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ENDORSED

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County of Santa Clara, California
by S. Ulleseit
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SANTA CLARA

11 TESLA MOTORS, INC.,

12 Plaintiff,

13 v.

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

16 Defendants.

17 TODD A. KATZ,

18 Cross-Complainant,

19 v.

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

22 Cross-Defendants.

Case No. 16CV299916

**CROSS-COMPLAINT FOR
DAMAGES FOR:**

**VIOLATION OF CALIFORNIA
PENAL CODE § 502(c)(1), (c)(2), (c)(7), (e)**

DEMAND FOR JURY TRIAL

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

Gallo LLP
315 W. Ninth Street, Suite 501
Los Angeles, CA 90015

FAXED

INTRODUCTION

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2 1. Plaintiff and cross-defendant Tesla Motors, Inc. (“Tesla”) has sued defendant and
3 cross-complainant Todd A. Katz (“Katz”), claiming that Katz violated a California criminal
4 misdemeanor statute by allegedly sending a single email that impersonated Tesla’s Chief
5 Executive Officer, Elon Musk. But in fact it was Tesla who broke the law: in its zeal to
6 investigate and silence Mr. Katz, an outspoken critic of Tesla, the company hacked into a Twitter
7 account owned by Mr. Katz, in order to illegally obtain and use information to identify Katz,
8 publicly embarrass and silence him, and discourage other critics. By doing so, Tesla violated
9 California Penal Code §§ 502(c)(1), (c)(2) and (c)(7), all of which outlaw unauthorized access
10 into computer systems. In this civil action for violations of this criminal statute, authorized by
11 California Penal Code § 502(e), cross-complainant Katz is entitled to recover compensatory
12 damages, equitable relief, punitive and exemplary damages, and attorney’s fees.

GENERAL ALLEGATIONS

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14 **A. The Parties**

15 2. Cross-complainant Katz is an individual who resides in Alameda County,
16 California. Until resigning his position on September 19, 2016, Katz served as the Chief
17 Financial Officer of an energy-sector consulting firm.

18 3. Cross-defendant Tesla is a publicly-traded Delaware corporation with its principal
19 executive offices at 3500 Deer Creek Road, Palo Alto, California. Tesla designs, manufactures,
20 and sells electric vehicles, and operates its sole vehicle manufacturing factory at 45500 Fremont
21 Blvd., Fremont, California.

22 4. The true names and capacities, whether individual, corporate, associate, or
23 otherwise, of cross-defendants Roe 1 through Roe 10, inclusive, are unknown to cross-
24 complainant, who therefore sues said cross-defendants by such fictitious names pursuant to
25 Section 474 of the California Code of Civil Procedure. Cross-complainant is informed and
26 believes, and on that basis alleges, that each of said fictitious Roe cross-defendants is in some
27 manner responsible for the acts, conduct, and occurrences alleged herein, as either actual
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1 perpetrators or co-conspirators, aiders and abettors, or primary officers and/or managers with
2 knowledge and control of the perpetrators' activities. Cross-complainant will seek leave of the
3 Court to amend this Cross-Complaint to allege the true names and capacities of the Roe cross-
4 defendants when the same are ascertained, as well as the manner in which each fictitious cross-
5 defendant is responsible for the damages sustained by cross-complainant.

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7 **FACTUAL BACKGROUND**

8 5. Tesla is a public corporation with a current stock market capitalization of
9 approximately \$30 billion. For sixteen straight quarters after it began selling its 4-door sedan in
10 late 2012, Tesla has operated at a financial loss, as measured under generally accepted accounting
11 principles ("GAAP"). As Tesla has progressively sold or leased more vehicles during this time
12 period, it has generally reported increasing financial losses both on an absolute basis and as a
13 percentage of its total revenues. For example, for the twelve-month period ending June 30, 2016,
14 Tesla reported a net loss of \$1.13 billion, representing a loss of 25 cents for each dollar of
15 revenue.

16 6. Financial media, corporate governance experts, respected automobile industry
17 analysts, institutional investors, individual investors, and many independent bloggers have
18 repeatedly criticized Tesla and/or its Chief Executive Officer (CEO) Elon Musk for the following:

- 19 a. Knowingly and deliberately making numerous materially misleading public
20 statements, disclosures and press releases, and omitting material information from
21 their public disclosures, in order to promote Tesla's stock price;
- 22 b. Maintaining a Tesla board of directors comprised of personal business associates
23 and family members that is widely considered to be among the least independent
24 boards of any major U.S. public company;
- 25 c. Knowingly and deliberately making misleading forecasts about future products
26 and revenue growth that always seem to be several years away, while enjoying
27 immunity under the "Safe Harbor for Forward-Looking Statements" provisions of
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- 1 federal securities law;
- 2 d. Witnessing an unprecedented number of executive departures from Tesla in recent
- 3 months and years; and
- 4 e. Fabricating a novel definition of “revenue” in order to convince investors that
- 5 Tesla’s “real” revenue was higher than revenue derived under GAAP. Such “non-
- 6 GAAP revenue” even included funds borrowed from third-party leasing
- 7 companies.

8 7. In addition to the general criticism regarding Tesla’s business practices, Tesla has
9 experienced significant negative publicity from specific events over the last six months:

- 10 a. In early June 2016, media outlets reported that the U.S. National Highway
- 11 Transportation Safety Administration (“NHTSA”) was investigating Tesla vehicles
- 12 in connection with possible suspension failures. NHTSA also took the rare step of
- 13 publicly rebuking Tesla for requiring its customers to sign broadly worded non-
- 14 disclosure agreements in exchange for certain warranty services, which the
- 15 NHTSA stated could dissuade vehicle owners from reporting vehicle safety issues.
- 16 b. On June 21, 2016, Tesla announced it intended to merge with SolarCity
- 17 Corporation (“SolarCity”), a company rumored to be facing insolvency and
- 18 bankruptcy due to its ongoing and staggering losses. Elon Musk was and remains
- 19 an owner of approximately 20% of each of Tesla and SolarCity. After news of the
- 20 merger broke, Tesla’s stock market value fell by more than the entire value of
- 21 Tesla’s offer for SolarCity. Tesla did not disclose the possibility of this merger at
- 22 the time of its \$2.3 billion stock sale on May 18, 2016, despite such transaction
- 23 being highly material to the future sales and profits (or losses) of Tesla and despite
- 24 CEO Musk presumably knowing of this contemplated transaction at the time of the
- 25 stock sale.
- 26 c. On July 11, 2016 the Wall Street Journal reported that the SEC was investigating
- 27 Tesla for its failure to disclose – prior to the \$2.3 billion sale of Tesla common
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1 stock by Tesla and CEO Elon Musk on May 18, 2016 – the death of a Tesla driver
2 on May 7, 2016 while the car’s “Autopilot” feature was engaged.

3 8. Since March 23, 2016, cross-complainant Katz has maintained a Twitter account,
4 under the username *@ValuationMattrrs*. Under that Twitter account, Katz has also used the
5 screen names “Elon Madoff,” “Enron Musk,” and “Otto Pilot.”

6 9. Via his Twitter account, cross-complainant Katz has strongly criticized Tesla and
7 CEO Elon Musk for the following conduct:

- 8 a. Improperly re-defining revenue to include borrowing that was up to 40%
9 greater than the recognized GAAP definition of revenue; thereby
10 knowingly and deliberately attempting to mislead investors and increase
11 Tesla’s stock price;
- 12 b. Prior to the sale of \$2.3 billion of Tesla common stock to public investors
13 in May 2016, promoting the news of “400,000 Model 3 reservations” (even
14 though the Model 3 will not be manufactured in meaningful quantities for
15 at least 18 months) and falsely touting “\$14 billion” of “sales” and/or
16 “orders,” when in fact such reservations are simply refundable deposits in
17 the amount of approximately \$400 million;
- 18 c. Selling \$2.3 billion of Tesla common stock to public investors on May 18,
19 2016, but failing to disclose the following material facts:
- 20 i. Tesla’s poor second-quarter 2016 sales in progress, known to Tesla
21 at the time of the sale of such stock;
- 22 ii. Multiple Tesla driver deaths while the company’s most important
23 new feature, Autopilot, was engaged;
- 24 iii. CEO Elon Musk’s and Tesla’s plans to merge with SolarCity
25 Corporation (“SolarCity”), and the following material facts about
26 SolarCity: SolarCity reported negative free cash flow of
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- 1 approximately \$2 billion for the 12 months ended June 30, 2016;
- 2 iv. SolarCity is owned approximately 20% by Elon Musk; SolarCity's
- 3 CEO is the first cousin of Elon Musk; and SolarCity's directors
- 4 have extensive overlap, financial ties and/or family ties with Tesla
- 5 and its directors.
- 6 d. Comingling Model 3 reservation deposits in the amount of approximately
- 7 \$400 million with Tesla general funds and using said deposits to pay other
- 8 current expenses of Tesla; and
- 9 e. Knowingly and deliberately making misleading forecasts about future
- 10 products and revenue growth.

11 10. On September 14, 2016, Tesla filed the instant civil action, Case No.

12 16CV299916, against Katz in Santa Clara County Superior Court, accusing Katz of using a

13 Yahoo email address to "credibly impersonate" Tesla CEO Elon Musk. The Tesla complaint

14 specifically alleges that on the evening of August 3, 2016, Katz sent the Chief Financial Officer

15 of Tesla, Jason Wheeler, an email "purporting to be from CEO Elon Musk," allegedly from the

16 Yahoo email account, elontesla@yahoo.com (the "Elontesla Email"). Tesla Complaint at ¶ 9.

17 11. On information and belief, after CFO Wheeler purportedly received the Elontesla

18 Email, Tesla and its agents investigated Katz. On August 4, 2016—the day immediately after

19 Tesla CFO Wheeler allegedly received the Elontesla Email, Tesla and its agents, on information

20 and belief, accessed Katz's Twitter account, [@ValuationMatters](#), without authorization from Katz.

21 12. According to the log-in history of Katz's Twitter account, on August 4, 2016 at

22 3:25 PM, a person logged into this account from an Internet Protocol ("IP") address, which upon

23 information and belief, corresponds to the IP address used by the two Best Buy electronics stores

24 closest to the Tesla factory in Fremont, California. The closest such Best Buy store, located at 63

25 Ranch Drive in Milpitas, California, is approximately 7.0 miles from the Tesla factory. The

26 second-closest Best Buy store, located at 31350 Courthouse Drive, Union City, California, is

27 approximately 11.3 miles from the Tesla factory. Other area Best Buy stores, which are further

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1 away from the Tesla factory do not use this IP address.

2 13. Each of these Best Buy stores makes available, on its showroom floor, sample
3 computers and smart phones for customers to try out while they are shopping for devices. These
4 devices are connected via Wi-Fi to the store's Internet connection, which enables customers to
5 access the Internet through these floor sample devices. Both of these Best Buy stores sells
6 products manufactured by Apple, including the Apple iPhone.

7 14. On information and belief, Tesla CEO Elon Musk maintains an office at the Tesla
8 factory in Fremont and by his own admission spends "an enormous amount of time" there. On
9 May 4, 2016, Musk stated on a quarterly earnings call: "I'm personally spending an enormous
10 amount of time on the production line. My desk is at the end of the production line; I have a
11 sleeping bag in a conference room adjacent to the production line which I use quite frequently."

12 15. Based on the timing of the unauthorized access of Katz's Twitter account, and on
13 the physical proximity to the Tesla factory of the Best Buy stores that use the originating IP
14 address, and upon information and belief, on August 4, 2016 Tesla dispatched an employee or
15 agent from its factory to a nearby Best Buy store, in order to use a Best Buy floor sample iPhone
16 to access Katz's Twitter account, from an IP address that did not correspond to Tesla. In this
17 way, Tesla sought to conceal its illegal and criminal activities, specifically its violations of
18 California Penal Code § 502(c).

19 16. Katz has never used this Best Buy IP address to log into his Twitter account. The
20 Best Buy IP address was only used on one occasion to access Katz's Twitter account—on August
21 4, 2016, the day immediately after CFO Wheeler allegedly received the Elontesla Email.

22 17. On information and belief, Tesla and its agents (i) knowingly accessed and,
23 without the permission of Katz, used data from Katz's Twitter account in order to wrongfully
24 obtain data; (ii) knowingly accessed and, without the permission of Katz, took, copied and made
25 use of data from Katz's Twitter account; and (iii) knowingly accessed, without the permission of
26 Katz, Katz's Twitter account, in violation of California Penal Code § 502(c)(7). On information
27 and belief, Tesla did so in order to identify, intimidate, publicly humiliate and silence an
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1 outspoken critic of Tesla, and discourage others from criticizing the company.

2 18. Under California Penal Code § 502(e), the owner of the computer system,
3 computer network, computer program, or data who suffers damage or loss from a violation of
4 § 502(c) may bring a civil action against the violator for compensatory damages, injunctive relief,
5 or other equitable relief, punitive and exemplary damages, and attorney's fees.

6 19. As a result of Tesla illegally accessing his Twitter account, Katz has suffered
7 damages, including loss of earnings and damage to reputation, and reasonable attorney's fees, in
8 an amount to be shown according to proof at trial.

9
10 **FIRST CAUSE OF ACTION**
11 **UNAUTHORIZED ACCESS TO COMPUTER DATA**
12 **IN VIOLATION OF CAL. PENAL CODE § 502(c)(1), (c)(2), (c)(7), (e)**
13 **(As Against All Cross-Defendants)**

14 20. Cross-complainant Katz incorporates by reference the allegations of paragraphs 1
15 through 19 above as though repeated here.

16 21. On or about August 4, 2016, cross-defendants Tesla, its agents, and Roes 1-10 did
17 knowingly access and without permission use data from Katz's Twitter account in order to
18 wrongfully obtain data, in violation of California Penal Code § 502(c)(1).

19 22. On or about August 4, 2016, cross-defendants Tesla, its agents, and Roes 1-10 did
20 knowingly access and without permission take, copy and make use of data from Katz's Twitter
21 account, in violation of California Penal Code § 502(c)(2).

22 23. On or about August 4, 2016, cross-defendants Tesla, its agents, and Roes 1-10 did
23 knowingly and without permission access Katz's Twitter account, in violation of California Penal
24 Code § 502(c)(7).

25 24. Cross-defendants' actions were malicious, oppressive, and fraudulent within the
26 meaning of Civil Code § 3294, entitling cross-complainant to punitive or exemplary damages in
27 an amount sufficient to punish or set an example of cross-defendants.
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PRAYER FOR RELIEF

WHEREFORE, cross-complainant Katz prays for relief and judgment against cross-defendants as follows:

1. For compensatory damages of not less than \$1,000,000 as proven at trial;
2. Punitive and exemplary damages, according to proof;
3. Injunctive relief;
4. For interest as provided by law;
5. Reasonable attorney's fees, as provided by law; and
6. For such other and further relief as the Court deems just and proper.

DATED: November 2, 2016

RESPECTFULLY SUBMITTED,

GALLO LLP

By: 

ANDREW S. COWAN

Attorneys for Cross-Complainant
Todd A. Katz

DEMAND FOR JURY TRIAL

Cross-Complainant hereby demands a jury trial on all issues so triable.

DATED: November 2, 2016

RESPECTFULLY SUBMITTED,

GALLO LLP

By: 

ANDREW S. COWAN

Attorneys for Cross-Complainant
Todd A. Katz

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

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

On November 2, 2016, I served the foregoing document:

CROSS COMPLAINT

on the interested parties in this action addressed as follows:

John Hueston Eric Hayden Hueston Hennigan LLP 620 Newport Center Drive Suite 1300 Newport Beach, CA 92660	Counsel for Plaintiff and cross-defendant, Tesla Motors Inc.
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By First Class Mail, by enclosing the documents in an envelope and depositing the sealed envelopes with the United States Postal Service at Los Angeles, California, with the postage fully prepaid.

By Overnight Delivery Service, by enclosing the documents in a sealed envelope, with delivery fees paid or provided for, in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by Federal Express to receive documents.

By Electronic Mail, by sending it via electronic mail without transmission error, at _____ a.m./p.m. to the email address(es) provided by the party(ies) identified above, pursuant to CCP 1010.6(a)(6).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on November 2, 2016, at Los Angeles, California.



EMILY WIRICK