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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HENRY GIFFORD, GIFFORD FUEL SAVING,	:	
INC., ELISA LARKIN, ANDREW ASK,	:	Civil Action No. 1:10-cv-07747-LBS
MATTHEW ARNOLD,	:	
	:	
Plaintiffs,	:	ECF CASE
	:	
-against-	:	
	:	
U.S. GREEN BUILDING COUNCIL,	:	
	:	
Defendant.	:	
	:	
	:	
	:	
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----- X		

**U.S. GREEN BUILDING COUNCIL’S MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

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PRELIMINARY STATEMENT

The First Amended Complaint in this action (the “FAC”) reads as if being a critic of the defendant’s business is enough to confer standing, and as if compliance with Fed. R. Civ. P. 8(a) – as construed by the U.S. Supreme Court in *Twombly* and *Iqbal* – is optional. In fact, proper allegations of standing are missing from the FAC, which requires its dismissal. Nor does the FAC contain any plausible, non-conclusory allegations of fact which, if credited, would suffice to hold defendant, U.S. Green Building Council, liable for false advertising under either the Lanham Act or New York law. That is an independent ground for dismissal.

The U.S. Green Building Council, known as “USGBC”, is a non-profit organization that advocates environmentally sustainable building, commonly referred to as “green” building. USGBC developed and publishes a widely recognized rating system for “green” building. It is called “LEED,” short for Leadership in Energy and Environmental Design. LEED is a voluntary nongovernmental rating system that has been developed cooperatively by USGBC and many of its diverse member organizations, which include architectural firms, government agencies, product manufacturers, educational institutions, environmental organizations, real estate developers, and engineering companies.

While USGBC invites all perspectives, including from the public at large, to inform the continuing development of LEED, there are some critics of the LEED rating system. One, Henry Gifford (“Gifford”), is the principal plaintiff in this suit. Gifford, who alleges he is an energy consultant, has been a longtime gadfly, preoccupied with critiquing USGBC and LEED through the media, internet forums and the like. Gifford has every right to voice his criticisms of USGBC and LEED in the public forums of his choosing. But unlike the internet and the public square, access to the federal courts is limited to those with standing to sue. Article III of the U.S.

Constitution has been construed to require a plaintiff to have suffered (and in the pleading context to plausibly allege that it has suffered) an injury-in-fact caused by the conduct complained of. There also can be (and in this case there are) separate federal and state statutory standing requirements. Except in the most conclusory, legally insufficient way, the FAC fails to allege Article III or statutory standing, either for Gifford, his company Gifford Fuel Saving, Inc., or for any of the new co-plaintiffs added to the FAC.

First, plaintiffs lack standing to assert their Lanham Act false advertising claim because they do not, and cannot, properly allege that they are competitors of USGBC, or that USGBC has caused them any direct competitive injury. USGBC develops green building rating systems. USGBC also developed a certification program for buildings and accreditation programs for professionals involved in the design and construction of LEED green buildings. By contrast, plaintiffs do not claim to be developers of green building ratings systems or accreditation programs for green building professionals. Rather, the FAC alleges that plaintiffs are involved in the *actual design* of buildings and building equipment. Moreover, plaintiffs' choice not to be involved in the design and construction of LEED-certified buildings is purely voluntary, just as the choice of others to design buildings in order to achieve LEED certification is also voluntary.

Given the absence of competition between the parties, it is not surprising that plaintiffs further fail to allege a non-conclusory, non-speculative "injury-in-fact" caused by any allegedly false statement by USGBC. Plaintiffs' conclusory and general allegations of injury – disconnected from any specific allegation of wrongdoing by USGBC – are entirely too tenuous and abstract to satisfy the injury-in-fact requirement. Plaintiffs' state law claims suffer from this same fatal defect, plus the additional one that New York state laws concerning false advertising apply only to ads directed at the consuming public at large, not at the more limited commercial

market of businesses involved in the real estate development industry, to which the USGBC statements at issue are directed.

The FAC's substantive allegations of false advertising also do not come close to meeting the requirements of *Iqbal* and *Twombly*. While it is clear that plaintiffs do not like the LEED rating system, they do not claim that any aspect of that rating system constitutes false advertising. Indeed, despite its length, the FAC only claims three statements to be false: (1) a USGBC website statement that LEED certification provides "third-party verification" that buildings were "designed and built using strategies aimed at improving performance across" various metrics, including energy savings; (2) a USGBC press release containing a reference to a study by a third party which concluded that LEED buildings are "performing 25-30% better than non-LEED buildings in terms of energy use"; and (3) an alleged statement that "LEED-certified and other allegedly 'green' buildings 'Boost Employee Productivity.'"

The first and third allegations of falsity are purely conclusory, and thus are not entitled to be treated as true under the teachings of *Twombly* and *Iqbal*. As to the second allegation, the FAC takes the statement completely out of context. The full context is properly before the Court on this motion and, in context, there is no plausible basis to conclude that the statement is false. Accordingly, because plaintiffs have failed to allege sufficient facts for this Court to determine that plaintiffs have Article III and statutory standing, and have failed to allege sufficient facts to support a plausible claim that USGBC has engaged in false advertising in violation of either the Lanham Act or state law, the FAC should be dismissed with prejudice in its entirety.

STATEMENT OF FACTS

The following summary is drawn from the FAC's allegations and from documentary evidence (including references to USGBC's website) referred to in the FAC. The Court may

consider the documents referenced in the FAC, and on which plaintiffs' claims are founded, on this motion to dismiss. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d. Cir. 2002); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 589 (S.D.N.Y. 2007).¹

The Parties to the Lawsuit

According to the FAC, plaintiff Gifford consults on reducing energy costs, and plaintiff Gifford Fuel Savings, Inc. ("Gifford Fuel Savings") is a New York corporation that designs heating and cooling systems, and advises on reducing energy costs. Plaintiff Arnold is a Virginia architect who advises on energy-efficient and sustainable buildings. Plaintiff Ask is a Florida engineer specializing in energy utilization of heating and cooling systems. Plaintiff Larkin is an Oklahoma specialist in moisture barrier design and mold remediation. FAC ¶¶ 8-11.

Defendant USGBC is a Washington, D.C.-based non-profit organization founded in 1993. *Id.* ¶¶ 14, 22. Its mission is to "transform the way buildings and communities are designed, built and operated, enabling an environmentally and socially responsible, healthy and prosperous environment that improves the quality of life." Reddy Dec. Ex. B at 1.

The LEED Rating System

Soon after its formation, USGBC began to develop a voluntary rating system for use in to evaluating environmentally sustainable building design and construction. *Id.* Ex. B at 6. In 1998, USGBC launched LEED as a pilot program to rate new building projects according to various "green" design metrics. *Id.* In March 2000, after extensive modifications, USGBC released a new version of LEED ("LEED 2.0"), called LEED for New Construction, and launched its first building certification program, using that rating system. *See* FAC ¶ 15; Reddy

¹ Plaintiffs failed to annex (or provide website addresses for) any of the documents or web pages referred to in the FAC. Copies of those documents and web pages, and additional pages from the referenced website, are annexed as exhibits to the April 6, 2011 Declaration of Anne C. Reddy ("Reddy Dec.").

Dec. Ex. B at 6-7. Over the next few years, LEED 2.0 was adapted to also provide a green building rating system for the operation and maintenance of existing buildings, and to other niches of the building design and construction industry. Reddy Dec. Ex. B at 7. USGBC's latest rating system, LEED 2009, which includes an upgrade of LEED for new building construction and major renovations, was introduced in January 2009. *Id.* Ex. B at 31-33.

Since 2000, LEED has been premised on identifying strategies intended to improve building design, materials and performance across a number of areas. Those areas include the selection and management of an environmentally sustainable building site, efficient use of water, innovations in energy use and atmospheric emissions, use of sustainable materials and waste-reducing resources, such as recycling, and improvements to the indoor environment such as air quality, acoustics, and light. *See* Reddy Dec. Ex. B at 34-35. LEED certification is available for many segments of the commercial building industry.² LEED certification is point based. Available levels of certification (in ascending order of the points required to achieve them) are: Certified, Silver, Gold, and Platinum. Reddy Dec. Ex. B at 12-13.

All LEED rating systems are publicly and freely available on the USGBC website. *See id.* Ex. B at 36-37. Importantly, in the various applications for which LEED certification is made available, points are awarded for design, materials, location, technologies and strategies *aimed at* improving the environmental performance of the building in question. With the exception of the existing buildings program, the LEED certification process does not assess the *actual* environmental performance of any of the structures for which certification is sought or granted. *See id.* Ex. B at 38-44.

² LEED rating systems include, *inter alia*, LEED for Existing Buildings, LEED for Commercial Interiors, LEED for Core and Shell buildings, LEED for Retail, LEED for Neighborhood Development, and LEED for Schools. *See* Reddy Dec. Ex. B at 36.

In 2007, USGBC created the Green Building Certification Institute (“GBCI”). GBCI is a USGBC affiliate in charge of, among other things, actually awarding LEED certification by determining what points particular applicants are entitled to under the appropriate LEED rating system. To do so, GBCI reviews submitted documentary evidence such as blueprints, specifications, and construction documentation, to verify that a building or renovation is designed and built in accordance with project submissions. *Id.* at Ex. C at 1. GBCI employs project reviewers in the LEED certification program, some of which are drawn from a network of International Organization for Standardization (ISO)-compliant certifying bodies. FAC ¶ 22; Reddy Dec. Ex. B at 45-47. Aside from providing building certifications, GBCI also offers a voluntary accreditation program by which individuals can attain credentials by demonstrating proficiency in a particular LEED rating system. Reddy Dec. Ex. C at 2.

Plaintiffs’ Original “Class Action” Complaint

On October 8, 2010, plaintiffs (then just Gifford and Gifford Fuel Savings) filed a putative class action complaint (the “Class Action Complaint”) (Dkt. 1) against USGBC and its individual founders. The Class Action Complaint alleged that USGBC engaged in a “scheme of deception” intended to injure the “community of building professionals” through deceptive marketing and advertising in violation of the Lanham Act and related New York law, racketeering in violation of RICO, and monopolistic activities in violation of the Sherman Act. *Id., passim.* Plaintiffs purported to represent four disparate classes of plaintiffs: taxpayers, consumers of LEED products, and two classes of building design and construction professionals. *Id.* ¶¶ 1, 12. In December 2010, after USGBC invested considerable time and resources preparing a motion to dismiss the Class Action Complaint, plaintiffs’ counsel suddenly advised

that plaintiffs intended to file an amended complaint; thereafter, plaintiffs were given until February 7, 2011 to do so. (Dkt. 11).

Plaintiffs filed the FAC on February 7. The FAC dropped all class claims, but added three individual plaintiffs: Larkin, Ask, and Arnold. (Dkt. 17.) The FAC abandoned the RICO and Sherman Act claims, but retained a Lanham Act claim and related New York law claims. Finally, although abandoning their allegation of a “scheme of deception” by USGBC, plaintiffs continue to accuse USGBC of willful false advertising. FAC ¶¶ 56, 67, 73, 78.

The FAC purports to quote various statements allegedly made by USGBC, but it only alleges that three statements are false. See p. 3, *supra*. Based on these three allegedly false statements, the FAC asserts causes of action for false advertising in violation of § 43(a) of the Lanham Act, N.Y.G.B.L. §§ 349 and 350, and “common law.”

ARGUMENT

I. STANDARD OF REVIEW

To avoid dismissal under Rule 12(b)(1) and (6), a plaintiff cannot merely recite the elements of a cause of action, or make conclusory allegations. Instead, the plaintiff must allege facts showing grounds for entitlement that raise a plaintiff’s right to relief “above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). Thus, Rule 8(a) requires that a plaintiff plead facts that “state a claim that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Conclusory allegations are insufficient to allow a court to conclude that plaintiff has met this standard. Also insufficient are statements that “merely recite labels, or present legal conclusions as fact, or express a factual inference without stating the underlying facts on which the inference is based.” *Twombly*, 550 U.S. at 545 n.5; *see also Hanly v. Powell Goldstein, L.L.P.*, 290 Fed. Appx. 435, 440 (2d Cir. 2008). Although a plaintiff’s well-pleaded

allegations are entitled to a presumption of truth, conclusory allegations are not. *Iqbal*, 129 S. Ct. at 1951; *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010).

II. THE FIRST CAUSE OF ACTION FOR VIOLATION OF THE LANHAM ACT MUST BE DISMISSED

A. Plaintiffs Lack Statutory Standing

In several circuits, the law is clear that standing to sue for false advertising under the Lanham Act is limited to the advertiser's direct competitors.³ The reason for limiting standing to competitors is found in the Lanham Act's stated purpose of preventing unfair competition, rather than protecting consumer or other business interests. *See* 15 U.S.C.S. 1127; *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir.), *cert. denied*, 516 U.S. 910 (1995); *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.* 165 F.3d 221, 234-35 (3d Cir. 1998) (injury to a non-competitive commercial interest is outside the zone of interests protected by the Lanham Act).

The law in the Second Circuit is slightly less clear, as courts in this Circuit have applied both the "direct competitor" test and a "reasonable commercial interest" test to dismiss false advertising claims under the Lanham Act for lack of standing. *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 2010 U.S. App. LEXIS 21745, at *14 (2d Cir. Oct. 21, 2010) (discussing cases applying both standards); *see, e.g., Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001) (dismissing false advertising claims because plaintiff was not a direct competitor of advertiser); *see also Yurman Studio, Inc. v. Castaneda*, 591 F. Supp. 2d 471, 504 (S.D.N.Y. 2008); *Arnold Chevrolet LLC v. Tribune Co.*, 418 F. Supp. 2d 172, 188 (E.D.N.Y. 2006).

The "reasonable interest" test requires that a plaintiff have (1) a reasonable commercial interest to be protected, and (2) a reasonable basis for believing that this interest is likely to be

³ *See, e.g., Jack Russell Terrier Network v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1037 (9th Cir. 2005); *Hutchinson v. Pfeil*, 211 F.3d 515, 520 (10th Cir.), *cert. denied*, 531 U.S. 959 (2000); *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427, 438 (7th Cir. 1999), *cert. denied*, 528 U.S. 1188 (2000).

damaged by, the alleged false advertising. *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994). Under the reasonable interest test, courts in the Second Circuit routinely dismiss Lanham Act claims for lack of standing due to failure to show a sufficient causal nexus to a competitive harm. *See, e.g., id.* at 694; *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 169-70 (2d Cir. 2007).

A plaintiff lacks a reasonable interest under the first prong of the test where such plaintiff is unable to show that it has a “stake” in the subject matter at issue in the case, i.e., a discernable commercial interest, direct pecuniary interest or a potential for a competitive injury. *See PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1111 (2d Cir. 1997); *The Christopher D. Smithers Foundation, Inc. v. St. Luke’s-Roosevelt Hosp. Ctr.*, 2001 WL 761076, at *3 (S.D.N.Y. July 6, 2001). Under the second prong, while direct competition is not a *sine qua non* for Lanham Act standing, the Second Circuit has repeatedly emphasized “the importance of whether the plaintiff and defendant are in competition [because] competition is a strong indication of why the plaintiff has a reasonable basis for believing that its interest will be damaged.” *Famous Horse*, 2010 U.S. App. LEXIS 21745, at *17; *see Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 131 (2d Cir. 2000) (the reasonable basis prong requires both likely injury and a causal nexus to the false advertising).

In addition, where (as here) defendant’s advertisement is not directly comparative to plaintiff’s product, and plaintiff’s product is not obviously in competition with defendant’s product, a “more substantial showing” of injury and causation is required to satisfy this prong. *ITC Ltd.*, 482 F.3d at 169-70; *Praxair, Inc. v. Gen. Insulation Co.*, 611 F. Supp. 2d 318, 328 (W.D.N.Y. 2009) (noting that the court “disfavors finding standing in cases where the products are not obviously in competition or where the defendant’s advertisements make no direct

reference to any competitor's products"); *see also PDK Labs, Inc. v. Friedlander*, 103 F.3d at 1112-14 (2d Cir. 1997).

Plaintiffs here lack standing to bring their Lanham Act claim under either the direct competitor test or the reasonable interest test. First, plaintiffs have not plausibly alleged that they directly compete with USGBC. Although plaintiffs seek to obscure this fact, the FAC is clear enough that the plaintiffs and USGBC are not competitors. According to the FAC, USGBC is the developer of a voluntary rating system for green buildings and accredits building professionals who provide advice on LEED building design, construction, operation and maintenance. *See* FAC ¶ 2. The FAC does not allege that any of the plaintiffs does either of those things. *Id.* ¶¶ 8-11. Nor does the FAC allege that USGBC designs, constructs or renovates green buildings, makes or installs the equipment used in them, or designs or builds moisture barrier or mold remediation systems, which is what the plaintiffs are alleged to do. *See id.*, asserting that: plaintiff Gifford's business, Gifford Fuel Savings, "provides energy saving heating and cooling system design;" plaintiff Arnold is an architect; plaintiff Ask is an engineer specializing in "diagnosing, designing, and retrofitting" HVAC systems; and plaintiff Larkin "specializes in moisture barrier design and mold remediation."

Plaintiffs' sole allegation of "competitive" activity is the artifice that USGBC and plaintiffs supposedly provide competing "advice" about energy-efficient design. *Id.* ¶ 2. But this allegation is entirely conclusory, because the FAC does not describe the advice that either plaintiffs or USGBC provides, or to whom that advice is provided. This alone is sufficient to contradict any notion that the FAC has sufficiently alleged that the parties are competitors. Moreover, the FAC relies on numerous references to the USGBC website. *See, e.g.*, FAC ¶¶ 26-27, 29. Thus, the description of USGBC's business and the LEED rating systems on the website

are properly before the Court, because they are part of that website. *See* cases cited at pp. 3-4, *supra*.

According to the FAC, plaintiffs' alleged "advice" is solely how to help their customers save energy. FAC ¶ 2. But energy saving is only one part of the LEED rating system, which addresses the overall environmental sustainability of buildings, and also evaluates metrics such as water efficiency, sustainability of site selection, reduction and choice of materials and resources, and evaluation of indoor environmental quality. Reddy Dec. Ex. B at 34-35. The FAC does not allege that plaintiffs provide advice concerning any of the metrics other than energy saving.

The "reasonable interest" test adopted by some courts in this Circuit leads to the same result. Because plaintiffs do not claim that they are in, or attempting to enter, the business of providing a rating system to assess "green" building design, or of accrediting real estate professionals in LEED building design, it is plaintiffs' burden to allege facts that show a reasonable basis for a belief that their commercial interests have been harmed, or are likely to be harmed, by USGBC's conduct. *See Famous Horse*, 2010 U.S. App. LEXIS 21745, at *17. Further, since plaintiffs do not allege that USGBC has referred to plaintiffs' products or services in their advertising, plaintiffs are required to make heightened allegations of injury and causation to sustain their claim. *See ITC Ltd.*, 482 F.3d at 169-70.

The FAC's allegations in this regard are plainly insufficient. Plaintiffs conclusorily allege that they have been injured because USGBC's supposed false advertising "causes consumers of building design and construction advice to utilize a LEED-certified professional instead of Plaintiffs because consumers mistakenly believe that LEED-certified professionals will design a LEED-certified building that is verified by a third party to be more energy-efficient

than the building that Plaintiffs would design,” and “causes consumers of building design and construction services to purchase the design and construction advice contained in the LEED certification system as opposed to Plaintiffs’ design and construction advice.” FAC ¶ 49(a), (b).

These allegations are quintessentially conclusory and speculative. At the most basic level, the FAC fails to identify any instances in which any “consumer of building design and construction advice” considered using one of the plaintiffs but instead decided to use a LEED-certified professional for a project. But even allegations of that sort would be entirely insufficient. In order to establish their pleading obligations regarding standing, plaintiffs would also have to set forth facts sufficient to enable this Court to determine that they have plausibly alleged that the reason a particular builder or developer decided not to use plaintiffs and instead chose a LEED-certified professional was in reliance on one of the three isolated statements made by USGBC in its 18-year history that the FAC alleges to be false. As construed by the Supreme Court in *Iqbal* and *Twombly*, this Court is not permitted, much less required, to accept as true allegations that are conclusory, speculative, or both. *See Twombly*, 550 U.S. at 554; *Iqbal*, 129 S. Ct. at 1951. But that is all the FAC offers to support plaintiffs’ standing to sue USGBC for false advertising.

Finally, in all events, plaintiffs’ speculation is illogical because the LEED professional accreditation is not based simply on an individual’s understanding about energy saving, but rather familiarity across the entire LEED curriculum, which focuses on several critical areas of environmental sustainability besides energy saving. Reddy Dec. Ex. B at 48; *see p. 5, supra*. Thus, LEED-certified professionals offer expertise that the FAC does not allege that plaintiffs possess or market.

B. Plaintiffs Lack Article III Standing because Their Alleged Injury Is Remote and Speculative

A plaintiff bringing a claim in the federal courts must establish Article III standing “for each claim and form of relief sought.” *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010). On a motion to dismiss, a plaintiff must allege “[i] that [it] ‘suffered an injury-in-fact - an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical’; [ii] that there was a ‘causal connection between the injury and the conduct complained of’; and [iii] that it is ‘likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.’” *Id.*, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

A plaintiff bears the burden of proof of establishing all three elements of this test. *Lujan*, 504 U.S. at 560. To show injury-in-fact, the plaintiff must allege a tangible injury, such as monetary loss or harm to goodwill, that “affect[s] the plaintiff in a personal and individual way.” *Id.* at 560 n.1. The causation prong requires that the alleged injury is “fairly traceable to the challenged action of the defendant.” *Id.*; see *Ford v. Nylcare Health Plans of the Gulf Coast, Inc.*, 301 F.3d 329, 332 (5th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003) (causation prong not established where plaintiff could not identify a patient lost as a result of defendants’ ads, or show that plaintiff had received lower pay for his services). The third prong is lacking where the alleged harm, even if fairly traceable to the challenged action, is uncertain to occur if at all. See *Hutchinson*, 211 F.3d at 521.

Plaintiffs have failed to plead any of these elements for Article III standing. The FAC does not allege *any* facts demonstrating a specific tangible injury to any of the plaintiffs, much less an injury expressly caused by any of USGBC’s purportedly false statements. Instead, the FAC’s allegations of injury are entirely conclusory and unspecific as to which customers were

lost, which LEED professionals those customers used instead of plaintiffs, or why those professionals chose not to use plaintiffs. *See* FAC ¶ 49. In short, as pleaded in the FAC, plaintiffs' alleged injury is entirely hypothetical. The FAC does no more than merely suppose that, absent USGBC's allegedly false statements, clients of LEED-certified professionals might have opted against the integrated green building design that the LEED rating system champions, abandoned any interest in sustainable building features other than energy efficiency, and instead opted to pay for plaintiffs' alleged "advice." Such an alleged injury is speculative to say the least.

C. Plaintiffs Have Not Plausibly Alleged a Lanham Act Claim

A claim for false advertising under Lanham Act § 43(a)(1)(B) requires: (1) a commercial advertisement or promotion that contains (2) a false or misleading representation of material fact. *E.g., Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112 (2d Cir.), *cert. denied*, 131 S. Ct. 647 (2010). The FAC identifies only three statements that plaintiffs allege to be false (in each case, literally false): (1) an incomplete excerpt from the USGBC website stating that the LEED system "provid[es] third-party verification that a building or community was designed and built using strategies aimed at improving performance across all the metrics that matter most: energy savings ..." (the remainder of this statement is omitted from the FAC); (2) an incomplete excerpt from a USGBC April 3, 2008 press release, which plaintiffs quote as stating that "buildings certified under the U.S. Green Building Council's [LEED] certification system are, on average, performing 25-30% better than non-[LEED] certified buildings in terms of energy use," and (3) an alleged statement, as to which the FAC does not identify the author, publication, date of publication or context, that "LEED certified and other allegedly 'green' buildings 'Boost Employee Productivity.'" *See* FAC ¶¶ 3, 30, 32, 37-38, 45-47, 54.

None of these allegations satisfies the pleading requirements of *Iqbal* and *Twombly*. In light of *Twombly* and *Iqbal*, the Second Circuit has identified a two-step process to determine whether factual allegations are sufficient to support necessary legal conclusions. First, a court may identify “pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Ruston v. Town Bd. for the Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir.), *cert. denied*, 131 S. Ct. 824 (2010) (internal citations omitted). Disregarding those conclusory averments, the court next considers “the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief.” *Id.*

In assessing whether an advertising statement is false or misleading under the Lanham Act, a court must review the statement in context and in its entirety. *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001); *Time Warner Cable v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007). The requirement that an advertisement must be viewed in context fully applies even at the pleading stage. *See Dyson, Inc. v. Garry Vacuum, LLC*, (C.D. Cal. Jan. 4, 2011), at 22 (attached as Ex. F to the Reddy Dec.). Where the full context of an advertisement is either not presented by plaintiff, or defeats the alleged falsity of the statement, the claim should be dismissed. *Id.* at 22; *see also Cytoc Corp. v. Neuromedical Sys., Inc.*, 12 F. Supp. 2d 296, 299 (S.D.N.Y. 1998).

Plaintiffs assert that USGBC’s “third-party verification” statement is “false on its face” because (a) “there is no certification of the applications submitted for LEED certification;” (b) “[c]ertification does not require actual energy use data;” and (c) USGBC does not have the staff or expertise to evaluate LEED applications. FAC ¶ 38. These allegations are not entitled to any presumption of truth because, to the extent they are even comprehensible, they are wholly conclusory. *Iqbal*, 129 S. Ct. at 1949. The same USGBC website that contains the allegedly

“false” third-party verification statement links directly to the GBCI website, which sets forth the procedures for third-party verification of all applications by developers to obtain a LEED rating for their building, including verification of the completeness of the application and compliance with the specific requirements of the applicable LEED rating system by GBCI reviewers. Reddy Dec. Ex. B at 49-50. Simply saying that this statement is false, without asserting a plausible, non-conclusory reason why it is false, does not suffice.

Plaintiffs’ only stated support for the assertion that LEED applications are not verified is an irrelevant reference to a high school building project in Wisconsin that resulted in a challenge by a few of the school board’s disgruntled building committee members after those individuals allegedly complained that the building, although awarded LEED status, did not meet LEED criteria. FAC ¶ 40. But whatever the facts of that one incident, it does not permit a plausible inference that, contrary to the USGBC’s website statement, the LEED rating system does not provide “third-party verification that a building or community was designed and built using strategies aimed at improving performances across all of the metrics that matter most: energy savings, water efficiency, CO₂ emissions reduction, improved environmental quality, and stewardship of resources and sensitivity to their impacts.” *See* Reddy Dec. Ex. B at 48.

Plaintiffs’ allegation that there is no third-party verification because LEED certification “does not require actual energy use data” is a non-sequitur. The third-party verification statement – quoted in full in the paragraph immediately above – makes clear that what is verified is that buildings which are awarded LEED certification are “designed and built *using strategies aimed at improving*” environmental performance, not how LEED-certified buildings perform after they are occupied. It is plaintiffs’ right to urge, if they wish, that LEED certification be subject to renewal based on post-construction and occupancy performance data. But the USGBC

statement plaintiffs challenge does not represent that actual energy use data is taken into account in granting LEED certifications, or that actual energy use data is part of the third-party verification process. Thus, plaintiffs' argument does not provide any plausible basis for concluding that the "third-party verification" statement is literally false. Finally, plaintiffs do not and cannot claim to have any involvement in how applications for LEED certification are verified, so simply stating that the USGBC does not have the expertise or staff to evaluate LEED applications is an empty conclusory allegation not entitled to be assumed as true under *Iqbal*.

Plaintiffs' assertion that USGBC's "25-30%" statement is "literally false" also fails under Rule 8. The statement that appears in the USGBC April 3, 2008 USGBC press release (the "2008 release") reports on the results of a study performed by a third party organization called the New Buildings Institute ("NBI"). The actual statement in the 2008 release is as follows: "In the NBI study, the results indicate that new buildings certified under the U.S. Green Building Council's (USGBC) LEED certification system are, on average, performing 25-30% better than non-LEED certified buildings in terms of energy use." *See* Reddy Dec. Ex. D.

Plaintiffs do not dispute that the NBI study in fact concludes that new LEED certified buildings are on average performing 25%-30% better than non-LEED buildings in terms of energy use. Instead, plaintiffs' theory is apparently one of concealment, namely that the 2008 release purportedly did not disclose that "[l]ess than half of LEED certified buildings responded to the survey, [and] half of those were eliminated from the sample"; that the study compared new buildings to old buildings; and that the study compared the median average BTUs per square foot in LEED buildings to the mean average used in CBECS buildings, the study's control group. FAC ¶ 32 (a)-(c).

If that is plaintiffs' position, it is demonstrably wrong. The full text of the NBI study is linked to, and is thus a part of, the 2008 release. *See* FAC ¶ 32; Reddy Dec. Ex. E. While plaintiffs are free to criticize the NBI study, each of the above issues was fully disclosed in that study. Compare FAC ¶ 32 (a)-(c) with Reddy Dec. Ex. E at 33-37. The 2008 release also fully disclosed the fact that the NBI study was commissioned by USGBC (*id.* at Ex. D), contrary to plaintiffs' additional erroneous allegation of concealment. *See* FAC ¶ 31.

In short, the 2008 release does nothing more than accurately report the conclusion of the NBI study and provide a link to the study itself, so that persons in the building industry could make their own judgments about that study. Real estate professionals are free to reject the study's conclusions, like plaintiffs claim they have done, because of NBI's express disclosures about how the study was conducted. But that fact does not plausibly or permissibly lead to any inference of false advertising on the part of USGBC.

Finally, plaintiffs' allegation that at some point, in some medium, some entity stated that "LEED certified and other allegedly 'green' buildings 'Boost Employee Productivity,'" and that "Upon information and belief, this claim is false" (*id.* ¶¶ 46-47), is purely conclusory, and for that reason deficient under *Iqbal* and *Twombly*.

Accordingly, the Court should dismiss plaintiffs' Lanham Act claim for the additional reason that it fails to plausibly state a cause of action under Fed. R. Civ. P. 8(a).

III. PLAINTIFFS FAIL TO STATE A CLAIM UNDER NYGBL §§ 349 AND 350

A. Plaintiffs Lack Standing To Sue under New York's Consumer Protection Act

1. The Statements from the USGBC Website Are Not Directed at Consumers

The FAC fails to meet the threshold requirement for bringing a New York Consumer Protection Act claim because it does not plausibly allege conduct by USGBC directed against

consumers. As the name indicates, the Consumer Protection Act is directed at wrongs against the general consuming public, not businesses. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 24 (1995). Article 22-a of the General Business Law, which includes §§ 349 and 350, is intended to protect those who “purchase goods, services or property primarily for ‘personal, family or household purposes.’” *Sheth v. New York Life Ins. Co.*, 273 A.D.2d 72, 73 (1st Dep’t 2000). Section 349 was not intended “to be a sword ‘to be wielded in business-versus-business disputes.’” *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F. Supp. 2d 565, 583 (S.D.N.Y. 1999). Thus, as is reflected in the limited remedy provided (the greater of actual damages or \$50), the statute contemplates actions by individual consumers, or “citizens,” who fall victim to misrepresentations made by sellers of goods, rather than actions by disgruntled businesses. NYGBL § 349(h); *Cruz v. NYNEX Info. Res.*, 263 A.D.2d 285, 290 (1st Dep’t 2000).

In keeping with this stated purpose, New York courts have found that §§ 349 and 350 require a plaintiff to make a threshold showing that a defendant’s challenged acts are “consumer-oriented.” *Cruz*, 263 A.D.2d at 291 (dismissing § 349 claim brought by purchasers of advertising space in business directory published by defendant as failing to show consumer-oriented conduct). To show consumer-oriented conduct, a plaintiff must show that the acts or practices complained of are “directed to consumers” or have a “broad[] impact on the public at large.” *Oswego*, 85 N.Y.2d at 25; see *U.W. Marx, Inc. v. Bonded Concrete, Inc.*, 7 A.D.3d 856, 857 (3d Dep’t 2004).

Although a business is not precluded from bringing a claim under § 349, it is not enough to allege conduct aimed at a business or at a class of professionals; a business is not a consumer under the statute. *Spirit Locker, Inc. v. EVO Direct, LLC*, 696 F. Supp. 2d 296, 303 (E.D.N.Y.

2010); *see Sheth*, 273 A.D.2d at 73; *Med. Soc’y v. Oxford Health Plans, Inc.*, 15 A.D.3d 206 (1st Dep’t 2005). It is also not sufficient to allege that consumers are end-users of services that are marketed at businesses, or to allege that marketing efforts are directed at the public at large, where only businesses are the actual customers served. *See Black Radio Network*, 44 F. Supp. 2d at 583; *Spirit Locker*, 696 F. Supp. at 302.

The FAC conclusorily alleges that USGBC’s “promotion, marketing and advertising of its LEED rating system is ... directed at the general public and consumers, including those within the state of New York.” FAC ¶¶ 65, 71. This new allegation does not help plaintiffs here, however, because USGBC’s marketing – which is before this Court on this motion -- is directed at businesses and professionals. The website, which is how USGBC advertises, defines the audience for USGBC’s marketing. LEED users are “[a]rchitects, real estate professionals, facility managers, engineers, interior designers, landscape architects, construction managers, lenders and government officials,” and USGBC members are identified as including “organizations, corporations and institutions across the globe ... from big companies and small businesses to nonprofits and governments.” Reddy Dec. Ex. B at 36-37. Similarly, the 2008 release identifies USGBC members as “corporations, builders, universities, government agencies, and other non-profit organizations.” *Id.* Ex. D. The mere fact that the USGBC website is publicly accessible does not convert USGBC’s promotion and marketing into “consumer-oriented” conduct. *Spirit Locker*, 696 F. Supp. at 302.

Plaintiffs, moreover, allege no facts in support of their allegation of consumer-directed conduct. As such, this allegation amounts to nothing more than a “formulaic recitation of the elements” of a § 349 or § 350 claim and is not entitled to a presumption of truth. *See Twombly*, 550 U.S. at 554; *Hayden*, 594 F.3d at 161. As the First Department held in *Cruz* and the Eastern

District held in *Spirit Locker*, conduct such as is alleged in the FAC, directed only at other businesses or professionals, fails to meet the threshold “consumer-oriented” requirement for asserting a § 349 claim.

2. Plaintiffs Do Not Allege Actual and Direct Injury

Plaintiffs’ standing to bring their §§ 349 and 350 claims is further defective for lack of allegations of cognizable harm. Under the plain language of the statute and well-settled precedent, standing under New York’s Consumer Protection Act requires an actual and direct injury, just as do claims under the Lanham Act. *See* N.Y. G.B.L. §§ 349(h), 350(e); *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55 (1999). Plaintiffs make no non-conclusory allegations of injury. *See* Point II.B above.

Wholly apart from its failure to properly allege injury in fact, the FAC’s state law claims of false advertising are defective under *Iqbal* and *Twombly* for the same reason as its Lanham Act claim, i.e., there is no plausible claim of deception. *See* Point II.C above. There are also additional reasons. Causation is a requirement for a N.Y. G.B.L. § 349 and 350 claim; § 350 also requires that a plaintiff plead actual reliance on the allegedly false statement. The FAC is conspicuously absent of *any* allegations in these regards.

Under New York law, a statement is not deceptive to the extent that the information was fully disclosed or a plaintiff could “reasonably have obtained” the information alleged to be omitted. *See Oswego*, 85 N.Y.2d at 27; *Sands v. Ticketmaster-New York, Inc.*, 207 A.D.2d 687, 687 (1st Dep’t 1994), *appeal denied*, 85 N.Y.2d 904 (1995); *see also Marcus v. AT&T Corp.*, 138 F.3d 46, 64-65 (2d Cir. 1998) (dismissing §§ 349 and 350 claims where telephone tariff rates were disclosed as a matter of public record). Plaintiffs fail to explain why or how the “25-30%” statement is deceptive or false, given that the NBI study fully supports the statement’s validity

and discloses the methodology used and conclusions reached. *See* Reddy Dec. Ex. E. This disclosure is a complete defense to plaintiffs' allegations of falsity based on the NBI study.

Plaintiffs have also failed to plead reliance or causation. A cause of action under § 350 is legally insufficient absent an allegation that plaintiff "relied upon or even knew of defendant's advertising." *Gershon v. Hertz Corp.*, 215 A.D.2d 202, 203 (1st Dep't 1995); *see Gale v. IBM Corp.*, 9 A.D.3d 446, 447 (2d Dep't 2004) (dismissing § 350 claim for failure to allege that plaintiff saw IBM's allegedly misleading statements before purchasing his hard drive); *Colbert v. Rank America, Inc.*, 295 A.D.2d 300, 301 (2d Dep't 2002) (dismissing § 350 claim because plaintiffs "did not see any of the appellants' advertis[ements]... and that the advertising did not play a role" in plaintiffs' purchasing decision). Although reliance is not an element of a § 349 claim, causation is required. *See Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000); *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 311 (S.D.N.Y. 2004). A § 349 claim is equally deficient for lack of causation absent an allegation that plaintiff saw any of the allegedly deceptive statements. *Gale*, 9 A.D.3d at 447. Not one plaintiff alleges that he or she saw, knew of, or relied on the "25-30%" statement or the "third-party verification" statement. Failure to allege these elements is fatal to plaintiffs' Consumer Protection Act claims.

For the above reasons, plaintiffs' state law "Causes of Action" for deceptive business practices and false advertising should be dismissed for failure to state a claim.

IV. NEW YORK COMMON LAW DOES NOT RESUSCITATE PLAINTIFFS' CLAIMS

Plaintiffs' three common law "causes of action" – false advertising, unfair competition, and unfair business practices (*see* FAC ¶ 77) – all fail for the same reasons as plaintiffs' Lanham Act claim. As an initial matter, the three common law causes of action plaintiffs have attempted to plead are subsumed under the category "common law unfair competition." *See Tarascio v.*

DeCapite, 2009 N.Y. Slip Op. 30368U, at *5 (Sup. Ct. Nassau Cnty. Feb. 10, 2009) (“[T]he labeling of an action as ‘unfair business practices’ rather than ‘unfair competition’ does not change the substance of the claim”); *Louis Capital Markets, L.P. v. REFCO Group Ltd.*, 9 Misc.3d 283, 288 (Sup. Ct. N.Y. Cnty. June 6, 2005) (same).

Where, as here, a claim for common law unfair competition is based on the same set of facts as a claim under the Lanham Act, a plaintiff must properly plead all of the elements required by the Lanham Act, as well as the additional requirement that the acts constituting unfair competition were undertaken in bad faith. *Conmed Corp. v. ERBE Electromedizin GmbH*, 129 F. Supp. 2d 461, 470 (N.D.N.Y. 2001) (“The elements of [common law unfair competition] are the same as those under the Lanham Act, with the additional allegation of bad faith.”). Since, as addressed in Point II above, plaintiffs have failed to state a claim under the Lanham Act, plaintiffs have also failed to state a claim under New York common law.

CONCLUSION

For all of the foregoing reasons, the Court should grant USGBC’s motion to dismiss the FAC, in its entirety and with prejudice, pursuant to Fed. R. Civ. P. Rule 12(b) (1) and (6).

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Respectfully submitted,

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