

1 Hon. William F. McDonald (Ret.)
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8 JUDICIAL ARBITRATION AND MEDIATION SERVICE
 9 ARBITRATION

10 TESLA MOTORS, INC.,

11 Claimant,

12 vs.

13 FISKER COACHBUILD, LLC, et al.,

14 Respondent

JAMS Case No. 1200040910

Arbitrator: William F. McDonald (Ret.)

CORRECTED FINAL AWARD

21
 22 This matter came on for Hearing commencing on September 10, 2008, before the
 23 Honorable William F. McDonald (Ret.), Arbitrator. All parties appeared with Counsel. The
 24 Arbitrator having heard testimony considered all evidence, including Exhibits received into
 25 evidence, makes the following Corrected Final Award, correcting a computational error in the
 26 Final Award dated November 21, 2008.

27
 28 SUMMARY OF FACTS

1
2 Tesla Motors (Tesla), a producer of an all electric sports car, desirous of expanding its
3 line of vehicles to include an all electric 4-door, 5 passenger sedan (the WhiteStar) contacted a
4 number of automobile design studios about designing such a vehicle. One of these was Fisker
5 Coachbuild (Fisker). Fisker was a well known designer in the automotive industry and a well
6 known manufacturer of the Tramonto and the Latigo by what is known as the reskinning
7 process. Elon Musk (Musk), the Chairman of the Board of Tesla, testified he did not want a
8 designer who was also involved in manufacturing an automobile to be involved in the WhiteStar
9 design.

10
11 Exhibit 209 was the Tesla Request for quotations for the design of the WhiteStar. The
12 WhiteStar was to be an all-electric drive vehicle. The hardpoints for the design were based upon
13 the Ford Fusion platform. The vehicle was to seat five, two 98th percentile seats in front and
14 three 95th percentile seats in rear. It was to have a rear-mounted motor with the energy storage
15 system (ESS) under the structural floor. The vehicle was to compete with the equivalent of
16 September 2006 \$35,000 to \$45,000 sedans.

17
18 Based thereon, Fisker submitted a proposal, which resulted in a contract between the
19 parties dated January 19th, 2007, Exhibit 222. The Terms and Conditions, commencing at page 9
20 thereof, are of particular importance to this dispute. There are articles spelling out the
21 confidentiality obligation and how it was to be implemented, how the existence of the working
22 relationship could be disclosed, the desire by Tesla to use "Designed by Fisker Coachbuild" as a
23 promotional tool, Tesla ownership of defined work product, and in Section 8 that "---nothing in
24 the Proposal or in this Agreement prohibits Fisker from providing services which are similar or
25 identical to those being provided to Tesla".

26
27 Fisker commenced work on the project. Fisker early expressed concerns that the design
28 criteria, particularly the rear seat width and headroom requirements and adherence to the Ford
Fusion hardpoints, inhibited the design of a 2 "beautiful and cool" vehicle. The under floor

1 space requirements for enough battery for the vehicle to have a minimum of 250 mile range as
2 an all electric vehicle compounded the rear seat headroom problem. Musk would tell Fisker it
3 could deviate from the hardpoints to improve the design of the vehicles. The Tesla engineers
4 would then tell Fisker the design had to comply with the hardpoints.

5
6 Fisker continued to work on the design. The base price of the WhiteStar increased to
7 around \$50,000. Exhibit 52 is a Tesla press release dated February 19, 2007 describing the car
8 and that price point. On April 15, 2007 Musk requested copies of the Fisker design images of
9 the WhiteStar to use in presentations to investors, stating the car was "starting to look pretty
10 good"(Exhibit 241).

11
12 There is a dispute in the testimony as to when Fisker was informed Tesla was
13 considering a plug-in hybrid electric vehicle (PHEV). Musk and others testified Fisker was
14 apprised of this in conversations early on. Other Tesla people testified this was a closely held
15 secret within Tesla and Fisker deliberately was not informed of this until September, 2007, when
16 the second contract was executed.

17
18 Fisker continued to look for other projects. Fisker entered into discussions with the
19 principal of Quantum Fuel Systems Technologies Worldwide (Quantum) about a possible joint
20 venture to produce a line of vehicles utilizing Quantum's propulsion technologies. A letter of
21 intent was entered into between Fisker and Quantum in May 2007 (Exhibit 247). Four vehicles
22 were contemplated, a 4-door sports sedan, a 2-door sports coupe, a 2-door convertible, and a 4-
23 door SUV. The vehicles were to be manufactured totally, not reskinned, by a new company to
24 be called Fisker Automotive. Quantum was to own 62% of Fisker Automotive and Fisker would
25 own 38%.

26
27 Tesla was not informed at the time of the Fisker -Quantum venture. Musk sent Fisker an
28 e-mail on May 31, 2007 expressing satisfaction with the progress on WhiteStar (Exhibit 251).

On July 19, 2007, Tesla sent Fisker an e-mail putting the WhiteStar project on hold (Exhibit

1 261). The stated reason was that difficulty in meeting the performance goals required a
2 rethinking of the vehicle specifications, both interior and exterior. The e-mail further expressed
3 Tesla's satisfaction with the work done by Fisker.
4

5 Sometime around July 31, 2007, a financial "teaser" was sent out by a venture capitalist
6 on behalf of the Fisker-Quantum joint venture, Exhibit 288. The purpose was to raise capital for
7 a PHEV show car to be shown at the January 2008 Detroit Auto Show. A rollout of four
8 vehicles was contemplated by 2011. Exhibit 288 contained sketches of four vehicles, including
9 a 4-door sedan, to have a MSRP of \$80,000. Tesla became aware of Exhibit 288 on July
10 31,2007. Musk expressed a concern that if the Fisker vehicle was to compete with WhiteStar,
11 the relationship with Fisker should be terminated immediately.
12

13 Tesla investigated. It contacted Fisker for details. Fisker informed Tesla it felt there was
14 no conflict. Tesla contacted Bernhard Koehler at Fisker for details on August 20, 2007.
15 Koehler testified he informed Tesla why Fisker did not see a conflict. Tesla disputes being
16 provided the details why Fisker did not see a conflict. Koehler testified he told Malcolm Smith
17 (Tesla) the show car would be a 4-door, 4-seater, \$80,000 PHEV vs Tesla's 4-door 5-seater,
18 \$50,000 all electric vehicle.
19

20 Tesla concluded the Fisker-Quantum venture would not raise the necessary capital,
21 lacked the necessary technical experience with PHEV technology, and would never get off the
22 ground. Tesla joked about selling the venture some of its technology. On September 5, 2007,
23 Darryl Siry of Tesla informed the Executive Staff of Tesla of the conclusion the Fisker –
24 Quantum venture would not amount to much of anything and recommended Tesla go forward
25 with Fisker to complete the styling of WhiteStar for construction of a demonstration car by June,
26 2008.
27

28 Tesla entered into negotiations with Fisker for a new contract to complete the styling. Per
Exhibit 264, the timetable was to be tight and only limited surface modifications were

1 permitted. On September 18, 2007, a new contract, Exhibit 268, was entered into between Tesla
2 and Fisker for this work. The "Terms and Conditions" were identical to those in the original
3 contract, Exhibit 222.

4
5 On October 31, 2007 Quantum and Fisker announced they had received the necessary
6 funding and were proceeding with the show car for the 2008 Detroit Auto Show, Exhibits 301
7 and 36. On November 8, 2007 at Musk's direction, Tesla terminated the agreement with Fisker,
8 Exhibit 273. The Fisker Automotive car was shown at the Detroit Auto Show in January, 2008.
9 The show car contained a two dimensional mockup of a center console which had some
10 resemblance to the Motorola RAZR cell phone. Some of the Fisker designs for the WhiteStar
11 also used a console design based upon the Motorola RAZR. Eric Noble, an expert witness for
12 Fisker testified there were other show cars at the Detroit Auto Show which appeared to have
13 center console designs which might have been based upon the Motorola RAZR design, as well
14 as the Lexus 460H. In January 25, 2008, Fisker Automotive entered into a Powertrain
15 Development Agreement with Quantum.

16
17 April 14, 2008, Tesla filed this action in San Mateo Superior Court against Fisker,
18 Quantum, Fisker Automotive, Henrik Fisker, and Bernhard Koehler, The suit stated causes of
19 action for fraud, breach of contract, violation of the Uniform Trade Secrets Act, and unfair
20 competition. ON April 15, 2008 a columnist for the New York Times wrote a column about the
21 filing of the lawsuit and quoted Musk therein making disparaging comments about Fisker and its
22 work.

23
24 Pursuant to the Arbitration provision in both Tesla – Fisker contracts, the matter was
25 ordered to arbitration. Tesla employees during the relevant time, VanAssche and Dickinson,
26 both testified in the arbitration they were not aware of any Tesla confidential information
27 improperly used by Fisker in developing the Fisker Automotive vehicle, the Karma.

28

1
2 ISSUES
3

4 Although others were initially alleged, after Hearing, before Oral Argument, Tesla
5 reduced its Trade Secrets violations to number 2 on its Amended Trade Secret Designation:
6 Tesla's strategic goals, and actual and conceptual marketing plans and techniques for developing
7 and pursuing the "green" luxury, high-performance sedan market for Electric Vehicles; as well
8 as the Motorola RAZR derived center consol design. With that as the basis for the alleged Trade
9 Secrets violations, did Fisker commit any of the breaches alleged in Tesla's First Amended
10 Complaint herein? If Fisker did not commit the violations of the Uniform Trade Secrets Act as
11 alleged, were the assertions thereof made in bad faith, such that Tesla is liable for all of the
12 Respondents' attorney fees in this matter?
13
14
15

16 RULING ON THE ISSUES
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18 There was no evidence Fisker ever concealed its intentions to participate in the
19 development of a PHEV with Quantum, or that it intended to become a manufacturer of a
20 complete automobile. It was well known when the first contract between Tesla and Fisker was
21 executed that Fisker was manufacturing automobiles, although by the reskinning process. Tesla
22 made no inquiry of Fisker concerning this and there is nothing in either Tesla-Fisker agreement
23 prohibiting this. Tesla asserts there is a big difference between reskinning and complete
24 manufacture. This may well be true. However, there was no evidence Fisker had any intention
25 to get into complete manufacturing, beyond dreaming of doing it someday, until the discussions
26 with Quantum ensued. The expert testimony was that because designers are typically working
27 simultaneously on a variety of projects for a variety of manufacturers in the automotive industry,
28 there is no disclosure requirement absent a direct conflict.

1 Here there is no evidence Fisker was aware of Tesla's aversion to doing business
2 with a company that was or might become a manufacturer. The preponderance of the evidence is
3 that Fisker was not aware of Tesla's plans to shift to a PHEV for the WhiteStar until September
4 2007, months after the venture agreement with Quantum. Tesla made inquiry of Fisker and
5 others in July 2007, concerning Fisker's plans. Tesla satisfied itself as to the lack of any viable
6 conflict before entering into the second agreement with Fisker. Nothing was contained in the
7 second agreement which referred to Fisker's development of a PHEV and placing any
8 restrictions thereon.

9
10 There is no evidence Fisker used any confidential information of Tesla's in the Karma
11 project. The testimony was the desire to do a PHEV and to come out first with a 4-door sedan
12 originated with Quantum. The attractiveness of the 4-door market came from Quantum.
13 Quantum had the PHEV technology. There is no evidence Tesla had any PHEV technology
14 before Fisker and Quantum formed their joint venture, let alone that Tesla had shared it with
15 Fisker.

16
17 Tesla announced its production timetable and price range for the WhiteStar in the
18 February 19, 2007 press release, Exhibit 52. At least from that point forward there was nothing
19 confidential or proprietary about such information. The desirable 50 mile range for an Electric
20 Vehicle to run on pure electric power was disclosed by Tesla in Exhibit 290, Elon Musk's blog
21 dated August 2, 2006.

22
23 The uncontradicted testimony was that others were showing center consoles which
24 appeared to be based somewhat on the Motorola RAZR design. The center consoles for the
25 WhiteStar and Karma, while arguably having some starting point with the Motorola RAZR, are
26 not identical in design.

27
28 The evidence is overwhelming that Fisker did nothing wrong. Tesla's pique was based
upon the Fisker - Quantum venture, contrary to Tesla's analysis, being able to come up with the

1 necessary financing and have a show car at the January 2008, Detroit Auto Show.

2
3 Tesla's assertions of violations of the Uniform Trade Secrets Act by Fisker were baseless
4 and neither brought nor pursued in good faith.

5
6
7 RULING ON REMAINING ISSUES

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9
10 Fisker is the prevailing party. Sections 20 of the Terms and Conditions in both Fisker
11 – Tesla Agreements provide the prevailing party shall be entitled to its attorney fees and costs.
12 All of the Respondents are entitled to their attorney fees pursuant to the provisions of the
13 Uniform Trade Secrets Act

14
15 Respondents have submitted an application for Costs and Fees in the amounts of
16 \$119,141.27 and \$1,027,277.76 respectively, with supporting documentation. Tesla timely filed
17 an opposition thereto and Respondents then filed a Reply. Tesla's opposition generally does not
18 oppose Respondents Application but focuses upon two categories, fees to non-litigation counsel
19 and the cost of four models not received into evidence but used by Respondents in the
20 presentation of their opposition at the Hearing.

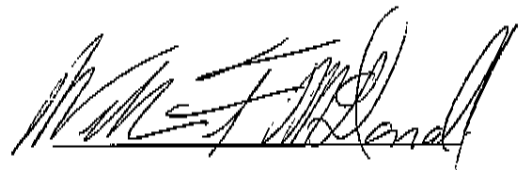
21
22 Respondents concede the merits of some of Tesla's objections and in the Reply
23 reduced the amount of fees sought by \$1534.00. The Arbitrator has reviewed all of the invoices
24 and has found another billing entry by Finck & Dadras for 4/17/08 in the amount of \$2006.00
25 which facially contains some time not related to the litigation. Accordingly this entry will be
26 reduced by \$500.00 to \$15,006.00. The general objection by Tesla to fees by non-litigation
27 attorneys is not supported by Statute, Rule, or Case Law. Fees reasonably incurred in support of
28 a party's defense of an action are compensable.

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Similarly, the models, although not received in evidence, were used in defense of the action were used by Respondents in presentation of their case and were helpful to the trier of fact.

Respondents are awarded \$1,144,385.03 in fees and costs (\$1,025,243.76 fees plus \$119,141.27 costs) .

Date: November 24, 2008



Hon. William F. McDonald (Ret.)
Arbitrator

PROOF OF SERVICE BY FACSIMILE & U.S. MAIL

Re: Tesla Motors, Inc. vs. Fisker Coachbuild, LLC, et al.
Reference No. 1200040910

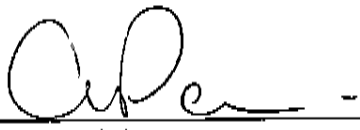
I, Andrea Perini, not a party to the within action, hereby declare that on November 24, 2008 I served the attached Corrected Final Award on the parties in the within action by facsimile and depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Orange, CALIFORNIA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Orange, CALIFORNIA on November 24, 2008.



Andrea Perini