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STEVEN H. FRANKEL (State Bar No. 171919)
SONNENSCHN NATH & ROSENTHAL LLP
525 Market Street, 26th Floor
San Francisco, CA 94105-2708
Telephone: (415) 882-5000
Facsimile: (415) 882-0300

BRETT A. CRAWFORD
SONNENSCHN NATH & ROSENTHAL LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, DC 20005-3364
Telephone: (202) 408-6400
Facsimile: (202) 408-6399

Attorneys for Respondents
MASCO CORPORATION and ENERGYSSENSE, INC.

DOCKET	
08-CRI-01	
DATE	<u>APR 06 2009</u>
RECD.	<u>APR 06 2009</u>

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
ENERGYSSENSE, INC.,

Respondents.

Docket Number 08-CRI-01

**CLOSING BRIEF OF RESPONDENTS
MASCO CORPORATION AND
ENERGYSSENSE, INC.**

SONNENSCHN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

SONNENSCHN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

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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 Cal. Edison v. Public Utilities Com.*, 85 Cal. App. 4th 1086, 1105-06 (2000) (agency’s 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.”

1 provision); *see also Park Medical Pharmacy v. San Diego Orthopedic Associates Medical Group,*
2 *Inc.*, 99 Cal. App. 4th 247, 258-59 (2002) (litigants may not re-write a statute to encompass a
3 conflict of interest where the words of the statute do not reflect one).

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

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

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

21 Testimony at the hearing further confirmed that only individuals (not corporations) can be
22 certified as HERS raters. Transcript of March 17, 2009 Hearing (“Hearing Tr.”) at 32:2-9.⁴

23 With that apparent recognition, the Commission’s Energy Efficiency Division previously
24 acknowledged that the conflict of interest prohibitions apply only to individual HERS raters:

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

27 ⁴ Whether or not a corporation pays for the training that an individual receives from an
28 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.

1 verified. They can have no financial interest in the installation of
2 improvements. HERS raters can not be employees of the builder or
3 subcontractor whose work they are verifying. Also, HERS raters
4 cannot have a financial interest in the builder's or contractor's business,
5 nor can they advocate or recommend the use of any product or service
6 that they are verifying. (Commission Docket Binder, Tab 23, Blue
7 Print, Summer/Fall 2001, #66, Energy Efficiency Division, California
8 Energy Commission, p. 1.)

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

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

16 Following EnergySense's formation in 2006, the HERS raters EnergySense employed
17 conducted Title 24 testing of High Quality Installation of Insulation ("HQII") that had been
18 installed by Western Insulation, L.P., Coast Insulation Contractors, Inc., Sacramento Insulation
19 Contractors and Masco Contractor Services of California, Inc., separate wholly-owned Masco
20 installation subsidiaries. Affidavit of Sharon Werner ("Werner Aff."), ¶¶ 2-3; 5-8⁵; Affidavit of
21 Jaime Padron ("Padron Aff."), ¶ 14. In fact, HQII is the only type of energy efficiency
22 improvement subject to Title 24 testing by a HERS rater for which the installation work might be
23 performed by a Masco subsidiary. Hearing Tr. at 91:1-24; Padron Aff., ¶ 14; Affidavit of Steven
24 Heim ("Heim Aff."), ¶¶ 3-4; Affidavit of Jim Brewer ("Brewer Aff."), ¶¶ 2-4; Affidavit of Steve
25 Weber ("Weber Aff."), ¶¶ 2-4; Affidavit of Richard Smith ("Smith Aff."), ¶¶ 2-4.

26 _____
27 ⁵ EnergySense's Delaware Certificate of Incorporation and Certificate of Qualification to do
28 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.

1 Title 24 testing of such installations by the HERS raters EnergySense employs is plainly
2 permissible under the Title 20 conflict of interest regulations because those raters
3 (as well as EnergySense itself) do not have a prohibited “financial interest” in those separate
4 Masco installation subsidiaries.⁶ First, as the evidence confirmed, the HERS raters EnergySense
5 employs have no “ownership interest” in any of those Masco installation subsidiaries, and
6 EnergySense itself owns no stock and has no ownership interest in those subsidiaries either.
7 Padron Aff., ¶ 6; Werner Aff., ¶¶ 2-3; 5-8; Affidavit of Israel Calleros (“Calleros Aff.”), ¶ 5;
8 Affidavit of Timothy Williams (“Williams Aff.”), ¶ 5; Hearing Tr. at 99:21-100:1. Likewise, the
9 HERS raters employed by EnergySense (as well as EnergySense itself) do not have any “debt
10 agreements” with any Masco installation subsidiary whose work is tested or verified under Title
11 24. Hearing Tr. at 100:2-5; Padron Aff., ¶ 7; Calleros Aff., ¶ 6; Williams Aff., ¶ 6; Heim Aff., ¶
12 6; Brewer Aff., ¶ 6; Weber Aff., ¶ 6; Smith Aff., ¶ 6.

13 Finally, the HERS raters employed by EnergySense (as well as Energy Sense) do not have
14 an “employee/employer relationship” with the installer of energy efficient improvements that
15 they test under Title 24, including any Masco installation subsidiary. Hearing Tr. at 100:6-9;
16 142:5-18; Padron Aff., ¶¶ 4,8; Calleros Aff., ¶ 7; Williams Aff., ¶ 7. Although Complainants
17 have made claims that raters employed by EnergySense are also employed by or share office
18 space with other Masco subsidiaries whose work they test, those allegations are groundless. *See*
19 Hearing Tr. at 79:11-81:1. The HERS raters employed by EnergySense are exclusively
20 employees of EnergySense, and EnergySense does not employ anyone who is also employed by a
21 builder or installer whose work is tested by EnergySense’s raters. Hearing Tr. at 100:6-9,
22 142:12-18; Padron Aff., ¶¶ 4, 8; Calleros Aff., ¶ 7; Williams Aff., ¶ 7. Furthermore, for the entire
23 period since EnergySense was formed, its rater employees have operated out of their own homes
24 and have not shared office space with any Masco company whose work they test. Hearing Tr. at
25

26 ⁶ Masco is a publicly traded holding company that provides administrative and high-level
27 corporate governance support (*i.e.*, accounting, legal, e-mail) to more than 200 subsidiary
28 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).

1 120:4-7; Padron Aff., ¶¶ 11-12; Calleros Aff., ¶ 9; Williams Aff., ¶ 9.

2 In short, because EnergySense and the HERS raters employed by EnergySense do not have
3 an ownership interest in, debt agreements with, or an employee/employer relationship with, any
4 person or company whose work they field test and verify, they simply do not have a “financial
5 interest” that is barred by Title 20.⁷

6 Yet, it appears that Complainants are of the mistaken view that because two corporations
7 (for example, EnergySense and Masco Contractor Services of California, Inc.) are related through
8 a common parent (Masco Corporation), this establishes the requisite prohibited “financial
9 interest” — essentially treating the parent corporation and its subsidiaries as a single legal entity
10 because, as Complainants claim, they are “owned by Masco.” *See generally* Pre-Hearing Brief of
11 Complainants, Commission Docket Binder at Tab 26. However, that argument ignores the well-
12 settled principle that a parent corporation and its respective subsidiaries are presumed to be
13 legally separate entities, with separate liabilities and obligations. *Sonora Diamond Corp. v.*
14 *Superior Court*, 83 Cal. App. 4th 523, 538 (2000); *Mid-Century Ins. Co. v. Gardner*, 9 Cal. App.
15 4th 1205, 1212 (1992).

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

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26 ⁷ Even Mr. Lilly, the President of Complainant California Living & Energy, conceded that he
27 was unaware of any ownership interest in, debt agreement with or any current
28 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.

1 those legally separate companies for that purpose.⁸ *Institute of Veterinary Pathology, Inc. v.*
2 *California Health Laboratories, Inc.*, 116 Cal. App. 3d 111, 120 (1981) (evidence of interlocking
3 directors and officers between parent corporation and wholly-owned subsidiaries insufficient to
4 warrant piercing the corporate veil); *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 Del.
5 Super. LEXIS 116, *18-*19 (Del. Super. Ct. Mar. 30, 1988) (common officers and directors
6 between parent and subsidiary insufficient to pierce the corporate veil); *see also* Cal. Corp. Code
7 § 310(a) (“A mere common directorship does not constitute a material financial interest within
8 the meaning of this subdivision.”); 8 Del. C. § 144 (similar effect).

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

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19
20 ⁸ The insinuations at the hearing that EnergySense’s President, David Bell, also serves as Vice
21 President of Marketing for Masco Contractor Services and National Sales Manager for Masco
22 are false. Mr. Bell has never held a position as an officer or director in any Masco-related
23 company except as President of EnergySense, and he has never been a National Sales Manager
24 for Masco. Affidavit of David Bell (“Bell Aff.”), ¶¶ 1-6; Commission Docket Binder at Tab 22,
25 p. 10. The documents referenced at the hearing (Commission Docket Binder, Tab 18, Bates No.
26 0000075 (October 16, 2006 e-mail from Tav Commins) and Complainant Ex. at Tab 29, Bates
27 No. GA 000213 (AHC Group Brochure)) identifying Mr. Bell as the Vice President of
28 Marketing for Masco Contractor Services or as National Sales Manager for Masco are simply
erroneous. *Id.*

25 Mr. Bell is employed by Masco Home Services, Inc., a wholly-owned Masco subsidiary,
26 as the Manager of the Environments for Living® program. Bell Aff., ¶ 2; Werner Aff., ¶ 4.
27 Neither Mr. Bell nor any of EnergySense’s other officers and directors are employed by
28 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.

1 **B. Neither EnergySense Nor The HERS Raters EnergySense Employs**
2 **Advocate Or Recommend The Use Of Any Product Or Service As A**
3 **Means Of Gaining Increased Business From The Installers Of Energy**
4 **Efficiency Improvements That Are Tested Under Title 24.**

5 Under the Title 20 conflict of interest regulation, individual HERS raters are also prohibited
6 from advocating or recommending the products or services of builders or installers whose work is
7 tested under Title 24, as a means of gaining increased business from them. The HERS raters
8 employed by EnergySense (and EnergySense itself) comply fully with this prohibition. Hearing
9 Tr. 100:9-101:11; 140:22-141:10; Calleros Aff., ¶ 8; Padron Aff., ¶ 9; Williams Aff., ¶ 8.
10 Notably, the marketing efforts of the HERS raters and EnergySense focus exclusively on
11 advocating their testing services, not the products or services sold by builders or installers,
12 including Masco's separate installation subsidiaries. Contrary to the claim raised at the hearing
13 (Hearing Tr. at 29:10-30:2), neither Masco Corporation nor any other Masco-related company
14 has ever entered into a national contract with Pulte Homes that requires the use of HERS raters
15 employed by EnergySense or any other Masco-related company for Title 24 testing purposes.
16 Bell Aff., ¶12; Hearing Tr. 148:14-149:7.⁹

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

23 Instead, that website is operated by Williams Consolidated I, Ltd. ("Williams"), a Texas

24 ⁹ However, nothing in the Title 20 regulations prohibits builders or installers of energy efficient
25 improvements from advocating or recommending the use of HERS raters employed by
26 EnergySense, EnergySense or others for testing services. Indeed, that is fully consistent with the
27 language in Example 2-7 of the 2005 Residential Compliance Manual, which expressly
28 acknowledges that installation and testing services may be sold to builders as a package by
 installation companies. The incorrect use by a division of one of the Masco installation
 subsidiaries, Coast Insulation Contractors, Inc., of a bid form bearing EnergySense's name in the
 letterhead, and erroneously identifying EnergySense as a division of Masco Contractor Services,
 does not alter that conclusion. See Complainant Ex., Tab 22 at MAS 00035; Padron Aff., ¶ 17;
 Weber Aff., ¶ 10; Davenport Aff., ¶ 3.¶

1 limited partnership indirectly owned by Masco Corporation, that conducts business exclusively in
2 Texas under the assumed names “Energy Sense” and “Energy Sense Systems.” Werner Aff., ¶¶
3 9-10; Affidavit of Mark Curry (“Curry Aff.”), ¶ 3.¹⁰ Williams, not EnergySense, is solely
4 responsible for the content of that website. Curry Aff., ¶¶ 2-4.

5 The Declarations of David Hegarty and Vicki Rule submitted by Complainants concerning
6 a meeting that Mr. Padron attended on March 5, 2008 (not in April 2007 as Hegarty and Rule
7 claim) concerning an Isleton, California Del Valle Builder project do not come close to showing
8 that either Mr. Padron or EnergySense violated any of Title 20’s conflict of interest requirements,
9 including the prohibition on advocating or recommending the services of installers of energy
10 efficiency improvements as a means of gaining increased business.¹¹ Padron Aff., ¶ 18.
11 Certainly, Mr. Padron never stated that “EnergySense was not in any way affiliated with Masco,”
12 as Ms. Rule asserts. Rule Dec., ¶ 6. Instead, Mr. Padron stated that “EnergySense was a separate
13 company owned by Masco and that the HERS raters employed by EnergySense complied with
14 the HERS conflict of interest requirements.” Padron Aff., ¶ 18. Likewise, neither at that meeting
15 nor on any other occasion after commencing his employment as EnergySense’s Division
16 Manager in March 2008, has Mr. Padron advocated or recommended the services of any Masco
17 subsidiary to Ms. Rule or anyone else as a means of gaining increased business for EnergySense.

18
19 ¹⁰ EnergySense and Williams are entirely separate businesses. Werner Aff., ¶¶ 9-10; Bell Aff.,
20 ¶ 8. EnergySense does not operate in Texas; instead, it conducts business only in California and
21 Nevada. Padron Aff., ¶ 1. EnergySense has no involvement in the business or operations of
22 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.

23 ¹¹ Pursuant to the Commission’s March 18, 2009 Order, the parties had until March 27, 2009 to
24 file “any sworn witness affidavits.” The declarations are not “sworn affidavits,” and thus should
25 be disregarded. Moreover, at the March 17, 2009 hearing, the Commission directed the parties
26 to exchange any affidavits with each other prior to filing. See Hearing Tr. at 167. Respondents
27 provided Complainants with copies of all the affidavits they intended to file on March 24, three
28 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.

1 Padron Aff., ¶¶1, 9-10, 18-19; Hearing Tr. at 140:22-141:10.

2 **II. BOTH ENERGYSENSE'S STRUCTURE AND THE CONTRACTS**
3 **ENERGYSENSE HAS ENTERED INTO WITH THE SEPARATE MASCO**
4 **INSTALLATION SUBSIDIARIES SAFEGUARD TITLE 20 CONFLICT OF**
5 **INTEREST COMPLIANCE.**

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

16 In January 2006, representatives of Masco and certain of its installation subsidiaries
17 operating in California approached CHEERS' Executive Director, Tom Hamilton, for guidance in
18 complying with the conflict of interest requirements. In a series of meetings with Hamilton,
19 Masco received reassurance that its proposed plan to consolidate and transfer HERS raters from
20 the installing subsidiaries (where they had been employed) to a new, separate wholly-owned
21 Masco subsidiary (to be named EnergySense, Inc.) would meet HERS requirements. Bell Aff., ¶
22 9; Davenport Aff., ¶ 5; Hearing Tr. at 88:23-91:24 Significantly, Hamilton expressed CHEERS'
23 view that EnergySense's proposed structure, including having HERS raters employed by
24 EnergySense conduct field verification and diagnostic testing of HQII work performed by
25 separate Masco installation subsidiaries, would be consistent with Title 20 conflict of interest
26 requirements, particularly in light of the fact that the regulations on their face apply only to
27 individual HERS raters, and not to their employer. *Id.*; Commission Docket Binder at Tabs 21
28 (Deposition of Tom Hamilton) and 17 at 0000188-191.

In those discussions, Hamilton also suggested that, as an extra precaution, firewalls be put

1 in place between EnergySense and the Masco installation subsidiaries. *Id.* Following Hamilton's
2 advice, Masco began the lengthy process of forming EnergySense as a new, wholly-owned
3 subsidiary, while Masco's insulation installing subsidiaries took steps to modify their structure
4 and procedures to ensure the separateness and independence of their previously employed HERS
5 raters. *See* Hearing Tr. 95:13-97:4

6 One of the measures central to that effort was EnergySense's entry into contracts with the
7 Masco installation subsidiaries. Commission Docket Binder at Tab 6, MAS 001-0022. Those
8 contracts establish that the raters employed by EnergySense are independent contractors who are
9 directly accountable to the installation companies' customers — the builders — for the testing
10 services they provide. *See, e.g., Id.* at MAS 004, ¶ 9; MAS 001, ¶ 3; MAS 002, ¶ 1(e). The
11 contracts are non-exclusive — they do not obligate Masco's subsidiaries to use EnergySense's
12 raters for testing services, nor do they obligate EnergySense's raters to perform testing referred
13 by those companies. *Id.* at MAS 001, ¶ 1(a). Indeed, under those contracts, EnergySense is free
14 to market the testing services provided by its HERS raters directly to builders or rely upon
15 referrals from Masco's installation subsidiaries. *Id.* Under the contracts, EnergySense retains
16 exclusive control over the prices charged to builders for the verification and testing services
17 provided by its HERS raters, and it does not vary its pricing based upon the identity of the
18 installation company whose work is tested. *Id.* at MAS 003, ¶ 3; Hearing Tr. at 106:18-114;
19 146:14-147:6; Respondents' Exhibits A and B.

20 In exchange for the opportunity to offer builders a more comprehensive set of services,
21 Masco's installation subsidiaries act as conduits for builder orders and payments to EnergySense
22 for the testing services provided by its HERS raters on a pass-through basis without any markup
23 or administrative fees charged by the installation subsidiary. Commission Docket Binder, Tab 6
24 at MAS 003, ¶ 4(a); Heim Aff., ¶¶ 7-9; Weber Aff., ¶¶ 7-9; Brewer Aff., ¶¶ 7-9.; Smith Aff., ¶¶
25 7-9. Moreover, bids submitted to a builder for installation and testing services are evaluated
26 separately by the builder on a standalone basis, enabling the builder to select from among the
27 services offered. Heim Aff., ¶ 8; Weber Aff., ¶ 8; Brewer Aff., ¶ 8; Smith Aff., ¶ 8. If, in
28 response to those bids, a builder elects HERS testing services, EnergySense is responsible for

1 scheduling the testing by its HERS raters and reporting the test results to the builder and
2 CHEERS, not the installation subsidiary. *See* Respondents' Exhibits A and B; Hearing Tr. at
3 106:18-114:15; 146:14-147:6. That contractual arrangement is functionally equivalent to the
4 permissible "three-party contracts" described in Example 2-7 in Section 2 of the 2005 Residential
5 Compliance Manual. Bell Aff., ¶ 10; Complainant Ex. at Tab 9; Commission Docket Binder at
6 Tab 17, Bates Nos. 0000188-191.

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

11 **III. THE COMPLAINTS SHOULD BE DISMISSED.**

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

16 However, even assuming that a conflict of interest violation occurred (although none did),
17 the remedy that Complainants seek — barring EnergySense "from performing HERS testing on
18 any structure upon which any other Masco-related entity has performed installation of energy
19 efficient products" — is not available as a matter of law.¹² *See* Commission Docket Binder, Tab
20 26, Prehearing Brief of Complainants at 5:19-23. While "any person or entity may file a
21 complaint" with the Commission "concerning any violation of [the HERS] regulations as
22 provided for in Section 1230 *et. seq.*," and the "Commission may for, good cause, conduct an
23 investigation, and if necessary, hearing," the Commission has no authority under Title 20 to
24 sanction Masco, EnergySense or the HERS raters EnergySense employs for any HERS conflict of
25 interest violations. Section 1675(b). Instead, the Commission's authority is expressly limited to

26
27 ¹² As a matter of policy, that remedy is also unavailable, as it would effectively restrain
28 EnergySense's ability to compete and would provide Complainants, two of EnergySense's
competitors in the HERS testing market, with an improper competitive advantage.

1 revoking the “certification of the provider pursuant to Section 1230, *et. seq.*” Section 1675(c)
2 (emphasis added). Because the Commission’s remedial authority is so restricted under Title 20, it
3 is thus barred from assessing any sanctions against Respondents in this case. *See People v.*
4 *Harter Packing Co.*, 160 Cal. App. 2d 464, 467-68 (1958) (invalidating administrative order that
5 imposed a penalty not expressly authorized).¹³

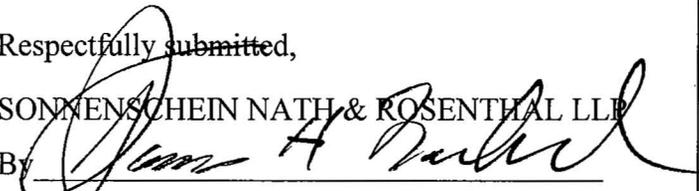
6 **CONCLUSION**

7 For the foregoing reasons, the Commission should find that EnergySense and the HERS
8 raters EnergySense employs have not violated Title 20 conflict of interest requirements, and
9 dismiss the Complaints.¹⁴

10 Dated: April 6, 2009

Respectfully submitted,

11 SONNENSCHN NATH & ROSENTHAL LLP

12 By 

13 STEVEN H. FRANKEL (State Bar No. 171919)
14 SONNENSCHN NATH & ROSENTHAL LLP
15 525 Market Street, 26th Floor
16 San Francisco, CA 94105-2708
17 Telephone: (415) 882-5000
18 Facsimile: (415) 882-0300

19 BRETT A. CRAWFORD
20 SONNENSCHN NATH & ROSENTHAL LLP
21 1301 K Street, N.W.
22 Suite 600, East Tower
23 Washington, DC 20005-3364
24 Telephone: (202) 408-6400
25 Facsimile: (202) 408-6399

26 Attorneys for Respondents
27 MASCO CORPORATION AND
28 ENERGYSENSE, INC.

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.*

14 As agreed at the March 17 hearing, Respondents submit their Closing Brief in lieu of
reconvening a hearing for closing argument purposes.

1 **PROOF OF SERVICE**

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

4 I, Diane Donner, hereby declare:

5 I am employed in the City and County of San Francisco, California in the office of a
6 member of the bar of this court and at whose direction the following service was made. I am
7 over the age of eighteen years and not a party to the within action. My business address is
8 Sonnenschein Nath & Rosenthal, 525 Market Street, 26th Floor, San Francisco, California
9 94105.

10 On April 6, 2009, I served the enclosed document, filed electronically with the State of
11 California Energy Resources Conservation and Development Commission, and described as

12 **CLOSING BRIEF OF RESPONDENTS MASCO
13 CORPORATION AND ENERGYSENSE, INC.**

14 on the interested parties in this action by placing a true copy thereof, on the above date, enclosed
15 in a sealed envelope, following the ordinary business practice of Sonnenschein Nath &
16 Rosenthal LLP, addressed as follows:

17 Brett L. Dickerson (via email)
18 Gianelli & Associates PLC
19 1014 16th Street
20 P.O. Box 3212
Modesto, CA 95353

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

21 Carol A. Davis
22 CHEERS Legal Counsel
23 3009 Palos Verdes Drive West
Palos Verdes Estates, CA 90274

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

24 John Richau, HERS Rater
25 Certified Energy Consulting
26 4782 N. Fruit Avenue
Fresno, CA 93705

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

SONNENSCHN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 882-5000

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

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

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

- 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.
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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]