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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

CLOSING BRIEF OF RESPONDENTS MASCO CORPORATION AND ENERGYSENSE, INC.
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INTRODUCTION

With the hearing concluded and the record closed, there now is no question that Complainants California Living & Energy and Duct Testers, Inc. ("Complainants") failed to present any evidence (let alone proving by a preponderance of the evidence\(^1\)) that Respondents Masco Corporation ("Masco") and EnergySense, Inc. ("EnergySense") violated the California Home Energy Rating System ("HERS") conflict of interest proscriptions set forth in Section 1673(i)(2) of Title 20 of the California Code of Regulations.\(^2\) Instead, Complainants adopted an interpretation of that regulation that is squarely at odds with its plain and unambiguous language in an attempt to manufacture a violation and turn well-settled corporate legal principles on their head.

According to Complainants, EnergySense, a wholly-owned Masco subsidiary, violates Title 20 conflict of interest requirements whenever it tests energy efficiency improvements (specifically, high quality insulation installation) that have been installed by other separate wholly-owned Masco installation subsidiaries because EnergySense and the installation subsidiaries share the same corporate parent. While it is uncontested that the HERS raters EnergySense employs conduct such Title 24 testing, the record shows that those HERS raters (as well as EnergySense itself) are "independent entities" that do not have a prohibited "financial interest" in the Masco installation subsidiaries whose work is tested as those terms are defined in Title 20. Because the HERS raters EnergySense employs (as well as EnergySense itself) operate in full accord with Title 20 conflict of interest requirements, the Complaints should be dismissed.

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\(^2\) Subsequent references to section numbers are to those in Title 20 or Title 24 of the California Code of Regulations unless otherwise noted.
ARGUMENT

I. THE RECORD CONFIRMS THAT ENERGYSENSE AND THE HERS RATERS
ENERGYSENSE EMPLOYS COMPLY WITH TITLE 20 CONFLICT OF
INTEREST REQUIREMENTS.

In relevant part, Section 1673(i)(2) provides that HERS raters, who perform Title 24 field
testing and verification, “shall be independent entities from the builder and from the
subcontractor installer of energy efficiency improvements field verified or diagnostically tested.”

Under Section 1671, the “Definitions” section of the Title 20 HERS regulations, “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” the builder or installer of
energy efficient improvements. That same definitions section states that “Financial Interest
means an ownership interest, debt agreement, or employer/employee relationship” with the
builder or installer of the energy efficient improvement that the individual HERS rater field tests
or verifies.3

Together, those provisions narrowly define what a prohibited “conflict of interest” is
between an individual HERS rater and a builder or installer of energy efficient improvements that
are subject to the rater’s Title 24 field testing and verification. Specifically, the regulation’s plain
language bars an individual HERS rater from (a) having an ownership interest in a builder or
installer of energy efficiency improvements that he or she field tests or verifies, (b) having a debt
agreement with such a builder or installer, or (c) having an employer/employee relationship with
such a builder or installer.

While Complainants maintain that the conflict of interest regulation applies to the
corporations that employ HERS raters, the regulation’s unambiguous language leaves no doubt
that the Title 20 conflict of interest prohibitions apply only to the individual raters. See Southern
interpretation of a regulation is controlled by the plain and unambiguous language of the

3 Section 1671 also provides that “[f]inancial interest does not include ownership of less than
5% of the outstanding equity securities of a publicly traded corporation.”
provision); see also Park Medical Pharmacy v. San Diego Orthopedic Associates Medical Group, Inc., 99 Cal. App. 4th 247, 258-59 (2002) (litigants may not re-write a statute to encompass a conflict of interest where the words of the statute do not reflect one).

   For example, in Section 1671, a “rater” is defined as “a person performing the site inspection and data collection required to produce a home energy rating or the field verification and diagnostic testing required for demonstrating compliance with the Title 24 energy performance standards, who is listed on a registry in compliance with Section 1673(c).” (emphasis added). Furthermore, the term “rater” is used throughout Title 20 without any mention of the entity that may employ the rater, except to prohibit a rater from having an employer/employee relationship with a builder or installer of the energy efficient improvements that the rater field tests or verifies. The consistent usage of the term “rater” to refer to persons or individuals, and not to corporations who may employ raters (e.g., in the context of certification, testing and registration) further underscores that the Title 20 conflict of interest prohibitions apply only to the individual HERS raters EnergySense employs, not to EnergySense itself.

   Section 7.9 of the 2005 Residential HERS Field Verification and Diagnostic Testing Regulations (CEC-400-2005-044) illustrates that a HERS rater is a person, not a corporation:

   HERS Rater means a person certified by a Commission approved HERS Provider to perform the field verification and diagnostic testing required for demonstrating compliance with the standards. (Emphasis added.)

   Testimony at the hearing further confirmed that only individuals (not corporations) can be certified as HERS raters. Transcript of March 17, 2009 Hearing (“Hearing Tr.) at 32:2-9. With that apparent recognition, the Commission’s Energy Efficiency Division previously acknowledged that the conflict of interest prohibitions apply only to individual HERS raters:

   By law, HERS raters must be independent from the builder or subcontractor installer of the energy efficient features being tested and

4 Whether or not a corporation pays for the training that an individual receives from an authorized “Provider” (e.g., California Home Energy Efficiency Rating Services (“CHEERS”)) to become certified as a HERS rater does not alter the fact that a corporation cannot be a HERS rater subject to Title 20’s conflict of interest proscriptions.
verified. They can have no financial interest in the installation of improvements. HERS raters cannot be employees of the builder or subcontractor whose work they are verifying. Also, HERS raters cannot have a financial interest in the builder's or contractor's business, nor can they advocate or recommend the use of any product or service that they are verifying. (Commission Docket Binder, Tab 23, Blue Print, Summer/Fall 2001, #66, Energy Efficiency Division, California Energy Commission, p. 1.)

In any event, whether the conflict of interest regulation applies just to the individual HERS raters EnergySense employs (as the plain language mandates) or EnergySense itself (as Complainants erroneously claim), the evidence demonstrates that the HERS raters EnergySense employs and EnergySense fully comply with Title 20 conflict of interest requirements.

A. Neither EnergySense Nor the HERS Raters EnergySense Employs Have A Prohibited "Financial Interest" In The Installers Of Energy Efficient Improvements That They Verify Or Test Under Title 24.

Following EnergySense's formation in 2006, the HERS raters EnergySense employed conducted Title 24 testing of High Quality Installation of Insulation ("HQII") that had been installed by Western Insulation, L.P., Coast Insulation Contractors, Inc., Sacramento Insulation Contractors and Masco Contractor Services of California, Inc., separate wholly-owned Masco installation subsidiaries. Affidavit of Sharon Werner ("Werner Aff."), ¶ 2-3; 5-8; Affidavit of Jaime Padron ("Padron Aff."), ¶ 14. In fact, HQII is the only type of energy efficiency improvement subject to Title 24 testing by a HERS rater for which the installation work might be performed by a Masco subsidiary. Hearing Tr. at 91:1-24; Padron Aff., ¶ 14; Affidavit of Steven Heim ("Heim Aff."), ¶¶ 3-4; Affidavit of Jim Brewer ("Brewer Aff."), ¶¶ 2-4; Affidavit of Steve Weber ("Weber Aff."), ¶¶ 2-4; Affidavit of Richard Smith ("Smith Aff."), ¶¶ 2-4.

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5 EnergySense's Delaware Certificate of Incorporation and Certificate of Qualification to do business in the State of California are attached, respectively, as Exhibits 2 and 3 to the Werner Aff. See also Commission Docket Binder, Tab 22 at p. 3. In addition, Annual Reports filed on behalf of Masco, EnergySense, Coast Insulation Contractors, Inc., Sacramento Insulation Contractors, and Masco Contractor Services of California, Inc. are also attached as exhibits 1, 4 and 6-8 to the Werner Aff. With respect to Western Insulation, L.P., no annual reports are available since the State of California Secretary of State's office has no annual report filing requirements for California limited partnerships. However, the managing general partner of Western Insulation, L.P. is Western Insulation Holdings, LLC, both of which are wholly-owned by Builder Services Group, Inc., an indirect wholly-owned subsidiary of Masco Corporation. Werner Aff., ¶ 8.
Title 24 testing of such installations by the HERS raters EnergySense employs is plainly permissible under the Title 20 conflict of interest regulations because those raters (as well as EnergySense itself) do not have a prohibited “financial interest” in those separate Masco installation subsidiaries. First, as the evidence confirmed, the HERS raters EnergySense employs have no “ownership interest” in any of those Masco installation subsidiaries, and EnergySense itself owns no stock and has no ownership interest in those subsidiaries either. Padron Aff., ¶ 6; Werner Aff., ¶¶ 2-3; 5-8; Affidavit of Israel Calleros (“Calleros Aff.”), ¶ 5; Affidavit of Timothy Williams (“Williams Aff.”), ¶ 5; Hearing Tr. at 99:21-100:1. Likewise, the HERS raters employed by EnergySense (as well as EnergySense itself) do not have any “debt agreements” with any Masco installation subsidiary whose work is tested or verified under Title 24. Hearing Tr. at 100:2-5; Padron Aff., ¶ 7; Calleros Aff., ¶ 6; Williams Aff., ¶ 6; Heim Aff., ¶ 6; Brewer Aff., ¶ 6; Weber Aff., ¶ 6; Smith Aff., ¶ 6.

Finally, the HERS raters employed by EnergySense (as well as Energy Sense) do not have an “employee/employer relationship” with the installer of energy efficient improvements that they test under Title 24, including any Masco installation subsidiary. Hearing Tr. at 100:6-9; 142:5-18; Padron Aff., ¶¶ 4,8; Calleros Aff., ¶ 7; Williams Aff., ¶ 7. Although Complainants have made claims that raters employed by EnergySense are also employed by or share office space with other Masco subsidiaries whose work they test, those allegations are groundless. See Hearing Tr. at 79:11-81:1. The HERS raters employed by EnergySense are exclusively employees of EnergySense, and EnergySense does not employ anyone who is also employed by a builder or installer whose work is tested by EnergySense’s raters. Hearing Tr. at 100:6-9, 142:12-18; Padron Aff., ¶¶ 4, 8; Calleros Aff., ¶ 7; Williams Aff., ¶ 7. Furthermore, for the entire period since EnergySense was formed, its rater employees have operated out of their own homes and have not shared office space with any Masco company whose work they test. Hearing Tr. at

Masco is a publicly traded holding company that provides administrative and high-level corporate governance support (i.e., accounting, legal, e-mail) to more than 200 subsidiary companies, including EnergySense. Werner Aff., ¶¶ 2, 12; Affidavit of Dan Calton ("Calton Aff."), ¶¶ 1-2; Commission Docket Binder at Tab 6, pp. 7-8; Complainants’ Exhibit Binder ("Complainant Ex.") at Tabs 27-28 (Masco 2007 Annual Report and Form 10-K).
In short, because EnergySense and the HERS raters employed by EnergySense do not have an ownership interest in, debt agreements with, or an employee/employer relationship with, any person or company whose work they field test and verify, they simply do not have a "financial interest" that is barred by Title 20.7

Yet, it appears that Complainants are of the mistaken view that because two corporations (for example, EnergySense and Masco Contractor Services of California, Inc.) are related through a common parent (Masco Corporation), this establishes the requisite prohibited "financial interest" — essentially treating the parent corporation and its subsidiaries as a single legal entity because, as Complainants claim, they are "owned by Masco." See generally Pre-Hearing Brief of Complainants, Commission Docket Binder at Tab 26. However, that argument ignores the well-settled principle that a parent corporation and its respective subsidiaries are presumed to be legally separate entities, with separate liabilities and obligations. Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 538 (2000); Mid-Century Ins. Co. v. Gardner, 9 Cal. App. 4th 1205, 1212 (1992).

Complainants presented no evidence that overcomes that strong presumption and permits the corporate veils between Masco, EnergySense and the installation subsidiaries to be, in effect, collapsed in an attempt create a prohibited "financial interest." Certainly, the fact that Masco, EnergySense and the installation subsidiaries share some common officers and directors (not employees) is insufficient as a matter of law to permit the piercing of the corporate veils between

7 Even Mr. Lilly, the President of Complainant California Living & Energy, conceded that he was unaware of any ownership interest in, debt agreement with or any current employer/employee relationship between EnergySense’s HERS raters and any company whose work they test for Title 24 compliance purposes. Hearing Tr. at 78:24-81:1.
those legally separate companies for that purpose.\textsuperscript{8} \textit{Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc.}, 116 Cal. App. 3d 111, 120 (1981) (evidence of interlocking directors and officers between parent corporation and wholly-owned subsidiaries insufficient to warrant piercing the corporate veil); \textit{J.E. Rhoads \& Sons, Inc. v. Ammeraal, Inc.}, 1988 Del. Super. LEXIS 116, *18-*19 (Del. Super. Ct. Mar. 30, 1988) (common officers and directors between parent and subsidiary insufficient to pierce the corporate veil); \textit{see also} Cal. Corp. Code § 310(a) (“A mere common directorship does not constitute a material financial interest within the meaning of this subdivision.”); 8 Del. C. § 144 (similar effect).

In any event, as previously shown, the plain and unambiguous language of the Title 20 conflict of interest prohibitions do not apply to corporations, or to corporations related through common ownership; on their face, they apply only to an individual HERS rater in carefully circumscribed circumstances (\textit{i.e.}, barring the rater from having an ownership interest in, debt agreement with, or employer/employee relationship with the builder or installer of improvements that the rater field tests or verifies under Title 24). Because EnergySense’s raters (and EnergySense) do not have any prohibited “financial interest” in the separate Masco installation subsidiaries whose HQII work is field tested or verified under Title 24, there simply is no financial conflict of interest under Title 20.

\textsuperscript{8} The insinuations at the hearing that EnergySense’s President, David Bell, also serves as Vice President of Marketing for Masco Contractor Services and National Sales Manager for Masco are false. Mr. Bell has never held a position as an officer or director in any Masco-related company except as President of EnergySense, and he has never been a National Sales Manager for Masco. Affidavit of David Bell ("Bell Aff.", ¶ 1-6; Commission Docket Binder at Tab 22, p. 10. The documents referenced at the hearing (Commission Docket Binder, Tab 18, Bates No. 0000075 (October 16, 2006 e-mail from Tav Commins) and Complainant Ex. at Tab 29, Bates No. GA 000213 (AHC Group Brochure)) identifying Mr. Bell as the Vice President of Marketing for Masco Contractor Services or as National Sales Manager for Masco are simply erroneous. \textit{Id.}

Mr. Bell is employed by Masco Home Services, Inc., a wholly-owned Masco subsidiary, as the Manager of the Environments for Living® program. Bell Aff., ¶ 2; Werner Aff., ¶ 4. Neither Mr. Bell nor any of EnergySense’s other officers and directors are employed by EnergySense. Bell Aff., ¶ 6; Werner Aff., ¶ 13. In contrast to Title 24, the Environments For Living® program is an entirely voluntary energy efficiency certification program for home builders. Affidavit of Richard A. Davenport ("Davenport Aff.", ¶¶ 1-4.)
B. Neither EnergySense Nor The HERS Raters EnergySense Employs Advocate Or Recommend The Use Of Any Product Or Service As A Means Of Gaining Increased Business From The Installers Of Energy Efficiency Improvements That Are Tested Under Title 24.

Under the Title 20 conflict of interest regulation, individual HERS raters are also prohibited from advocating or recommending the products or services of builders or installers whose work is tested under Title 24, as a means of gaining increased business from them. The HERS raters employed by EnergySense (and EnergySense itself) comply fully with this prohibition. Hearing Tr. 100:9-101:11; 140:22-141:10; Calleros Aff., ¶ 8; Padron Aff., ¶ 9; Williams Aff., ¶ 8.

Notably, the marketing efforts of the HERS raters and EnergySense focus exclusively on advocating their testing services, not the products or services sold by builders or installers, including Masco’s separate installation subsidiaries. Contrary to the claim raised at the hearing (Hearing Tr. at 29:10-30:2), neither Masco Corporation nor any other Masco-related company has ever entered into a national contract with Pulte Homes that requires the use of HERS raters employed by EnergySense or any other Masco-related company for Title 24 testing purposes. Bell Aff., ¶12; Hearing Tr. 148:14-149:7.

In an attempt to cast doubt on EnergySense’s and its raters’ compliance with the prohibited advocacy and recommendation conflict of interest requirement, Complainants pointed to printouts from a Texas website, www.energysense.org, in an attempt to show that EnergySense has advocated and recommended the services of other Masco subsidiaries. Complainant Ex., Tab 30 at GA 000242, 247-248. However, that website is not operated by EnergySense. Hearing Tr. at 115:22-119:6; 145:10-146:12.

Instead, that website is operated by Williams Consolidated I, Ltd. (“Williams”), a Texas company.
limited partnership indirectly owned by Masco Corporation, that conducts business exclusively in
Texas under the assumed names “Energy Sense” and “Energy Sense Systems.” Werner Aff., ¶¶
9-10; Affidavit of Mark Curry (“Curry Aff.”), ¶ 3.10 Williams, not EnergySense, is solely
responsible for the content of that website. Curry Aff., ¶§ 2-4.

The Declarations of David Hegarty and Vicki Rule submitted by Complainants concerning
a meeting that Mr. Padron attended on March 5, 2008 (not in April 2007 as Hegarty and Rule
claim) concerning an Isleton, California Del Valle Builder project do not come close to showing
that either Mr. Padron or EnergySense violated any of Title 20’s conflict of interest requirements,
including the prohibition on advocating or recommending the services of installers of energy
efficiency improvements as a means of gaining increased business.11 Padron Aff., ¶ 18.

Certainly, Mr. Padron never stated that “EnergySense was not in any way affiliated with Masco,”
as Ms. Rule asserts. Rule Dec., ¶ 6. Instead, Mr. Padron stated that “EnergySense was a separate
company owned by Masco and that the HERS raters employed by EnergySense complied with
the HERS conflict of interest requirements.” Padron Aff., ¶ 18. Likewise, neither at that meeting
nor on any other occasion after commencing his employment as EnergySense’s Division
Manager in March 2008, has Mr. Padron advocated or recommended the services of any Masco
subsidiary to Ms. Rule or anyone else as a means of gaining increased business for EnergySense.

10 EnergySense and Williams are entirely separate businesses. Werner Aff., ¶¶ 9-10; Bell Aff., ¶
8. EnergySense does not operate in Texas; instead, it conducts business only in California and
Nevada. Padron Aff., ¶ 1. EnergySense has no involvement in the business or operations of
Williams, and Williams has no involvement in the business or operations of EnergySense.
Curry Aff., ¶¶ 3-4; Padron Aff., ¶ 1; Bell Aff., ¶ 8. David Bell, EnergySense’s President, has
never maintained an office at Williams, and has had no involvement with the management or
operations of Williams. Bell Aff., ¶¶ 2, 7-8; Hearing Tr. at 116:17-22.

11 Pursuant to the Commission’s March 18, 2009 Order, the parties had until March 27, 2009 to
file “any sworn witness affidavits.” The declarations are not “sworn affidavits,” and thus should
be disregarded. Moreover, at the March 17, 2009 hearing, the Commission directed the parties
to exchange any affidavits with each other prior to filing. See Hearing Tr. at 167. Respondents
provided Complainants with copies of all the affidavits they intended to file on March 24, three
days before the filing deadline. In contrast, Complainants never provided Respondents with a
copy of the Hegarty Declaration (who, for some inexplicable reason, chose not to testify at the
hearing) prior to its filing, and first provided a draft of the Rule Declaration in the morning of
the March 27 deadline, and then proceeded to repeatedly modify that draft until minutes before
filing it.
II. BOTH ENERGYSENSE’S STRUCTURE AND THE CONTRACTS
ENERGYSENSE HAS ENTERED INTO WITH THE SEPARATE MASCO
INSTALLATION SUBSIDIARIES SAFEGUARD TITLE 20 CONFLICT OF
INTEREST COMPLIANCE.

Prior to October 1, 2005, the effective date of the amendments to Title 24 that added HQII
as one of the measures that could be field tested by HERS raters, the Title 20 conflict of interest
prohibitions did not cause Masco or its subsidiaries any concern because the other types of
improvements subject to Title 24 HERS testing were not installed by any Masco subsidiary. See
Hearing Tr. at 88:23-91:24. However, with the addition of HQII to the list of improvements that
could be tested by HERS raters, Masco recognized that the conflict of interest prohibitions posed
a potential issue because certain Masco insulation installing subsidiaries also employed HERS
raters. Id. Accordingly, Masco and its installation subsidiaries began exploring various options
to ensure Title 20 conflict of interest compliance, including formation of a separate Masco
subsidiary that would employ HERS raters to perform Title 24 testing.

In January 2006, representatives of Masco and certain of its installation subsidiaries
operating in California approached CHEERS’ Executive Director, Tom Hamilton, for guidance in
complying with the conflict of interest requirements. In a series of meetings with Hamilton,
Masco received reassurance that its proposed plan to consolidate and transfer HERS raters from
the installing subsidiaries (where they had been employed) to a new, separate wholly-owned
Masco subsidiary (to be named EnergySense, Inc.) would meet HERS requirements. Bell Aff., ¶
9; Davenport Aff., ¶ 5; Hearing Tr. at 88:23-91:24. Significantly, Hamilton expressed CHEERS’
view that EnergySense’s proposed structure, including having HERS raters employed by
EnergySense conduct field verification and diagnostic testing of HQII work performed by
separate Masco installation subsidiaries, would be consistent with Title 20 conflict of interest
requirements, particularly in light of the fact that the regulations on their face apply only to
individual HERS raters, and not to their employer. Id.; Commission Docket Binder at Tabs 21
(Deposition of Tom Hamilton) and 17 at 0000188-191.

In those discussions, Hamilton also suggested that, as an extra precaution, firewalls be put
in place between EnergySense and the Masco installation subsidiaries. *Id.* Following Hamilton’s advice, Masco began the lengthy process of forming EnergySense as a new, wholly-owned subsidiary, while Masco’s insulation installing subsidiaries took steps to modify their structure and procedures to ensure the separateness and independence of their previously employed HERS raters. See Hearing Tr. 95:13-97:4

One of the measures central to that effort was EnergySense’s entry into contracts with the Masco installation subsidiaries. Commission Docket Binder at Tab 6, MAS 001-0022. Those contracts establish that the raters employed by EnergySense are independent contractors who are directly accountable to the installation companies’ customers — the builders — for the testing services they provide. See, e.g., *Id.* at MAS 004, ¶ 9; MAS 001, ¶ 3; MAS 002, ¶ 1(e). The contracts are non-exclusive — they do not obligate Masco’s subsidiaries to use EnergySense’s raters for testing services, nor do they obligate EnergySense’s raters to perform testing referred by those companies. *Id.* at MAS 001, ¶ 1(a). Indeed, under those contracts, EnergySense is free to market the testing services provided by its HERS raters directly to builders or rely upon referrals from Masco’s installation subsidiaries. *Id.* Under the contracts, EnergySense retains exclusive control over the prices charged to builders for the verification and testing services provided by its HERS raters, and it does not vary its pricing based upon the identity of the installation company whose work is tested. *Id.* at MAS 003, ¶ 3; Hearing Tr. at 106:18-114; 146:14-147:6; Respondents’ Exhibits A and B.

In exchange for the opportunity to offer builders a more comprehensive set of services, Masco’s installation subsidiaries act as conduits for builder orders and payments to EnergySense for the testing services provided by its HERS raters on a pass-through basis without any markup or administrative fees charged by the installation subsidiary. Commission Docket Binder, Tab 6 at MAS 003, ¶ 4(a); Heim Aff., ¶¶ 7-9; Weber Aff., ¶¶ 7-9; Brewer Aff., ¶¶ 7-9; Smith Aff., ¶¶ 7-9. Moreover, bids submitted to a builder for installation and testing services are evaluated separately by the builder on a standalone basis, enabling the builder to select from among the services offered. Heim Aff., ¶ 8; Weber Aff., ¶ 8; Brewer Aff., ¶ 8; Smith Aff., ¶ 8. If, in response to those bids, a builder elects HERS testing services, EnergySense is responsible for
scheduling the testing by its HERS raters and reporting the test results to the builder and
CHEERS, not the installation subsidiary. See Respondents’ Exhibits A and B; Hearing Tr. at
106:18-114:15; 146:14-147:6. That contractual arrangement is functionally equivalent to the
permissible “three-party contracts” described in Example 2-7 in Section 2 of the 2005 Residential
Compliance Manual. Bell Aff., ¶ 10; Complainant Ex. at Tab 9; Commission Docket Binder at
Tab 17, Bates Nos. 0000188-191.

In short, those contracts and EnergySense’s structure illustrate the extraordinary steps
Respondents took to ensure that EnergySense’s HERS raters performed their Title 24 testing
responsibilities impartially and independently, and in conformity with Title 20 conflict of interest
requirements.

III. THE COMPLAINTS SHOULD BE DISMISSED.

Based on the plain and unambiguous language of the conflict of interest regulation, and the
record in this proceeding, the Commission cannot find that EnergySense or the HERS raters
Energy Sense employs violated any of the Title 20 conflict of interest requirements.

Accordingly, the Commission should dismiss the Complaints.

However, even assuming that a conflict of interest violation occurred (although none did),
the remedy that Complainants seek — barring EnergySense “from performing HERS testing on
any structure upon which any other Masco-related entity has performed installation of energy
efficient products” — is not available as a matter of law. See Commission Docket Binder, Tab
26, Prehearing Brief of Complainants at 5:19-23. While “any person or entity may file a
complaint” with the Commission “concerning any violation of [the HERS] regulations as
provided for in Section 1230 et. seq.,” and the “Commission may for, good cause, conduct an
investigation, and if necessary, hearing,” the Commission has no authority under Title 20 to
sanction Masco, EnergySense or the HERS raters EnergySense employs for any HERS conflict of
interest violations. Section 1675(b). Instead, the Commission’s authority is expressly limited to

12 As a matter of policy, that remedy is also unavailable, as it would effectively restrain
EnergySense’s ability to compete and would provide Complainants, two of EnergySense’s
competitors in the HERS testing market, with an improper competitive advantage.
revoking the “certification of the provider pursuant to Section 1230, et. seq.” Section 1675(c) (emphasis added). Because the Commission’s remedial authority is so restricted under Title 20, it is thus barred from assessing any sanctions against Respondents in this case. See People v. Harter Packing Co., 160 Cal. App. 2d 464, 467-68 (1958) (invalidating administrative order that imposed a penalty not expressly authorized).\textsuperscript{13}

CONCLUSION

For the foregoing reasons, the Commission should find that EnergySense and the HERS raters EnergySense employs have not violated Title 20 conflict of interest requirements, and dismiss the Complaints.\textsuperscript{14}

Dated: April 6, 2009

Respectfully submitted,

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MASCO CORPORATION AND ENERGYSENSE, INC.

\textsuperscript{13} Although CHEERS has never identified any issues with respect to the quality or integrity of the work performed by any of the raters employed by EnergySense that it certified, if the Commission still has concerns, it could consider (without a finding of a conflict of interest violation) directing CHEERS to provide “increased scrutiny,” and to take action (such as providing more training and oversight) to ensure that the raters EnergySense employs are performing objective and accurate Title 24 HERS testing in accordance with Commission adopted procedures. See Example 2-7, 2005 Residential Compliance Manual.

\textsuperscript{14} As agreed at the March 17 hearing, Respondents submit their Closing Brief in lieu of reconvening a hearing for closing argument purposes.
PROOF OF SERVICE

California Living & Energy v. MASCO Corporation and EnergySense, Inc.
ERCDC Docket No. 08-CRI-01

I, Diane Donner, hereby declare:

I am employed in the City and County of San Francisco, California in the office of a
member of the bar of this court and at whose direction the following service was made. I am
over the age of eighteen years and not a party to the within action. My business address is
Sonnenschein Nath & Rosenthal, 525 Market Street, 26th Floor, San Francisco, California
94105.

On April 6, 2009, I served the enclosed document, filed electronically with the State of
California Energy Resources Conservation and Development Commission, and described as
CLOSING BRIEF OF RESPONDENTS MASCO CORPORATION AND ENERGYSENSE, INC.
on the interested parties in this action by placing a true copy thereof, on the above date, enclosed
in a sealed envelope, following the ordinary business practice of Sonnenschein Nath &
Rosenthal LLP, addressed as follows:

Brett L. Dickerson (via email)
Gianelli & Associates PLC
1014 16th Street
P.O. Box 3212
Modesto, CA 95353

Dave Hegarty
Duct Testers, Inc.
P.O. Box 266
Ripon, CA 95366

Carol A. Davis
CHEERS Legal Counsel
3009 Palos Verdes Drive West
Palos Verdes Estates, CA 90274

Galo LeBron, CEO
Energy Inspectors
1036 Commerce Street, Suite B
San Marco, CA 93078

John Richau, HERS Rater
Certified Energy Consulting
4782 N. Fruit Avenue
Fresno, CA 93705

Mike Hodgson
ConSol
7407 Tam O’Shanter Drive
Stockton, CA 95210-3370

PROOF OF SERVICE
San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 6, 2009, at

Bill Lilly,
President
California Living & Energy
3015 Dale Court
Ceres, CA 95307

Randel Riedel
California Building Performance Contractors Association (CBPCA)
1000 Broadway, Suite 410
Oakland, CA 94607

Mike Bachand
California Certified Energy Rating & Testing Services (CalCERTS)
31 Natoma Street, Suite 120
Folsom, CA 95630

Robert Scott
California Home Energy Efficiency Rating System (CHEERS)
20422 Beach Boulevard
Huntington Beach, CA 92648

Bill Lilly, President
California Living & Energy
3015 Dale Court
Ceres, CA 95307

California Certified Energy Rating & Testing Services (CalCERTS)
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Robert Scott
California Home Energy Efficiency Rating System (CHEERS)
20422 Beach Boulevard
Huntington Beach, CA 92648

I am personally and readily familiar with the business practice of Sonnenschein Nath & Rosenthal for collection and processing of correspondence for mailing with the United States Postal Service, pursuant to which mail placed for collection at designated stations in the ordinary course of business is deposited the same day, proper postage prepaid, with the United States Postal Service.

☐ U.S. MAIL: I am personally and readily familiar with the business practice of Sonnenschein Nath & Rosenthal for collection and processing of correspondence for mailing with the United States Postal Service, pursuant to which mail placed for collection at designated stations in the ordinary course of business is deposited the same day, proper postage prepaid, with the United States Postal Service.

☐ FACSIMILE TRANSMISSION: I caused such document to be sent by facsimile transmission at the above-listed fax number for the party.

☐ FEDERAL EXPRESS: I served the within document in a sealed Federal Express envelope with delivery fees provided for and deposited in a facility regularly maintained by Federal Express.

☐ HAND DELIVERY: I caused such document to be served by hand delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 6, 2009, at San Francisco, California.

DIANE VIVIAN DONNER

[27282008]