny such obligations and breaches.

21 48. On information and belief, Ebates assumed all liabilities of PopSugar as they
22 relate to the ShopStyle business, including the obligations and liabilities of PopSugar under the
23 Agreement. Ebates is therefore liable for PopSugar’s breach of contract as set forth herein.

24 49. As a result of this breach, Pop Middle East has suffered damages.

25 **SECOND CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS**

26 **(BREACH OF THE IMPLIED COVENANT)**

27 50. Pop Middle East incorporates by reference the allegations in paragraphs 1 to 42
28 as if fully set forth herein.

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1 51. The Agreement contained an implied promise of good faith and fair dealing,
2 whereby neither party would do anything to unfairly interfere with the right of the other party to
3 receive the benefits of their contract. The Agreement further required PopSugar to act at all
4 times in a manner consistent with a duty of good faith and fair dealing in the performance and
5 enforcement of the Agreement under law.

6 52. Pop Middle East has performed all obligations and conditions required by it in
7 the Agreement and/or excused from doing so.

8 53. PopSugar breached the covenant of good faith and fair dealing by unfairly
9 interfering with Pop Middle East’s right to receive the benefits of the Agreement. Specifically, it
10 purported to exercise unlawfully and in bad faith a unilaterally right of termination, while giving
11 no reason for its action, and acted upon its purported termination by abandoning the Agreement
12 or any semblance of performance thereunder. Moreover, any lack of revenue sufficient to meet
13 the Agreement’s Revenue Baseline was the direct result of (a) PopSugar’s failure to develop and
14 launch an Arabic-language website for ShopStyle, and (b) the Revenue Baseline being based on
15 incomplete and inaccurate financial disclosures. By refusing to renegotiate those Revenue
16 Baselines in light of same, and acting as if it had terminated the Agreement, PopSugar breached
17 the Agreement’s covenant of good faith and fair dealing.

18 54. Based on PopSugar’s conduct described in this Complaint, PopSugar also waived
19 its right and/or is estopped to deny such obligations and breaches.

20 55. On information and belief, Ebates assumed all liabilities of PopSugar as they
21 relate to the ShopStyle business, including the obligations and liabilities of PopSugar under the
22 Agreement. Ebates is therefore liable for PopSugar’s breach of the implied covenant as set forth
23 herein.

24 56. As a result of this breach, Pop Middle East has suffered damages.

25 **THIRD CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS**

26 **(FRAUD)**

27 57. Pop Middle East incorporates by reference the allegations in paragraphs 1 to 42
28 as if fully set forth herein.

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1. For compensatory damages in an amount to be determined at trial, but estimated at this time to be approximately \$6.1 million;
2. For punitive damages;
3. For attorney’s fees and costs if and as applicable; and
4. For all such other and further relief as the Court may deem just, proper and equitable.

Dated: April 11, 2017

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP

By: /s/ David Given

David M. Given
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby requests a trial by jury of all issues so triable.

Dated: April 11, 2017

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP

By: /s/ David Given

David M. Given
Attorneys for Plaintiff