

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

CALIFORNIA LIVING & ENERGY (a
division of William Lilly & Associates, Inc.)
and DUCT TESTERS, INC.,

Docket Number 08-CRI-01

**CLOSING BRIEF OF COMPLAINANTS
CALIFORNIA LIVING AND ENERGY
AND DUCT TESTERS, INC.**

Complainants,

vs.

MASCO CORPORATION and
ENERGYSENSE, INC.,
Respondents.

DOCKET

08-CRI-1

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TABLE OF CONTENTS

I.	WAIVER OF RIGHT TO PRESENT ORAL ARGUMENT	4
II.	APPLICABILITY OF FACTUAL ELEMENTS TO LEGAL ISSUE	4
1.	<u>EnergySense Performs HERS Testing of Installations</u> <u>Carried Out By Other Masco Subsidiaries.</u>	5
2.	<u>Shared Employees.</u>	5
*	David Bell's Position in the Masco Corporation Hierarchy	6
3.	Employment of HERS Raters.	7
III.	FINANCIAL RELATIONSHIP BETWEEN MASCO, ENERGYSENSE AND MASCO'S INSTALLING SUBSIDIARIES.	9
1.	<u>Wholly Owned Subsidiaries</u>	9
2.	<u>Income Reporting</u>	10
3.	<u>Legal Services.</u>	11
4.	<u>"High Level Oversight"</u>	12
IV.	CROSS REFERRAL OF BUSINESS BETWEEN ENERGYSENSE AND MASCO'S INSTALLING SUBSIDIARIES.	13
1.	<u>Administrative Services in Exchange for Business</u> <u>"Opportunities"</u>	13
2.	<u>Identifying the Appropriate "EnergySense".</u>	14
3.	<u>Further Examples of Cross-Promotion.</u>	15
4.	<u>"Environments For Living"</u>	16
V.	THE ROLE OF THE CALIFORNIA HOME ENERGY EFFICIENCY RATING SERVICE IN SEEKING APPROVAL FOR THE MASCO/ENERGYSENSE RELATIONSHIP	17
1.	<u>CHEERS' Assistance to Masco.</u>	17
2.	<u>The Hamilton E-Mail to Masco.</u>	18
3.	<u>CHEERS' Response To Complaint Re: Conflict of Interest.</u>	19

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VI.	NO APPROVAL BY THE CALIFORNIA ENERGY COMMISSION WAS EVER GRANTED FOR ENERGYSense TO INSPECT INSTALLATIONS BY OTHER MASCO SUBSIDIARIES.	20
VI.	HOW THE MASCO/ENERGYSense RELATIONSHIP VIOLATES THE CONFLICT OF INTEREST PROVISIONS AND RESULTS IN FINANCIAL BENEFIT TO MASCO CORPORATION.....	21
VII.	THE ISSUE BEFORE THE COMMITTEE IS NOT FOUNDED ON THEORIES OF ALTER-EGO LIABILITY AS ALLEGED BYRESPONDENTS IN THEIR PRE-HEARING BRIEF.....	23
VIII.	COMPLAINANTS' INTERPRETATION OF THE CONFLICT OF INTEREST REGULATIONS ARE CONSISTENT WITH THOSE HELD BY THE C.E.C	24
IX.	COMPLAINANTS INTERPRETATION OF THE CONFLICT OF INTEREST REGULATIONS IS CONSISTENT WITH THE LEGISLATIVE INTENT OF THE ENERGY EFFICIENCY PROGRAM	27
X.	THE GOAL OF STATUTORY INTERPRETATION IS TO CARRY OUT THE GOALS OF THAT LEGISLATION SO AS TO AVOID ERRONEOUS RESULTS.....	28
XI.	PROPOSED REMEDIES.....	29
	CONCLUSION.....	30

1 During the opening moments of the Hearing in this matter conducted on March 17, 2009,
2 California Energy Commission Senior Staff Counsel Dennis Beck described the issue of law
3 which the Efficiency Committee had convened to resolve, namely:

4 Is there a conflict of interest on the part of the Masco Corporation and
5 EnergySense, Inc. in violation of the HERS regulations found in Article
6 8 of Title 20 of the California Code of Regulation, sections 1670
through 1675?

7 Although this is, primarily, a strictly legal issue, there was a significant amount of
8 factual evidence provided during the course of the Hearing, both oral and documentary, that
9 related directly to this legal inquiry. That evidence clearly established that the
10 Masco/EnergySense relationship and the long-term practice of EnergySense performing HERS
11 inspections of installations of energy efficiency measures conducted by other Masco
12 subsidiaries does violate these provisions and, in so doing, does nothing less than place the
13 integrity of California's entire Energy Efficiency Program into question. As was shown at the
14 Hearing and will be described in detail below, the relationship between these two entities is
15 deep and multi-faceted. There can be no other decision other than a finding that this relationship
16 is in violation of the relevant regulations prohibiting conflicts of interest between the *installer*
17 and the *inspector* of these energy measures and cannot be allowed to continue.

18 **I.**
19 **WAIVER OF RIGHT TO PRESENT ORAL ARGUMENT**

20 Consistent with the agreement reached at the conclusion of the Hearing, Complainants
21 hereby waive their right to present oral closing arguments in this matter. This Closing Brief is
22 hereby submitted to the Committee in lieu thereof.

23 **II.**
24 **APPLICABILITY OF FACTUAL ELEMENTS TO LEGAL ISSUE**

25 The Masco/Energy Sense Relationship violates 20 CCR 1670 through 1675 on multiple
26 levels. Complainants will, in the following pages, go through the overwhelming factual evidence
27 that clearly establish the impropriety of this relationship for purposes of the conflict of interest
28 Regulations.

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1 **1. EnergySense Performs HERS Testing of Installations Carried Out By Other**
2 **Masco Subsidiaries**

3 This important element of the conflict of interest inquiry was rendered a *fait accompli* by
4 Respondent's stipulation, at the beginning of the Hearing, that EnergySense actively and openly
5 performs HERS testing of installations carried out by other Masco subsidiaries which require
6 such tests under Title 24.

7 **2. Shared Employees**

8 Respondents have gone to great lengths in an effort to show that none of the individual
9 HERS Raters have ever been employed by any other Masco-related entity, although the
10 evidence presented below will conclusively show that they have previously been, and remain to
11 some degree, the employees of Masco Corporation. However, Respondents have chosen to
12 disregard Masco's widespread sharing of employees at the highest level of corporate
13 governance. Clearly, it is less the individual Raters than the high-level corporate decision
14 makers who can bring about the harm caused by illegal conflicts of interest, particularly when
15 carried out on a State-wide scale.

16 Such is the case with Masco Corporation and EnergySense. According to the evidence
17 presented at the Hearing (Complainant's Exhibit 35 & Docket Binder - Tab: 6; Pg.: MAS 024 &
18 25) the following individuals occupy positions of authority within Masco, Energy Sense and
19 other Masco subsidiaries:
20

21 **Eugene Gargaro:** *Masco - Director*
22 *EnergySense - Director, Vice President and Secretary.*

23 **John Leekley:** *Masco - Vice President and General Counsel.*
24 *EnergySense - Director*

25 **John G. Szniewajs:** *Masco - Director and the Vice President, Treasurer and Chief*
26 *Financial Officer*
 EnergySense - Vice President, Treasurer and Assistant Secretary

27 **Barry Silverman:** *Masco - Vice President – Associate General Counsel*
28 *EnergySense - Assistant Secretary*

1 **Lawrence Leamon** *Masco Contractor Services of California - Vice President*
2 *Builder Services Group, Inc. – Vice President*
3 *EnergySense - Vice President*

4 **Carolyn Christian** *Masco - Secretary*
5 *EnergySense - Secretary*

6 **David Bell** *Masco Contractor Services – Vice President (*)*
7 *EnergySense – President*

8 *** David Bell's Position in the Masco Corporation Hierarchy**

9 In his affidavit, David Bell asserts that he has never held any position with a
10 Masco-related entity other than his current position as President of EnergySense.
11 (Affidavit of David Bell; 1;23-25 and 2;11-16) Nonetheless, the Flyer for the AHC
12 Group Conference (Complainant's Exhibit 29; Pg.: 000213) identifies him as Vice
13 President of marketing for Masco Contractor Services. Mr. Bell asserts this is a
14 mistake on the part of AHC, although the website for Mr. Bell is identified therein as
15 www.masco-csc.com. While this flyer was admittedly not produced by Masco, it was
16 likely put together on the basis of information provided either by Mr. Bell or someone
17 working with him.

18 Complainants also presented an e-mail from Tav Commins of the CEC to Bill
19 Lilly. (Docket Binder – Tab: 17; Pg.: 000075) In this e-mail Mr. Commins identifies
20 Mr. Bell as the "National Sales Manager with Masco". Mr. Bell asserts Mr. Commins
21 was, like the AHC Group, in error as to this identification.

22 As a final point, during the Hearing, Bill Lilly testified under oath that, during
23 the many years of their acquaintance, Mr. Bell had also identified himself as a Vice
24 President and/or Manager of Masco Contractor Services. (Hearing Transcript: 76; 8-
25 19)

26 No documentary evidence was presented by Complainants which would
27 contradict Mr. Bell's assertions that he had never formally occupied the position of
28

1 Vice President with any other Masco entity. However, there is a difference between
2 actually holding a corporate officer position, and *representing yourself* as holding it. In
3 the present matter, we have a conference flyer and two separate individuals within the
4 industry, all of which identify Mr. Bell as a Vice President with Masco. It is
5 Complaints' position that, regardless of what position Mr. Bell may have formally
6 held with Masco Contractor Services, for purposes of generating business for his
7 employer, he likely either represented himself as being an officer with Masco, or failed
8 to readily correct anyone who mistakenly held this belief.
9

10 Complainants will leave the determination of this issue to the Committees'
11 judgment.

12 **3. Employment of HERS Raters.**

13 Regarding the individual Raters employed by EnergySense, the two witnesses called by
14 Respondents, David Short and Jaime Padrone, (both HERS raters with either former or current
15 employment with EnergySense), testified that there were no Raters employed by EnergySense
16 who were also simultaneously employed by another Masco-subsiary. However, the close
17 relationship between EnergySense and other Masco subsidiaries, is highlighted by Mr. Short's
18 testimony that virtually all of the original 8 raters who worked for EnergySense had previously
19 worked for other Masco installers. Furthermore, according to this same testimony, these HERS
20 Raters had, for all intents and purposes, essentially quit Masco one day and started with
21 EnergySense the next. (Hearing Transcript: 132;2-24)
22

23 The extent to which these employees simply "changed hats", but not their function,
24 within the Masco empire is confirmed by the invoices for HERS training to both EnergySense
25 and other Masco-subsiaries. (Complainants' Exhibits 25 and 26 & Docket Binder – Tab: 17;
26 Pgs.: 296 to 316) These documents identify the following individuals as having been through
27 HERS training on behalf of Energy Sense and other Masco companies.
28

<u>Name</u>	<u>Date of Masco Training</u>	<u>Date of EnergySense Training</u>	
Jaime Padrone	6-14-05	4-11-08	
Matthew Jordan	6-14-05	4-11-08	
Timothy Williams	9-28-05	4-11-08	
Josh Perez	9-28-05	8-2-07	
Mark Boone	8-25-05	8-15-06	(Billed 6-1-07)
Israel Calleros	6-29-05	8-17-06	(Billed 6-1-07)
Corey Barnhardt	1-12-06	4-11-08	
Marco Vacca	1-26-06	8-29-06	(Billed 6-1-07)
Mike Smit	1-12-06	8-17-06	
Brandon Wood	1-12-06	8-17-06	

It also critically important to note that the two of the invoices to Sacramento Building Products, a Masco-subsiary performing insulation installation, were sent to 500 Sequoia Pacific Blvd, Sacramento, CA, 95814. (Docket Binder – Tab: 17; Pgs.: 297, 300 & 306) Two of the invoices sent to EnergySense in June and August 2007 were also mailed to 500 Sequoia Pacific Blvd, Sacramento, CA, 95814. (See Docket Binder – Tab: 17; Pgs.: 307 & 308)

Not only were the invoices to Masco-related installers and EnergySense being sent to the same addresses, the identity of the entities paying for these services further establishes the unity of these Masco subsidiaries. In 2005 and 2006, there are checks written to pay for CHEERS training and certification of HERS Raters employed by Masco subsidiaries performing installations, including, but not limited to Coast Building Products. These checks are issued by three different payors identified as 1) Masco Contractor Services West, Inc.; 2) American National Services, Inc.; and 3) American National Services, Inc. aka Masco Contractor Services. (Docket Binder - Tab: 17; Pgs.: 320 to 325). The address and phone number for these entities listed on the checks is: 260 Jimmy Ann Drive, Daytona Beach, FL, Ph. # (386) 304-2217.

We also have two checks to CHEERS from April and May of 2008 in which the payor is identified as Energy Sense, Inc. (Docket Binder – Tab: 17; Pgs.: 326 to 327) The address and phone number for Energy Sense Inc. is: 260 Jimmy Ann Drive, Daytona Beach, FL, Ph. # (386)

1 304-2217.

2 Same Raters.

3 Same work.

4 Same addresses.

5 Same phone numbers.

6 The Declaration of Vicki Rule also establishes that all contact she had with Jaime
7 Padrone was done by way of a Masco e-mail address and that whenever she had a problem with
8 any of the Masco installations, insulation or otherwise, it was Mr. Padrone she would contact
9 for assistance. (Declaration of Vicki Rule: 2;10-18)

10
11 The observation made in Complainants' Pre-Hearing Brief rings more true now than it
12 did then. For all intents and purposes, all these Raters did was replace the magnetic signs on the
13 side of their truck. Nothing of substance changed. Masco Corporation, through their wholly
14 owned subsidiaries, was doing both the installation *and* the inspection of those installations in
15 violation of the conflict of interest provisions before EnergySense was formed. Masco
16 Corporation, through EnergySense, continues to do so to this day.

17
18 **III.**
19 **FINANCIAL RELATIONSHIP BETWEEN MASCO,**
20 **ENERGYSENSE AND MASCO'S INSTALLING SUBSIDIARIES.**

21 **1. Wholly Owned Subsidiaries**

22 The evidence is clear and uncontroverted. The financial relationship between Masco and
23 their subsidiaries, including, but not limited to, EnergySense, is widespread and deep. As an
24 initial point, Respondents acknowledge that EnergySense is a wholly-owned subsidiary of
25 Masco. (Docket Binder – Tab: 6; Pg.: 5; 14 to 19) The installing companies are all also Masco
26 affiliates, as well (See Affidavits of Jim Brewer: 1;26-28; Richard Smith: 1;26-28; Steve
27 Weber: 26-28 and Sharon A. Werner: 2;4 to 3;10) Not surprisingly, however, Respondents
28 have spent a great deal of time and effort glossing over a simple, yet compelling fact:

1 *At the end of the day, they all report back to Masco Corporation.*

2 Mega-conglomerates like Masco do not purchase or form subsidiaries in order to lose
3 money, unless those losses can be offset by profits from other sources. The formation of
4 EnergySense by Masco was done with an eye towards improving Masco's bottom line, nothing
5 more, nothing less. While the profit motive may be consistent with our capitalist economy,
6 serious problems arise when the profit-motive conflicts with regulatory prohibitions against
7 certain conduct. The considerable effort which Masco undertook in creating EnergySense
8 underscores their awareness that there were clear violations of the Regulations prohibiting
9 conflicts of interest in the manner in which they were formally doing HERS inspections.
10 Nonetheless, their creation of EnergySense has not solved the underlying problem. Regardless
11 of what they choose to call it, it's all still Masco Corporation.

12
13 **2. Income Reporting**

14 As a publicly traded company, Masco Corporation generates an Annual Report and a
15 Form 10-K. The form 10-K is required by the Securities and Exchange Commission and
16 provides a very detailed financial picture of Masco Corporation. Included in these reports are
17 consolidated financial statements that include the performance of their subsidiaries. In the
18 present matter, all financial information regarding the performance of EnergySense and
19 Masco's installation subsidiaries operating in California, including Western Insulation, LP,
20 Coast Insulation Contractors, Inc., Sacramento Insulation Contractors and Masco Contractors
21 Services of California are reported back to Masco Corporation for inclusion in Masco's Annual
22 Reports and Form 10-Ks. This has taken place since those companies began operations or were
23 acquired by Masco Corporation. (See Complainants' Exhibit 24 & Docket Binder - Tab: 22;
24 Pgs.: 6 & 7)

25
26 Because of this reporting, the financial fortunes of EnergySense and all other installation
27 subsidiaries have a direct impact on Masco's bottom line. This places Masco Corporation's
28 management, many of whom also occupy positions of authority in EnergySense and the Masco

1 installation subsidiaries, in a position to control the operations of all affected entities and pursue
2 a “big picture” approach so as to maximize the value of Masco Corporation’s stock.

3 This is the textbook scenario which conflict of interest provisions are meant to address.
4 Under 20 CCR 1673, this relationship cannot be allowed to continue if EnergySense is to
5 perform HERS testing here in California.

6 **3. Legal Services**

7 The evidence presented was clear: When EnergySense faces a legal battle, it is Masco
8 Corporation’s cavalry that rides in over the hill. As an example, on or about July 25, 2008,
9 Robert Scott, the Executive Director of the California Home Energy Efficiency Rating Service
10 (CHEERS) sent letters to several HERS Raters employed by EnergySense advising them that a
11 complaint had been lodged which alleged violations of the conflict of interest provisions. (See
12 Complainants’ Exhibit 5 & Docket Binder – Tab: 17; Pgs.: 0166 to 0186) The response to these
13 letters came not from an EnergySense attorney or a private law firm retained by EnergySense.
14 This defensive missive came from Kenneth Cole, who is identified on the letterhead as
15 “Associate Corporate Counsel & Counsel – Installation and Other Services, Masco
16 Corporation” (Complainants’ Exhibit 4 & Docket Binder - Tab 17: 188-191) Additionally, the
17 testimony of David Short at the Hearing confirmed that, during his tenure with EnergySense, he
18 also regularly utilized legal services provided by Masco Corporation. (Hearing Transcript:
19 124:22 to 125;2).

22 Metaphorically, EnergySense is similar to the 18-year old who loudly proclaims his
23 personal and financial independence, but at the first hint of trouble, yells for his parents. If
24 EnergySense calls for Masco’s attorneys to bail them out every time they have a legal issue,
25 they are not as independent from the parent company as Respondents would invite you to
26 believe.

27 ///

1 **4. “High Level Oversight”**

2 Both the Hearing testimony of David Short and the responses to the Commission’s
3 initial request for information from Respondents confirms that Masco provides “high level
4 oversight” to EnergySense. (Docket Binder – Tab: 6; Pg.: 8;1-2) The profound level of this
5 oversight can be confirmed, not only by the shared officers and directors described above, but by
6 an inspection of both the corporate bylaws of various Masco entities, including EnergySense,
7 There is literally no difference among any of them, save the identity of the corporation. Clearly,
8 these were all drafted by the same legal department. The same holds true for the agreements for
9 HERS services (Docket Binder – Tab: 6; Pgs.: MAS 001 to MAS 021) Again, they are virtual
10 duplications of one another. Obviously, a single entity is drafting these documents on behalf of
11 all Masco subsidiaries, including EnergySense, and the evidence clearly establishes that the
12 entity doing so is Masco Corporation.
13

14 This “sharing” of administrative services is not limited to Masco Corporation and
15 EnergySense. Even those Masco subsidiaries which perform installations provide such services
16 to EnergySense. The affidavits of: 1) Richard Smith, the Manager of Masco Contractor
17 Services; Steven Heim, the Regional Manager for Western Insulation, L.P.; 3) Jim Brewer, the
18 President of Sacramento Insulation Contractors, and 4) Steve Weber, the District Manager for
19 Coast Insulation Contractors, Inc., all of which are entities that install residential insulation here
20 in California, provide this identical, and rather startling, admission:
21

22 “[The respective Masco installing entity] provides invoicing and payment
23 collection services for EnergySense, Inc. *in exchange for the ability to offer a
24 more comprehensive set of services to Builders.*” (emphasis added)

25 This statement acknowledges the existence of a *quid pro quo* relationship between four
26 (4) installing subsidiaries and an inspecting subsidiary. That relationship, expressed in plain
27 English, can be defined as follows:

28 “We will give you free billing services and you will pay us back by sending
installation services our way through package deals.”

As will be shown below, such a relationship not only establishes that there are shared responsibilities for the operation of the various Masco entities, but also that these relationship inevitably result in improper cross-promotion between insulation installers and the HERS Raters who inspect those installations.

**IV.
CROSS REFERRAL OF BUSINESS BETWEEN ENERGYSENSE
AND MASCO'S INSTALLING SUBSIDIARIES.**

1. Administrative Services in Exchange for Business "Opportunities"

We now have confirmation that these corporate governance services are not done *gratis*, but, rather with an expectation of return favors. In the case of Masco Contractor Services, that consideration is the promotion of their installation services under the guise of a "more comprehensive set of services to Builders."

In business, as in life, there is no such thing as a free lunch. EnergySense is not being given these services for nothing. Masco installers such as Masco Contractor Services obviously receive something of significant value in return. Not only does this constitute an independent violation of 20 CCR 1673 as an improper cross-promotion of an installer by a HERS Rater, but it also constitutes a violation of the financial prohibitions as well, as the monetary benefits of these arrangements inevitably find their way back to Masco Corporation.

Additionally, the Affidavits submitted by Richard Smith, Steven Heim, Jim Brewer and Steve Weber, identified above, all contain the following statement as well:

"Bids submitted to builders by [The respective Masco installing entity] for installation and for field verification and diagnostic testing by HERS raters employed by EnergySense, Inc. are generally evaluated by the builders on a standalone basis, allowing the builders to pick from a variety of service options."

Again, builders are being provided package deals where the inspection services of EnergySense: are included in the installation bid. While the builders are "generally" allowed to evaluate them on a stand alone basis, it is likely they will not seek to bring in a separate Rater, particularly of the package deal allows for a lower overall rate due to the economies of everything being provided by what is essentially the same entity.

1 **2. Identifying the Appropriate “EnergySense”.**

2 Much has been made of the relationship between Respondent EnergySense and the
3 EnergySense which is identified in Complainant’s Exhibit 30. The affidavits submitted by
4 Respondents allege that there is virtually no connection between these two entities and that any
5 links in the website to other Masco installing entities will be of no moment to the present
6 inquiry. However, in response to these affidavit-based denials, the authors of which were never
7 subject to cross-examination, the Committee is asked to consider the following testimony and
8 documents which were presented at the Hearing:

- 9
- 10 1. The logo for both EnergySense entities involves the word “Sense” below the word
11 “Energy” and slightly offset so that the first “S” in the word Sense is directly below
12 the “r” in the word Energy. Additionally, the S at the beginning of the word Sense in
13 both logos are identically modified so as to resemble a dollar sign. (Complainants
14 Exhibits 9 and 30);
- 15 2. Both EnergySense entities are admitted Masco affiliates;
- 16
- 17 3. The link from the EnergySense website is to Masco Contractor Services, (MCS)
18 which according to the MCS website is a group of independent companies operating
19 under “local business names that you know and trust”. Furthermore, the affidavit of
20 Richard A. Davenport confirms that these independent businesses are also
21 subsidiaries of Masco Corporation. (Declaration of Richard Davenport: 2;9-12)
- 22
- 23 4. The MCS website has a conspicuous reference to Masco’s “Environments for Living
24 program which the evidence has shown is sold throughout the United States,
25 including California, as a package of services, including inspections.
- 26 5. It is also acknowledged by Respondents that another Masco Corporation subsidiary
27 identified as Masco Contractor Services *of California*, performs insulation
28 installation in California (Declaration of Richard Smith: 2;1-2). As to the

relationship between Masco Contractor Services of California and EnergySense, they share 5 individuals who occupy identical positions of authority in each entity; (Complainants' Exhibit 18; Pg.: MAS 00281)

6. MCS is also the entity which Tom Hamilton of CHEERS will be shown to have requested as the source of legal correspondence to the CEC when he was advising Masco on the best way to work around the various CEC personnel to obtain the approval of EnergySense as a Rater of Masco installations. In his e-mail to Masco he makes reference to "MCS legal people" an apparent reference to Masco Contractor Services. The accuracy of this identification is confirmed by the a similar use of the term "MCS" in referring to Masco Contractor Services in Masco's annual report (Complainants' Exhibit 27; Pg. GA000108).

Respondents ask the Committee to believe that, because they are separate corporate entities, there is no connection between them or, more importantly, there is no sharing of information between them. The evidence, however, proves otherwise. Given the significant connections between these entities, if a consumer here in California was linked to Masco Contractor Services through the EnergySense website, the odds of that person not eventually being connected with another Masco subsidiary here on the West Coast are virtually nil. Again, it is all a part of one large plan, the ultimate beneficiary of which is Masco Corporation.

3. Further Examples of Cross-Promotion

The examples of the relationship between the Masco installation and inspection subsidiaries and how they refer business to one another multiply the more these entities and their business practices are examined. In addition to those previously discussed, the list of products propounded by Coast Building Products, a division of Masco Contractor Services shows that this Masco-affiliated installer advertises that they can provide HERS testing in conjunction with their installation services. (Complainants' Exhibit 10; Docket Binder – Tab: 1; Pg.: 0050) Additionally, the Bid Sheets and Purchase Orders contained in Complainants

1 Exhibits 19-23 show that Coast Building Products and Sacramento Building Products are
2 bidding out the cost of Title 24 inspections. Based on the information before the Committee,
3 and the pre-hearing stipulations by Respondents, can there be any question which HERS Rater
4 is performing these services?

5 The evidence presented conclusively shows that the various Masco entities are so
6 inexorably intertwined, it is difficult to see where one ends and the other begins. Nonetheless,
7 Respondents boldly proclaim that there is nothing to this. If we were to accept their arguments,
8 it doesn't matter: 1) how many Vice Presidents, Secretaries, Directors, and attorneys they all
9 share; 2) that they use a common legal department to, not only draft their documents, but to
10 fight their battles with both the CEC and CHEERS; and 3) that they readily admit their
11 installing and inspecting subsidiaries exchange administrative services for the opportunity to
12 provide a "more comprehensive set of services to Builders." According to Respondents, these
13 various entities have barely even heard of one another. However, the voluminous evidence to
14 the contrary and simple common sense shows this is categorically false.

15
16 **4. "Environments For Living"**

17 In those states which do not have the equivalent of California's Title 24, Masco is free to
18 perform all energy-related services, including both installation and inspection, in conjunction
19 with comprehensive energy packages. One of the most common "package" deals offered by
20 Masco is their "Environments for Living" Program ("EFL"). Through this multi-layered
21 program, Masco provides multiple energy savings measures, several of which would be subject
22 to Title 24 HERS testing here in California (See Complainants' Exhibit 27; Pgs.: 108 & 109). It
23 was Masco's efforts to do their own installation and inspection under EFL here in California
24 that formed the genesis of the current dispute.

25 In 2002, at the request of Complainant, California Living and Energy, the CEC looked
26 into the EFL's compliance with Title 24. In a series of E-mails involving William Pennington of
27 the CEC, Bill Lilly of California Living and Energy and Tom Hamilton of CHEERS. Masco's
28

1 compliance with Title 24 under the EFL program was examined and, ultimately, found to be
2 inadequate by Mr. Pennington:

3 “Independent third-party verification is required for measures in the standards
4 that require such verification. The MASCO quality control process does not
5 satisfy this requirement.” (Complainants’ Exhibit 37 & Docket Binder – Tab: 1;
Pg. 0051)

6 At this point, it appeared that this conclusion by Mr. Pennington was the end of the
7 matter. Unfortunately, it resurfaced, thereby precipitating a follow-up e-mail from Bill Lilly to
8 Mr. Pennington in April of 2006. (Complainants’ Exhibit 38 & Docket Binder – Tab: 1; Pg.:
9 0017) By this time, however, Masco had recognized that their practice of using the same
10 company to perform both installation and HERS inspections violated California’s conflict of
11 interest regulations. As such, Masco had already embarked on their plan to create a separate
12 corporate fiction for the sole purpose of circumventing these regulations and allow Masco
13 Corporation to utilize their status as one of the pre-eminent suppliers of insulation products in
14 the United States (See Complainants’ Exhibit 27; Pg.: 102) to obtain a position of similar
15 dominance in the field of HERS inspections here in California.

16 **V.**
17 **THE ROLE OF THE CALIFORNIA HOME ENERGY EFFICIENCY**
18 **RATING SERVICE IN SEEKING APPROVAL FOR THE**
19 **MASCO/ENERGYSENSE RELATIONSHIP**

20 The Respondents have placed great reliance on their efforts to work with the California
21 Energy Efficiency Rating Service (“CHEERS”) to form EnergySense in a manner that would
22 avoid Title 20’s conflict of interest regulations. As such, it is important for the Committee to
23 fully understand the role CHEERS played in the process and how Respondents used a Provider
to unsuccessfully ramrod their plan through the CEC.

24 **1. CHEERS’ Assistance to Masco.**

25 The evidence presented at the hearing, along with the deposition testimony of Tom
26 Hamilton, the former Executive Director of CHEERS, establishes the means by which Masco
27 sought to carry out this plan. Masco Corporation essentially solicited the personal, hands-on
28

1 assistance of CHEERS, a HERS Provider, in forming EnergySense. According to Mr.
2 Hamilton's deposition testimony, he engaged in telephone conversations with high level
3 personnel from Masco Corporation in an effort to create a corporate scheme by which the very
4 same HERS raters could continue to inspect installations by Masco subsidiaries, but do so under
5 the banner of a new corporation. This new entity, which ultimately evolved into EnergySense,
6 would employ the same HERS raters, inspect the same Masco installations and, in the
7 beginning, have the same mailing address as Sacramento Building Products, a Masco subsidiary
8 performing installations. (Docket Binder – Tab: 17; Pgs.: 297, 300, 306, 307 & 308) However,
9 through the clever use of “firewalls” suggested by Mr. Hamilton, they would be able to continue
10 business as usual just by changing the name under which they did business (Deposition
11 testimony of Tom Hamilton; 32;11 to 33;14 and 37;8 to 19)

12
13 It is important to note, however, that, while Masco was aggressively seeking the “seal of
14 approval” of CHEERS, (Docket Binder – Tab: 7; Pg.: 4; 8-13) it was the California Energy
15 Commission that was ultimately responsible for the approval of this plan as being consistent
16 with the conflict of interest provisions. Mr. Hamilton acknowledges this in his deposition
17 testimony. (Deposition of Hamilton: 60;22 to 61;7 and 69;13 –16)) He further acknowledges
18 that, in providing this assistance to Masco, he never “approved” the EnergySense organizational
19 structure (66;4-11 and 80; 16-20) and he made no inquiries into many of those issues which
20 would assist him in conclusively establish whether a conflict existed. (Deposition of Hamilton:
21 66;12 to 67;14).

22
23 **2. The Hamilton E-Mail to Masco.**

24 The nature of the efforts being carried out by Respondents to procure CHEERS
25 assistance in obtaining CEC approval cannot be ignored. While these efforts are characterized
26 by Respondents as a “prudent” means of insuring that the formation of EnergySense would
27 meet all Title 20 requirements, the communications from the Executive Director of CHEERS to
28 several high level Masco managers paints a somewhat different picture. (Complainants' Exhibit

1 3 & Docket Binder – Tab: 17; Pg.: 200) This document shows that CHEERS did not merely
2 provide advice to Masco, but instead actively advocated for Masco and strategized with them on
3 how to procure CEC approval.

4 There is little need to belabor the contents of the Hamilton e-mail in this Brief, as it was
5 read in its entirety by William Pennington during the course of the Hearing and is available for
6 full review by the Committee. Suffice it to say that it casts a revealing light on the creation of
7 EnergySense and the lengths to which Masco and CHEERS, somewhat questionably, joined
8 forces to pursue the CEC approval that they clearly realized was not likely to be granted.
9

10 **3. CHEERS' Response To Complaint Re: Conflict of Interest.**

11 It must also be noted that, the Response of CHEERS to complaints of potential conflicts
12 of interest and to the letter from Masco attorney Kenneth Cole may highlight a weak point in
13 the process of ensuring compliance with California law. It appears that the extent of the
14 investigation carried out by CHEERS in response to this complex legal and factual inquiry was
15 to do nothing more than send each Rater a letter advising them of the complaint, reminding
16 them of their obligations, and requesting that they sign a "Verification of Rater Agreement" in
17 which the Rater verifies he or she is in compliance with the terms of the "CHEERS TITLE
18 24/RESIDENTIAL NEW CONSTRUCTION RATER RENEWAL AGREEMENT
19 (Complainants' Exhibit 5 & Docket Binder – Tab: 17; Pgs.: 166 to 198) This indicates that, as
20 far as one of California's three Providers is concerned, an illegal conflict of interest can be
21 resolved by the affected rater signing a document which says "I promise I'm doing it right" and
22 having it sent back under a cover letter from Masco Corporations' legal department. Under the
23 relevant regulations, including, but not limited to 20 CCR 1673(b)(3) CHEERS is required to be
24 actively involved in this process and, among other duties, to provide certifications that the Rater
25 meets the conflict of interest requirements so as to assist the CEC in determining the regulations
26 are being followed. If this doesn't take place, the regulatory system, and with it, the Energy
27 Efficiency Program collapses.
28

1 This matter will, hopefully, be addressed in greater detail at a future date.

2 **VI.**
3 **NO APPROVAL BY THE CALIFORNIA ENERGY COMMISSION**
4 **WAS EVER GRANTED FOR ENERGYSENSE TO INSPECT**
5 **INSTALLATIONS BY OTHER MASCO SUBSIDIARIES.**

6 The deposition testimony of Tom Hamilton and the documentary evidence clearly
7 establishes that Masco knowingly jumped the gun on this matter. It is undisputed that no CEC
8 approval was ever provided for Masco Corporation to form EnergySense to carry out HERS
9 inspections of installations being carried out by other Masco subsidiaries. In spite of
10 Respondents' best efforts to cast their relationship as having been sanctioned by both CHEERS
11 and the CEC, the evidence is undeniably to the contrary. In fact, as late as May 15, 2007,
12 William Stack, the CEC's Senior Staff Counsel wrote a letter to David Bell, the President of
13 EnergySense advising him of a potential conflict of interest in the Masco/Energy Sense
14 relationship. In this letter, he requests extensive additional information which would show that
15 no conflict existed. (Complainants' Exhibit 15 & Docket Binder - Tab: 18; Pgs.: 001- 004) This
16 is an important point. The CEC was not seeking information to establish the existence of a
17 conflict, but was rather soliciting information from EnergySense to show that there was not a
18 conflict.

19 There is no evidence that this information was ever provided to the CEC. All that exists
20 is the letter from Kenneth Cole, attorney for Masco Corporation, in which he alludes to an
21 alleged conversation with members of the CEC in which the possible conflict was discussed
22 (Complainants' Exhibit 4; & Docket Binder - Tab 17; 188-191) However, even this letter
23 acknowledges that there was no affirmative approval granted by the CEC. Essentially, Mr. Cole
24 states that, because no one there affirmatively said "No", it must have meant "Yes".
25 Additionally, David Short, in his testimony before the Committee at the Hearing, admits that the
26 CEC had never given approval for the EnergySense to inspect installations by Masco
27 companies. (Hearing Transcript: 131;9-11) Given the importance of insuring that the conflict of
28 interest provisions are followed, this assumption on Masco's part was not only erroneous, but
reckless as well.

1 The evidence further shows that, although no such approval had ever been granted,
2 EnergySense personnel were claiming such approval existed in order to procure additional
3 business inspecting Masco installations. (See Declarations of Vicki Rule:2;23-26 and David
4 Hegarty:2;5-11). Respondents were unable to produce any such documents to support this
5 claim. Additionally, the Affidavit of Jamie Padrone, in which he attempts to rebut having made
6 this claim is, to say the least, a bit underwhelming. He refuses to deny he made the claim, but
7 instead will only go so far as to say that he had no recollection of saying it. He then goes on to
8 further qualify this response by saying that, if he did make that representation to Vicki Rule and
9 Dave Hegarty, he was in error. These declarations and affidavits establish a strong likelihood
10 that Masco and/or EnergySense were convincing customers that the CEC had given their
11 approval, even though everyone involved knew such approval didn't exist.

12
13 The failure on the part of Respondents to produce any such evidence, coupled with the
14 absence of any such written approval in the CEC's file on this matter, conclusively establishes
15 no such approval ever existed, in spite of EnergySense's representations to the contrary. Even
16 Tom Hamilton was forced to admit, there was no "prudence" in EnergySense performing HERS
17 inspection of other Masco installers before the CEC had given their approval. (Hamilton
18 Deposition Transcript: 80;10-15) He then proceeds to deny ever having given Masco the OK,
19 from a conflict of interest standpoint, for EnergySense to inspect installations by other Masco
20 affiliates. (Hamilton Deposition Transcript: 80;10-15) In a nutshell, Masco and EnergySense
21 satisfied no one but themselves that they were good to go on their plan, yet went forward
22 anyway. This level of making your own rules and then deciding for yourself when you have
23 satisfied them cannot be countenanced and must be stopped.
24

25
26 **VI.**
27 **HOW THE MASCO/ENERGYSENSE RELATIONSHIP VIOLATES**
28 **THE CONFLICT OF INTEREST PROVISIONS AND RESULTS IN**
FINANCIAL BENEFIT TO MASCO CORPORATION

It is important to bear in mind that the conflict of interest provisions contained in 20 CCR

1 §1673 are preventative in nature. No one is allowed a “free bite at the apple.” The goal is to
2 prevent conflicts of interest before they happen. Unfortunately, because Masco unilaterally took
3 the ball and ran with it before any approval had been granted, the present conflict exists and
4 could, conceivably, affect every home in which a Masco subsidiary has installed energy savings
5 measures which require HERS testing.

6 How can Masco utilize the existence of EnergySense to benefit their stockholders?
7 Because Masco Corporation ultimately owns and controls companies that perform both the
8 installations *and* the inspection, there is potential for otherwise faulty installations to be passed
9 over, thereby avoiding the need for corrective measures to be carried out by the installer. Masco
10 Corporation’s nationwide sales of insulation alone have approached \$2 *billion* per year, so there
11 is a real potential for them to similarly dominate the installation of insulation here in
12 California, as well. The uncontroverted testimony of Kirk Dall establishes the significant added
13 expense incurred when an installer has to come out and correct a faulty installation. (Hearing
14 Transcript: 30;17) Furthermore, the cost of the second HERS inspection is not borne by the
15 builder, but by the installer responsible for the faulty installation. (Hearing Transcript: 30;18 to
16 31;5)

17
18 In short, the cost to correct a faulty installation significantly outstrips the cost of the
19 original work. As such, it is in the best interests of the installer to avoid this added expense. In
20 the current scenario, all EnergySense need do is provide their Masco – affiliated installers a
21 more lenient approach to HERS inspections and the bottom line of the installer is significantly
22 enhanced. The extent of the reduced costs to the installer could conceivably be so pronounced
23 that EnergySense could operate on a virtual “non-profit” basis, yet still allow Masco
24 Corporation, as the parent company of both entities, to enjoy significant overall benefit which,
25 ultimately, is paid for by California’s homeowners and the waste of our scarce resources.

26 Respondents have proclaimed that such conduct will never take place and the
27 EnergySense employees they brought to the Hearing echoed this sentiment and expressed the
28

appropriate level of offense that it was even suggested. In fact, Respondents' frequently stated fall-back position, when confronted with the inevitable conflict in the Masco/EnergySense relationship and the distinct possibility that poor installations will not be "called" by the Rater, is that EnergySense inspectors really try to do a good job and are very conscientious in how they carry out their inspections. However, these protests are of no moment to the present inquiry. It is not for Complainants to prove that such conduct has taken place. It is only to show *that the present Masco/EnergySense scheme creates the potential for such conduct*. The level of training and education they undergo cannot and will not resolve the problem. A financial conflict of interest of the type at issue is not cured with extra training.

There is no doubt of the severity of the problems that could arise with EnergySense, a Masco Corporation subsidiary, inspecting installations carried out other Masco subsidiaries. It cannot be allowed to continue if California's Energy Efficiency Program is to function as intended, and with it, maintain any credibility within either the industry or the minds of the ultimate consumer.

**VII.
THE ISSUE BEFORE THE COMMITTEE IS NOT FOUNDED
ON THEORIES OF ALTER-EGO LIABILITY AS ALLEGED BY
RESPONDENTS IN THEIR PRE-HEARING BRIEF**

Respondents, in their opening brief, have relied on two cases for the proposition that there can be no conflict of interest because EnergySense being a subsidiary, is a legally separate entity from its parent company Masco Corporation. (Westinghouse Electric Corp v. Superior Court of Alameda County (1976) 549 P.2d 129; Luis v. Orcutt Town Water Co. 204 Cal.App.2d 433.) As such, according to Respondents' arguments, since they are separate corporate entities, there can be no illegal conflict under 20 CCR 1670 to 1675.

This position is unsupportable on multiple levels. First, the issues presented herein relate to conflicts of interest, not "alter ego" liability. There is nothing within the relevant regulations which require that the corporate veil be pierced in order to find an improper conflict. Furthermore, even if there were such a requirement, the cases cited by Respondents would be

1 inapplicable in that the evidence presented shows that EnergySense was formed for no other
2 purpose than to circumvent the conflict of interest regulations. In the face of such open efforts to
3 utilize the corporate fiction to gain an illegal competitive advantage, our Courts have consistently
4 recognized that, as a preventative measure, the corporate existence will be disregarded:

5
6 “It should also be noted that, while the doctrine does not depend on the presence
7 of actual fraud, it is designed to prevent what would be fraud or injustice, if
8 accomplished. Accordingly, bad faith in one form or another is an underlying
9 consideration and will be found in some form or another in those cases wherein
10 the trial court was justified in disregarding the corporate entity.” (Associated
11 Vendors, Inc. v. Oakland Meat Co., (1962) 210 Cal. App. 2d 825, 838.)

12 This disregard of the distinction between related corporate entities is especially
13 appropriate when the rights of third persons, in this case, the citizens of California, need to be
14 protected, as the following case held:

15 “While it is the general rule that a corporation is an entity separate and distinct
16 from its stockholders, with separate, distinct liabilities and obligations,
17 nevertheless there is a well-recognized and firmly settled exception to this
18 general rule, that, when necessary to redress fraud, protect the rights of third
19 persons, or prevent a palpable injustice, the law and equity will intervene and
20 cast aside the legal fiction of independent corporate existence, as distinguished
21 from those who hold and own the corporate capital stock, and deal with the
22 corporation and stockholders as identical entities with identical duties and
23 obligations.” (Wenban Estate, Inc. v. Hewlett, (1924) 193 Cal. 675, 696.)

24 As discussed above, this matter is not dependent upon theories of alter ego liability.
25 However, even if it were, there was adequate evidence presented to allow the Committee to
26 disregard the corporate fiction and, for the protection of California’s home-buying public, treat
27 EnergySense and Masco Corporation as a single entity for purposes of ensuring compliance with
28 20 CCR 1673.

24
25 **VIII.**
26 **COMPLAINANTS’ INTERPRETATION OF THE CONFLICT OF INTEREST**
27 **REGULATIONS ARE CONSISTENT WITH THOSE HELD BY THE C.E.C.**

28 The Respondents have vehemently argued that the Complainants are misinterpreting the
relevant sections of Title 20, sections 1671 through 1674. However, based upon the requests
previously propounded by the CEC in this matter, Complainants and the C.E.C are on the same

page. The reality is that the both the Complainants and the CEC can see the “forest” and are not becoming distracted by the individual “trees” They both recognize the underlying purpose of the conflict of interest provisions and why the Masco/EnergySense relationship violates these provisions.

The conflict of interest regulations at issue were drafted in response to a legislative fiat to create a program by which California could effectively implement a program for energy efficiency in residential construction. Title 20, § 1670 specifically describes to the scope of the relevant regulations:

“These regulations establish the California Home Energy Rating System Program pursuant to Public Resources Code Section 25942, including procedures for the training and certification of raters, and a certification program for home energy rating system organizations (herein referred to as providers) and for home energy rating services (herein referred to as rating systems)” (20 CCR 1670)

Reference to the relevant portions of Section 25942 of the Public Resources Code provides important guidance as to what the regulations promulgated by the Commission were to accomplish in meeting the Legislatures intent:

(a) On or before July 1, 1995, the commission shall establish criteria for adopting a statewide home energy rating program for residential dwellings. The program criteria shall include, but are not limited to, all of the following elements:

- (1) Consistent, accurate, and uniform ratings based on a single statewide rating scale.
- (2) Reasonable estimates of potential utility bill savings, and reliable recommendations on cost-effective measures to improve energy efficiency.
- (3) Training and certification procedures for home raters and quality assurance procedures *to promote accurate ratings and to protect consumers.*” (emphasis added) (Cal Pub Resources Code § 25942 (a)(1)(2) & (3))

The purpose of the legislation which ultimately resulted in the Regulations at issue was to benefit the homeowners of the state of California. A pivotal element in this goal was the

1 establishment of an energy rating system by which consumers could make informed decisions
2 regarding home energy efficiency.

3 Obviously, the role that the Raters play in this important process cannot be overstated.
4 Not only is the accuracy of the ratings important to the buying public, but it is pivotal in
5 ensuring that the finite resources here in California are not squandered. In assessing the
6 reliability of these ratings, the State cannot tolerate even a hint of impropriety, either actual or
7 potential. The result of this imperative was the creation of 20 CCR 1673(i):
8

9 i) Conflict of Interest.

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

12 (2) Providers and raters shall be independent entities from the builder and
13 from the subcontractor installer of energy efficiency improvements field
14 verified or diagnostically tested. (20 CCR 1673.)

15 The meaning of the terms utilized within the above cited sections were
16 provided earlier within the regulations:

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

21 Independent Entity means having no financial interest in, and not
22 advocating or recommending the use of any product or service as a means
23 of gaining increased business with, firms or persons specified in Section
24 1673(i).

25 Note: The definitions of "independent entity" and "financial interest,"
26 together with Section 1673(i), prohibit conflicts of interest between
27 providers and raters, or between providers/raters and
28 builders/subcontractors (20 CCR 1671.)

Respondents advocate the narrowest possible reading of this statute. Their position is that
the only "conflict of interest" the legislature envisioned as compromising the integrity of the
system is if the Rater themselves had a personal financial interest in the installer. Having the
Rater's ultimate employer (Masco Corporation) owning the installer is, according to

Respondents, just fine. However, as will be shown below, this strained interpretation is not consistent with the legislative intent behind its creation and, if followed would result in results that are both inconsistent and illogical.

**IX.
COMPLAINANTS INTERPRETATION OF THE CONFLICT OF INTEREST
REGULATIONS IS CONSISTENT WITH THE LEGISLATIVE INTENT OF
THE ENERGY EFFICIENCY PROGRAM**

Allowing a massive conglomerate such as Masco Corporation carry out and, ultimately, control both the installation and inspection of energy efficiency measures will clearly violate the Legislature's intent when they passed these laws. Such a result is unacceptable if the rating system is going to function as proposed, regardless of how many corporate layers Masco Corporation adds to the picture. However, Respondents have consistently asserted that is not the proper inquiry. They advocate the narrowest possible reading of the relevant regulations. According to Respondents, unless the individual Rater has some personal interest in the installing entity, all is well and the integrity of the independent third party rating system remains pristine. Respondents, however, ignore a fundamental principle regarding corporations, namely that, a corporation is incapable of doing anything on its own. It must utilize employees to carry on its corporate purpose: "A corporation can act only through its individual employees" Janken v. G.M. Hughes Electronics (1996) 46 Cal.App.4th 55, 77.)

The C.E.C., however, has never been amenable to Respondents' strained reading of the Regulations. In their own inquiries into this matter in May of 2007 (Complainants' Exhibit 15 & Docket Binder – Tab: 18; Pgs.: 001-004) and their request for information in response to this complaint (Complainants Exhibit 33 Pgs.: 4-6 & Docket Binder - Tab 4; Pgs. 4-6) there is virtually no information requested regarding individual Raters. These requests deal almost exclusively with the relationship between Masco and EnergySense and the cross-referral of business between the various Masco entities. Both the Complainants and the CEC recognize where the true potential for mischief resides regarding conflicts of interest in this arena.

Respondents, nonetheless assert everyone else is wrong and the regulations can only be interpreted in the manner they propose. As will be shown below, however, the Courts of California have consistently upheld Complainants' common-sense interpretation of regulations of the type at issue before the Committee.

**X.
THE GOAL OF STATUTORY INTERPRETATION IS TO
CARRY OUT THE GOALS OF THAT LEGISLATION SO AS
TO AVOID ERRONEOUS RESULTS.**

The courts of our State have long recognized the need to see beyond the most restrictive interpretation of a statute or regulation so as to insure the goals of the legislation are carried out and illogical results avoided. "It is fundamental in statutory construction that courts should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (citations) Clean Air Constituency v. State Air Resources Bd., (1974) 11 Cal. 3d 801, 813-814. A long line of cases since then have not only confirmed this fundamental principle of statutory construction, but have expanded it to encompass perceived conflicts between a litigant's proposed interpretation of a statute and the obvious intent of the legislature when it was enacted:

"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (citation) People v. Belton (1979) 23 Cal.3d 516, 526.)

Later cases are in accord:

"But the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible (citations) Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. Lungren v. Deukmejian (1988) 45 Cal. 3d 727, 735.)

One of these decisions even spoke of the need to judiciously avoid interpretations which would produce results that defied common sense:

Accordingly, if a statute is susceptible to more than one interpretation, we must adopt the reasonable meaning and reject that which would lead to an unjust and absurd result. (citations) Even if the language of the statute is unambiguous, it "should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." (citations) "Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (citation) People v. Catelli, (1991) 227 Cal. App. 3d 1434, 1448.)

Admittedly, "absurd" is a strong word. Nonetheless, can anyone legitimately argue that the most rational interpretation of 20 CCR §1673(i) would be to preclude an individual Rater from owning 6% of the stock in a small corporation that performs installation, but would embrace a multi-billion dollar conglomerate potentially taking over both the installation and inspection of energy efficiency measures here in California through the artful use of corporate subsidiaries? Such an interpretation would render the conflict of interest provisions, and with them, the entire Home Energy Rating System, a sham. Common sense and California law, as shown in the above-cited cases, prohibit such a result.

XI. PROPOSED REMEDIES

As a proposed remedy to improve and maintain the integrity of the HERS procedures, Complainants propose the following:

- (1) When all signatures are received and 3-party contract complete, prior to any inspections being carried out, the HERS rater who is responsible for third-party testing forwards the signed contract/agreement to one of the three (3) Providers. The Providers will be responsible to confirm and approve all procedures were completed correctly and will sign off each and every 3 party agreement.
- (2) The HERS Provider shall confirm there is no conflict of interest, including, but not limited to, joint ownership, parent-subsidiary relationship, "sister company" or any other manner of corporate or financial relationship between

1 the installer and HERS Rater. Should the HERS Provider determine a
2 potential conflict exists, the affected HERS Rater shall submit a new
3 application to the CEC for approval prior to conducting HERS inspections
4 under the affected 3-party contract.

5 (3) When the HERS Rater receives written approval from the Provider, the Rater
6 can initiate HERS testing. The Provider shall have the authority, at the
7 Providers' discretion, to require that the HERS Rater may not be a part of
8 "ride-alongs" with the company carrying out the affected installation. In
9 these ride-alongs, the Rater does not perform inspections after the work is
10 completed, but in essence, rides along in the installer's truck throughout the
11 day while the installations are being carried out.

12 (4) Energy Sense will be precluded from performing HERS testing on any
13 installations carried out by another Masco-affiliate until such time as
14 EnergySense has, to the full satisfaction of the CEC, and after appropriate
15 notice and opportunity for public comment, severed the corporate and
16 financial relationship with Masco Corporation and its subsidiaries so as to
17 meet the conflict of interest provisions contained in 20 CCR 1670 to 1675.

18 CONCLUSION

19 California's Energy Efficiency Program is the "Gold Standard" for energy-
20 savings in residential construction. It is no exaggeration that much of the rest of the United
21 States looks to us for guidance as to how to implement and carry out similar programs in their
22 own State. Furthermore, the home-buying consumer looks to our rating system as a means of
23 ensuring that the home they build or purchase has satisfied California's stringent standards
24 regarding energy efficiency. The C.E.C., in their ongoing efforts to insure the People's interests
25 are protected, regularly take steps to insure that the system performs as intended, such as the
26 recently adopted changes to the Building Energy Efficiency Standards. The backbone of this
27 system is the requirement that those charged with the responsibility of confirming these
28

standards are independent and free from any hint of an affiliation with those installing the energy measures which are subject to inspection. For this reason, our Legislature enacted provisions which preclude conflicts of interest between the HERS rater and those performing installations.

Masco Corporation, a multi-billion dollar building material conglomerate, has, through the nimble use of the corporate fiction, attempted to circumvent these pivotal conflict of interest provisions through a veritable labyrinth of business entities, the complexity of which required Respondents to offer a separate affidavit for no other purpose than to try to explain it all. Nonetheless, regardless of how many layers of companies they form in an effort to show that EnergySense is a "stand-alone" entity, the facts conclusive show that EnergySense, like their Masco sister companies, is ultimately controlled by the mother corporation. The potential for this relationship to compromise the integrity of the HERS rating system is both serious and self-evident. If the Energy Efficiency Program is to maintain any credibility, EnergySense cannot perform HERS testing on any structure in which another Masco company has performed installations. Masco Corporation is far too involved in these subsidiaries, both operationally and financially, to accept Respondents' claim that operate independently.

The Committee is respectfully requested to find the Masco/Energy Sense relationship to be in violation of, among others, 20 CCR 1673(i) and that EnergySense be precluded from further testing of installations conducted by another Masco-related entity.

Dated: April 6, 2009.

GIANELLI & ASSOCIATES,
A Professional Law Corporation

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 April 6, 2009 I served:

CLOSING BRIEF OF COMPLAINANTS CALIFORNIA LIVING AND ENERGY AND DUCT TESTERS, INC.

in the following manner and addressed as set forth below;

xx **Via United States Postal Service:** Such correspondence was enclosed in a sealed envelope with postage thereon fully prepaid, addressed as stated below. I caused such envelope to be deposited in the U.S. Mail at Modesto, California through the firm's ordinary course of business.

PLEASE SEE ATTACHMENT

xx 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: April 6, 2009 at Modesto, California.


NIVES GUTHRIE

- 1 Carol A. Davis
- 2 CHEERS Legal Counsel
- 3 3009 Palos Verdes Drive West
- 4 Palos Verde Estates, CA 90274
- 5
- 6 Certified Energy Consulting
- 7 Attn: John Richau, HERS Rater
- 8 4782 N. Fruit Avenue
- 9 Fresno, CA 93705
- 10
- 11 California Certified Energy Rating &
- 12 Testing Services (CalCERTS)
- 13 Attn: Mike Bachand
- 14 31 Natoma Street, Suite 120
- 15 Folsom, CA 95630
- 16
- 17 California Building Performance
- 18 Contractors Association (CBPCA)
- 19 Attn: Randel Riedel
- 20 1000 Broadway, Suite 410
- 21 Oakland, CA 94607
- 22
- 23 California Home Energy Efficiency
- 24 Rating System (CHEERS)
- 25 Attn: Robert Scott
- 26 20422 Beach Blvd.
- 27 Huntington Beach, CA 92648
- 28
- 29 Duct Testers, Inc.
- 30 Attn: Dave Hegarty
- 31 P.O. Box 266
- 32 Ripon, CA 95366
- 33
- 34 Energy Inspectors
- 35 Attn: Galo LeBron, CEO
- 36 1036 Commerce Street, Suite B
- 37 San Marcos, CA 92078
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