



July 29, 2019

**BY EMAIL**

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***Re: Notice of Breach and Demand for Cure***

This firm is litigation counsel to Tesla Energy Operations Inc. (fka SolarCity, Inc.) (“Tesla”). I am writing to follow up on the notice of breach and demand for cure that Tesla sent to Walmart Inc. (“Walmart”) July 8, 2019, and to respond to the retaliatory notice of breach and demand for cure that Walmart delivered the following day, July 9.

**I. Walmart’s Material Breaches of the Agreements**

As you know, Tesla installed, maintains, and operates 248 solar photovoltaic energy systems located on rooftops at 248 Walmart stores, each system the subject of separate Solar Power & Services Agreement, Solar System Lease & Assignment Agreement, or similar contract (collectively, “Agreements”). While the specific terms of the Agreements vary in some respects, the fundamental underlying purpose of each is the same: Tesla supplies and maintains the systems that reliably generate clean, renewable solar power, and Walmart pays for the use of the equipment or the power it generates.

Regrettably, Walmart’s breaches of contract, deliberate delay, and bad faith have frustrated that fundamental purpose. Today, all 248 rooftop systems lie idle. Of those, 244 systems are offline not because they are inoperable or unsafe, but because Walmart unfairly seeks to exploit claims it asserted – concerning just four **other** systems – as a pretext for refusing to comply with Walmart’s contractual obligations and for demanding

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concessions from Tesla on all 248 systems. For over a year now, Tesla has made extensive efforts to accommodate Walmart's inconsistent and shifting positions, repeated delays, and unreasonable demands, all at significant cost to Tesla. My client continues to prefer a business solution to this dispute, but Walmart's conduct has put the parties on a collision course for litigation.

It is neither necessary, nor realistic, to attempt to document all of Walmart's breaches, misconduct, or bad faith in a single letter. Nonetheless, we will summarize that course of conduct to ensure that Walmart is on notice of the claims that Tesla has against it, as well as Walmart's duties to preserve evidence regarding each of the 248 systems, sites, Agreements and other contracts, as well as Walmart's dealings with Tesla, Walmart's own consultants, and Walmart's counsel, from the inception of the parties' business relationship.

#### **A. The Rooftop Solar Photovoltaic Systems**

Tesla began operating the first of the 248 rooftop systems in or about September 2010. Tesla installed eight systems in 2010 and added 47 systems in 2011; another 88 systems in 2012; 17 systems in 2013; 11 systems in 2014; 32 systems in 2015; and 44 systems in 2016, eventually reaching 248 systems with the addition of the Gardena, California system in 2017. Subsequent to construction and installation, each system passed inspection by the local authority having jurisdiction, and was granted permission to operate by the local utility. Between September 2010 and March 2018, the systems generated over 600,000 MWh of electricity.

#### **B. Without Contractual Obligation, Tesla Accommodated Walmart's Concerns After Unrelated Thermal Events in Spring 2018**

In March and May 2018, two of the 248 commercial systems installed at Walmart sites (Beavercreek, Ohio and Indio, California) experienced unrelated thermal events, in each case a roof fire. Following the second of these fires, on May 31, 2018, Walmart demanded that Tesla de-energize all of the remaining 246 systems at the other sites, despite the fact that those other systems had no history of thermal events and posed no imminent risk to safety or property, whether from thermal events or otherwise. Although Walmart had no right (contractual or otherwise) to demand that the unaffected systems be de-energized, Tesla acquiesced to accommodate the request of a valued customer. Tesla further agreed to inspect each system and remediate any identified issues, to the extent the parties mutually agreed that remediation was necessary after conducting the inspections. This accommodation came at a significant cost, since for most of the systems, Tesla and its investors are paid based on the energy generated by the systems.

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### C. Walmart Caused Delays by Reneging on the First Inspection Protocol

Regrettably, Walmart has repeatedly obstructed and delayed the inspection process. For example, Tesla promptly devised a comprehensive inspection protocol to address any potential safety or operational issues and to bring the systems back online. Walmart agreed to that protocol in July 2018, and Tesla, relying on the agreed protocol, inspected approximately 64 of the system sites. During that time, Walmart did not engage with Tesla concerning the inspection or reports or provide any feedback on the content or substance of the reports. Later, in or about September 2018, Walmart hired multiple consultants, including Mr. Gene Tankersley of HDR, as well as Casey Marshall, David Penalva, and James Nagel of Clean Energy Associates (CEA) and insisted that the agreed protocol be revised with their input. Months were lost as Tesla, Walmart, and its new consultants negotiated a new protocol, reaching agreement only in December 2018.<sup>1</sup>

### D. Walmart Caused Delays By Imposing Extra-Contractual Conditions on Re-Energization, by Failing to Provide Feedback on Inspection Reports, by Failing to Pay its Consultant, and by Not Following Through

In December, Tesla and Walmart agreed that Tesla would complete pilot inspections using the new protocol. By early January, Tesla had reviewed the reports of those inspections with both Mr. Tankersley and CEA, and all agreed that the pass criteria were met for two sites, Colton and Santa Clarita. Tesla asked to re-energize those sites. Instead, on January 8, 2019, Walmart invited Tesla to Walmart's headquarters on January 25, 2019 to discuss re-energization and a plan for "maintaining" the good progress the parties had made in the prior year. Then, on January 18, 2019, Walmart demanded amendments to **every one of the 248** separate Agreements, on terms that would fundamentally change the commercial terms the parties had originally negotiated and agreed upon, force Tesla to insure against risks that Tesla did not create and cannot prevent, and expose Tesla to unlimited liability even for Walmart's own misconduct.

In addition to those patently unreasonable demands, Walmart demanded immediate payment of damages on the three sites that actually had experienced property damage, and that Tesla pay its attorneys' and consultant fees allegedly incurred in connection with all four thermal events. Unless and until its unilateral demands were met, Walmart decreed, it would prevent Tesla from exercising its contractual right to re-energize **any** of the systems – including systems that had never experienced any thermal event, that posed no apparent risk of a thermal event, and that even had been inspected pursuant to the protocol that Walmart and its consultants had expressly agreed to.

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<sup>1</sup> Those advisers purported to find fault with inspections they observed. Tesla disputes those alleged faults, which merely involved the experts pointing out issues that the technicians onsite were in the process of addressing as part of a systematic inspection of the systems.



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Notably, at that point in time, Walmart did not demand that additional work be performed to determine root cause at any of the sites.

The parties met at Walmart's headquarters on January 25, 2019. Although Tesla disagreed with Walmart's demands, Tesla expressed its willingness to provide some contractual and other accommodations to its valued customer. While the parties did not reach agreement during the meeting, they agreed to try to negotiate a resolution to Walmart's demands over the next weeks. At the conclusion of the meeting, however, Walmart expressly authorized Tesla to begin conducting site inspections at scale, raising no issue as to the adequacy of the protocol or the safety of the inspected sites.

Tesla once again worked promptly and diligently to conduct the inspections and provide Walmart with the information Walmart now required. Tesla provided the first completed inspection report in early March and had provided 30 such reports as of June 14, 2019. In an April 30, 2019 phone call, Tesla also pressed Walmart to authorize re-energization of the 17 systems that had already passed inspection as of that date. Walmart did not provide its position during that call, but said it would do so within two weeks. Three weeks later, after repeated follow-up emails from Tesla, on May 20, 2019, Walmart refused to allow re-energization, citing its purported need for more information about the root cause of Beavercreek and Indio, and its demand to be compensated for alleged damages from the four thermal events. However, Walmart did not cite any specific concerns with the safety of any site, and did not provide any feedback on the inspection reports provided by Tesla.

Indeed, despite repeated requests from Tesla for feedback or commentary on those reports, and assurances from Walmart that Mr. Tankersley was reviewing the reports, Walmart has never provided any such feedback. Eventually, Mr. Tankersley told Tesla that he was not performing work related to the reports, and could not share any feedback with Tesla, because of a dispute involving Walmart's failure to pay his fees and because he was waiting for signatures on a new engagement agreement. When Tesla asked Walmart about these matters, Walmart admitted that these administrative issues had delayed and were delaying Mr. Tankersley's work.

Walmart also began insisting that Mr. Tankersley would need to visit each of the inspected sites to verify the reports and confirm that the remediation work had been performed as described. Tesla had no objection to that proposal, provided that work be done expeditiously, and even agreed to pay Walmart's costs of performing the first 30 site inspections. But Walmart repeatedly failed to make any progress in scheduling any site visits, once again despite repeated entreaties by Tesla. As with the reports themselves, Tesla learned that the same payment and contract dispute with Mr. Tankersley was preventing progress on the site visits that Walmart demanded. Given the

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substantial losses to Tesla and its investors that were and are mounting on a daily basis, Walmart's decision to allow the relatively trivial sums owed to Mr. Tankersley to further delay the resolution of this matter was nothing short of bad faith.

Similarly, Tesla agreed to cover a portion of Walmart's consultant fees and asked for a scope of work to evaluate the reasonableness of Walmart's demand for \$600,000 (upfront) over two years. Mr. Tankersley agreed to provide the scope of work on May 2, 2019, and repeatedly confirmed that commitment thereafter. Walmart's representatives repeatedly conceded that this request was reasonable. In or about June 2019, Walmart told Tesla that the scope of work was with Walmart's outside counsel, and later said it could not be shared because of the fee dispute with Mr. Tankersley. Then, on June 26, Walmart provided Tesla with a document called "HDR scope of inspections" that simply listed the equipment on a typical solar site. When Tesla repeated its request for an actual scope of work, Walmart declined, saying—for the first time—that Mr. Tankersley does not want Tesla to know what he is doing (even though Tesla will be onsite during his inspections).

**E. Walmart's Belated and New Demand that Re-Energization of 248 Systems Wait for Additional "Root Cause" Analyses for 2 (or Perhaps 4) Systems.**

Yet another example of Walmart's bad faith and constantly changing demands is its current insistence that none of the 248 systems can be reenergized until Tesla provides final "root cause" analyses for the Beavercreek and Indio incidents (and for the first time in Walmart's July 9 letter, apparently the Yuba City and Denton incidents, too). This is not a reasonable or good faith position either.

The current inspection protocol was designed with the existing root cause reports in hand. It was designed to detect all possible failures in the system from any cause and was crafted based upon extensive input from Walmart's army of consultants and lawyers. As to root cause, Walmart's experts and attorneys inspected all four sites on which there was an incident, purportedly charged Walmart more than \$300,000 for work done in connection with the Yuba City and Indio incidents, and apparently prepared a "final report" at least for Beavercreek. All of this occurred before Walmart authorized Tesla to proceed at scale with inspections.

If Walmart had concerns about any specific site, or about the sites in general, as a result of the root cause information provided by Tesla—and otherwise known by Walmart—that information should have been shared with Tesla long ago. And if Walmart has specific concerns about the safety of any particular site now, Tesla absolutely wants to know what those concerns are. But for Walmart to say that it is ignorant about root cause, withhold what its own consultants and experts have found, and

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insist that more definitive information is needed to re-energize *any site*—regardless of the components on those sites and the detailed inspection reports provided by Tesla—is neither reasonable nor good faith.

Indeed, after Tesla provided the initial reports (on October 20, 2018 for Indio and November 13, 2018 for Beavercreek), Walmart appeared satisfied with the information Tesla provided, and instead turned to focus on its patently non-safety-related objectives of securing contractual concessions, damages payments, and other money from Tesla. Additional reports were not among the host of unreasonable demands that Walmart made in the January 18, 2019 letter, at the January 25, 2019 meeting, in its take-it-or-leave-it proposal on April 5, 2019, or on the joint legal/business call on April 30, 2019. Walmart only raised its request for more (or more final) reports as a pretext, after Tesla showed there was no basis to delay re-energization of the 30 inspected sites.

Walmart's July 9 letter – a tit-for-tat assertion of breach in response to Tesla's July 8 letter – contains the first response of any kind that Walmart has provided concerning Tesla's inspection reports (or at least the 27 reports that Walmart claims to have now reviewed). It remains unclear whether Walmart's consultants have actually reviewed the reports that Tesla provided, or whether the "review" described in the July 9 letter is simply a lawyer's recitation of the issues that Tesla has already identified and fixed, as the reports themselves describe. In any event, Walmart has not identified any defect in the reports, has no grounds to challenge the safety of the inspected systems today, and has no basis to challenge Tesla's conclusion that all issues have been identified and remediated. Importantly, despite its history of shifting demands and reneging on prior commitments, Walmart has expressly conceded that it has no issues with the current, agreed-upon inspection protocol and that the protocol is adequate to pick up all issues, if performed robustly. Thus, even if there had been questions about these 30 systems, there is no dispute now that they are safe and ready to operate—and they have been for months.

**F. Walmart Further Delayed Re-Energization by Slow-Playing  
"Negotiations" Over Its Demand for Contract Amendments and Then  
Refusing to Negotiate**

As explained above, beginning in January 2019, Walmart purported to impose a number of conditions on re-energization, including a wholesale revision to the parties' 248 agreements. While Tesla did not agree with this supposed condition, it was willing to consider amendments that would increase Tesla's liability in the event of future thermal events that it either caused or should have prevented.



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Tesla sent its initial proposal for a contractual amendment on February 20, 2019. Despite Tesla's repeated request for a response, Walmart did not respond, at all, until April 5, 2019, when it sent a proposed amendment, along with other demands, on a purported take-it-or-leave basis. In addition, Walmart purported to condition "moving forward" (i.e., re-energization under the parties' existing, binding contracts) on a number of familiar conditions: (1) payment of disputed damages amounts; (2) up-front payment of \$600,000 in consultant fees for Walmart's purported future site monitoring, and (3) upgrades to certain monitoring capabilities. Walmart's letter concluded:

Tesla must accept the requirement to enter into amendments to the Agreements. If Tesla can accept the contract amendments proposed by Walmart, pay Walmart the confirmed outstanding amount, as well as guarantee the reimbursement of up to \$600,000 to cover the costs of consultants to monitor Tesla's operation and maintenance activities at each site for two years, then Walmart can devote its full attention to the prompt but orderly re-energization of the solar facilities pursuant to the site by site changes and upgrades. Indeed, Walmart is offering a clear path forward, but not an invitation to commence further circular negotiations.<sup>2</sup>

Again, Walmart made no mention of the purported need for further work on determining the root cause of the prior thermal events.

Tesla requested a call to discuss the matter, which took place on April 30, 2019. In advance of the call, Walmart reiterated what it purportedly needed to see from Tesla "in order to decide whether further meetings would be fruitful." That list included: (1) payment for alleged damages related to the thermal events, (2) Walmart's desire for a contractual right to terminate a specific site in the event of a future thermal event, (3) payment for future consultant fees, and (4) enhanced monitoring and reporting. Tesla addressed each of those items on the April 30, 2019 call, signaling its willingness to accommodate Walmart on each of those issues. There was no mention of Walmart's purported need for additional root cause analyses as a precondition to re-energization.

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<sup>2</sup> Even as Walmart was refusing to permit any of the 248 solar photovoltaic systems to be re-energized, and was insisting that they all lie idle, it has been misleadingly boasting to the public about its commitment to renewable energy, including claims about the total amount of solar energy it purportedly generated at its sites. See, e.g., <https://corporate.walmart.com/esgreport/environmental>; <https://corporate.walmart.com/newsroom/2019/05/08/walmart-on-track-to-reduce-1-billion-metric-tons-of-emissions-from-global-supply-chains-by-2030>; <https://corporate.walmart.com/esgreport/data>; <https://www.greenbiz.com/article/walmart-inches-toward-audacious-project-gigaton-goal>.

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Despite Walmart’s demands being wholly unreasonable, Tesla continued to try to work with Walmart in good faith. Tesla spent considerable time reviewing Walmart’s proposed amendment and working with Tesla’s counsel, business leaders, and investors to come up with a reasonable counter-proposal, which Tesla provided on June 5. Tesla and Walmart discussed the timeline on which Walmart would provide its feedback. But instead, on June 21, Walmart simply sent back its April 5 draft amendment, again on a take-it-or-leave it basis.

The contractual changes Walmart demanded are commercially unreasonable and, in many instances, nonsensical. While Tesla had hoped to reach agreement on a reasonable accommodation for Walmart, as a gesture of goodwill, Walmart cut off that dialogue when it refused to engage.

My client has had enough. Walmart cannot negotiate (and renegotiate) a protocol for inspection; then try to impose new, extra-contractual conditions on the exercise of Tesla’s contractual rights; then invite negotiation over those improper, unreasonable conditions; and then refuse to negotiate. Walmart has unfortunately wasted time and diverted resources while undermining the goodwill that Tesla had sought to preserve throughout this process.

**G. Walmart’s Breaches of the Agreements**

As previously explained in Tesla’s July 8 notice of breach and demand for cure, by engaging in the conduct described above, Walmart materially breached the Agreements by

- [REDACTED]
- [REDACTED]
- [REDACTED]

Walmart’s breaches have caused significant compensable damages to Tesla and its investors. These include, but are not limited to, the payments that Walmart is obligated to make for power the systems generate – power that has not been generated solely as a result of Walmart’s obstruction of Tesla’s efforts to re-energize and operate the systems



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pursuant to contract. Over the course of a single year, the amount of those damages is at least \$13.7 million (not including lost incentives) and it increases by at least \$37,400 daily (based on Walmart's historical load).

## **II. Tesla Denies Walmart's Claim that Tesla Has Materially Breached the Agreements**

The parties had scheduled a conference call for the afternoon of July 9 to discuss their ongoing dispute, to be attended by both sides' business and legal teams and their outside counsel. After receiving Tesla's notice of breach, and shortly before the call was to begin, Walmart unilaterally canceled the call. Later that evening, Walmart delivered its own retaliatory "Notice of Material Breach of Solar Power & Services Agreements." That Walmart's notice of breach was merely a pretextual maneuver, made in the hopes of obtaining some degree of leverage, is revealed by the timing alone. The content of the notice merely confirms that fact, as does the fact that the notice appears to have actually been drafted back in May 2019, when Tesla had inspected only 27 systems.

For the avoidance of doubt, Tesla unequivocally denies Walmart's claims of breach. As explained below, none of Walmart's claims has any merit and Walmart has no contractual or other legal right to the concessions it seeks in its demand for cure.

### **A. Beavercreek, Denton, Indio, and Yuba City Thermal Events**

Walmart's letter discusses the thermal events that occurred at four separate sites: Beavercreek, Denton, Indio, and Yuba City. Tesla of course shares Walmart's desire that each and every system operate reliably, efficiently, and above all safely. Each of the incidents is regrettable, and Tesla is and always has been committed to ensuring that thermal events are as rare as possible.

Unfortunately, it is not possible to eliminate all potential risks of fire at a given site or in a given system as Walmart now asks Tesla to do. Walmart needs no reminder of that fact, given the number of publicly reported fires that have occurred even in recent weeks at its stores, all of which have nothing to do with solar photovoltaic systems. See, e.g.,

- <https://www.courier-tribune.com/news/20190715/walmart-evacuated-due-to-fire> (July 15, 2019 fire in Asheboro, North Carolina requiring evacuation; second such fire at that store in a week);
- <https://www.vcstar.com/story/news/local/2019/07/10/cardboard-catches-fire-behind-oxnard-walmart/1699468001/> (July 10, 2019 cardboard/trash fire at Oxnard, California store);

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- <https://www.weeklycitizen.com/news/20190709/walmart-closed-evacuated-on-suspicion-of-fire> (July 8, 2019 evacuation of Gonzales, Louisiana store on account of fire);
- <https://www.berkshireeagle.com/stories/fire-causes-evacuation-at-walmart-in-pittsfield,577821> (June 26, 2019 fire inside Pittsfield, Massachusetts store);
- <https://www.wkrg.com/top-stories/fire-at-thomasville-walmart-closes-store-sunday-evening/> (June 23, 2019 electrical fire inside Thomasville Alabama store requiring closure of store);
- <https://krctv.com/north-coast-news/eureka-local-news/crescent-city-walmart-fire-burns-close-to-propane-tanks> (June 18, 2019 cardboard/recyclables fire at Crescent City, California store);
- <https://www.riverbender.com/articles/details/granite-city-fire-department-quickly-extinguish-fire-at-walmart-35980.cfm> (June 14, 2019 fire inside store in Granite City, Illinois);
- <https://www.ktre.com/2019/06/10/police-man-arrested-after-setting-fire-nacogdoches-walmart-store-closed-due-damage/> (June 10, 2019 arson inside Nacogdoches Texas store);
- <https://wcti12.com/news/local/two-vehicles-pumps-burn-at-walmart-gas-station-in-jacksonville> (May 25, 2019 fire at Walmart gas station);
- <https://www.oregonlive.com/crime/2019/05/fire-inside-lebanon-walmart-creates-toxic-smoke-closes-several-nearby-businesses.html> (May 14, 2019 chemical fire inside Lebanon, Oregon store requiring evacuation of nearby businesses).

We do not cite these incidents to trivialize those at Beaver Creek, Denton, Indio, and Yuba City. Rather, we emphasize that, despite careful planning and design and diligent oversight, fires may occur for widely varying reasons, some of which can be anticipated and mitigated against and some which unfortunately cannot. Tesla does not and cannot warrant that there will never be a fire in a solar photovoltaic system, just as Walmart does not and cannot warrant that there will never be a fire in its stores. Tesla and Walmart negotiated warranties and indemnities to cover losses that arise from incidents that are Tesla's responsibility under the terms of the parties' Agreements.

However, none of these four incidents constitutes or is evidence of a breach of the Agreement by Tesla that applies to the affected site, much less a breach or evidence of a breach at some other site, subject to a different Agreement. In the event of property damage, the Agreements spell out the parties' respective rights and obligations, and Tesla is complying in full with its own obligations. Accordingly, and as you are well aware, Tesla has been working closely with Walmart, Walmart's outside advisers, Tesla's own consultants and outside advisers, and Tesla's insurers, to address the causes of these four incidents and provide compensation to Walmart, even where Tesla believes it does not

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bear responsibility for those losses. Tesla has authorized certain payments, as discussed below, and will continue to work with Walmart to resolve the remainder of its claims.

In addition, although Walmart says that it does not know the actual causes of any of the four thermal events, it nonetheless asserts that **none** “are the result isolated failures such as discrete equipment malfunctions,” and **all** “are symptoms of broad, systemic issues arising from Tesla’s widespread, negligent or grossly negligent installation, inspection, operation, and maintenance of the Systems.” Walmart Letter, at 3. On that unsupported basis, Walmart claims that the circumstances of those four incidents demonstrate that none of the remaining 244 sites are safe to operate.

Not so. For each thermal event, Tesla and its consultants, with the participation of Walmart and its advisers and consultants, inspected the site and examined the evidence to narrow the potential causes and identify, to the extent reasonably possible, the isolated cause of the failure. Although more testing can and may be done in connection with subrogation, the root cause reports provided by Tesla provide an adequate basis to remediate the sites. Moreover, Tesla is confident that, just as Walmart and Mr. Tankersley have already confirmed, the parties’ agreed-upon inspection protocol is broad enough and thorough enough to identify and remedy any condition that appears to have been a potential cause of the incidents at Beaver Creek, Denton, Indio, or Yuba City, or that otherwise appears to present a risk of a future thermal event.

As explained below, Tesla has shared and remains willing to share its consultants’ findings. Again, if Walmart has specific concerns about safety or has its own views or questions about root cause, Tesla urges Walmart to share that information immediately. The fact that Walmart has not done so—and has never done so—strongly suggests that Walmart is delaying re-energization for reasons having nothing to do with safety.

### **B. Purported Findings by Walmart’s Consultants**

Walmart’s July 9 letter also includes a lengthy list of purported “defects in the installation, operation, inspection, and maintenance by Tesla of the Systems” identified by the consultants Walmart hired for this dispute. Walmart Letter, at 4. We note that Walmart has never shared this list with us before, and that Walmart does not identify the supposed defects with specificity that would allow Tesla to confirm or remedy them at any particular location. Tesla thus disputes all of these supposed findings.

We also disagree with Walmart’s contention that its consultants have “confirm[ed] Tesla’s systemic, widespread breaches and negligence.” The parties’ Agreements anticipate that the systems will require periodic maintenance and repair in a manner that is entirely customary within the solar power industry. The fact that some sites in fact



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need maintenance and repair – especially sites that have been idle for a year now – is neither surprising nor a breach of any Agreement. The fact that thorough, comprehensive inspections have identified areas for improvement and opportunities for error correction is equally unsurprising. Tesla welcomes the chance to improve its processes, tools, and monitoring, but that too is not evidence of any breach.

In any event, whatever issues may have been present on the sites, those issues have been addressed in the revised inspection protocol that the parties – with extensive input from Walmart’s consultants – agreed on in December. To the extent that any of these issues genuinely exist at any Walmart rooftop site (and Tesla does not dispute that some of these issues did exist, to varying degrees, at some Walmart rooftop sites), they will be identified, addressed, and remedied through the use of that protocol.

### **C. Reports Pursuant to Agreed Inspection Protocol**

As noted above, Tesla inspected over sixty sites pursuant to the original agreed protocol, and then thirty pursuant to the revised, agreed protocol, each time providing reports to Walmart describing the issues identified and remedied in the inspection. Prior to July 9, despite Tesla’s repeated requests, Walmart provided no substantive feedback regarding any of these reports.

The July 9 letter states that Walmart has reviewed 27 (for some reason, not 30) of the reports, and then simply recites, in summary fashion, the issues that Tesla identified and addressed using the protocol as the parties had intended. While Walmart appears to contend that the reports themselves are somehow evidence of breach, they are nothing of the sort. They are evidence that any asserted maintenance issues have been cured.

Walmart complains that, even if everything it sought to address in the protocol has been identified and addressed, Walmart still “has no meaningful assurances that the underlying causes of those [purported] breaches have been cured or will be avoided in the future.” We disagree. The protocol itself, the close inspection of each site that has occurred or will occur in the future, the learning derived from those inspections, the improved monitoring that Tesla is adopting going forward, and Tesla’s continuing obligations under the contracts all provide substantial, meaningful assurances that the systems will operate reliably and safely in the future.

### **D. Claims of “Ongoing Material Breaches”**

Walmart further contends that Tesla has failed to comply with various contract provisions concerning the standards governing Tesla’s installation, operation, and maintenance of the systems. Once again, we deny those claims of breach, none of which

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are tied to any particular factual allegation in Walmart's letter and many of which are not supported even by allegations, disputed or otherwise.

Based on those assertions, Walmart makes a generic claim that Tesla's supposed "continuing breaches . . . create an imminent risk of damage or injury to people or property and risk violations of applicable law," such that Walmart has the right to disconnect or remove each and every one of the 248 systems. (Walmart Letter, at 8).

Tesla strongly disagrees. Walmart cannot make a claim for breach on scores of sites that it has not inspected at all. Tesla and Walmart have no reason to believe that any of the currently de-energized systems create an imminent risk of damage or injury to people or property and risk violations of applicable law. And especially with respect to the 30 systems that have been inspected under the agreed protocol, Walmart has no basis at all to claim any imminent risk – and indeed makes no actual effort to do so. The same will be true of the remaining systems, once they have been inspected under the agreed-upon protocol. Once again, the only obstacle to that inspection is Walmart's delay and intransigence.

#### **E. Walmart's Demand for Cure**

In its July 9 letter, Walmart also lists what it describes as the "Requirements to Effectuate Cure." (Walmart Letter, at 8). Tesla denies that Walmart has any contractual right to any of the remedies that Walmart lists. In fact, Walmart's insistence that all of these conditions be satisfied, apparently before it will take any action to begin re-energizing the systems, is itself a breach of the Agreements.

Nonetheless, Tesla is willing to satisfy most of the requirements that Walmart has given, as part of a global resolution of our dispute that includes the expeditious re-energization of all of the systems in accordance with the agreed protocol. Subject to that condition, Tesla responds to each of Walmart's demands as follows:

- Final root cause analyses for Beavercreek, Denton, Indio, and Yuba City. Tesla is willing to provide Walmart with Tesla's final reports of its analyses of the potential causes for each incident, as those reports are completed. Again, if Walmart is truly concerned about isolating root cause, we urge Walmart to share the findings and opinions of its own experts and consultants.
- Satisfaction that Tesla can safely and reliably maintain and operate the systems going forward. As noted above, Tesla strongly believes that the inspection protocol itself, the close inspection of each site that has occurred or will occur in the future, the learning derived from those inspections, the improved monitoring

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that Tesla is adopting going forward, and Tesla's continuing obligations under the contracts all provide substantial, meaningful assurances that the systems will operate reliably and safely in the future in a manner consistent with prudent industry practices.

More specifically, the following improvements should provide Walmart with a high level of confidence in Tesla's O&M program moving forward:

- Dedicated task force and escalation path: Tesla has created a Walmart task force to the inspections and has provided Walmart with a list of team member to contact in the event of an emergency, inspection-related issue, or other issue.
- Inspection app: With Walmart's input, Tesla designed and developed an inspection app to improve process flow and inspection quality, dedicating over 700 man-hours to that effort (not counting ongoing maintenance and reporting).
- Inspections: The 30 inspections performed to date have been performed by 5-person teams and have taken about 5 days per inspection. The reports received by Walmart fully document the work performed and issues found. All inspections to date have been performed by Tesla employees, and Tesla has not used third-party contractors for this work. The cost to Tesla of these inspections will be substantial.
- Ongoing maintenance protocol: Tesla has committed to performing the full, agreed-upon inspection protocol on an annual basis. These inspections substantially exceed industry standards for annual inspections, and are substantially most expensive to conduct. This fact alone should give Walmart substantial comfort about our Tesla's commitment and ability to maintaining the sites.
- Enhanced monitoring: Tesla has invested substantial development time, and will be investing in new hardware, to improve remote site monitoring capabilities. These capabilities will improve Tesla's ability to more quickly respond to issues on the sites.
- Audits: In addition, Tesla is willing to pay for a neutral third party to conduct random spot inspections and audits of the systems in Walmart's portfolio, at Tesla's expense, with reporting provided directly to Walmart.



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Tesla is also willing to discuss additional, specific improvements, if Walmart has reasonable, good faith suggestions in these regards.

- Formal adoption of a “substantially enhanced inspection protocol.” We believe that this request is fully addressed by the first bullet above and the already agreed-upon protocol.
- Certification that the root causes for Beavercreek, Denton, Indio, and Yuba City are not present elsewhere; that other sites have been thoroughly inspected, and that all other sites have been remediated and “do not pose a risk of a future fire.” We believe that this request is fully addressed by the first bullet above and the already agreed-upon protocol, except that Tesla cannot provide a certification that a site does “not pose a risk of a future fire.” As explained above, it is not possible to eliminate all possible risks of fire – one of which is Walmart, its contractors, its employees, its customers, and third parties at its sites. Tesla would be prepared to provide a statement that for each inspected site, Tesla is not aware of any conditions or circumstances that it has any reason to believe present a risk of a fire.
- Payment of Performance Guarantees. Tesla disputes any obligation to pay performance guarantees. As part of a global resolution, Tesla is willing to pay performance guarantees on the Beavercreek, Denton, Indio, and Yuba City sites only to the extent that the systems were inoperable on account of the thermal events that occurred at those sites, the contracts are in the form of leases, and Walmart is current on its monthly lease payments. With respect to all other leased rooftop systems, Tesla would pay a performance guarantee for the loss of the use of the systems from initial shutdown to September 30, 2018, in recognition of the fact that Tesla agreed to temporarily de-energize the systems for a limited time as an accommodation to a valued customer, and would not require Walmart to forgo the guarantee to receive that accommodation. Tesla is not willing to pay a performance guarantee for any period beyond September 30, 2018, as Walmart is responsible for the continuing delays in re-energizing the systems after that date. Moreover, any amounts that Tesla would pay pursuant to the performance guarantee would be offset by the amounts Tesla has been damaged by Walmart’s refusal to allow the systems to be re-energized, as described above.
- Payment of claimed out-of-pocket damages, attorneys’ fees, consultant fees for Beavercreek, Denton, Indio, and Yuba City fires.
  - Property damage. As you are well aware, Tesla has been working closely with Walmart, Walmart’s outside advisers, Tesla’s own consultants and

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outside advisers, and the insurers, to pay Walmart's property damage claims, even where Tesla believes that it does not bear responsibility for that loss. While disputing liability, Tesla has authorized the payment of \$674,526.83 for Walmart's claimed losses in the Beaver Creek incident and \$4,879.40 for Walmart's claimed losses for Yuba City. Tesla will continue to work with Walmart to resolve the disputed Indio claim.

- o Attorneys'/consultant fees: To maintain goodwill with Walmart, Tesla previously offered to cover a portion of Walmart's attorneys' and consultant fees incurred in connection with the fires, as part of a global settlement. However, Tesla denies that it has any obligation to attorney or consultant fees.

\* \* \*

In response to Walmart's concerns over the incidents at Beaver Creek, Denton, Indio, and Yuba City, Tesla made significant concessions and accommodations to ensure that every one of the Walmart rooftop systems was safe and, moreover, to ensure that Walmart is satisfied this was so. In making these accommodations and concessions, Tesla unilaterally incurred expenses and losses that it was willing to suffer to satisfy a valued, long-term customer. Tesla did not, however, waive its rights under the 248 contracts the parties negotiated.

Unfortunately, Walmart has not acted with an equal degree of diligence or good faith. While Tesla has consistently sought to resolve all of Walmart's concerns – whether it thought those concerns were justified or not – Walmart has failed to make any concrete progress to re-energizing the systems, and instead continues to impose new conditions, delays, and obstacles.

The only obstacles to re-energizing the 30 sites that have already been inspected are (a) Walmart's insistence that it must first send its consultant to verify the reports while failing to take any concrete steps to do so, and (b) Walmart's repeated practice of imposing unreasonable, extra-contractual conditions and concessions on re-energization. Tesla is certain that if Walmart were to actually examine the inspected sites, it would find that its concerns have been alleviated. But Walmart refuses to even look. Walmart cannot claim breach on sites it has never inspected, agree on an inspection protocol as a means to cure, and then continue claiming breach because it refuses to confirm that its demands for cure have been satisfied. The only real obstacle to Walmart obtaining what it is entitled to under the contract is Walmart itself.

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Tesla demands that Walmart comply with the contracts it signed, re-energize the systems that have been inspected pursuant to the parties' protocol (the 30 already inspected and the remainder as inspected), and compensate Tesla in full for its losses.

Tesla reserves all rights and waives none.

Very truly yours,



Fred Norton  
The Norton Law Firm PC

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