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9 Todd A. Katz

PNDORSED

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David H. Winkler, Clerk of the Superior Court
County of Santa Clara, California
S. Ulleselt

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SANTA CLARA**

12 TESLA MOTORS, INC.,

13 Plaintiff,

14 v.

15 TODD A. KATZ; and DOES 1 through
16 10, inclusive;

17 Defendants.

18 TODD A. KATZ,

19 Cross-Complainant,

20 v.

21 TESLA MOTORS, INC.; and
22 ROES 1-10;

23 Cross-Defendants.

Case No. 16CV299916

**NOTICE OF DEMURRER AND DEMURRER
TO COMPLAINT BY DEFENDANT TODD A.
KATZ; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF;
DECLARATION OF COUNSEL**

Assigned to: Hon. Maureen A. Folan
Department: 8

Hearing Date: 1/12/17
Hearing Time: 9:00 AM

Complaint Filed: 9/14/16

1 TO PLAINTIFF TESLA MOTORS, INC. AND TO ITS ATTORNEY OF RECORD, JOHN
2 HUESTON:

3 NOTICE IS HEREBY GIVEN that on January 12, 2017, at 9:00 AM, in Department 8 of
4 the above-entitled court, located at 191 North First Street, San Jose, California 95113, defendant
5 Todd Katz will and hereby does, demur generally to the Complaint of plaintiff Tesla Motors, Inc.
6 and all causes of action asserted therein.

7 Each demurrer is made on the grounds that the Complaint fails to state facts sufficient to
8 constitute any cause of action. Each demurrer is based upon this Notice, the accompanying
9 Memorandum of Points and Authorities in support of the demurrer, the attached declaration of
10 counsel, and upon such oral argument and other evidence as the Court may consider at the time of
11 hearing.

12 On October 21, 2016, pursuant to Cal. Code Civ. Proc. § 430.41(a), the parties conducted a
13 telephonic meet-and-confer in an effort to resolve the issues raised by this demurrer. The parties,
14 however, were unable to resolve these issues. See Declaration of Andrew S. Cowan, attached
15 hereto.

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Gallo LLP
315 West 9th Street, Suite 501
Los Angeles, CA 90015

DEMURRERS


Defendant Todd Katz demurs to the Complaint filed by plaintiff Tesla Motors, Inc. on the following grounds:

1. The first cause of action for violation of California Penal Code § 528.5 fails to state facts sufficient to constitute a cause of action.
2. The second cause of action for violations of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, fails to state facts sufficient to constitute a cause of action.

DATED: November 2, 2016

RESPECTFULLY SUBMITTED,

GALLO LLP



Andrew S. Cowan
Attorneys for Defendant
Todd A. Katz

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Tesla Motors, Inc. ("Tesla"), a \$30 billion corporation, has sued defendant Todd Katz, an unemployed individual, for allegedly sending a solitary email that supposedly impersonated Elon Musk, the Chief Executive Officer of Tesla. The facts Tesla alleges in its Complaint, however, demonstrate that *nobody* who received this preposterous and grammatically deficient email ever believed that it really came from Elon Musk. Tesla's own Complaint makes it clear that absolutely none of Tesla's confidential information was disclosed as a result of this solitary email, nor did the email itself cause any direct injury to Tesla. But even though Tesla immediately flagged the email as phony, the company's reaction to it has been over-the-top. As detailed in defendant Katz's cross-complaint, Tesla launched an illegal investigation of Katz, violating California criminal statutes by hacking into his Twitter account to obtain his identifying information. Moreover, despite the fact that Tesla had posted significant losses for sixteen straight quarters, it has elected to spend its investors' funds to pursue this petty, ill-conceived lawsuit against Mr. Katz, burdening the Court's docket in the process.

Tesla's heavy-handed attempt to intimidate and silence Mr. Katz, a Tesla critic, fails because, as detailed below, Tesla's Complaint fails to state a claim against him. The Court should therefore grant the demurrers as to both causes of action and dismiss the Complaint in its entirety.

I. LEGAL ARGUMENT**A. Legal Standard for Demurrer**

A demurrer tests the legal sufficiency of factual allegations in a complaint by raising questions of law. *See Lee Newman, M.D., Inc. v. Wells Fargo Bank* (2001) 87 Cal. App. 4th 73, 78; *ABF Capital Corp. v. Berglass* (2005) 130 Cal. App. 4th 825, 833. A complaint must generally plead facts sufficient to establish every element of each cause of action. *See Rakestraw v. Cal. Physicians' Service* (2000), 81 Cal. App. 4th 39, 43. In turn, "if the defendants negate any essential element of a particular cause of action, [the] court should sustain the demurrer to that cause of action." *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.

App. 4th 857, 880. “[T]o withstand a demurrer, a complaint must allege ultimate facts, not evidentiary facts or conclusions of law.” *Logan v. Southern Cal. Rapid Transit Dist.* (1982) 136 Cal. App. 3d 116, 126. Under Code Civ. Proc. § 430.10(e), a party may demur to a pleading on the grounds that “[t]he pleading does not state facts sufficient to constitute a cause of action.”

In ruling on a demurrer, the trial court must normally accept as true all material facts properly pleaded in a plaintiff's complaint. *See Burt v. County of Orange* (2004) 120 Cal. App. 4th 273, 277. However, presumptions in a demurrer are “always against the pleader, and all doubts [as to whether a cause of action is pled] are to be resolved against him, for it is presumed that he stated his case as favorably as possible as to himself.” *Richmond Redevelopment Agency v. Western Title Guaranty Co.* (1975) 48 Cal. App. 3d 343, 349.

B. The Complaint Fails to State a Claim for a Violation of California Penal Code § 528.5 Because No Facts Establish that Defendant *Credibly* Impersonated Elon Musk.

The Complaint alleges, in a conclusory fashion, that Katz violated Cal. Penal Code § 528.5 by “credibly impersonating Tesla CEO Elon Musk.” Complaint, ¶ 16. However, the ultimate facts as pleaded in the Complaint fail to establish that defendant “credibly impersonated” CEO Musk.

As alleged in the Complaint, on August 3, 2016, Jason Wheeler, the Chief Financial Officer of Tesla, received an email from the account elontesla@yahoo.com that stated the following:

why you so cautious w Q3/4 gm guidance on call?
also what are your thoughts on disclosing current M3 res#? Pros/cons from ir pov?
what is ur best guess as to where we actually come in on q3/4 deliverables.
honest best guess? no bs.
thx for hard work prepping 4 today
em

Complaint, ¶ 11. Tesla filed this lawsuit solely on the basis of this email, which Tesla contends was a “credible impersonation” of Elon Musk. But the facts as alleged in the Complaint belie Tesla’s claim, and demonstrate that the email was not a “credible impersonation” of Elon Musk in any way.

1 Under Penal Code § 528.5(b), “an impersonation is credible if another person would
2 reasonably believe, or did reasonably believe, that the defendant was or is the person who was
3 impersonated.” The Complaint, however, fails to allege facts that would show that any person
4 *did* reasonably believe, or *would* reasonably believe, that the sender of the email was really Elon
5 Musk.

6 First, there is no allegation in the Complaint that CFO Wheeler “did reasonably believe”
7 that the email really came from Elon Musk. To the contrary, this high-level Tesla executive
8 immediately recognized the email for what it was: a preposterous fake. Had CFO Wheeler
9 “reasonably believed” the email came from CEO Musk, the Complaint certainly would have
10 alleged such facts. But the Complaint does not. Nor does Complaint allege that CFO Wheeler
11 ever responded to the author of the email in any way. Nor does the Complaint allege that Tesla
12 sent out even a scrap of non-public information in response to the email. Based on the allegations
13 in the Complaint, it is clear that neither CFO Wheeler or anybody else at Tesla believed in any
14 way that this email was a “credible impersonation” of CEO Musk. To the contrary, Tesla’s
15 response was to investigate Mr. Katz.

16 Second, the Complaint fails to allege facts that would establish that any person at Tesla
17 “would reasonably believe” that the email came from CEO Musk. For example, the email was
18 sent from a Yahoo account—but there is no allegation that CEO Musk has ever used a Yahoo
19 email account. Nor does the Complaint allege that CEO Musk ever used “elontesla” as part of
20 any email address. Nor does the Complaint allege that the peculiar syntax of the email bore any
21 similarity to that of CEO Musk (who is known to be a stickler for grammar and who would never
22 use such atrocious syntax). Nor does the Complaint allege that CEO Musk typically used the
23 abbreviations or expressions present in the email (such as “gm,” “ir pov,” “ur,” “4” in place of
24 “for,” etc.). Nor does the Complaint allege that CEO Musk habitually signed his emails with a
25 lowercase “em.” In sum, the Complaint fails to allege any specific similarities between the email
26 and any email actually created by Elon Musk from which a Tesla employee, or anyone else,
27 “would reasonably believe” that the sender was Musk.

Based on the facts pleaded in the Complaint, it is clear that the email allegedly received by CFO Wheeler on August 3, 2016 was a goofy, grammatically deficient communication that was not a “credible” impersonation of Elon Musk in any way. Nobody at Tesla who saw it would believe or did believe that it came from Musk. Moreover, it is apparent from the Complaint that Tesla disclosed absolutely no information, confidential or otherwise, in response to the email. To the contrary, it appears from the Complaint that Tesla responded by immediately launching an aggressive investigation to identify the person who sent the email.

The Complaint therefore alleges no ultimate facts that would establish that the person who sent the email “credibly impersonated” CEO Musk in violation of Penal Code § 528.5. The demurrer must therefore be sustained as to Tesla’s first cause of action.

C. The Complaint Fails to State a Claim Under the UCL.

Plaintiff further contends that defendant violated each of the three prongs of California’s Unfair Competition Law, Cal. Bus. & Prof. Code 17200 *et seq.*, (“UCL”) by engaging in fraudulent, unlawful and unfair fraudulent business practices. Complaint ¶¶ 21-25. Tesla alleges that defendant violated the UCL in two ways: by impersonating Elon Musk by electronic means, in violation of Cal. Penal Code § 528.5, and by “attempting to obtain Tesla’s trade secrets by fraud, artifice or deception,” in violation of Cal. Penal Code § 499c. Plaintiff’s second cause of action fails because Tesla has failed to allege facts to establish standing to bring this claim under the UCL, and because the facts as pleaded do not establish that defendant Katz violated either of these statutes.

First, plaintiff fails to allege facts sufficient to satisfy the strict standing requirement under the UCL. Bus. & Prof. Code § 17204 requires that a plaintiff show that it “suffered injury in fact and has lost money or property as a result of the unfair competition.” In other words, a plaintiff must show that it lost money or property, and that this injury was *caused* by the unfair competition. *See Peterson v. Cellco Partnership* (2008) 164 Cal. App. 4th 1583, 1590. Here, however, Tesla fails to allege any cognizable injury that was *caused* by defendant’s alleged conduct. According to the Complaint, defendant Katz at most did one thing: send an email to CFO Wheeler from the address, elontesla@yahoo.com. Tesla was not fooled, did not disclose any information in

1 response.

2 Instead, Tesla decided to aggressively investigate the source of the email, and now
3 contends that it had to “pay investigators and expend IT and other resources to identify the source
4 of the message.” Complaint, ¶ 13. But according to the Complaint, Tesla’s investigation went
5 well beyond what was necessary to investigate to this solitary email. For example, Tesla
6 investigated “other impersonation attempts and efforts to gain access to the company’s servers” –
7 even though there is no allegation that defendant Katz engaged in other impersonation or tried to
8 gain access to Tesla’s servers. In other words, the at-issue email was not the proximate cause of
9 Tesla’s alleged “injury.” All Katz allegedly did was send an email. The fact that Tesla claims that
10 it launched a wide-ranging security audit of its information technology infrastructure in the wake
11 of this isolated email does not establish that Tesla suffered injury-in-fact *caused* by the email
12 allegedly sent by defendant. Any expenses that Tesla incurred as a result of this investigation (as
13 with the expenses Tesla incurred by hiring a prominent former federal prosecutor to file this
14 lawsuit), were caused instead by Tesla’s decision to spare no expense in exposing and punishing
15 the sender of this phony and absurd email. Therefore, the proximate cause of the “costs, damages
16 and losses” alleged in Paragraph 13 of the Complaint is the decision of Tesla’s top management to
17 respond to this bogus email in the most aggressive way possible. Naturally, Tesla is free to spend
18 its money however it likes. But Tesla lacks standing to bring any claim under the UCL, because
19 any “injury” it suffered was self-inflicted. Tesla suffered no injury-in-fact that was *caused* by the
20 bogus email.

21 Moreover, even if Tesla had standing to bring a claim under the UCL, its claim still fails
22 because Tesla fails to allege facts sufficient to establish that defendant Katz violated either Penal
23 Code § 528.5 or Penal Code § 499c, violations that the Complaint identifies as the conduct that
24 violated the UCL. As previously argued, Tesla fails to allege facts sufficient to establish that
25 defendant Katz violated Penal Code § 528.5, because Tesla has pleaded no ultimate facts showing
26 that Katz “credibly impersonated” Elon Musk. *See* discussion *supra*, Section I.B.

27 The Complaint similarly fails to allege facts sufficient to establish that defendant Katz
28

1 violated the UCL by “attempting” to obtain Tesla’s trade secrets by fraud, artifice or deception, in
2 violation of Penal Code § 499c. Notably, by alleging *attempted* theft of trade secrets, Tesla admits
3 that there was no *actual* theft of trade secrets. Such an unsuccessful attempt, by definition, is an
4 inchoate offense that resulted in the theft of no trade secrets, and therefore no loss or injury to
5 Tesla. As argued previously, Tesla’s claim fails because it cannot allege any injury-in-fact under
6 Bus & Prof. Code § 17204 that resulted from an unsuccessful attempt to steal trade secrets. There
7 is simply no private cause of action, under the UCL or any other statute, arising from the attempted
8 but unsuccessful theft of trade secrets, an inchoate offense. Defendant knows of no case in which
9 a UCL claim—or for that matter any civil claim—was based on the mere *attempt* to violate a
10 criminal statute. Indeed, to allow such a claim would result in a breathtaking expansion of the
11 types of claims actionable under the UCL.¹ The Court should reject such a broad, novel and
12 unwarranted reading of the UCL, and reject Tesla’s attempt to manufacture a UCL violation out of
13 the inchoate offense of attempt.

14 For these reasons, plaintiff Tesla fails to state a cause of action under the UCL.

15 II. CONCLUSION

16 For the foregoing reasons, the Court should grant each demurrer and dismiss the Complaint
17 in its entirety.

18 DATED: November 2, 2016

19 RESPECTFULLY SUBMITTED,

20 GALLO LLP



21 Andrew S. Cowan
22 Attorneys for Defendant
23 Todd A. Katz
24

25 ¹ For example, if two persons agreed to break into the Tesla factory to steal parts, and to that end
26 surveilled the security perimeter of the factory for weaknesses, the two might be guilty of the
27 crime of conspiracy to commit larceny. Under Tesla’s expansive interpretation of the UCL, the
28 defendants would also be liable civilly to Tesla under the UCL, because they committed the
unlawful act of conspiracy—even though the underlying crime of larceny was never committed
and even though Tesla was never injured.

DECLARATION OF ANDREW COWAN

I, Andrew Cowan, declare as follows:

1. I have personal knowledge of the following facts, and if called as a witness, I could and would testify competently as follows.

2. I am counsel for defendant Todd Katz in the case of *Tesla Motors Inc. v. Todd Katz*, Case No. 16CV299916, pending in Santa Clara County Superior Court.

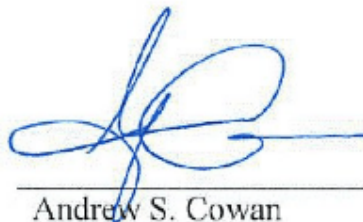
3. On October 21, 2016, I conducted a telephonic meet and confer conference with counsel for plaintiff, Eric Hayden.

4. During the conference, I explained to Mr. Hayden the grounds for my client's position that the complaint is legally insufficient, and provided him with specific legal support for that position. Those grounds are the same as those set forth in defendant's demurrer, *i.e.* that the Complaint fails to state facts sufficient to constitute a cause of action as to any of plaintiff's causes of action.

5. On October 25, 2016, Mr. Hayden sent me an email stating that his client did not intend to amend the complaint, and believed that its claims were adequate as pleaded. The parties were therefore unable to resolve the objections raised in the demurrer filed herewith.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 2nd day of November, 2016, at Los Angeles, California.



Andrew S. Cowan

1
2 **PROOF OF SERVICE**

3 STATE OF CALIFORNIA)
4) ss.
5 COUNTY OF LOS ANGELES)

6 I am employed in the County of Los Angeles, State of California. I am over the age of 18 years
7 and not a party to the within action; my business address is 315 W. Ninth Street, Suite 501, Los
8 Angeles, CA 90015.

9 On November 2, 2016 I served the foregoing documents:

10 **NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT BY DEFENDANT TODD**
11 **A. KATZ; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF;**
12 **DECLARATION OF COUNSEL** on the interested parties in this action addressed as follows:

13 JOHN C. HUESTON
14 HUESTON HENNIGAN, LLP
15 620 Newport Center Drive
16 Suite 1300
17 Newport Beach, CA 92660


Counsel for Plaintiff TESLA MOTORS,
INC.

18 **X By Mail:** I caused such envelope to be deposited in the mail at Los Angeles, California. The
19 envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's
20 practice of collection and processing correspondence for mailing. It is deposited with the U.S.
21 postal service on that same day in the ordinary course of business. I am aware that on motion of
22 party served, service is presumed invalid if postal cancellation date or postage meter date is more
23 than one day after date of deposit for mailing in affidavit.

24 **By Federal Express-Overnight:** I caused such envelope to be deposited in a box or other
25 facility regularly maintained by Federal Express in an envelope or package designated by Federal
26 Express with delivery fees paid.

27 **By Fax:** I served a true copy of the document(s) described on all parties to this action by fax
28 transmission, and the transmission was reported as complete and without error. Fax transmissions
were sent and addressed as stated above.

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

26 
27 Emily Wirick