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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 **PRE-HEARING BRIEF OF COMPLAINANTS CALIFORNIA LIVING AND ENERGY and DUCT TESTERS, INC.** **Hearing Date: March 17, 2009**

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I.
PARTIES

CALIFORNIA LIVING & ENERGY (a division of William Lilly & Associates, Inc.) and DUCT TESTERS, INC., (collectively "Complainants") are represented by attorney Brett L. Dickerson of the Law Offices of Gianelli & Associates, located at 1014 16th Street, Modesto, CA, 95354. MASCO CORPORATION and ENERGYSENSE, INC. (collectively "Respondents") are represented by the law firm of Sonnenschein Nath & Rosenthal, LLP 525 Market Street, 26th Floor, San Francisco, CA 94105-2708.

II.
NATURE OF THE CASE

Normally, this would be the point at which the writer would provide a brief history of the matter before the Commission. However, there is no "brief" history attendant to this dispute. This matter and the issues presented thereunder have been before the California Energy Commission in some form since 2002 with little variation except for the names of the

participants. In an effort to circumvent the regulatory prohibitions against conflicts of interest between those doing the installation of energy efficiency measure and those who provide the HERS inspections of those measures, Masco established a wholly owned subsidiary, their Co-Respondent EnergySense. The goal of this new entity was to carry out HERS rating services as opposed to those services being carried out by the same Masco subsidiary that was doing the actual installation as had been done in the past.

In practical terms, all Masco did was change the magnetic signs on the side of the work truck and then send the same people out to the same places to do the same thing as they did in the pre-EnergySense days. Nothing has changed since May of 2007 when the CEC itself informed EnergySense that their set-up was a potential conflict of interest violation and requested additional information to prove otherwise, information which, apparently, was never provided based upon documents produced to Complainants in conjunction with these proceedings.

What Masco was doing was illegal in 2002. What Masco and EnergySense are doing was illegal when EnergySense was formed in 2006 and it remains so today. The impending hearing is the final act in a 7-year story in which the outcome has never really been in question. The Masco/EnergySense corporate scheme violates the relevant sections of the California Code of Regulations and compromises the credibility of the State's Energy Efficiency Program. It must stop.

III.
ISSUES

1. Regulations Relevant to This Inquiry

The primary issue involved in this matter is whether EnergySense's performance of HERS testing violates the conflict of interest provisions contained in CCR Title 20, sections 1670 to 1674. As all parties and the CEC are aware, the relevant sections thereof provide as follows:

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1671. Definitions

Financial Interest means an ownership interest, debt agreement or employer/employee relationship. Financial ownership does not include ownership of less that 5% of the outstanding equity securities of a publicly traded corporation.

Independent Entity means having no financial interest in, and not advocating or recommending the use of any product or service as a means of gaining increased business with, firms or person specified in Section 1673(i).

1673. Requirements for Providers.

(i) Conflict of Interest.

(1) Providers shall be independent entities from Raters who provide field verification and diagnostic testing.

(2) Providers and raters shall be independent entities from the builder and from the subcontractor is installer of energy efficiency improvements field verified or diagnostically tested.

NOTE: The definition of "independent entity" and "financial interest" together with Section 1673)i) prohibit conflicts of interest between providers and raters, or between providers/raters and builders/subcontractors

2. Conflict between Masco and EnergySense

Masco knows that their arrangement with EnergySense, their wholly-owned subsidiary, violates this provision and, in so doing, ignores the clear intent of the conflict of interest prohibitions. Nonetheless, in an effort to avoid their obligations under these provisions, Masco/EnergySense has adopted a novel, though strained interpretation of these provisions. They assert that, under the Code sections, there is no conflict of interest unless the individual rater has a financial interest in the company who does the installation. Regardless of the connections between the rater's employer and the company doing the installation, unless the rater themselves own stock in the installing company or have an individual financial relationship with the installer, they are good to go.

This interpretation is, in a word, wrong, and Masco knows it. The reason they know it is

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wrong is that, as of May of 2007, EnergySense was informed of this fact shortly after the CEC received a letter from David Bell, the President of EnergySense. The evidence will show that, in May of 2007, the CEC's Senior Staff Counsel wrote to Mr. Bell advising of a possible conflict of interest as to the Masco/Energy Sense relationship and requesting further information which would indicate a contrary conclusion.

It will be further shown that the information which the CEC requested from Mr. Bell included absolutely nothing regarding the financial relationship(s) between individual raters and companies doing the testing or vice versa. These requests from the CEC dealt specifically with the relationship between Masco and Energy Sense and the extent to which the various installing and testing entities referred work back and forth to one another.

The evidence will further show that, over a year later, in response to the present complaint, a similar request was again propounded by the Commission. Once again, the Commission displays no interest in whether individual Energy Sense employees have financial interests in other Masco subsidiaries. All the Commission wants to see is how connected the various Masco subsidiaries are and if, once again, they are throwing business one another's way.

The California Energy Commission and the attorneys who are employed there are not incapable of understanding what their own rules say. It is a simple matter of the CEC recognizing the obvious: There is a profound and, yes, disqualifying, financial interest among EnergySense, the individual raters employed by EnergySense and the Masco subsidiaries which perform installations:

They are all either owned by Masco or work for Companies owned by Masco.

This simple fact alone establishes that the raters employed by EnergySense are hopelessly conflicted and, furthermore, satisfies the prohibition against there being an employer/employee relationship between the rater and the subcontractor providing the installation service. As discussed above, the people doing the rating for EnergySense are largely the very same persons who were performing those services for the previous Masco-related entities. All they have done

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is change the name on the shirts they wear. In a nutshell, it is the same people doing the same things they have always done and, at the end of the day, reporting to the same ultimate boss. The only difference is that that Masco has established an intermediate corporate "barrier" by creating EnergySense. This fact is undisputed, yet Masco continues to have their Masco raters inspect Masco installations. This open violation of the conflict of interest provisions must stop.

2. Potential Conflict Between Provider (CHEERS) and Masco.

Information gleaned from the recent deposition of Tom Hamilton, the former Executive Director of the California Home Energy Efficiency Rating Services (CHEERS) along with documents produced by CHEERS in conjunction with these proceedings, indicate that there may have been a questionable level of assistance being provided by CHEERS to Masco in their efforts to create an entity whereby Masco could inspect their own installations. Although all parties thereto are attempting to characterize this conduct as "prudence" on the part of Masco, there is a fine line between CHEERS providing simple "advice" and crossing over into "advocacy" by helping Masco push their plan through the CEC. The propriety of these efforts bears not only on the current matter before the Commission but will play a pivotal role in ensuring future violations do not occur.

V.
REMEDIES AND DAMAGES

The remedy which the Complainants request is simple and straightforward, as it is the only remedy which will insure that the goals of the conflict of interest provisions described above are met. EnergySense must be estopped from performing HERS testing on any structure upon which any other Masco-related entity has performed installation of energy efficient products requiring that HERS testing.

VI.
CONCLUSION

There is nothing new under the sun. Masco, consistent with their position as a major player in the nationwide construction industry, has created multiple subsidiaries which provide

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both the installation and inspection of Energy Efficiency Measures. Regardless of how they attempt to separate each of these entities from the other, they are all connected by a single thread. They all ultimately report back to Masco, both operationally and financially. Furthermore there is evidence that EnergySense has been actively promoting the services of Masco Contractor Services. Finally, the level of assistance which CHEERS was providing to Masco while Masco was formulating their creation and use of EnergySense may require further investigation.

All in all, this conduct needs to come to an immediate end. The integrity of the entire Energy Efficiency Program is being compromised. Masco is simply too big and does far too much work here in California to allow this to continue. The CEC needs to follow through on what was begun several years ago and rule that the Masco/EnergySense relationship violates CCR Title 20's prohibition against conflicts of interest.

Respectfully Submitted.

Dated: March 16, 2009

GIANELLI & ASSOCIATES,
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By: _____
BRETT L. DICKERSON
Attorneys for Complainants

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PROOF OF SERVICE

I, NIVES GUTHRIE, declare:

I am a citizen of the United States and a resident of the County of Stanislaus, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1014 – 16th Street, Modesto, California 95354.

I am readily familiar with the business practice for collection and processing of correspondence, and on March 16, 2009 I served:

PRE-HEARING BRIEF OF COMPLAINANTS CALIFORNIA LIVING AND ENERGY and DUCT TESTERS, INC.

in the following manner and addressed as set forth below;

On March 16, 2009 I served the enclosed document, filed electronically with the State of California Energy Resources Conservation and Development Commission and e-mailed to Dennis Beck and Steven H. Frankel as follows:

docket@energy.state.ca.us

Steven H. Frankel
Sonnenschein Nath & Rosenthal LLP
sfrankel@sonnenschein.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and if called could truthfully testify thereto.

Dated: March 16, 2009 at Modesto, California.

Nives Guthrie

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