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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.	:	
	:	
	:	
	:	
	:	
----- X		

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

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PRELIMINARY STATEMENT

Plaintiffs' opposition brief ("Opp." or "Opposition") is not well-reasoned. It starts by misstating the governing law. It then engages in an irrelevant discussion of standing decisions that turn on facts utterly dissimilar to those alleged in the First Amended Complaint ("FAC"). Like the FAC, the Opposition barely discusses the alleged false advertising that is the supposed basis of this lawsuit. Instead, the Opposition make policy arguments about the supposed flaws of the LEED "green" building rating system and the alleged harm that LEED has caused "the 'green' building sciences on the whole" (Opp. at 10), rather than plaintiffs specifically.

To properly allege standing under the pleading requirements of *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), the FAC would have to plead facts, not mere conclusions, plausibly showing that the individual plaintiffs specifically, not the green building community generally, had suffered or were likely to suffer actual injury directly related to one of the three allegedly false statements the FAC attributes to USGBC. USGBC's moving papers showed that instead of doing this, the FAC substituted conjecture and conclusory rhetoric for facts that plausibly drew the required causal connection.

Plaintiffs' Opposition does not contend that the FAC properly alleged either Article III or statutory standing under *Iqbal* and *Twombly* for the simple reason that plaintiffs frivolously contend that those two Supreme Court decisions are not controlling. Nor do plaintiffs claim they possess facts that would enable them to file a second amended pleading curing the defects of the FAC. Instead, plaintiffs resort to vague and meaningless generalities, such as asserting that they and USGBC compete in the supposed "markets" of "energy optimization," "energy-efficient building expertise," and "energy-related oversight." Opp. at 5-7.

But *Iqbal* and *Twombly* instruct that a well-pleaded complaint requires more than empty slogans. Rather, facts that plausibly demonstrate the existence or likelihood of particularized injury to the plaintiffs resulting directly from the alleged misconduct are necessary. The facts properly before this Court show that USGBC's business is the development of the LEED rating system and the accreditation of real estate professionals as having expertise in that system. Even if the Court accepts that the popularity of LEED has spawned a class of professionals who can help guide real estate developers to obtain LEED project certification, the FAC does not allege, nor could it, that plaintiffs were precluded from obtaining LEED accreditation, or that such accreditation is required of those who assist developers in obtaining LEED project certification.

Moreover, it would be nonsense to assert, and indeed the FAC does not plead any non-conclusory facts to show, that plaintiffs, whose businesses involve the actual system design of the various mechanical, heating and cooling elements that every building, whether or not LEED-certified, requires, have lost or likely will lose any business as a result of any of USGBC's allegedly false statements. As its website makes clear, USGBC neither designs nor installs these elements, nor does it mandate which system design or installation professionals a developer must use. Thus, plaintiffs have failed to allege any plausible basis for asserting that they have personally suffered or are likely to suffer any injury as a direct result of any of the three isolated, supposedly "false" statements referenced in the FAC.

Finally, the FAC must also be dismissed for failure to properly allege a violation of either the Lanham Act or state law. As noted, plaintiffs alleged that USGBC made three false statements. FAC ¶¶ 30-32, 37-38, 46-47. USGBC's moving brief showed that none of the FAC's allegations of false advertising satisfy *Iqbal* and *Twombly*. See Dkt. 20 at 14-18. Plaintiffs' Opposition does not dispute that the FAC's allegations as to two of the three

statements are inadequate. The sole remaining allegation of falsity concerns a USGBC press release stating that a “recently released stud[y]... by the New Buildings Institute... indicate[s] that new buildings certified under the [LEED] certification system are, on average, performing 25-30% better than non-LEED buildings in terms of energy use.” The FAC makes clear that plaintiffs’ theory of falsity is that the release allegedly concealed certain facts about the study. FAC ¶¶ 30-33. In fact, the press release contained a link to the entire study, which fully disclosed all allegedly concealed facts. *Id.* at 18; Feb. 7, 2011 Declaration of Anne C. Reddy (“Reddy Dec.”) Ex. E (Dkt. 21-5) at 33-37. Lacking any response to that decisive point, the Opposition simply ignores it, and repeats the FAC’s erroneous allegations of concealment.

In short, the Opposition demonstrates that plaintiffs cannot remedy the defects in the FAC in a further pleading, and thus the FAC should be dismissed with prejudice.

ARGUMENT

I. STANDARD OF REVIEW

The Supreme Court has instructed that to satisfy Fed. R. Civ. P. 8(a), a plaintiff must state a claim “that is plausible on its face,” and must allege facts showing grounds for entitlement that raise a plaintiff’s right to relief “above the speculative level.” *Twombly*, 550 U.S. at 555. Neither conclusory allegations nor conjecture, labels, or rubrics will suffice, and they must be set aside and not considered. *See Iqbal*, 129 S. Ct. at 1949; *Hanly v. Powell Goldstein, L.L.P.*, 290 F. App’x 435, 440 (2d Cir. 2008). In *Twombly*, the Supreme Court rejected the “no set of facts” standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), relied upon by plaintiffs (Opp. at 3, 4). 550 U.S. at 562-63; *see In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435, 440 (S.D.N.Y. 2008) (*Twombly* “retired” the *Conley* standard).

II. PLAINTIFFS LACK ARTICLE III STANDING

In its moving brief, USGBC set forth the well-settled requirements for Article III standing. To survive dismissal, a plaintiff must allege (1) an injury-in-fact that is concrete, particularized, actual and imminent; (2) a causal connection between the injury and the conduct complained of that is unattenuated, and “fairly traceable” to defendant’s alleged misconduct; and (3) that it is likely, not just possible, that such injury will be redressed by a favorable decision. *See* Dkt. 20 at 13, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Article III standing is a prerequisite to any federal court suit, and was specifically discussed in USGBC’s moving papers. Yet, the Opposition does not address Article III standing at all, much less assert that the FAC satisfied each of the three required elements. The first element, injury-in-fact, requires a tangible injury that “affect[s] the plaintiff in a personal and individual way.” *Id.* at 13, quoting *Lujan*, 504 U.S. at 560 n.1. The allegations in the FAC are insufficient to meet this standard. Dkt. 20 at 13-14; FAC ¶ 49. Plaintiffs acknowledge they have no proof of actual injury to any plaintiff (Opp. at 11), and their vague new theory of “reputational” harm caused by the LEED system (*see id.* at 10), is not alleged in the FAC. Even if it were, the FAC does not contend that the LEED system violates the Lanham Act, nor do plaintiffs contend that the “reputational” harm is specific to them individually. Rather, the injury they assert is to the reputation of the green building industry as a whole. *Id.*

The vagueness of the Opposition’s assertions of reputational harm make it equally clear that plaintiffs are unable to establish the second element of Article III standing, namely an unattenuated, “fairly traceable” causal link between the injury and any allegedly false statement. *See id.* Finally, plaintiffs’ alleged injury also cannot be redressed by a favorable decision from this Court. In simple terms, the permitted scope of any injunction were the USGBC’s alleged

advertising statements found to be false would involve removal of the three supposedly false statements from USGBC's website. However, the FAC makes no effort to explain how any of those allegedly false statements directly caused or will cause plaintiffs' supposed reputational injury, or how that injury would be cured if USGBC were to remove them from its website.

The utter disconnect between the FAC's allegations of falsity and the relief plaintiffs seek is exemplified perfectly by the statement that what plaintiffs "most wish" for is a mandatory injunction "compelling USGBC to release actual utility rates in its buildings" (apparently referring to LEED-certified building projects). Opp. at 16. This is not something the USGBC could possibly provide. USGBC is a developer of rating systems, not a public utility, and the certification process for nearly all LEED projects relates to the design and construction of buildings only at the point of completion, prior to occupancy or operation, at a time when the buildings do not have operational utilities. See Dkt. 20 at 5. Moreover, the injunction plaintiffs seek is completely disconnected from the supposedly false statements alleged in the FAC. Plaintiffs therefore have not alleged any plausible means for this Court to remedy their purported injury. For all of these reasons, plaintiffs' Lanham Act and ancillary state law claims should be dismissed as a threshold matter for lack of Article III subject matter jurisdiction.

III. PLAINTIFFS LACK LANHAM ACT STANDING

Plaintiffs devote pages of their brief to a rambling and difficult to follow discussion of Lanham Act standing cases. But plaintiffs cannot dispute that the Second Circuit's most recent discussion of Lanham Act standing is *Famous Horse v. Fifth Ave. Photo Inc.*, 624 F.3d 106 (2d Cir. 2010) (cited at Dkt. 20 at 8-11). There, the Second Circuit (1) acknowledged a split between the Circuits that apply the "direct competitor" test and those that apply the "reasonable interest" test, (2) noted that both tests had been applied by Second Circuit panels, and (3) held that

because in *Famous Horse*, the parties were competitors, it need not decide whether the Court's *Telecom* decision was a shift in its approach to standing. See *Famous Horse*, 624 F.3d at 113.

The FAC's allegations are deficient under either Lanham Act test. For the reasons set forth at Dkt. 20 at 8-11, the FAC lacks non-conclusory allegations that would plausibly allow the Court to find that the parties are direct competitors. Nor does the Opposition assert facts to suggest that plaintiffs could correct this defect in a further complaint. Plaintiffs concede they are not in the business of developing building rating systems or accrediting real estate professionals, and they do not claim USGBC is in the business of HVAC, mold remediation, or architectural design, consultation or installation. Plaintiffs instead resort to empty labels in a vain effort to shoehorn the parties' disparate businesses into a notion of direct competition. Notwithstanding plaintiffs' vague and meaningless assertion that the parties compete in the "energy-efficiency" or "energy optimization services" market (Opp. at 6, 8), the indisputable fact remains that the business of USGBC is entirely different than that of plaintiffs, who allegedly design and consult on the installation of equipment in individual buildings. FAC ¶¶ 8-11; Dkt. 20 at 10-11.

Nor have plaintiffs alleged a "reasonable basis" to believe that, despite the absence of direct competition with USGBC, their businesses have been or likely will be harmed by the conduct the FAC complains of. In the handful of cases in this Circuit where standing was found in the absence of direct, head-to-head competition, unique and obvious factors not present here caused competitive injury to be likely instead of merely speculative. Plaintiffs completely miss this decisive point, as their Opposition engages in a lengthy discussion of cases which involve materially different facts than those alleged in the FAC. In *Famous Horse*, both parties marketed jeans. Where defendant distributor knowingly sold counterfeit jeans that retail at a much lower price than the authentic jeans sold by plaintiff retailer, there is a reasonable basis to

believe that the counterfeit jeans could cause buyers unaware that they were counterfeit to forego buying plaintiff's more expensive authentic jeans. *See Famous Horse*, 624 F.3d at 114-15.

Similarly, in *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186 (2d Cir. 1980), plaintiff manufactured baby oil and defendant manufactured a depilatory, but both parties marketed their products as moisturizers to the same customers. Where the defendant falsely advertised that its depilatory provided equivalent moisturizing performance to plaintiff's product, plaintiff clearly had a reasonable basis to allege that defendant's false advertising would affect the sales of plaintiff's product. *Id.* at 190-91. Finally, in *PPX Enters., Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 124-26 (2d Cir. 1984), plaintiff earned royalties on the sale of authentic Jimi Hendrix records, and plainly had a reasonable basis to allege that defendant's false advertising statements that its records contained Jimi Hendrix music would deprive plaintiff of sales.

By contrast, plaintiffs here face an insurmountable problem. The USGBC's "product" merely provides criteria for meeting a *voluntary* building standard. There is no reasonable basis to believe (and certainly no such basis was asserted in the FAC), that any of the USGBC's allegedly false statements did or could harm plaintiffs in the distinctly different market for heating, cooling, and mechanical systems design and installation. That is particularly the case because (i) whether built according to LEED criteria or not, buildings still need the HVAC and other systems that plaintiffs claim to provide, and (ii) plaintiffs do not allege, nor could they, that they were precluded from seeking LEED accreditation if they wanted to obtain it, or that LEED accreditation is required in order to provide HVAC or mechanical system design consulting and installation in buildings seeking LEED certification (or any other buildings).

Plaintiffs concede that they are unable to show that any of them has lost sales as a result of USGBC's alleged false advertising (Opp. at 11), and plaintiffs' new theory (not asserted in the

FAC) that they have been injured by virtue of USGBC's "bogus promises" that allegedly result in a "discrediting of the whole industry" (*id.* at 10) is far too remote and speculative to meet the "substantial showing" required in this Circuit to confer Lanham Act standing. *See Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 234-35 (3d Cir. 1998) (dismissing Lanham Act claims where alleged harm to defendant retail sellers of product competing with plaintiff's product was remote, indirect, and theoretical).

IV. PLAINTIFFS HAVE NOT PLAUSIBLY ALLEGED A "FALSE" STATEMENT

The FAC only alleges that three statements are "false." *See* FAC ¶¶ 30-32, 37-38, 45-47; Dkt. 20 at 14. USGBC pointed out at pp. 15-18 of its moving brief that the allegations involving the first ("third-party verification") and third ("boost employee productivity") "false" statements are wholly conclusory. The Opposition makes no effort whatsoever to defend the sufficiency of those allegations, or to contend that plaintiffs could provide any plausible support for them in a substitute pleading. Plaintiffs thus appear to concede that they have not properly alleged that those statements violate the Lanham Act or state law.

The only challenged statement that plaintiffs attempt to defend is the claim in a USGBC press release that a "recently released stud[y]... by the New Buildings Institute... indicate[s] that new buildings certified under the [LEED] certification system are, on average, performing 25-30% better than non-LEED buildings in terms of energy use." Reddy Dec. Ex. D. Plaintiffs do not dispute that the study reaches the very conclusion USGBC said it did. Instead, plaintiffs assert that the press release is misleading because it conceals supposedly "suspect" methodological flaws in the study. *Opp.* at 12; FAC ¶¶ 30-32. However, the press release links directly to the study, which fully discloses the challenged methodologies. *Opp.* at 12; Dkt. 20 at 17-18; *see* Reddy Aff. Ex. E. Remarkably, plaintiffs even assert that the study would not be

misleading if it had been qualified by *the precise information actually contained in the study*. See *id.*; see Ex. E at 33-37. Thus, under plaintiffs' own logic, the study's disclosures render plaintiffs' allegations of falsity implausible under Rule 8.

V. PLAINTIFFS' STATE LAW CLAIMS SHOULD BE DISMISSED

Plaintiffs' attempt to avoid the "consumer-oriented conduct" requirement for a NY GBL §§ 349 and 350 claim by contending that the challenged statements "impact public welfare" under *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 257 (2d Cir. 1995) (Opp. Mem. at 14) does not rescue the FAC's state law claims. Unfair competition and false advertising claims under NY GBL §§ 349 and 350 are "substantially the same" as Lanham Act claims. *Nomination Di Antonio E Paolo Gensini S.N.C. v. H.E.R. Accessories Ltd.*, 2009 U.S. Dist. LEXIS 117368, at *9-10 n.3 (S.D.N.Y. Dec. 14, 2009). Thus, plaintiffs' failure to state a claim for false advertising under the Lanham Act also defeats their state law claims. See *Avon Prods., Inc. v. S.C. Johnson & Son, Inc.*, 984 F. Supp. 768, 800 (S.D.N.Y. 1997) (denying state law counterclaims alleging false advertising for the same reason it denied Lanham Act counterclaim).

In all events, for the reasons delineated in USGBC's moving brief, *Securitron* does not alter the state court cases holding that §§ 349 and 350 do not provide recourse in business-versus-business disputes. See Dkt. 20 at 18-20, and cases cited therein. Accordingly, New York courts and courts in this Circuit have repeatedly declined to find advertising aimed at other businesses sufficient to meet §§ 349 and 350's "consumer-oriented conduct" requirement simply because there is an attenuated link to an alleged public harm. See cases cited at Dkt. 20 at 19-20; see also *Cooper Square Realty, Inc. v. Building Link, LLC*, 2010 N.Y. Slip Op. 30197U, at *7-9 (Sup. Ct. N.Y. Co. Jan. 28, 2010) (advertisement that might affect "thousands of residential tenants[,] was not consumer-oriented as the advertisement was aimed at businesses). Moreover,

as New York's highest court clarified in *City of New York v. Smokes-Spirits.com, Inc.*, 12 N.Y.3d 616, 623 (2009), where a false statement would cause injury to one class, such as here, those who actually paid LEED fees, a derivative injury to persons such as plaintiffs is not a cognizable basis for a §§ 349 or 350 claim. *See id.* at 624 (distinguishing *Securitron*).

Plaintiffs' last-ditch attempt to bypass the elements of causation and reliance by relying on *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339 (S.D.N.Y. 2008) is simply wrong. Although the plaintiff in *Procter & Gamble* brought suit under §§ 349 and 350, the court's opinion focused solely on the Lanham Act. *See id.* at 344-45. Plaintiffs' failure to allege actual reliance and causation is fatal to its claims for the reasons stated in USGBC's brief at 21-22.

VI. THE FAC SHOULD BE DISMISSED WITH PREJUDICE

Plaintiffs cannot rescue their pleading by citing the need for discovery as to facts which *Iqbal* and *Twombly* require the pleading to contain. As the Supreme Court said in *Iqbal*, "Rule 8 ... does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." 129 S. Ct. at 1950. Moreover, plaintiffs have not asked for leave to re-plead if the FAC is dismissed, much less suggested the existence of facts that, if alleged in a further amended complaint, could plausibly remedy the FAC's deficiencies. In such a situation, dismissal with prejudice is appropriate. *See Smugglers Notch Homeowners' Assoc., Inc. v. Smugglers' Notch Mgmt. Co.*, 2011 U.S. App. LEXIS 5180, at *13-14 (2d Cir. Mar. 15, 2011) (dismissing complaint with prejudice where plaintiff "offers no plausible argument as to how the failure to plead... could be rectified through an amended complaint").

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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