

THE FIRST TRUE CASE OF ‘LEED®-IGATION’: THE FAR-REACHING IMPACT OF *GIFFORD V. UNITED STATES GREEN BUILDING COUNCIL*

I. INTRODUCTION

On August 16, 2011, a decision was handed down by the United States District Court for the Southern District of New York in the case of *Gifford v. United States Green Building Council*.¹ The case had been closely watched by numerous organizations within the green building and legal communities in part because of the prevalence of the United States Green Building Council’s (USGBC) Leadership in Energy and Environmental Design® (LEED®) Certification System.² The case was ultimately dismissed for two overriding reasons: (1) Henry Gifford lacked standing to sue USGBC as a class representative or an individual to file the suit and (2) Mr. Gifford failed to state a claim on which relief could be granted.³ In some ways, this was a victory for USGBC and green building certifications everywhere, but the decision did not completely ameliorate the threat of litigation concerning USGBC or other green building professionals.⁴ Therefore, it is necessary to assess the explicit and implicit ramifications of the issues and reasoning surrounding *Gifford v. United States Green Building Council*: the first real example of “full-blown ‘LEEDigation’ [which has generally] remained elusive.”⁵

¹ *Gifford v. U.S. Green Bldg. Council*, No. 10 Civ. 7747, 2011 WL 4343815 (S.D.N.Y. Aug. 16, 2011).

² See, e.g., James Stewart & Robbie J. Vargo, *Gifford v. USGBC: LEED Certification Challenged*, 11 MEALY’S LITIGATION REPORT, CONSTRUCTION DEFECTS, No. 12 (Jan. 2011), available at <http://www.lowenstein.com/files/Publication/774e86c3-8706-4be3-a157-d695528a4097/Presentation/PublicationAttachment/cd7d40ad-fb94-4322-a80e-ed6dc3aadd19/Commentary%20Gifford%20v%20USGBC.pdf>; Timothy M. Clayton, *Amended Complaint Filed in Gifford v. USGBC*, OHIO GREEN BLDG. L. (Apr. 4, 2011), <http://ohiogreenbuildinglaw.com/2011/04/04/amended-complaint-filed-in-gifford-v-usgbc/>; Shari Shapiro, *Gifford Files Amended Complaint in Gifford v. USGBC Which May Lead to Discovery from USGBC*, GREEN BLDG. L. BLOG, (February 8, 2011) <http://www.greenbuildinglawblog.com/2011/02/articles/litigation/gifford-files-amended-complaint-in-gifford-v-usgbc-which-may-lead-to-discovery-from-usgbc/>.

³ *Gifford*, 2011WL 4343815, at *3-4; Adam J. Sulkowski, *FROM THE ENVIRONMENT*, 40 REAL EST. L.J. 49, 412-13(2011) (discussing the holding in *Gifford v. USGBC*).

⁴ Adam J. Sulkowski, *FROM THE ENVIRONMENT*, 40 REAL EST. L.J. 49, 414 (2011).

⁵ Stephen Del Percio, *The Top 5 Stories of Green Real Estate Law: 2011*, GREEN REAL EST. L.J. BLOG (Jan. 9, 2012), <http://www.greenrealestatelaw.com/2012/01/the-top-5-stories-in-green-real-estate-law-2011/>.

With the growth of competition in the green building market, and a better public understanding of green building knowledge, various legal concerns should be considered concerning LEED® or any other pervasive green building industry presence.⁶ There are specific issues that *Gifford v. USGBC* should bring to the legal world's attention. First, a plaintiff with proper standing to sue USGBC under the Lanham Act would fare much better because the court did not say that USGBC was not violating federal anti-trust law by making the claims litigated; though a different approach may be needed to prove the elements of standing. Second, it is plausible that a direct competitor of USGBC may have fared better with a modified Sherman Antitrust Act suit, despite the *Noerr-Pennington* Doctrine. Third, the ambiguity in *Gifford* forces us to consider what type of legal relationship exists between USGBC and LEED® Accredited Professionals (APs). This is always an important factor when assessing any potential future litigation. Finally, situations like this can, and should, be avoided by green building certification companies because exterior pressures to prove return on investment do not outweigh the downfalls of proffering false claims. This analysis does not explore every possibility arising from *Gifford* but does offer a far easier path to proving the types of claims Mr. Gifford wanted to assert. What can be stated with certainty is that Mr. Gifford's sharp critique of USGBC's claims has shown a chink in USGBC's legal armor.⁷

II. BACKGROUND

The Environmental Protection Agency defines the practice of green building as “the practice of creating structures and using processes that are environmentally responsible and

⁶ See, Colin W. Maguire, *The Imposing Specter of Municipal Liability for Exclusive Promotion of Private Green Building Certifications*, ___ UNIV. BALT. J. LAND & DEV. ___, __ (2011).

⁷ To fully disclose my position, I used to be full-time employee of SERF (Society of Environmentally Responsible Facilities) and I still occasionally contract with this company. SERF is an alternative certification to LEED and you can read information about the company at www.SERFgreen.org. *Gifford* is an important case for everyone involved with the green building community; but, for reasons that are apparent from the holding, *Gifford* is an especially relevant result to competitors of USGBC.

resource-efficient throughout a building's life-cycle from siting to design, construction, operation, maintenance, renovation and deconstruction. This practice expands and complements the classical building design concerns of economy, utility, durability, and comfort.”⁸ Henry Gifford is the founder of EnergySavingScience.com; he researches building energy efficiency and green building practices while operating as a consultant on energy efficiency in buildings, most notably apartment buildings.⁹ Mr. Gifford, on his own and through Gifford Fuel Savings, Inc., is “a consultant who provides advice about how to produce energy costs....”¹⁰ As proponents of LEED® have contemptuously, though correctly, pointed out, Mr. Gifford did not purchase USGBC products or work on LEED® certified properties.¹¹

LEED® is USGBC’s principal product: a designation for buildings that comply with certain standards.¹² The growth of LEED® and the USGBC has been a true success story, with many thousands of LEED® APs and LEED® certified buildings around the world.¹³ LEED® certified buildings assess aspects of “(1) site planning; (2) water management; (3) energy management; (4) material use; (5) indoor environmental air quality; and (6) innovation & design progress.”¹⁴

LEED® certification does not necessarily purport to assess actual environmental impacts of buildings, but rather looks to tangible design elements to infer sustainable qualities in a

⁸ Maguire, *supra* note 6, at __ (quoting ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/greenbuilding/pubs/about.htm> (last visited Jan. 27, 2012)).

⁹ ENERGYSAVINGSCIENCE.COM, <http://www.energysavingscience.com/> (last visited Feb. 8, 2012).

¹⁰ Amended Complaint and Demand for Jury Trial at 8, *Gifford v. U.S. Green Bldg. Council* (No. 10 Civ. 7747), 2011 WL 4343815 at *1.

¹¹ *E.g.*, Timothy M. Clayton, *Gifford v. USGBC Part I: Revenge is a Dish Best Served in Federal District Court (aka “The Complete Idiot’s Guide to Suing Your Way to More Speaking Engagements.”)*, OHIO GREEN BLDG. BLOG (Oct. 29, 2010), <http://ohiogreenbuildinglaw.com/2010/10/29/gifford-v-usgbc-part-i-revenge-is-a-dish-best-served-in-federal-district-court-aka-%e2%80%9cthe-complete-idiot%e2%80%99s-guide-to-suing-your-way-to-more-speaking-engagements-%e2%80%9d/>.

¹² Maguire, *supra* note 6; USGBC, <http://www.usgbc.org/> (last visited January 11, 2012).

¹³ *Id.*

¹⁴ *Id.*

building's construction and performance.¹⁵ Still, a 2008 study sponsored and promoted by USGBC found that LEED® certified buildings were 25-30% more energy-efficient than non-LEED® certified buildings.¹⁶ It was claims related to this study supported by USGBC that were the cause of Mr. Gifford's legal actions.¹⁷

A. Mr. Gifford Attempts Class Action Suit against USGBC, but Settled for Suing USGBC as an Individual with Co-Plaintiffs.

Initially, Mr. Gifford attempted to certify himself as a class-representative of a class for those injured by USGBC's claims.¹⁸ First, Mr. Gifford claimed that USGBC's public assertions violated the Sherman Anti-Trust Act¹⁹ by monopolization through fraud.²⁰ Second, Mr. Gifford claimed that USGBC's public assertions violated the Lanham Act²¹ by promoting unfair competition.²² Finally, Mr. Gifford claimed that USGBC's public assertions violated similar New York state statutes (which included a Racketeer Influence and Corrupt Organization (RICO)²³ claim) and a claim of unjust enrichment.²⁴

Before the Court ruled on the class certification, the complaint was amended to list Mr. Gifford, Gifford Fuel Savings, Inc., Mr. Matthew Arnold, Mr. Andrew Ask, and Ms. Elisa Larkin as plaintiffs; abandoning the request for a class certification.²⁵ Additionally, the claims

¹⁵ See Def. Mot. Dismiss at 5, Gifford v. U.S. Green Bldg. Council (No. 10 Civ. 7747), 2011 WL 4343815 at *1.

¹⁶ Amended Complaint and Demand for Jury Trial at 8, Gifford v. U.S. Green Bldg. Council (No. 10 Civ. 7747), 2011 WL 4343815 at *1.

¹⁷ *Id.*

¹⁸ Complaint and Demand for Jury Trial at 4, Gifford v. U.S. Green Bldg. Council (No. 10 Civ. 7747), 2011 WL 4343815 at *2.

¹⁹ 15 U.S.C.A § 2 (West 2004).

²⁰ Complaint and Demand for Jury Trial at 68-74, Gifford v. U.S. Green Bldg. Council (No. 10 Civ. 7747), 2011 WL 4343815 at *2.

²¹ 15 U.S.C.A § 1125(a)(1)(B) (West 2006).

²² Complaint and Demand for Jury Trial at 75-86, Gifford v. U.S. Green Bldg. Council (No. 10 Civ. 7747), 2011 WL 4343815 at *2.

²³ 18 U.S.C.A. § 1961 (West 2006).

²⁴ Complaint and Demand for Jury Trial at 86-133, Gifford v. U.S. Green Bldg. Council (No. 10 Civ. 7747), 2011 WL 4343815 at *2.

²⁵ Amended Complaint and Demand for Jury Trial at 8-11, Gifford v. U.S. Green Bldg. Council (No. 10 Civ. 7747), 2011 WL 4343815 at *2.

were limited to claims under the Lanham Act for false advertising²⁶ and similar New York state statutes,²⁷ again, based upon USGBC's assertions through promotion of their 2008 study.²⁸ Finally, Mr. Gifford cited various common law claims concerning unfair competition.²⁹ Notably, Mr. Gifford sought injunctive relief to correct literature extolling USGBC's allegedly inaccurate claims and to publicly disclose the actual total of utility bills for LEED® certified buildings; Mr. Gifford also sought actual, treble damages for loss of his business as a competitor.³⁰

District Judge Sand reasoned that the standard under USGBC's Rule 12(b)(6)³¹ motion to dismiss for failure to state a claim on which relief may be granted should be read in such a way to accept the factual elements set forth by Mr. Gifford as true.³² However, the Court also reasoned that the complaint needed to be persuasive to survive the summary judgment motion by USGBC and a mere recitation of the facts that would not be acceptable; rather, the complaint needed to be "plausible on its face."³³ Further, the Court reasoned that their analysis was "not limited to the four corners of the complaint...."³⁴

B. The Court Logically, Though Without a Close Assessment of LEED®, Reasoned That Gifford had no Standing Under the Lanham Act.

²⁶ 15 U.S.C.A § 1125(a)(1)(B) (West 2006).

²⁷ N.Y. GEN. BUS. LAW § 349(a), (h) (McKinney 2011) ; N.Y. GEN. BUS. LAW § 350(a), (e) (McKinney 2011).

²⁸ Amended Complaint and Demand for Jury Trial at 61-75, Gifford v. U.S. Green Bldg. Council (No. 10 Civ. 7747), 2011 WL 4343815 at *2.

²⁹ Amended Complaint and Demand for Jury Trial at 76-7, Gifford v. U.S. Green Bldg. Council (No. 10 Civ. 7747), 2011 WL 4343815 at *2.

³⁰ Amended Complaint and Demand for Jury Trial at 73-4 [sic.], Gifford v. U.S. Green Bldg. Council (No. 10 Civ. 7747), 2011 WL 4343815 at *2. There is clearly a formatting error on the part of the filing Attorney or Westlaw; the sections should read 73 & 74. *Id.*

³¹ FED. R. CIV. P. 12(b) (6).

³² *Gifford*, 2011 WL 4343815, at *2; *See* *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d. Cir. 2007).

³³ *Gifford*, 2011 WL 4343815, at *2; ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

³⁴ *Gifford*, 2011 WL 4343815, at *2; *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d. Cir. 1993).

In assessing the potential Lanham Act violations by USGBC, the Court reasoned the proper test to use³⁵ was a two-part test to determine the most basic precept of a Lanham Act violation: that the claimant is a competitor of the alleged violator.³⁶ Under the Court’s prescribed standing test for a Lanham Act violation, Mr. Gifford needed to “demonstrate (1) a reasonable interest to be protected against the alleged false advertising, and (2) a reasonable basis for believing that the interest is likely to be damaged by the false advertising.”³⁷ The Court also reasoned that because Mr. Gifford’s service was not in direct competition with USGBC’s service (LEED®), Mr. Gifford needed to establish a “more substantial showing of injury” to satisfy the second prong of the Lanham Act standing test.³⁸

The Court held that Mr. Gifford could not satisfy either prong of the standing test.³⁹ The Court reasoned that Mr. Gifford did not compete with USGBC in the green building certification industry or, in what Mr. Gifford referred to as, the “market for energy efficient building expertise.”⁴⁰ The Court specifically found that Mr. Gifford and USGBC were in different business, similar to an earlier case out of the Southern District of New York wherein a foundation which gave financial support to alcoholism rehabilitation services sued a non-

³⁵ *Gifford*, 2011 WL 4343815, at *2 (Discussing the broad language of the Lanham Act) (“...[I]n commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act”) (quoting 15 U.S.C.A. § 1125(a)(1)(B) (West 2006)).

³⁶ *Gifford*, 2011 WL 4343815, at *2; *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 111 (2d. Cir 2010) (“[T]o have standing for a Lanham Act false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury.” (quoting *Telecom Int’l Am., Inc. v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001); *Stanfield v. Osborne Industries, Inc.*, 52 F.3d 867, 873 (10th Cir. 1995))).

³⁷ *Gifford*, 2011 WL 4343815, at *2 (quoting *Famous Horse*, 624 F.3d at 113).

³⁸ *Gifford*, 2011 WL 4343815, at *2 (quoting *Ortho Pharm. Corp. v. Cosprophar, Inc.* 32 F.3d 690, 694 (2d Cir. 1994)).

³⁹ *Gifford*, 2011 WL 4343815, at *3.

⁴⁰ *Id.*; Pl. Opp’n Mot. Dismiss at 5.

affiliated alcoholism rehabilitation services provider under similar Lanham Act claims.⁴¹ In that case, it was found that a company offering alcoholism counseling was far different from a company awarding money to companies offering alcoholism counseling.⁴² In a similar way, the Court found Mr. Gifford performed energy-efficiency assessments but USGBC only promoted energy-efficiency assessments.⁴³

Before the formal analysis of this case begins, it is important to show that such reasoning by the Court is suspect. Taking a moment to explain why is an advisable step to take because it is instructive as to USGBC's business model. It is true that USGBC publishes forms of their LEED® certification criteria on their website for the world to see (essentially offering free advice on energy-efficiency).⁴⁴ The Court also correctly observes that one does not have to be a LEED® AP to perform work on a LEED® certified building.⁴⁵ However, USGBC has an entirely different business position than that of the type of foundation referenced by the Court in the alcoholism counseling services case.⁴⁶ USGBC provides information and study materials to individuals wishing to obtain LEED® AP status and further their knowledge of green building systems;⁴⁷ these individuals will subsequently pay fees and take an examination through the Green Building Certification Institute (GBCI).⁴⁸ Similarly, though USGBC creates the LEED® guidelines, it is GBCI who handles the actual LEED® application review and certification

⁴¹ *Gifford*, 2011 WL 4343815, at *3; *Smithers Found., Inc. v. St. Luke's-Roosevelt Hosp. Ctr.*, No. 00 Civ. 5502, 2001 WL 761076, at *5 (S.D.N.Y. Jul. 6, 2001).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *E.g.*, *LEED 2009 for New Construction and Major Renovation*, USGBC (Nov. 2011), <http://www.usgbc.org/ShowFile.aspx?DocumentID=8868>.

⁴⁵ *Gifford*, 2011 WL 4343815, at *3.

⁴⁶ *Id.*; *Smithers Found.*, 2001 WL 761076, at *5.

⁴⁷ *LEED Professional Credentials*, USGBC, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1815> (last visited Feb. 10, 2012).

⁴⁸ GREEN BUILDING CERTIFICATION INSTITUTE, <http://www.gbci.org/homepage.aspx> (last visited Feb. 10, 2012).

process.⁴⁹ There is no dispute in Gifford that GBCI is a direct arm of USGBC's operations and so assistance in complying with a green building standard could be considered a form of advisement on energy-efficiency.⁵⁰ Also, USGBC themselves charge as much as \$270.00, for LEED® reference guides⁵¹ and consulting with a LEED® AP (who is certified through the USGBC's sub-unit GBCI) can cost as much as \$600-\$2000.00, or more.⁵²

To be clear, there is nothing wrong with USGBC taking steps to ensure the stability and quality of their LEED® products by requiring the individuals representing them to become trained and familiar with their product. Yet, when this green building certification product is sold to the public, and instructions as to its use are available for a monetary fee, it is difficult to reconcile these facts with the idea that "USGBC does not provide clients with advice about energy efficient design..."⁵³ (unless there is some sort of admission that LEED® guidelines do not lead to energy efficient buildings). This is not to suggest that Mr. Gifford has a valid claim. After all, the Court astutely noted that Mr. Gifford was unable to establish any sort of casual nexus between an incident in which his services were passed over for a LEED® AP's services by developer Steve Bluestone and the allegedly fraudulent study supported by USGBC.⁵⁴ Rather, Mr. Bluestone contended that he chose the LEED® AP "because everyone has heard of LEED,

⁴⁹ *Building Certification*, GREEN BUILDING CERTIFICATION INSTITUTE, <http://www.gbci.org/main-nav/building-certification/certification-guide.aspx> (last visited Feb. 10, 2012).

⁵⁰ *Gifford*, 2011 WL 4343815, at *1.

⁵¹ *Publication Pricing*, USGBC, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1983> (last visited Feb. 10, 2012).

⁵² *LEED Consulting: How Much Does It Cost?*, LEED BLOGGER (Feb. 19, 2009), <http://leedblogger.com/2009/02/19/leed-consulting-how-much-does-it-cost/>.

⁵³ *Gifford*, 2011 WL 4343815, at *3.

⁵⁴ *Gifford*, 2011 WL 4343815, at *4; *see* ITC Ltd. V. Punchgni, Inc., 482 F.3d 135, 170 (2d Cir. 2007) (applying a causal nexus requirement between the alleged false advertising and the alleged injury as part of the 'reasonable basis' prong of the Lanham Act standing test) (quoting *Havana Club Holdings, S.A. v. Galleon S.A.*, 203 F.3d 116, 130 (2d Cir. 2000)).

but not everyone has heard of Henry Gifford.”⁵⁵ The Court dismissed the Lanham Act cause of action for lack of standing and dismissed Mr. Gifford’s state law claims for the same reason.⁵⁶ Still, Mr. Gifford probably is a competitor of USGBC on some level, even if the Court did find such reasoning persuasive. Again, the Court correctly dismissed the claim with prejudice;⁵⁷ but if the exclusion of one is the inclusion of all others, then the Court did specifically point to the fact that a company which actually certifies green buildings would be able to navigate the standing issues in Lanham with a far greater ease.⁵⁸

III. ANALYSIS

The opinion granting summary judgment to USGBC is not long, but it is dense and impactful. The most important aspect of Judge Sand’s opinion, going forward, is what it fails to say: that Henry Gifford is wrong about USGBC proffering a fraudulent advertising claim.⁵⁹ As an independent assessment of Mr. Gifford’s written response to USGBC’s 2008 published study stated:

After analyzing the data collected by NBI, however, Henry Gifford, a widely respected energy consultant and boiler expert from New York City, reached a dramatically different conclusion. His analysis amounts to a stinging indictment of the statistical procedures used to determine the performance of LEED-certified buildings. In “A Better Way [t]o Rate Green Buildings,” a paper posted on Gifford’s Web site, Gifford contends that “The LEED system has changed the market for environmentally friendly buildings in the US, but there is an enormous problem: the best data available shows that on average, they use more energy than comparable buildings. What has been created is the image of energy-efficient buildings, but not actual energy efficiency.”⁶⁰

Mr. Gifford’s arguments do make a degree of logical sense, even to the untrained researcher. For instance, only LEED® certified building owners who volunteered for the study

⁵⁵ *Gifford*, 2011 WL 4343815, at *4.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See Gifford*, 2011 WL 4343815, at *3.

⁵⁹ *Id.*

⁶⁰ *Assessing the Performance of LEED Buildings*, 28 No. 10 ENERGY DESIGN UPDATE 1, 1 (2008) (quoting Henry Gifford, *A Better Way to Rate Green Buildings*, ENERGYSAVINGSSCIENCE.COM (2008), <http://www.energysavingscience.com/articles/henrysarticles/BuildingRatingSystems.pdf?attredirects=0>).

were considered; the buildings volunteered were far more contemporary in age than the sampling they were compared to; and the comparison between the buildings may simply have been overstated because the researchers chose to use the mean values for older buildings and the median values for LEED® buildings (two values which, by definition, measure separate aspects of a grouping).⁶¹

To be fair, problems concerning a building's energy efficiency are not USGBC specific. Buildings and their construction constitute a real environmental problem; especially considering buildings directly account for up to 40% on our nation's energy consumption.⁶² As federal and state governments consider regulations to make buildings more energy efficient, other research is beginning to agree with Mr. Gifford's general proposition: our buildings are still using as much energy as they did 20-30 years ago.⁶³ The problem is simple enough: requiring 'green' and/or energy-efficient components in a system does not mean those components will work together in that same system.⁶⁴ Mr. Gifford's concerns address these issues directly by looking at problems like air-leakage that are not addressed by USGBC yet may be more prevalent if a green building system called, as an example, for more windows than your average building to maximize natural light.⁶⁵ Again, such problems may be prevalent in green buildings across the country, but that is not what Mr. Gifford was arguing. Rather, the question the court would have appropriately considered, with standing, was whether USGBC's claims were damaging to a competitor.⁶⁶ The general concept that USGBC may be promoting things about their product that are untrue is a

⁶¹ *Id.*

⁶² Seth Jaffe, *Does Energy Efficient Technology Make Buildings More Energy Efficient? The Answer May Not Be So Obvious*, FOLEY HOAG, LLP: LAW & THE ENVIRONMENT (Feb. 7, 2012) <http://www.lawandenvironment.com/>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See ENERGY DESIGN UPDATE, *supra* note 60, at 2.

⁶⁶ See *Gifford v. U.S. Green Bldg. Council*, No. 10 Civ. 7747, 2011 WL 4343815, at *3 (S.D.N.Y. Aug. 16, 2011).

dangerous one for USGBC and other green building certification systems because it leads down the ugly legal path of unfair competition and anti-trust litigation.

A. If USGBC is Falsely Representing their Product, Then Competitors may be Able to Prove the Causal Nexus Requirement for Standing Under the Lanham Act.

Recall that the first element required for standing under the Lanham Act is that the plaintiff actually be a competitor.⁶⁷ Recall also that the Court in *Gifford* reasoned the second element requires a causal nexus be established between the alleged damaging advertising and some actual damage.⁶⁸ The Court aptly reasoned that proving this second element will be hard to prove because some people are familiar with LEED® and no other certifications.⁶⁹ In assessing why this might be so, it is important to look to the root of LEED®'s ascendance and explore an even larger issue with LEED® that Mr. Gifford did not, or could not, explore.

Assume for a moment that the fictitious ACME Green Building Certifications, Inc. (ACME) runs a business directly certifying green buildings. ACME wants to certify a few building in Matthews, North Carolina. Unfortunately, ACME is unable to certify any buildings in Matthews, despite some initial positive conversations. So ACME asks you, their corporate counsel, to do research and see if there is some type of government program promoting energy-efficiency or green buildings which ACME can use to help increase customer interest in Matthews, North Carolina. What you find surprises you. As early as 2005, Ms. Alicia Ravetto (a LEED® Fellow)⁷⁰ was testifying in front the North Carolina Utilities Commission about the

⁶⁷ *Id.* at *2.

⁶⁸ *Id.* at *4; *see* ITC Ltd. V. Punchgni, Inc., 482 F.3d 135, 170 (2d Cir. 2007) (applying a causal nexus requirement between the alleged false advertising and the alleged injury as part of the 'reasonable basis' prong of the Lanham Act standing test) (quoting Havana Club Holdings, S.A. v. Galleon S.A., 203 F.3d 116, 130 (2d Cir. 2000)).

⁶⁹ *See Gifford*, 2011 WL 4343815, at *4.

⁷⁰ *Alicia Ravatto LEED Fellow*, LINKEDIN, <http://www.linkedin.com/pub/alicia-ravetto-leed-fellow/9/936/643> (last visited Feb. 11, 2012).

benefits of LEED® certified buildings while citing figures.⁷¹ Figures which you may question, in light of *Gifford*, but which were adopted as findings of fact by the North Carolina Utilities Commission.⁷²

Now you are curious as to the extent to which LEED® may or may not have been advocated to government entities around the State of North Carolina. It turns out that ACME’s prospective client was looking for municipal funding because the client was attempting to convert a former sawmill, designated as a brownfield site,⁷³ into a mixed-use commercial center. The costs of the environmental clean-up and adaptive reuse of the older building were such that the prospective client felt such municipal funding was necessary. So, you look into the municipal funding program and find an ordinance entitled “[e]nvironmental requirements for city funded construction”; this seems like great news for ACME, until you read the following:

The purpose of this ordinance is to promote development consistent with sound environmental practices by requiring, subject to *[relevant code section]*, that applicable building projects constructed with City construction funds obtain, at a minimum: (1) “Silver” for City owned and operated buildings, or (2) “Certified” for private building projects that receive City funds. These designations shall be from the United States Green Building Council (“USGBC”) as defined herein.⁷⁴

You are shocked, but your surprise begins to wear when you read that a member of the Town of Matthews, North Carolina Town Council is a LEED® AP.⁷⁵ As if this whole hypothetical analysis is not strange enough, you begin to wonder if the State of North Carolina

⁷¹ *Re Integrated Resource Planning – 2005*, 251 P.U.R.4th 469, 488-9, 2006 WL 2853038 (N.C.U.C) (advocating for green building systems designs, specifically LEED®, and their ability to create energy efficient buildings that can “save up to 75% of the energy used for electric lighting in a building”).

⁷² *Id.* at 485.

⁷³ *Brownfields Definition*, ENVIRONMENTAL PROTECTION AGENCY, <http://epa.gov/brownfields/overview/glossary.htm> (last visited Mar. 9, 2012) (“The term ‘brownfield site’ means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant”).

⁷⁴ 1C MATTHEWS MUN. ORDINANCES § 37:65(1) (2010).

⁷⁵ *Town Council: John Urban*, TOWN OF MATTHEWS, NORTH CAROLINA, <http://www.matthewsnc.com/TownGovernment/TownCouncil.aspx> (last visited Feb. 13, 2012).

has empowered local units of government to exclusively require LEED®, or any other private green building systems, as part of an incentive package. If this were true, you might have a devastating report for ACME’s executives. You then find a state statute on point, which states:

(i) In order to encourage construction that uses sustainable design principles and to improve energy efficiency in buildings, a county may charge reduced building permit fees or provide partial rebates of building permit fees for buildings that are constructed or renovated using design principles that conform to or exceed one or more of the following certifications or ratings:

(1) Leadership in Energy and Environmental Design (LEED) certification or higher rating under certification standards adopted by the U.S. Green Building Council.

(2) A One Globe or higher rating under the Green Globes program standards adopted by the Green Building Initiative.

(3) A certification or rating by another nationally recognized certification or rating system that is equivalent or greater than those listed in subdivisions (1) and (2) of this subsection.⁷⁶

The North Carolina Legislature’s plain-meaning and intent seems to indicate that local units of government may only enact programs like the one the Town of Matthews is using if the choice of green building standards is non-exclusive. Failing to do so probably puts the Town of Matthews in violation of state law and in violation of the Dormant Commerce Clause⁷⁷ (though not the Equal Protection Clause because of section 3 of the ordinance).⁷⁸ If ACME feels wronged in this hypothetical analysis, they may have easy recourse against the municipality, but what about USGBC, and how would this situation relate to *Gifford*?

This situation could create the type of situation that produces the causal nexus of the second element needed under the Lanham Act to have standing. It is not too hard to prove that

⁷⁶ N.C. GEN. STAT. ANN. § 153A-340(i) (West 2011).

⁷⁷ See, e.g., Colin W. Maguire, *The Imposing Specter of Municipal Liability for Exclusive Promotion of Private Green Building Certifications*, ___ UNIV. BALT. J. LAND & DEV. __, __ (2011).

⁷⁸ 1C MATTHEWS MUN. ORDINANCES § 37:65(3) (2010).

the fictitious ACME, a certifier of green buildings, is a direct competitor of USGBC per the first element of the standing test.⁷⁹ Still, it is a more nuanced analysis to consider the second element in this scenario. From a distance, it seems difficult to imagine that the Town of Matthews created their ordinance with intent to harm anyone; rather, they probably wanted to promote green building practices. However, intent does not matter in terms of standing under the Lanham Act (much less the municipality's intent) and a hypothetical suit by ACME must specifically "demonstrate (1) a reasonable interest to be protected against the alleged false advertising, and (2) a reasonable basis for believing that the interest is likely to be damaged by the false advertising."⁸⁰ Further, we now know that a claim subject to a motion to dismiss must be considered by a trier of fact as "plausible on its face"⁸¹ while "not [being] limited to the four corners of the complaint...."⁸²

Again, the second element remains provable but probably rests on the answers to very important questions, which could assess if such a claim is plausible, such as: (1) were members of the Town Council made aware of any statistics proffered by USGBC when they voted to adopt their LEED®-exclusive ordinance; (2) were representatives of USGBC present and did they make claims about the efficiency standards of LEED®; and (3) did anyone say that LEED® was the 'best', 'most viable', or 'only' green building certification system?" Such a line of inquiry is not as situational specific as one might think. Perhaps in reliance on USGBC studies, numerous cities across the country have adopted LEED®-specific building standards.⁸³ LEED® specific

⁷⁹ *Gifford v. U.S. Green Bidg. Council*, No. 10 Civ. 7477 2011, WL 4343815, at *3 (Aug. 16, 2011 S.D.N.Y).

⁸⁰ *Id.* at *2 (Aug. 16, 2011 S.D.N.Y) (quoting *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 113 (2d. Cir. 2010)).

⁸¹ *Gifford*, 2011 WL 4343815, at *2 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

⁸² *Gifford*, 2011 WL 4343815, at *2; *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d. Cir. 1993).

⁸³ Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 704 (2010) (discussing LEED® legislation in various cities and citing a

programs may be found in many states.⁸⁴ If USGBC misstated the effectiveness of LEED®, then it is very plausible to imagine a situation in which a city promoted LEED® as a result of falsely-presented information which led to the preference of a LEED® purchase over a competitor’s service. After all, the stated purpose for adopting or buying a LEED® certification is likely to address “(1) site planning; (2) water management; (3) energy management; (4) material use; (5) indoor environmental air quality; and (6) innovation & design progress.”⁸⁵ It follows that the aforementioned six purposes encompass the rationale for a municipality adopting LEED® standards. Assuming one or more of those six purposes are misstated, a municipality adopting a LEED®-exclusive standard must have relied on false information in coming to its decision. If a competitor of USGBC uses the same or similar criteria, then misstating the effectiveness of measures based upon those criteria propped up the quality of USGBC’s service, while simultaneously downgrading the quality of a competitor’s service. This would be a probable outcome because a municipality adopting LEED®-exclusive legislation would have erroneously given the LEED® certification more credit than it deserved and not rejected the LEED® certification as an exclusive standard or considered other certifications as seriously as they might have if accurate information had been advertised.

B. If the Basic Elements of a Lanham Act Claim Could be Proven by a Competitor Based Upon Exclusive Government Adoption of the LEED® Standard, Then a Sherman Antitrust Act Claim Could Also be Successful.

USGBC study stating: “[b]uilding green is one of the best strategies for meeting the challenge of climate change because the technology to make substantial reductions in energy and CO2 emissions already exists. The average LEED® certified building uses 32% less electricity and saves 350 metric tons of CO2 emissions annually.” (Press Release, U.S. GREEN BLDG. COUNCIL, *Building Design Leaders Collaborating on Carbon-Neutral Buildings by 2030: Goal to Meet Specific Energy Reduction Targets* (May 7, 2007), <http://www.usgbc.org/News/PressReleaseDetails.aspx?ID=3124>)).

⁸⁴ LES LO BAUGH, 556 PLI/REAL: LEED® GREEN BUILDING INCENTIVES, 39-79 (2008).

⁸⁵ Colin W. Maguire, *The Imposing Specter of Municipal Liability for Exclusive Promotion of Private Green Building Certifications*, ___ UNIV. BAL. J. LAND & DEV. ___ (2011), ___ (quoting USGBC, <http://www.usgbc.org/> (last visited January 11, 2012)).

Mr. Gifford chose to drop his claim under the Sherman Antitrust Act Sec. 2, when he amended his complaint.⁸⁶ This is likely because Mr. Gifford was not a competitor of USGBC in the most literal sense,⁸⁷ so it would be difficult for him to prove a conspiracy by USGBC to monopolize an industry USGBC was only marginally involved in - building energy-efficiency.⁸⁸ Still, Mr. Gifford never considered whether or not his business had been affected by a municipal code adopting LEED® because a municipality may have relied upon false information from USGBC (perhaps he had no reason to because no such code exists where he did business). If this had been considered, Mr. Gifford may have found a wealth of case law.⁸⁹

The problem with antitrust actions involving government influence is that they will have to pass muster under the *Noerr-Pennington* Doctrine.⁹⁰ This doctrine involves a principal laid out in both *Eastern Railroad Conference v. Noerr Motor Freight*⁹¹ and *United Mine Workers of America v. Pennington*.⁹² The case law antitrust immunization goes something like this: if a person or group sought to go into the marketplace and set prices, this would be considered a violation of the Sherman Antitrust Act because this is a direct attempt to injure a competitor in a private marketplace.⁹³ However, the Supreme Court has reasoned that it is not so clear that if a group collectively advocates and negotiates a restraint on the marketplace that the effect of that

⁸⁶ Amended Complaint and Demand for Jury Trial at 8-11, *Gifford v. U.S. Green Bldg. Council* (No. 10 Civ. 7747), 2011 WL 4343815 at *2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.” (quoting 15 U.S.C.A § 2 (West 2004))).

⁸⁷ *Gifford*, 2011 WL 4343815, at *3.

⁸⁸ See 15 U.S.C.A. § 2 (West 2004).

⁸⁹ See, e.g., LOUIS ALTMAN & MALLA POLLACK, 1 CALLMAN ON UNFAIR COMP. TR. & MONO. § 3:8 (4th ed. 2011); see also, e.g., WILLIAM C. HOLMES, HOLMES, ANTITRUST L. HANDBOOK § 8:8 (2011).

⁹⁰ See also, e.g., WILLIAM C. HOLMES, HOLMES, ANTITRUST L. HANDBOOK § 8:8 (2011).

⁹¹ *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

⁹² *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

⁹³ See, e.g., *Pennington*, 381 U.S. at 663.

advocacy falls within the Sherman Antitrust Act.⁹⁴ This idea was directly considered in the context of lobbying activity in *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, when the Supreme Court reasoned that “...where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is ‘incidental’ to a valid effort to influence governmental action.”⁹⁵

In *Allied Tube*, the Supreme Court did cast a more suspicious eye on lobbying efforts in the context of administrative or judicial proceedings, like the ones that might be found at a level of state agencies or municipal government.⁹⁶ The Court reasoned that conduct which is closer to private business communication, and less like an open legislative process, would be presumed to not enjoy *Noerr-Pennington* Doctrine protection⁹⁷ However, this well-reasoned doctrine was refined to the point of requiring rhetorical gymnastics in *City of Columbia v. Omni Outdoor Advertising, Inc.*⁹⁸ The Court has long recognized the previously stated exception to *Noerr-Pennington* Doctrine known as the “sham exception” because “[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.”⁹⁹ The new wrinkle that *City of Columbia* adds is the Court’s reasoning that only activities that directly interfere with a governments decision-making can be considered a sham (and not subject to *Noerr-Pennington* immunity) and not the government activity itself because

⁹⁴ *E.g., Id.* at 664.

⁹⁵ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (quoting *Noerr*, 365 U.S. at 143).

⁹⁶ *Allied Tube*, 486 U.S. at 499; *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 611-2 (1972).

⁹⁷ *Allied Tube*, 486 U.S. at 507 (“[Activities tending to enjoy immunity from antitrust litigation] bear little if any resemblance to the combinations normally held violative of the Sherman Act...”(quoting *Noerr*, 365 U.S. at 136)).

⁹⁸ *See City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991).

⁹⁹ *City of Columbia*, 499 U.S. at 380 (quoting *Noerr*, 365 U.S. at 144).

the government is an independent decision maker; in other words, lobbying but not the effect of a passed law is actionable under the Sherman Antitrust Act.¹⁰⁰

This seems like poison to lots of claims under Sherman and gives wealthy entities the ability to craft legislation at their leisure. This interpretation of *Noerr-Pennington* immunity is not without a variety of detractors ranging from Robert Bork to the Antitrust Section of the American Bar Association.¹⁰¹ Still, would this prohibition on a claim against those who successfully influence a government measure be fatal to the hypothetical discussed in this section? To recap, let us assume a true competitor of USGBC sought a Lanham Act claim and a Sherman sec. 2 claim under the exact same cause of action: that USGBC produced false advertising claims, which helped lead to the passage of LEED®-exclusive statutes or ordinances. Would the second claim be barred under the *Noerr-Pennington* doctrine? In a rare exception, the answer is probably ‘no’; in part because the plausibility standard of a claim “concerns the viability of an inference,”¹⁰² and this inference must have a plausible starting point.

The Sherman claim in this scenario is, at least, provable because one of two legal propositions must be true. First, a violation of the Sherman Antitrust Act Sec. 2, for lobbying with false information about your product, is subject to the same standard as disseminating false information about your product through the submission of false advertising that leads to the

¹⁰⁰ *City of Columbia*, 499 U.S. at 380-1.

¹⁰¹ See, Timothy J. Murisa, *Clarifying the State Action and Noerr Exemptions*, 27 HARV. J.L. & PUB. POL’Y 443 , 444 (2004) (“...[P]rofusion of such governmental authority offers almost limitless possibilities for abuse” (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 347 (Basic Books, 1978))); (“...[A]ntitrust ‘immunity drives a large hole in the framework of a nation’s competition laws” (quoting Section of Antitrust Law, *The State of Antitrust Enforcement—2001*, AM. BAR ASS’N, at 42 (2001), available at <http://www.abanet.org/antitrust/antitrustenforcement.pdf>)).

¹⁰² Nicholas Tymokzko, *Between the Possible and the Probable: Defining Plausibility Standard After Bell v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 532 (2009).

passage of municipal code.¹⁰³ In the alternative, these claims are two completely separate issues and would be confined to the mere promotion of a business in the case of Sherman and the *Noerr-Pennington* doctrine (because the doctrine clearly distinguishes between a claim under the process of making an anti-competitive law and a claim under the effect of the anti-competitive law itself), while a suit under the Lanham Act must consider the effect of such false claims generally¹⁰⁴ and as part of the causal nexus analysis for standing. For if any claim must be “plausible on its face,” must not a court provide for a plausible application of the law governing that claim?¹⁰⁵

USGBC’s studies would only have been useful at the preliminary lobbying stage.¹⁰⁶ USGBC does not, necessarily, have to be in direct contact with a governing body because they “represent 140,000 design professionals whom [USGBC] has accredited as qualified to advise real estate professionals and consumers on how to design a LEED-certified buildings.”¹⁰⁷ Therefore, a potentially misleading promotional study by USGBC, laid in the hands of an aggressive LEED® AP seeking exclusive statutory promotion of LEED®, has the ability to directly damage USGBC’s competitors in the marketplace in violation of the Lanham Act¹⁰⁸ and

¹⁰³ *Gifford*, 2011 WL 4343815, at *2; *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 111 (2d Cir. 2010) (“[T]o have standing for a Lanham Act false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury” (quoting *Telecom Int’l Am., Inc. v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001); *Stanfield v. Osborne Industries, Inc.*, 52 F.3d 867, 873 (10th Cir. 1995))).

¹⁰⁴ *Id.*

¹⁰⁵ Admittedly, this is an evolving area of the law that requires a particularized analysis, but it rationally follows a general discussion of the plausibility standard’s application to this hypothetical analysis because plausibility requires a rational and mutually exclusive connection between applicable law and a rational claim; *See Gifford*, 2011 WL 4343815, at *2; quoting (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))); *See, e.g.*, *Tymokzko*, *supra* note 95 at 511 (“Determining whether a claim is plausible is a ‘context-specific task’ requiring the exercise of ‘judicial experience and common sense’” (quoting *Iqbal*, 129 S.Ct. at 1950))).

¹⁰⁶ *See City of Columbia*, 499 U.S. at 380-1.

¹⁰⁷ *Gifford*, 2011 WL 4343815, at *1.

¹⁰⁸ *Gifford*, 2011 WL 4343815, at *4; *see ITC Ltd. V. Punchgni, Inc.*, 482 F.3d 135, 170 (2d Cir. 2007) (applying a causal nexus requirement between the alleged false advertising and the alleged injury as part of the ‘reasonable

in the eyes of a legislature or administrative body in violation of the Sherman Antitrust Act.¹⁰⁹ Especially in relation to the latter violation, what purpose would a study that is damaging to a competitor of USGBC's have in the hands of a LEED® AP other than to promote that LEED® AP and USGBC's products at-large?¹¹⁰

C. USGBC Claims That it Represents all LEED® APs, Though the Relationship Would Seem to go in the Opposite Direction.

In *Gifford*, the Court notes that USGBC “represents approximately 140,000 design professionals whom it has accredited as qualified to advise real estate developers and other consumers on how to design a LEED-certified building. USGBC receives fees from parties seeking LEED certification for their buildings and from the individual professionals it accredits.”¹¹¹ Therefore, some kind of relationship exists between USGBC and LEED. From the description given, the relationship sounds like one between an agent and a principal. Still, which side would be the agent and which the principal? If the relationship is not an agency, is it a franchisor-franchisee relationship or an independent contractor situation? The idea of representation may infer agency and so we should consider what the Court may implicitly be saying.

As *International Shoe Co. v. State of Washington*, possibly the most famous case involving corporations and agency in our jurisprudence, states: “[s]ince the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its ‘presence’ without, as well as within, the state of its origin can be

basis’ prong of the Lanham Act standing test) (quoting *Havana Club Holdings, S.A. v. Galleon S.A.*, 203 F.3d 116, 130 (2d Cir. 2000)).

¹⁰⁹ *See City of Columbia*, 499 U.S. at 380-1.

¹¹⁰ *Id.*

¹¹¹ *Gifford*, 2011 WL 4343815, at *1.

manifested only by activities carried on in its behalf by those who are authorized to act for it.”¹¹² The power of agency is an old one in our jurisprudence and it involves the power to affect the legal position of a principal.¹¹³ It is the authority of the agent to act for the benefit of the principal that established the relationship.¹¹⁴ Most importantly, the source of the power of agency must not be the agent but the principal.¹¹⁵

Still, the existence of any type of agency will not be presumed in most jurisdictions.¹¹⁶ Rather, the plaintiff in a potential lawsuit must establish agency by a showing of substantial evidence.¹¹⁷ So is there some sort of agency relationship between USGBC and LEED® APs? That would be impossible to say without a very close examination of documents between the two parties, but the basic query of who benefits who in this relationship is still an open question. We know that USGBC “accredits” LEED® APs through GBCI and that LEED® APs are “qualified to advise real estate developers and other consumers on how to design a LEED-certified building.”¹¹⁸ We also know that buildings gets credit for using a LEED® AP on a building’s LEED® certification process.¹¹⁹ It is probably safe to assume that many LEED® projects employ at least one LEED® AP. Therefore, it seems like the LEED® AP is in the position of benefitting from their relationship with USGBC. A more direct resolution to the issue would only be achieved by looking at a contract or other writings between the parties.

¹¹² *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316-7 (1945); *Klein v. Board of Tax Supervisors*, 282 U.S. 19, 24 (1930);

¹¹³ ANNE E. MELLEY, 3 AMER. JUR. 2d § 68 (3d ed. 2002); *Wen Kroy Realty Co. v. Public Nat. Bank & Trust Co.*, 260 N.Y. 84, 89 (1932).

¹¹⁴ MELLEY, *supra* note 113; *Fuller v. Fasig-Tipton Co.*, 587 F.2d 103, 106-7 (2d Cir. 1978).

¹¹⁵ MELLEY, *supra* note 113; *Alar v. Mercy Mem'l Hosp.*, 529 N.W.2d 318, 323 (Mich. App. 1995).

¹¹⁶ JOHN R. KENNEL, ET AL., 3 C.J.S. § 509 (2011); *John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 166 S.E.2d 141, 146 (W.Va. 1969).

¹¹⁷ KENNEL, *supra* note 116; *Lincoln Log Home Enter., Inc. v. Autrey*, 836 So.2d 804, 806 (Ala. 2002).

¹¹⁸ *Gifford v. U.S. Green Bldg. Council*, No. 10 Civ. 7747, 2011 WL 4343815 at *1 (S.D.N.Y. Aug. 16, 2011).

¹¹⁹ *LEED 2009 for New Construction and Major Renovation*, USGBC, 98 (2009), <http://www.usgbc.org/ShowFile.aspx?DocumentID=8868>.

D. Green Building Certification Companies Should be Very Careful When Presenting Marketing Claims.

Legal advisors to green building certification companies must be on alert at all times to remember their company's true mission. Consider USGBC's claim that LEED® "does not assess the *actual* environmental performance of any structure for which certification is sought or granted."¹²⁰ That seems appropriate because it may be very difficult to scientifically assess the actual environmental impact of a building; in part, because the definition of sustainability can vary.¹²¹ So why commission a sloppy statistical analysis of a building's energy efficiency, which Mr. Gifford ripped apart with the type of logical ease one associates with a preparatory school science teacher correcting their student on scientific method?¹²² Green building professionals¹²³ certainly understand the demands of a marketplace where the customer wants a concrete answer to certain question like "what is my return on investment going to be if I adopt your system and how efficient are your buildings as opposed to other buildings?"

This makes sense because executives and leaders in various fields are feeling personal pressure to show direct financial gain as a result of sustainability measures.¹²⁴ In fact, a global survey of 642 leaders in various fields found that 88% of respondents felt exactly this type of pressure to prove short-term return on investment when considering sustainability methods.¹²⁵ Still, green building certification providers should not necessarily feel any kind of pressure to

¹²⁰ Def. Mot. Dismiss at 5, *Gifford v. U.S. Green Bldg. Council* (No. 10 Civ. 7747), 2011 WL 4343815 at *1.

¹²¹ Tristan Roberts, *Green Manufacturers Examine Their Impacts*, GREENSOURCE (July 2011), available at http://greensource.construction.com/features/other/2011/1107_Green-Manufacturers.asp.

¹²² See generally, *Assessing the Performance of LEED Buildings*, 28 No. 10 ENERGY DESIGN UPDATE 1, 1 (2008) (quoting Henry Gifford, *A Better Way to Rate Green Buildings*, ENERGYSAVINGS SCIENCE.COM (2008), <http://www.energysavingscience.com/articles/henrysarticles/BuildingRatingSystems.pdf?attredirects=0>).

¹²³ A group which I count myself a part of.

¹²⁴ Business Green Staff, *Experts Polled for UN-Backed Research Name Short-Termism as Biggest Barrier to Green Transition*, BUSINESSGREEN (Jan. 27, 2012), http://www.businessgreen.com/bg/news/2141908/survey-profit-incentive-derailing-sustainability?WT.rss_f=Home&WT.rss_a=Survey%3A+Profit+incentive+derailing+sustainability.

¹²⁵ *Id.*

show return on investment; especially because this pressure is often marginally greater from internal sources the most important external source: the consumer.¹²⁶

Another recent survey of thousands of executives in over 100 countries found that around 66% of executives felt sustainability was a necessary part of being competitive within consumer markets; while around 31% found they had directly profited from sustainable practices.¹²⁷ Those numbers may mean that the average consumer is unconcerned with a company's green policy particulars, but may be satisfied with that company's efforts to be more sustainable. In terms of green buildings, operators may generally enjoy the advantages derived from an energy-efficient building, such as better protection against rising energy costs, the ability to lease due to lower energy costs, and a marketing bonus to potential users who are environmentally conscientious.¹²⁸ Those advantages assume that such claims of energy-efficiency are accurate, the very problem in *Gifford*, and reflect a larger problem with marketing proliferated through rapid sources like the Internet.

It is a basic legal truth that competitors and consumers are paying closer attention the content of Internet advertisement while looking for ways to poke holes in a company's claims.¹²⁹ For instance, companies like New Balance, Reebok, General Mills, and Yoplait USA, Inc., have all recently been sued based upon Internet ads.¹³⁰ The Federal Trade Commission is also coming down on various companies who market acai berries on the Internet.¹³¹ So while it may be worth

¹²⁶ R.P. Siegel, *Does Sustainability Increase Profits?*, TRIPLEPUNDIT (Jan. 30, 2012), <http://www.triplepundit.com/2012/01/sustainability-increase-profits/>.

¹²⁷ *Id.*; Knute Hannaes, et al., *Sustainability Nears a Tipping Point*, MIT SLOAN: MANAGEMENT REVIEW (Jan. 23, 2012), available at http://sloanreview.mit.edu/feature/sustainability-strategy/?utm_source=release&utm_medium=pr&utm_campaign=sust12;

¹²⁸ *E.g.*, Bonny Hedderly, et al., *The Real Estate Green Agenda: What Banks Should Know*, 2 BUTTERWORTHS J. INT'L BANK. & FIN. L. 99, 100 (2012).

¹²⁹ Gary Beaver, *Avoiding Lawsuits Over False Advertising on the Internet*, ABA COMMERCIAL & BUS. LITIG. NEWSLETTER Vol. 13 No. 1 (2011) available at <http://www.nexsenpruet.com/publications-606.html>.

¹³⁰ *Id.*

¹³¹ *Id.*

commissioning studies to assess how energy-efficient a building is, studies can be subjective and it would be advisable to use conservative figures when touting a product's benefits on the internet.¹³² Alternatively, a client might consider focusing product advertising in different directions. For instance, if consumers demand sustainability, then help point the client towards the sustainable aspects of a green building through marketing efforts.¹³³ There are also various government standards and research available which are federally funded, well-respected, and can provide a point of reference for energy-efficiency.¹³⁴

IV. CONCLUSION

In *Gifford*, USGBC is attacked, essentially, for promoting themselves. It is possible, and Mr. Gifford's analysis is not without its merits, that USGBC is promoting the LEED® standard in a dishonest way. Still, self-promotion is what we expect businesses to do. The real problem lies in municipal requirement of LEED® and its imposition on the consumer and the marketplace.¹³⁵ It may not be a just policy that USGBC or its representatives may argue for these statutory measures, but Mr. Gifford has stumbled onto a great legal weapon for competitors of USGBC. For if every LEED® exclusive statute was passed based upon false information furnished by USGBC, then the liability of USGBC may be far-reaching.

¹³² *Id.*

¹³³ *E.g., Thomas M. Cooley Law School – Auburn Hills Campus*, SERF (Oct. 2011), http://www.serfgreen.org/wp-content/uploads/2011/11/090_SERF_Cooley_AuburnHills_CaseStudy_FINAL_Web1.pdf (describing a building which had followed certain LEED® specifications but which had not been LEED® certified; the main idea of the piece is to extoll the sustainable aspects of the building in a way that an average building user can understand) (To disclose, I was the principal author of this piece but worked closely with all the institutions involved in this marketing piece).

¹³⁴ *See, e.g., Federal Green Building Requirements*, ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/oaintrnt/projects/requirements.htm> (last visited Feb. 17, 2012); *Criteria for Rating Building Energy Performance*, ENERGY STAR, http://www.energystar.gov/index.cfm?c=eligibility.bus_portfoliomanager_eligibility (last visited Feb. 17, 2012).

¹³⁵ Sarah Fox, *A Climate of Change: Shifting Environmental Concerns and Property Law Norms Through the Lens of LEED Building Standards*, 28 VA. ENVTL. L.J. 299,309-10 (2010).

There are many issues left to consider. First, state law claims related to the activity litigated in *Gifford* may vary as to their application and probable result.¹³⁶ Second, to what extent might true competitors be able to establish a class-action lawsuit against USGBC? Third, would a consumer class-action suit against USGBC be more effective and plausible, but under what claim or claims? Fourth and finally, to what extent is USGBC on the Federal Trade Commission's radar and, if not, does this have anything to do with the federal government deciding to use LEED® on all of their buildings?¹³⁷

¹³⁶ For this reason, I chose not to consider Mr. Gifford's state law claims.

¹³⁷ *Sustainable Design Program*, U.S. GENERAL SERVICES ADMINISTRATION, <http://www.gsa.gov/portal/content/104462> (last visited Feb. 17, 2012).