STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

CALIFORNIA LIVING & ENERGY (a division of William Lilly & Associates, Inc.) and DUCT TESTERS, INC., Complainants, vs. MASCO CORPORATION and ENERGYSENSE, INC., Respondents.	Docket Number 08-CRI-01 **JOINT CASE STATUS STATEMENT**

DOCKET
08-CRI-1
DATE DEC 04 2008
RECD. DEC 04 2008

Pursuant to the Request of the Energy Resources Conservation Commission (the "Commission") made during the November 12, 2008 pre-hearing conference in this matter, the parties respectfully submit this Joint Case Status Statement.

Complainants CALIFORNIA LIVING & ENERGY (a division of William Lilly & Associates, Inc.) and DUCT TESTERS, INC. are represented by Brett L. Dickerson, Gianelli & Associates, Modesto, California. Respondents MASCO CORPORATION and ENERGYSENSE, INC., are represented by Steven H. Frankel and Brett Crawford, SONNENSCHEIN NATH & ROSENTHAL LLP, San Francisco, California and Washington, D.C.

I. BRIEF DESCRIPTION OF THE DISPUTE

The complaint alleges that Respondents are in violation of, among others, Cal. Code of Reg. Title 20, Section 1673(i)(2), in that they provide Home Energy Rating Services ("HERS"), but are not entities independent from the builder, or subcontractor

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installer, of energy efficiency improvement whose work is being field verified or diagnostically tested.[1]

II. DISPUTED FACTUAL ISSUES:

A. Whether ENERGYSENSE is an "Independent Entity" from other MASCO-related entities that act as subcontractor installers.

Complainants allege that there exists such a uniformity of ownership and control among Respondents ENERGYSENSE, MASCO, and other MASCO-related subsidiaries that ENERGYSENSE is not an independent entity, as defined in Section 1671, from the MASCO-related entities whose installation work is tested by ENERGYSENSE for Title 24 compliance under the Commission's HERS field verification and diagnostic testing requirements.

Respondents dispute this contention and assert that ENERGYSENSE and its HERS raters are independent entities, as defined in Section 1671, from other MASCO-related subsidiaries whose installation work is tested by ENERGYSENSE for Title 24 compliance purposes.

B. Whether ENERGYSENSE and other MASCO-related entities cross-promote each other's services.

Complainants allege that ENERGYSENSE and other MASCO-related entities promote each other's services by way of both oral representations and printed flyers, etc., and that both the installation and the testing of energy efficiency improvements are sold as a "package deal."

Respondents deny these allegations. ENERGYSENSE does not promote the services of other MASCO-related entities whose installation work it field verifies or diagnostically tests for Title 24 compliance purposes.

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[1] References to section numbers are to those in Title 20 of the Cal. Code of Regulations unless otherwise noted.

III. DISPUTED LEGAL ISSUES:

A. Whether ENERGYSENSE is an "Independent Entity" from the various Masco-related subsidiaries whose installation work ENERGYSENSE field verifies or diagnostically tests for Title 24 compliance purposes.

A principal legal issue concerns the interpretation of the "independent entity" requirement in the conflict of interest provisions in Section 1673(i)(2) and its application to the relationship between ENERGYSENSE and the various MASCO-related entities that install energy efficiency improvements for which ENERGYSENSE performs field verification and diagnostic testing for Title 24 compliance purposes.

B. Whether the alleged cross-promotion by ENERGYSENSE and other MASCO-related entities violates the "Independent Entity" requirement in Section 1673(i)(2).

Another legal issue will be a determination of whether the alleged cross-promotion by ENERGYSENSE and other MASCO-related entities constitutes a violation of the HERS conflict of interest provisions. Complainants contend that: 1) ENERGY SENSE is promoting the installation services of MASCO-related subcontractors; and 2) MASCO-related subcontractors who perform installation services are promoting the field verification and diagnostic testing services of ENERGYSENSE.

Respondents dispute Complainants' contentions. Under the HERS regulations, raters are prohibited from "advocating or recommending the use of any product or service as a means of gaining increased business with" the installer of the energy efficient improvements being tested/inspected. Respondent ENERGYSENSE has not advocated or recommended the use of any product or service as a means of gaining increased business with the installer of the energy efficient improvements it has tested/inspected. Moreover, Example 2-7 in the 2005 Residential Compliance Manual expressly anticipates and gives approval to the joint sale of testing services to builders by subcontractor installers and raters.

IV. JOINDER OF ADDITIONAL PARTIES.

At this time, Complainants and Respondents are aware of no additional parties which need to be joined to these proceedings, although each reserves the right to join additional parties as discovery proceeds.

V. DISCOVERY STATUS

A. Complainant's Discovery

Respondents have provided initial responses to the discovery already propounded by the Commission. Complainants have recently served Respondents with a meet and confer letter which requests additional information under the Commission's discovery in addition to new requests from Complainants, as well. Complainants may be propounding additional discovery in follow-up to any future responses received from Respondent. Complainant may be required to depose certain employees of MASCO-related entities and Respondents' witnesses prior to the hearing.

This meet and confer letter also addressed possible procedures for obtaining business records from the California Home Energy Efficiency Rating Service (CHEERS) or the California Energy Commission.

B. Respondent's Discovery

Respondents reserve their rights to propound written discovery on Complainants, to depose Complainant's witnesses prior to the hearing, and to obtain certain business records from CHEERS and the California Energy Commission.

Respondents will take the videotaped deposition of Tom Hamilton, the former Executive Director of CHEERS, at a date, time and location to be determined. Since a satisfactory guarantee concerning Mr. Hamilton's commitment to testify by deposition, or at the hearing have not been secured, Respondents respectfully request that the subpoena for Mr. Hamilton's testimony previously requested by motion should now be issued.

Respondents received Complainants' meet and confer letter immediately prior to the Thanksgiving holiday and are still in the process of evaluating it. Respondents anticipate that they will be in a position to respond to that letter on December 8, 2008.

Complainants and Respondents have discussed the need for a Stipulated Protective Order to preserve and protect the confidentiality of proprietary business information, and expect to shortly present such an order to the Commission for entry.

VI. POTENTIAL WITNESSES

A. Complainants: At this time, Complainant anticipates that they may call the following witnesses to testify at the hearing:

1. Bill Lilly;
2. Dave Hegarty;
3. Doug Beaman;
4. Max McKenny;
5. Bill Pennington.

Complainants reserve the right to call the witnesses identified by Respondents to testify at the hearing. Based on further investigation and discovery, Complainants reserve the right to identify additional witnesses who they may call to testify at the hearing. Complainants also reserve their rights call additional witnesses for rebuttal or impeachment purposes.

B. Respondents. At this time, Respondents anticipate that they may call the following witnesses to testify at the hearing:

1. Jaime Padron
2. Tom Hamilton (by videotape deposition)
3. David Short

Respondents reserve the right to call the witnesses identified by Complainants to testify at the hearing. Based on further investigation and discovery, Respondents reserve the right to identify additional witnesses who they may call to testify at the hearing. Respondents also reserve their rights call additional witnesses for rebuttal or impeachment purposes.

VII. PROPOSED HEARING DATE

The parties expect that the hearing in this matter will take at least two days to

complete. Based upon the dates provided concerning the Commission's availability, Complainant and Respondents request that the hearing be scheduled for February 26 and February 27, 2009.

Respectfully submitted,

GIANELLI & ASSOCIATES

Dated: December 4, 2008

By_____

Brett L. Dickerson
Attorneys for Complainants
CALIFORNIA LIVING & ENERGY and DUCT TESTERS, INC.

SONNENSCHEIN NATH & ROSENTHAL LLP

Dated: December 4, 2008

By_____

Steven H. Frankel
Attorneys for Respondents
ENERGYSENSE, INC. AND MASCO CORPORATION

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Brett L. Dickerson
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SONNENSCHEIN NATH & ROSENTHAL LLP

Dated: December 4, 2008

By_____

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ENERGYSENSE, INC. AND MASCO CORPORATION

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

Complaint / Request for Investigation Regarding EnergySense / MASCO

DOCKET NO. 08-CRI-01
Proof of Service List

INSTRUCTIONS: All parties shall (1) file a printed, original signed document plus 12 copies OR file one original signed document and email the document to the Docket address below, AND (2) all parties shall also send a printed OR electronic copy of the document, plus a proof of declaration, to each of the entities and individuals on the Proof of Service List:

CALIFORNIA ENERGY COMMISSION Attn: DOCKET NO. 08-CRI-01 1516 Ninth Street, MS-4 Sacramento, CA 95814-5512 docket@energy.state.ca.us	
California Living & Energy Attn: Bill Lilly, President 3015 Dale Court Ceres, CA 95307	Duct Testers, Inc. Attn: Dave Hegarty P.O. Box 266 Ripon, CA 95366
Carol A. Davis CHEERS Legal Counsel 3009 Palos Verdes Drive West Palos Verdes Estates, CA 90274	Energy Inspectors Attn: Galo LeBron, CEO 1036 Commerce Street, Suite B San Marco, CA 92078
Certified Energy Consulting John Richau, HERS Rater 4782 N. Fruit Avenue Fresno, CA 93705	ConSol Attn: Mike Hodgson 7407 Tam O'Shanter Drive Stockton, CA 95210-3370
California Certified Energy Rating & Testing Services (CalCERTS) Attn: Mike Bachand 31 Natoma Street, Suite 120 Folsom, CA 95630	California Building Performance Contractors Association (CBPCA) Attn: Randel Riedel 1000 Broadway, Suite 410 Oakland, CA 94607
California Home Energy Efficiency Rating System (CHEERS) Attn: Robert Scott 20422 Beach Boulevard, Suite 235 Huntington Beach, CA 92648	

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DECLARATION OF SERVICE

I, Diane V. Donner, deposited copies of the attached JOINT CASE STATUS STATEMENT in the United States mail on **December 4, 2008**, at San Francisco, CA, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, Title 20, Sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.

Diane V. Donner
DIANE V. DONNER

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