Ji Chang Son, et al. v. Tesla, Inc.,
SACV 16-2282 JVS

TENTATIVE ORDER RE MOTION TO DISMISS

Plaintiffs Ji Chang Son ("Son") and his minor child, K.M.S. (together, "Plaintiffs), filed their Third Amended Complaint ("TAC") against Defendant Tesla, Inc. ("Tesla") alleging violations of California and federal consumer protection laws, negligence, product liability, slander per se, and defamation. (Docket No. 80). Tesla moves to dismiss the false advertising, breach of warranty, slander per se, and defamation claims. (Docket No. 91). Plaintiffs oppose the motion. (Docket No. 95). Tesla filed its reply. (Docket No. 96).

For the following reasons the Court **GRANTS** the motion.

I. Factual Allegations

The TAC alleges the following:

Tesla is a manufacturer of electric vehicles, and it markets and sells these vehicles through a national network of stores. TAC at ¶ 9. In February 2012, Tesla announced the development of a full-sized, all electric luxury crossover SUV called the Model X. Id. At the time, Tesla stated that the Model X Performance could accelerate from 0 to 60 miles per hour in 4.4 seconds, making it faster than many sports cars, including the Porsche 911. Id. By the time Tesla began delivering the Model X, it was offered in two performance packages: the P90D, which could accelerate from 0 to 60 miles per hour in 3.8 seconds; and the Ludicrous P90D, which could accelerate from 0 to 60 miles per hour in 3.2 seconds. Id. at ¶ 11. Each of the performance models had a top speed of 155 miles per hour. Id. Tesla now offers a Model X that can accelerate from 0 to 60 miles per hour in 2.9 seconds. Id. at ¶ 12.

Every Model X is equipped with "a forward-looking camera, radar, and 360-degree sonar to enable advanced autopilot features." Id. at ¶ 14. Tesla also promoted its "over-the-air software updates" that allow Tesla to "regularly improve

the sophistication of these features, enabling increasingly capable safety and convenience features." Id. at ¶ 15. The Model X is also equipped with two safety features called "Forward Collision Warning" and "Automatic Emergency Braking." Id. at ¶ 16.

Son is a well-known South Korean movie star and celebrity. Id. at ¶ 34. He and his wife purchased a 2016 Model X from Tesla on August 5, 2016. Id. at ¶ 1. While he was pulling into the garage of his Orange County home, Son experienced an "uncommanded [sic] full power acceleration," which caused him to crash through his garage and into his living room, injuring him and his son who was a passenger in the vehicle. Id. at ¶ 3.

"Prior to, and at the time of, the purchase of his Model X, Plaintiff Son was informed by Tesla sales personnel of the various safety features with which the Model X was equipped, including Frontal Collision Alert and Automatic Emergency Braking." Id. at ¶ 2. "It was explained to [Son] that Automatic Emergency Braking was intended to prevent accidents from happening and that the collision avoidance features were designed to increase the safety of the Model X." Id. As described in the Model X Owner's Manual:

> [T]he following collision avoidance features are designed to increase the safety of you and your passengers:
>
> - Forward Collision Warning provides visual and audible warnings in situations where there is a high risk of a frontal collision . . . .
>
> - Automatic Emergency Braking automatically applies braking to reduce the impact of a frontal collision . . . .
>
> The forward looking camera and the radar sensor are designed to determine the distance from any object (vehicle, motorcycle, bicycle, or pedestrian) traveling in front of Model X. When a frontal collision is considered unavoidable, Automatic Emergency Braking is designed to automatically apply the brakes to reduce the severity of the impact.

> When Automatic Emergency Braking applies the brakes, the instrument panel displays a visual warning and you'll hear a chime. You may also notice abrupt downward movement of the brake pedal. The brake lights turn on to alert other road users that you are slowing down.
>
> . . .
>
> Automatic Emergency Braking operates only when driving between 5 mph (8 km/h) and 85 mph (140 km/h).
>
> Automatic Emergency Braking does not apply the brakes, or stops applying the brakes, in situations where you are taking action to avoid a potential collision. For example:
>
> - You turn the steering wheel sharply.
> - You press the accelerator pedal.
> - You press and release the brake pedal.
> - A vehicle, motorcycle, bicycle, or pedestrian, is no longer detected ahead.

Id. at ¶ 16.

Plaintiffs allege that, after the filing of this lawsuit, Tesla "unleashed a pu[l]bic attack" on Son, asserting he was the cause of the accident and that he "attempted to use his celebrity status to threaten Tesla in an effort to achieve personal financial gain." Id. at ¶ 34. Tesla stated in a December 2016 "press release that was widely disseminated in both the United States and South Korea":

> We take the safety of our customers very seriously and conducted a thorough investigation following Mr. Son's claims. The evidence, including data from the car, conclusively shows that the crash was the result of Mr. Son pressing the accelerator pedal all the way to 100%. . . . Before filing his class action lawsuit against Tesla, Mr.

Son had threatened to use his celebrity status in Korea to hurt Tesla unless we agreed to make a financial payment and acknowledge that the vehicle accelerated on its own. However, the evidence clearly shows the vehicle was not at fault. Our policy is to stand by the evidence and not to give in to ultimatums.

Id. "Tesla's media play . . . is still being circulated on the internet." Id. at ¶ 35. Additionally, in or around August 2017, "[a] number of news media in America and South Korea had interviewed Tesla's representatives and reported that Tesla blamed Mr. Son's 'horrible' driving for the cause of the incident, and described this lawsuit as 'just a crass money play.'" Id. at ¶ 36.

Plaintiffs further allege that in or about August 2017 "a sales representative of Tesla's dealership on South Korea even made a statement to their customer that Mr. Son was paid by other car manufacturers to go after Tesla." Id. at ¶ 37. Plaintiffs allege that Son's reputation has been significantly harmed as a result of Tesla's "spurious allegations" and that he has suffered monetary damages. Id. at ¶ 35. Plaintiffs claim that Tesla made these statements "with the specific intent to injure [Son] and without any reasonable basis for believing them to be true." Id. at ¶ 38.

II. Legal Standard

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a Rule 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Nor must the Court "'accept as true a legal conclusion couched as a factual allegation.'" Id. at 678–80 (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its

experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

III. Discussion

A. Plaintiffs' Slander and Defamation Claims

Tesla first argues that Plaintiffs' slander and defamation claims are time-barred because they do not fall within the one-year statute of limitations. (Docket No. 91 at 7 (citing Cal. Code Civ. Proc. § 340(c))).

"Defamation constitutes an injury to reputation; the injury may occur by means of libel or slander." Shively v. Bozanich, 31 Cal. 4th 1230, 1242 (2003). In general, "a written communication that is false, that is not protected by any privilege, and that exposes a person to contempt or ridicule or certain other reputational injuries, constitutes libel." Id. (citing Cal. Code Civ. Proc. § 45). "A false and unprivileged oral communication attributing to a person specific misdeeds or certain unfavorable characteristics of qualities, or uttering certain other derogatory statements regarding a person, constitutes slander." Id. (citing Cal. Code Civ. Proc. § 46).

"One of the elements of the tort of defamation is 'publication.' In general, each time the defamatory statement is communicated to a third person who understands its defamatory meaning as applied to the plaintiff, the statement is said to have been 'published,' although a written dissemination, as suggested by the common meaning of that term, is not required. Each publication ordinarily gives rise to a new cause of action for defamation." Id.

Under the so-called "single publication rule," codified by California statute as California Code of Civil Procedure § 3435.3, for any single publication—such as one issue of a newspaper, book, magazine, one presentation to an audience, one radio or television broadcast, or one exhibition of a motion picture—there is only a single potential action for a defamatory statement, no matter how many copies of the newspaper or book, etc., are distributed. Id. at 1245.

With respect to statute of limitations, publication is said to occur on the "first general distribution of the publication to the public." Belli v. Roberts Furs 240 Cal. App. 2d 284, 289 (1966). "[A] new edition or new issue of a newspaper or book still constitutes a new publication, giving rise to a new and separate cause of action and a new accrual date for the purpose of the statute of limitations." Shively, 31 Cal. 4th at 1246 n.7 (emphasis original).

In a 2004 case, the California Court of Appeal held that a defamatory statement made on the internet is subject to the single publication rule. See Traditional Cat Assn., Inc. v. Gilbreath, 118 Cal. App. 4th 392, 399–404 (2004). The court reasoned that the policies underlying the single publication rule, namely, the avoidance of multiple actions and stale claims, "are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the Internet." Id. at 403–04. Thus, the court held, the single publication rule applies to physical publications as well as those published on the internet.

Here, Tesla's "press release" was published on the internet on December 30, 2016 and the allegedly slanderous statements were made in Korea in August 2017. TAC at ¶ 34, 36, 37. Plaintiffs filed the TAC, in which defamation and slander were first alleged, on January 7, 2019, over one year later than either alleged statement. See Docket Nos. 1, 25, 40, 80. Thus, Plaintiffs defamation and slander causes of action are untimely unless an exception to the statute of limitations apples.

Plaintiffs argue that republication exception applies to their defamation claim because the allegedly defamatory statement was "constantly republished by third parties" and that such republication was reasonably foreseeable by Tesla. (Docket No. 95 at 8). The Court disagrees.

"[W]hen the original defamer repeats or recirculates his or her original remarks to a new audience," each publication of the defamatory statement gives rise to a new cause of action. Shively, 31 Cal. 4th at 1242. "[T]he repetition by a new party of another person's earlier defamatory remark also gives rise to a separate cause of action for defamation against the original defamer, when the repetition was reasonably foreseeable. Id.

Here, Plaintiffs allege that Tesla's "press release" is "still being circulated on the internet." However, Plaintiffs do not state which websites have republished the original statements. The republication exception requires that a new party republish the allegedly defamatory statements and that such republication was reasonably foreseeable by Tesla. Absent such allegations, the Complaint is deficient.

Thus, Plaintiffs' defamation and slander causes of action are **DISMISSED** as untimely.

B. Plaintiffs' False Advertising Claim

Next, Tesla argues that Plaintiffs' claim under California's false advertising law ("FAL") should be dismissed because they fail to allege that they relied on any false or misleading statements in purchasing the Model X. Docket No. 91 at 12.

California's false advertising law ("FAL") prohibits any "unfair, deceptive, untrue, or misleading advertising." Cal. Bus. and Prof. Code § 17500. When claims under the "FAL are based on a manufacturer's alleged misrepresentations about a product's characteristics, those claims sound in fraud and Rule 9(b) applies." Janney v. Mills, 944 F. Supp. 2d 806, 817 (N.D. Cal. 2013). Under Rule 9(b), a plaintiff must plead each element of a fraud claim with particularity, i.e., the plaintiff "must set forth more than the neutral facts necessary to identify the transaction." Cooper v. Pickett, 137 F.3d 616, 625 (9th Cir. 1997) (emphasis in original). A fraud claim must be accompanied by "the who, what, when, where, and how" of the fraudulent conduct charged. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003). "A pleading is sufficient under rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989).

Furthermore, to state a claim under the FAL, "a plaintiff must allege facts showing that he or she suffered an economic injury caused by the alleged violation. Because 'reliance is the causal mechanism of fraud' this requires pleading facts showing actual reliance, that is, that the plaintiff suffered economic injury as a result of his or her reliance on the truth and accuracy of the defendant's

representations." Goonewardene v. ADP, LLC, 5 Cal. App. 5th 154, 184 (2016) (internal citations omitted).

Plaintiffs fail to allege facts to support their claim of false advertising. The only allegations in the TAC of statements relied upon by Plaintiffs are:

> (1) "Prior to and at the time of, the purchase of his 2016 Tesla Model X, Plaintiff Son was informed by Tesla sales personnel of the various safety features with which the Model X was equipped, including Forward Collision Alert and Emergency Automatic Braking,"
>
> (2) "It was explained to Plaintiff Son that Automatic Emergency Braking was intended to prevent accidents from happening in the first place and that the collision avoidance features were designed to increase the safety of the Model X,"
>
> (3) "In purchasing and/or leasing their Tesla vehicles, Plaintiffs relied on the misrepresentations and/or omissions of Tesla with respect to the safety and reliability of such vehicle.
>
> (4) "Tesla's representation turned out not to be true because the vehicles can unexpectedly and dangerously accelerate out of the driver's control."

TAC ¶¶ 2, 71. The statements regarding the Model X's safety features, however, are not alleged to be false. The fact that the safety features did not, in fact, prevent an accident does not make the fact that the safety features were intended to prevent accidents false. See Kearney v. Hyundai Motor Co., No. SACV 09-1298 DOC (MLGx), 2010 U.S. Dist. LEXIS 68242, at *30–32 (C.D. Cal. June 4, 2010) (allegation that safety feature failed to operate in particular circumstances did not adequately plead falsity because defendant did not say the feature would operate in that situation).

In Lee v. Toyota Motor Sales, U.S.A., Inc., 992 F. Supp. 2d 962 (C.D. Cal. 2014), for example, the plaintiff alleged that "(a) a statement in the owner's manual

for the 2012 Prius V that '[i]f the [Pre-Collision System] determines that a collision is unavoidable, the brakes are automatically applied to reduce the collision speed' and (b) a statement from the brochure for the 2013 Prius V stating "an available Pre-Collision System (PCS) employs the radar to determine if a frontal collision is unavoidable, and automatically applies to brakes" were misleading because, while "technically true," "the speed reduction provided by the pre-collision braking system is 'negligible.'" Id. at 974. The court granted a motion to dismiss for failure to state a claim, reasoning that the statements were "true because the PCS does come equipped with a pre-collision braking feature that automatically applies the brakes to reduce vehicle speed" and "Plaintiffs have not alleged that they saw, read, or in some way relied on a statement by Toyota promising that the pre-collision braking feature in their Prius' PCS would operate at a particular level of efficiency." Id.

Similarly, nothing in the challenged statements could be read to mean the safety features would have prevented their accident. The statements regarding Frontal Collision Warnings and Automatic Emergency Braking indicate, not that accidents will be avoided, but rather that the safety features are designed to increase safety. Plaintiffs have not alleged facts that negate the intention or design of these features. Accordingly, Plaintiffs claim for false advertising is **DISMISSED**.

C. Plaintiffs Breach of Written Warranty Claim

Finally, Tesla argues that Plaintiffs' breach of written warranty claim should be dismissed because Plaintiffs fail to allege the specific provisions of the warranty and instead rely solely on marketing statements.

The Magnuson-Moss Warranty Act ("MMWA") defines a written warranty as follows:

> [A]ny written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period time.

15 U.S.C. § 2301(6)(A).

As an initial matter, Plaintiffs fail to allege the specific provisions of Tesla's Basic Limited Warranty. Instead, the only allegation in the TAC regarding a "written warranty" is that "Tesla's 5 year/60,000 miles Basic Warranty and 10 year/100,000 miles Powertrain Warranty are 'written warranties' within the meaning of 15 U.S.C. § 2301(6)." TAC at ¶ 88. The Court finds this "threadbare allegation" insufficient to state a claim. Plaintiffs may, alternatively, cure this defect by alleging a "written promise" made in connection with the sale of the Model X. See 15 U.S.C. § 2301(6)(A). Here, Plaintiffs allege that they were exposed to marketing statements regarding the safety features of the Model X and that Tesla breached these warranties by:

> "not repairing or adjusting the Defective Vehicle's materials and workmanship defects; providing Defective Vehicle not in merchantable condition and which present an unreasonable risk of sudden unintended acceleration and not fit for the ordinary purpose for which vehicles are used; providing Vehicles that were not fully operational, safe, or reliable; and not curing defects and nonconformities once they were identified."

TAC at ¶ 90. However, as discussed above, the statements made by Tesla regarding the Model X's safety features are general descriptions of what the features were intended to do, not "promises" of what they would do. Thus, Plaintiffs MMWA cause of action is **DISMISSED**. See Anderson v. Jamba Juice Co., 888 F. Supp. 2d 1000 (N.D. Cal. 2012) (dismissing § 2301 claim because "a general product description rather than a promise that the product is defect free . . . did not create a written warranty within the meaning of the MMWA.").

IV. Conclusion

For the foregoing reasons, Plaintiffs third, fifth, ninth, and tenth causes of action are **DISMISSED** without prejudice. Plaintiffs are granted 30 days to amend.

IT IS SO ORDERED.