Norah Hart, Esq.
305 Broadway, 14th Floor
New York New York 10007
Telephone: (212) 897-5865
Facsimile: (646) 537-2662
E-mail nhart@consumerclasslaw.com
ATTORNEY FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HENRY GIFFORD, GIFFORD FUEL SAVING, INC., ELISA LARKIN, ANDREW ÄSK, MATTHEW ARNOLD,
Plaintiffs

1

1:10-cv-7747 LBS

vs.

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

U.S. GREEN BUILDING COUNCIL,
Defendant.

MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES 2

II. STANDARD OF REVIEW OF A MOTION TO DISMISS 3

III. ARGUMENTS 4

1. DIRECT COMPETITION IS NOT A REQUIREMENT FOR LANHAM ACT STANDING 4

2. THE MARKET FOR ENERGY-EFFICIENT BUILDING EXPERTISE—HOW THE SECOND CIRCUIT DEFINES "REASONABLE INTEREST TO BE PROTECTED"....... 5

3. AS COMPETITORS IN A NICHE MARKET, PLAINTIFFS ARE ESPECIALLY LIKELY TO BE HARMED BY USGBC'S COUNTERFEIT CLAIMS 9

4. CAUSATION, A QUESTION OF FACT, WILL BE PROVED IN DISCOVERY 11

5. PLAINTIFFS HAVE STANDING UNDER NEW YORK'S GBL §349 AND §350 BECAUSE THE ISSUE IMPACTS THE PUBLIC'S WELFARE.................................... 13

6. PLAINTIFFS HAVE STANDING UNDER NEW YORK'S GBL §349 AND §350 BECAUSE USGBC ADVERTISING IS CONSUMER-ORIENTED 14

7. THE PLAINTIFFS' BURDEN OF PROOF ON CAUSATION—FLEXIBLE, PROSPECTIVE, AND REASONABLE 16

IV. CONCLUSION..17

I. TABLE OF AUTHORITIES

Cases

American Home Products Corp. v. Johnson & Johnson, 577 F.2d 160, 165 (2d Cir. 1978) 15

Berni v. International Gourmet Restaurants of America, Inc., 838 F.2d 642 (2d Cir. 1988)......... 5

Boule v. Hutton, 328 F.3d 84, 90-91 (2d Cir. 2003); *Gmurzynska v. Hutton,*355 F.3d 206, 210 (2d Cir. 2004).. 5

Coca-Cola v. Tropicana Products, Inc., 690 F.2d 312, 317 (2d Cir. 1982) 15

Conley v. Gibson, 355 U.S. 41, at 47 (U.S. 1957) 3

Famous Horse Inc. v. 5th Ave. Photo, Inc., 2010 U.S.App. LEXIS 21745, at 31 (2d Cir. 2010). 10

Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 56-58 (2d Cir. 2002) 5

Jenkins v. McKeithen, 395 U.S. 411, 421 (U.S. 1969) 4

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, (1993). 4

McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co., 938 F.2d 1544. (S.D.N.Y. 1991). 16

PPX Enters., Inc. v. Audiofidelity, Inc., 746 F.2d 120 (2d Cir. 1984) 11

Procter & Gamble Company v. Ultreo,Inc., 574 F.Supp. 2d 339. (S.D.N.Y. 2008) 14

Securiton Magnalock Corp. v. Schnabolk, 65 F. 3d 256, 257 (2d Cir. 1995).............................. 13

S*immons v. Abruzzo,* 49 F.3d 83, 86 (2d Cir. 1995) 3

Twombly v. Bell Atlantic Corp., 425 F.3d 99, 108-09 (2d Cir. 2005), *cert. granted,* U.S., 126 S. Ct. 2965 (2006) 4

II. STANDARD OF REVIEW OF A MOTION TO DISMISS

As stated by the Supreme Court, the Federal Rules of Civil Procedure (F.R.C.P.) “do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.” *Conley v. Gibson,* 355 U.S. 41, at 47 (U.S. 1957). The Second Circuit defines fair notice to be “that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so it may be assigned the proper form of trial.” S*immons v. Abruzzo,* 49 F.3d 83, 86 (2d Cir. 1995). Certainly, the Defendants cannot say they are unable to identify the nature of this case.

Finally, as the Second Circuit has recognized, there is no heightened pleading requirement in antitrust cases. *Twombly v. Bell Atlantic Corp.,* 425 F.3d 99, 108-09 (2d Cir. 2005), *cert. granted,* U.S., 126 S. Ct. 2965 (2006).. Indeed, the Second Circuit has stated: "We have consistently rejected the argument—put forth by successive generations of lawyers representing clients defending against civil antitrust claims—that antitrust complaints merit a more rigorous pleading standard, whether because of their typical complexity and sometimes amorphous nature, or because of the related extraordinary burdens that litigation beyond the pleading stage may place on defendants and the courts." The Court must construe the pleadings in the light most favorable to Gifford and the other building design consultants representing the Class, and resolve all doubts in Gifford's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (U.S. 1969). "On a motion to dismiss under Rule 12(b)(6), the court must accept as true the factual allegations in the complaint," *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, (1993). "The district court should grant such motion only if, after viewing plaintiff's allegations in this favorable light, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* It is clear from reading the Defendant's Motion To Dismiss that factual issues exist that should be resolved by the trier of fact. Accordingly, the Motion should be denied.

III. ARGUMENTS

1. DIRECT COMPETITION IS NOT A REQUIREMENT FOR LANHAM ACT STANDING

Defendant USGBC argues, in its Motion To Dismiss ("MTD"), that "Plaintiffs lack statutory standing" to bring a claim under § 43(a)(1)(B) of the Lanham Act, because such

standing requires competitor status. According to the Defense, the Plaintiffs do not compete commercially with USGBC and do not have a "reasonable commercial interest" to protect. (MTD page 8.) The USGBC's arguments are wrong on the facts and wrong on the law as it has been interpreted by the Supreme Court and also wrong on the Second Circuit's rule.

Defendants cite 10th Circuit and 3rd Circuit cases when the 2nd Circuit is clear that there is no requirement of direct competition, or any competition, between the plaintiff and the defendant for standing in a Lanham Act claim for false advertising. *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.,* 314 F.3d 48, 56-58 (2d Cir. 2002) ("[W]e need not decide whether [to adopt] the second element—that defendant and plaintiff be competitors. We note that the requirement is not set forth in the text of Section 43(a) and express no view on its soundness."); *Boule v. Hutton,* 328 F.3d 84, 90-91 (2d Cir. 2003); *Gmurzynska v. Hutton,*355 F.3d 206, 210 (2d Cir. 2004). "Although a section 43 plaintiff need not be a direct competitor, it is apparent that, at a minimum, standing to bring a section 43 claim requires the potential for a commercial or competitive injury." *Berni v. International Gourmet Restaurants of America, Inc*., 838 F.2d 642 (2d Cir. 1988).

Because Plaintiffs are competitors of USGBC with a very real stake in the market for energy efficient building expertise, as argued below, the USGBC's assertions are simply incorrect as a matter of law and the Motion should be denied.

2. THE MARKET FOR ENERGY-EFFICIENT BUILDING EXPERTISE—HOW THE SECOND CIRCUIT DEFINES "REASONABLE INTEREST TO BE PROTECTED"

Plaintiffs compete with USGBC in providing guidance to consumers about how to design and construct buildings that will conserve energy. The parties here both provide building design and construction expertise. LEED certification, as explained in the LEED 2009 resource guide on the USGBC website, involves "commissioning" services, and "verifying that a project's energy-related systems are installed and calibrated to perform." Plaintiffs help build energy-efficient buildings, USGBC claims to do the same thing. While it is true USGBC sells far more products than the Plaintiffs do, the parties still compete in the energy optimization field because USGBC purports to provide the same service as the Plaintiffs. Defense's argument that "Plaintiffs do not claim that they are in, or attempting to enter, the business of providing a rating system…" (MTD page 11.) is mere syllogistic, and faulty, reasoning. The question is not simply whether the Plaintiffs sell building certification or rating systems, but whether USGBC sells energy-efficiency. Just because the Plaintiffs are not "in" the Defendant's business does not mean the Defendant is not "in" theirs.

How to identify when and where a competitor has a "reasonable interest to protect" for Lanham Act analysis is a question that this Court addressed in *Johnson & Johnson v. Carter-Wallace*, a case with similarities to the instant case. There, plaintiff Johnson & Johnson ("J&J"), manufacturers of best-selling brand of Baby Oil and Baby Lotion, sued the makers of NAIR, a depilatory, to enjoin them from marketing NAIR as "NAIR with baby oil" in print and television ads. While J&J wasn't marketing baby oil as a depilatory, NAIR was marketing itself as a moisturizer, and supplanting sales of baby oil. The Court of Appeals ruled that J&J and Nair inhabited a relevant market, and reversed this Court's granting of the defendant's motion to dismiss. "Although Johnson's Baby Oil and Lotion do not compete with NAIR in the narrower depilatory market,...Johnson's products are used as skin moisturizers after shaving or after the

use of depilatories. Such indirect competitors may avail themselves of the protection of § 43(a); the competition need not be direct." *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 190 (2d Cir. 1980).

As alleged, Gifford is a highly-respected consultant who provides design and construction guidance about how to reduce energy costs. Gifford Fuel Savings, Inc. is a corporation that provides heating and cooling system designs that are proven to reduce energy costs. Plaintiff Matthew Arnold is in the business of providing advice about how to design energy-efficient and sustainable buildings. Andrew Äsk has 41 years as a licensed engineer diagnosing, designing, and retrofitting heating and cooling systems in order to improve performance and energy utilization. (Complaint, pages 3, 12, 13.) Each of the Plaintiffs have a stake in the building energy saving market that gives him/her a "reasonable interest" to be protected against USGBC's false advertising.

Defense calls "entirely conclusory" the Plaintiffs allegation that USGBC competes against the Plaintiffs in the market for energy-efficient design. (MTD page 10.) The energy-related oversight that USGBC purportedly provides is identical to what the Plaintiffs offer. USGBC entered the market for energy optimization services through its own advertising, as alleged throughout the Complaint. That the parties compete in a relevant market cannot be disputed. The purported energy efficiency of LEED buildings is its veritable calling card. USGBC's "What is LEED" page on its website states: "LEED is an internationally recognized green building certification system**,** providing 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*, water efficiency, CO_2 emissions reduction, improved indoor environmental quality, and stewardship of resources and sensitivity to their

impacts (emphasis added.)" Defense seeks to distinguish between USGBC's certification system and the energy optimization services Plaintiffs provide, even though USGBC purposefully inserts itself into the same market through its own advertising. In doing so, LEED has begun to subsume the Plaintiffs' roles.

In the same way that NAIR lead the consumer to believe that using NAIR with baby oil made baby oil unnecessary, USGBC leads the consumer to believe that LEED certification makes separate energy saving guidance unnecessary. If a woman buys NAIR 'with baby oil', she is not going to also buy Baby Oil Lotion. If a man buys a record that is labeled to highlight its Jimi Hendrix performances, he is less likely to but another album with recordings of Jimi Hendrix. Nair was forced to stop advertising that it contained baby oil and Audiofidelity was forced to stop advertising its snippets of Jimi Hendrix material. Nair is not a substitute for Baby Oil, but Nair wanted the consumer to *think* it was; Audiofidelity's recordings were not a substitute for the authorized recordings, but Audiofidelity wanted the consumer to *think* they were; LEED certification and LEED "verification" is not a substitute for energy-saving design and build services, but USGBC wants the consumer to *think* it is. The Court of Appeals reasoned that "For each new depilatory user, a corresponding decline in the use of shaving products such as oils and lotions appears probable. Second, the use of baby oil after depilation is likely to be reduced if, as Johnson contends, Carter's [NAIR] advertising conveys to consumers the idea that NAIR's baby oil has a moisturizing and softening effect and leads the consumer to believe that use of a second, post-depilation, moisturizer is unnecessary. Of course, if Carter's ads are truthful, then its gains at Johnson's expense are well earned. If false, however, the damage to Johnson is unfair. *Id*. at 191. The Court of Appeals remanded for trial on whether the presence of baby oil in NAIR did in fact have a moisturizing effect. Likewise here the Court

should deny the Motion and allow discovery into the question whether USGBC's ads are truthful, whether LEED-rated buildings actually use less energy than conventionally-built buildings. The Court of Appeals also noted that even though the total pecuniary harm to J&J was arguably relatively slight, that fact did not bar injunctive relief. Gifford's demands are primarily injunctive, geared toward preserving the credibility of the market for green buildings. Plaintiffs respectfully request that the Motion be denied.

3. AS COMPETITORS IN A NICHE MARKET, PLAINTIFFS ARE ESPECIALLY LIKELY TO BE HARMED BY USGBC'S COUNTERFEIT CLAIMS

Defense argues that the Plaintiffs do not allege sufficient harm or a "causal nexus" between the Defendant's false advertising and the harm it causes the Plaintiffs. (MTD, page 9.) The Second Circuit takes a flexible approach toward the showing a Lanham Act plaintiff must make on the elements of injury and causation. "We have held that, while a plaintiff must show more than a "subjective belief" that it will be damaged, it need not demonstrate that it is in direct competition with the defendant or that it has definitely lost sales because of the defendant's advertisements." *Ortho Pharmaceutical Corp. v. Cosprophar, Inc*., 32 F.3d 690, 694. (2d Cir. 1994). (quoting *Coca-Cola Co. v. Tropicana Products*, 690 F.2d 312. (2d. Cir. 1982).

Admittedly, the Second Circuit Court of Appeals has also warned that a more substantial showing may be required where "the plaintiff's products are not obviously in competition with defendant's products, or the defendant's advertisements do not draw direct comparisons between the two." *Famous Horse Inc. v. 5th Ave. Photo, Inc*., 2010 U.S.App.

LEXIS 21745, at 31 (2d Cir. 2010). In assessing whether the Plaintiffs here have a reasonable basis for believing that their commercial interests will be harmed, the Famous Horse case is useful because it and the instant case involve a dispute as to whether the parties are in direct competition, and the injury alleged was/is very difficult to substantiate in terms of lost sales or reputational damage. The Court of Appeals found that "Famous Horse asserts a specific interest because it has a *particular market niche* (emphasis added) that is especially likely to be harmed by counterfeit sales. The [plaintiff's] chain of stores, according to plaintiff Famous Horse, is known for selling genuine name-brand clothing at very low prices. Famous Horse thus alleges that it was uniquely affected by Appellees' sale of counterfeit Rocawear jeans in two ways: first, its reputation as a discount store was harmed because consumers believed that it sold Rocawear jeans at inflated prices compared to counterfeit jeans supplied by Appellees; and second, consumers who learn of counterfeit Rocawear jeans on the market will believe that [plaintiff] similarly peddles counterfeit clothes." *Id,* at 20. Plaintiffs similarly allege lost sales in the energy optimization market and damage to the reputation of the "green" building sciences on the whole. Plaintiff fear that when consumers learn that the energy saving claims in LEED buildings are unsupported at best, they may view all claims of energy saving through design and construction as mere bogus promises. The consumer doesn't know that only USGBC's claims are fabricated or that the Plaintiffs' claims are held up by measured performance results. The Plaintiffs are liable to not only lose sales to USGBC but from the discrediting of the whole industry.

Another Second District ruling addressed the unique harm that can arise when the genuineness of the plaintiff's product is called into question by a defendant's misleading claims. The plaintiff in *PPX Enters., Inc. v. Audiofidelity, Inc.*, 746 F.2d 120 (2d Cir. 1984), had a

royalty interest in certain solo performances of Jimi Hendrix, the defendant sold recordings where Hendrix played in the background. The defendant's records were labeled as "featuring Jimi Hendrix" and the court held that plaintiff PPX had commercial interest that could be affected by misleadingly packaged Jimi Hendrix recordings because 1) "Every time a record in which they a have a royalty interest is sold, they earn money; every time a sale is lost to a a competitor, they lose a potential profit." *Id.* at 22. More relevantly, the court held "Moreover, if consumers buy defendant's Jimi Hendrix albums and find that they have, in fact, been misled, then it is not unlikely that they will be reluctant to buy other Hendrix recordings, including those in which the plaintiffs have their interests." *Id*. at 23.

The importance to the PPX plaintiff and the Famous Horse plaintiff of not having their credibility undermined in the eyes of consumers was deemed by the Court of Appeals to be reasonable interest that warranted protection. Gifford and the Plaintiffs make the very same argument, that the Defendant's false advertising undermines their ability to market their own genuine services. The Court should find that Plaintiffs have asserted a reasonable basis for believing that their interests will be damaged by the USGBC's false advertising, and have properly stated a false advertising claim under the Lanham Act, and dismiss the Motion.

4. CAUSATION, A QUESTION OF FACT, WILL BE PROVED IN DISCOVERY

Plaintiffs respectfully urge the Court to allow Plaintiffs the opportunity to prove during the discovery process that real estate developers who have hired Gifford and the other Plaintiffs in the past, to build energy-efficient heating and cooling systems, in many cases now designate the funds that once would have paid the Plaintiffs fees to the costs of LEED products. In May

2011, a 50-unit apartment building in Queens, built by developer Bluestone, was selected as New York's "best performing" building by engineers who specialize in making buildings operate more efficiently.[1] The building's mechanical systems were designed by Henry Gifford. Gifford's demonstrated ability to reduce *actual* energy use by 50% should put him in very high demand. However, demand for the Plaintiffs' expertise, despite the increasing cost of fuel, is sapped away the polluted information USGBC releases into the marketplace in order to perpetuate the falsehood that LEED-certification equates to energy-savings. The Bluestone Organization, that hired Gifford to design the mechanical systems in the Andrew, is now breaking ground on two buildings that will be LEED registered, Henry Gifford has not been hired and was told he would not be hired.

Plaintiffs have arguably met the burden of proof required in Lanham Act claim by debunking the USGBC's "study results" in the Complaint. The NBI study simply does not support the central premise of the LEED myth, that LEED saves energy. The suspect methodologies behind the study were fully alleged in the Complaint. This Court held in a comparative advertising case (although the Gifford case does not involve comparative advertising) that when a defendant advertises the result of "tests" as a type of marketing or promotion, the plaintiff's burden of proof is simply to establish that the publicized test results do not support the proposition for which it was cited. *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co*., 938 F.2d 1544. (S.D.N.Y. 1991). USGBC hails the results of the NBI study far and wide, in a press releases, brochures, media buzz, and via its accredited sales force: "In the NBI Study, the

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[1] The Andrew Named A Top Energy Efficient Building In NY." *The Mnn Report*, May 2011, page 64. Mann Publications.

results indicate that new buildings certified under [USGBC's] LEED certification system are, on average, performing 25-30% better than non-LEED certified buildings in terms of energy use." In truth, the data collected for the 66 page study reveals that LEED buildings use 29% more energy. There is a flagrant bias in the sample. For one, the buildings chosen for comparison ("CBECS") consists mostly of older buildings dating back to 1920, despite the availability of CBECS data on new buildings matching the ages of the LEED buildings. Secondly, balancing the age of the compared buildings would show that the LEED sample has an average (mean) energy use index of 105,000 BTUs per square foot per year, and the CBECS' buildings of the same age had an average (mean) energy use index of 81,600 BTUs per square foot per year. To be anything but intentionally misleading the Defendant would have to qualify the study thus, "By comparing new LEED buildings to older non-LEED buildings, and by comparing the median average of one dataset to the mean average of another dataset, and by carving out a sample of only 22% of all the LEED-certified buildings, we arrived at the conclusion that LEED-certified buildings perform better than non-LEED buildings in terms of energy use." The Plaintiffs can easily meet their burden of proving the study is not sufficiently reliable to conclude that the Defendant's LEED certified buildings save energy.

5. PLAINTIFFS HAVE STANDING UNDER NEW YORK'S GBL §349 AND §350 BECAUSE THE ISSUE IMPACTS THE PUBLIC'S WELFARE

Defense's position that Plaintiffs do not have standing to bring a claim under New York's consumer protection statute because they are not consumers (MTD, page 18), and that they do not allege reliance or causation (MTD page 22), is unsupported by any binding caselaw. The

lower court cases Defense cites in support of this position were all cases that were brought by plaintiff-consumers rather than plaintiff-competitors.

In the Second Circuit, competitors are welcome to bring deceptive trade claims, as long as harm to the public at large is alleged. "The critical question" in assessing a suit by a competitor "is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor." *Securiton Magnalock Corp. v. Schnabolk*, 65 F. 3d 256, 257 (2d Cir. 1995). The Complaint points to two social ills caused by USGBC claiming to save energy while certifying buildings that waste energy prolifically: 1) the reputational damage to the environmental building movement generally, and 2) the impact of USGBC's false advertising on "the policy decisions of voters, taxpayers, developers, municipalities, and legislators at the local, state and federal levels." (Complaint page 14).

6. PLAINTIFFS HAVE STANDING UNDER NEW YORK'S GBL §349 AND §350 BECAUSE USGBC ADVERTISING IS CONSUMER-ORIENTED

The Defense argues that New York's GBL §349 and §350 claims fail because the Defendant's advertising is not consumer-oriented and is instead "directed at businesses and professionals." (MTD, page 20) If the USGBC website were password protected for professional members only, that assertion would be more convincing. But the USGBC website is aimed at giving the general public an overview of LEED, with "What LEED Is?" on the masthead. USGBC's website explains to the layman consumer: "By using less energy, LEED-certified buildings save money for families, businesses and taxpayers[.], as alleged in the Complaint. Also, "Lower operating costs and increase asset value." "[LEED is] going to cut

utility use at least 38%. It will pay for itself in approximately six years through utility savings only." "LEED also makes business sense, benefitting commercial building owners as well as tenants." Homeowners are sold the LEED label. Manhattan's newest luxury condominiums boast LEED rating, including Solaire, Riverhouse, Noevel, The Laurel, and The Lucida, to name a few. It's absurd to think USGBC is not directing its marketing at the tenant-consumer.

In a 2008 Southern District case involving toothbrush companies, Procter & Gamble sued Ultreo, Inc. under the same causes of action Gifford has brought, §349, §350, and Lanham Act §1125(a)(1)(B). *Procter & Gamble Company v. Ultreo,Inc.*, 574 F.Supp. 2d 339. (S.D.N.Y. 2008) Although this Court denied the preliminary injunction sought by that plaintiff, in asking whether there was a sufficient causal connection between the allegedly false advertisements and the plaintiff's sales position, the Court recognized a wide range of promotional activity as exemplars of the defendant's advertising, including "retail presentations, labeling on the Ultreo box, and presentations to dental professionals." *Id* at 14. USGBC advertises it purported 25%-30% energy savings in every imaginable type of media. USGBC's most effective means of transmitting this apocrypha, as alleged in the Complaint, is through its sales force of LEED accredited professionals who parrot sales manuals like "*Making the Business Case*" emphasizing energy savings. USGBC is misleading the market, with phenomenal ingenuity, with the false notion that obtaining LEED certification equates to energy-efficiency. Because this issue presents a questions of fact that cannot be decided on a 12(b)(6) motion, the Defendant's Motion should be denied.

7. THE PLAINTIFFS' BURDEN OF PROOF ON CAUSATION—FLEXIBLE, PROSPECTIVE, AND REASONABLE

Given the skyrocketing success of the LEED brand, and its iconic status in the "green" economy, the concerns raised by the Plaintiffs merit discovery, in particular because Plaintiffs have requested primarily injunctive relief—which carries a lower burden of proof than do damages. ("Where the advertising claim is shown to be literally false, the court may enjoin the use of the claim without reference to the advertisement's impact on the buying public." *Coca-Cola v. Tropicana Products, Inc*., 690 F.2d 312, 317 (2d Cir. 1982). *see also PPX Enter, Inc. v. Audiofidelity,* Inc., 818 F.2d 266, at 272, *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978).

The relief Plaintiffs most wish for is full disclosure, compelling USGBC to release actual utility rates in its buildings, in order to foster a healthy marketplace of ideas by, as some progressive municipalities have started to require. Surely the Plaintiffs have set forth enough evidence to show a reasonable likelihood that LEED will replace them to a significant degree. Plaintiffs are not required to proffer specific evidence that the USGBC's advertising caused a loss in sales. The Second Circuit has held that the standard should be flexible in each case, and can rest on "reasonable beliefs" even absent any concrete evidence of sales losses or consumer surveys. "The correct standard is whether it is likely that [defendant's] advertising has caused or will cause a loss of [plaintiff's] sales, not whether [plaintiff] has come forward with specific evidence that [defendant's] ads actually resulted in some definite loss of sales. *Johnson & Johnson*, at 198. *See also Ortho Pharmaceutical Corp. v. Cosprophar, Inc*., 32 F.3d 690, 694. (2d Cir. 1994). (quoting *Coca-Cola Co. v. Tropicana Products*, 690 F.2d 312. (2d. Cir. 1982) ("[Plaintiff] need not demonstrate that it is in direct competition with the defendant or that it has

definitely lost sales because of the defendant's advertisements." Furthermore, conduct that is likely to cause damage, or that may in the future cause damage, can be proscribed. The Second Circuit demands only proof that the plaintiff is *likely* to be damaged as a result of the false advertising.

Further, because this issue presents a questions of fact that cannot be decided on a 12(b)(6) motion, the Defendant's Motion should be denied.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Defendant's Motion be denied.

Dated: New York, NY

May 2, 2011

Respectfully submitted,

TRUEHAFT & ZAKARIN, LLP

By:

Norah Hart, Esq. (NH 5153)
TREUHAFT & ZAKARIN, LLP
Attorneys for Plaintiffs

To:
Lawrence Weinstein, ESQ., Proskauer Rose LLP
Anne Reddy, ESQ., Proskauer Rose LLP