

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,

vs.

U.S. GREEN BUILDING
COUNCIL,

Defendant.

10-cv-7747 LBS

FIRST AMENDED
COMPLAINT

Plaintiffs, HENRY GIFFORD, GIFFORD FUEL SAVING, INC., ELISA LARKIN, MATTHEW ARNOLD, AND ANDREW ÄSK (collectively, “Plaintiffs”) sue U.S. GREEN BUILDING COUNCIL (“USGBC”), a Washington, D.C. based corporation, and allege as follows:

INTRODUCTION

1. Plaintiffs are building design and construction professionals who, amongst other things, provide real estate developers and other clients advice about how to design and construct energy efficient buildings. Plaintiffs have extensive experience in this field, which allows them to provide advice that actually improves buildings’ energy efficiency.
2. USGBC claims to provide this same advice. USGBC created, owns, and operates the Leadership in Energy and Environmental Design (“LEED”) certification system, which is a

product that purports to certify buildings as being designed and constructed in an environmentally friendly manner. USGBC receives massive fees from the owners of buildings seeking LEED certification. And USGBC represents the approximately 140,000 design professionals who it has certified as being able to advise real estate developers and other consumers on how to design a LEED building. In effect, USGBC sponsors and represents a billion-dollar building design business.

3. USGBC claims that buildings certified as LEED buildings are more energy efficient than non-LEED buildings: USGBC advertises that buildings “certified under the U.S. Green Building Council’s [LEED] certification system are, on average, performing 25-30% better than non-[LEED] certified buildings in terms of energy-use.” Similarly, USGBC’s advertisements claim that LEED “provid[es] third-party verification that a building or community was designed and built using strategies aimed at improving performance across all the metrics that matter most: energy savings...”
4. Both claims are false. First, LEED-certified buildings are no more energy-efficient than non-LEED certified buildings. USGBC's own study data on the subject indicate that, on average, LEED buildings use 41% more energy than non-LEED buildings. There is no objective empirical support for the claim that LEED buildings consume less energy. LEED buildings are less efficient because the criteria that USGBC purportedly uses to certify buildings do not correlate with energy efficiency.
5. Second, LEED does not verify that certified buildings are designed and built in a manner that leads to energy savings. USGBC does not conduct site investigations of the buildings it

certifies, nor does LEED require buildings to actually perform as predicted as a condition of certification. Applicants essentially self-certify.

6. USGBC's false advertising misleads consumers and damages Plaintiffs: USGBC's false advertisements divert customers from Plaintiffs to professionals accredited by USGBC and/or its affiliates who provide advice about how to obtain LEED certification. Plaintiffs are losing customers because USGBC's false advertisements mislead the consumer into believing that obtaining LEED certification incorporates construction techniques that achieve energy-efficiency. As a result, Plaintiffs bring this action for injunctive relief and damages under the Lanham Act, 15 U.S.C. § 1125 et seq., as well as pendent state law claims for false advertising and deceptive trade practices.

JURISDICTION

7. Pursuant to 28 U.S.C. § 1331, this Court has original jurisdiction in that this is a civil action arising under the laws of the United States. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b).

PARTIES

8. At all times material hereto, Plaintiff, Henry Gifford (hereinafter "Gifford") was and is a permanent resident of New York, New York. Gifford is a consultant who provides advice about how to reduce energy costs. Gifford Fuel Saving, Inc. is a corporation organized under the laws of the State of New York that provides energy saving heating and cooling system design and advice about how to reduce energy costs.

9. Matthew Arnold, a licensed architect, is a permanent resident of Sterling, Virginia. Arnold is in the business of providing advice about how to design energy-efficient and sustainable buildings.
10. Andrew Ask, a professional engineer licensed in Ohio, Minnesota, Florida, (also previously licensed in Nebraska and Pennsylvania), is a permanent resident of Cape Coral, Florida. Ask is a well known member of the building science community, a Life Member of American Society of Heating, Refrigeration and Air-Conditioning Engineers, and has 41 years as a licensed engineer diagnosing, designing, and retrofitting heating and cooling systems in order to improve performance and energy utilization. In addition to a number of trade journal articles and columns, Mr. Ask is the author of *H2No: Mechanical Systems and Moisture Control*, a book written for people who are not HVAC professionals.
11. Elisa Larkin, President of B'Green Environmental, Inc., residing in Norman, Oklahoma. Larkin specializes in moisture barrier design and mold remediation.
12. At all times material hereto, Defendant USGBC was a corporation based in Washington, D.C. with offices at 1800 Massachusetts Avenue NW, Suite 300, Washington, D.C. 20036.
13. Upon information and belief, USGBC maintains or used to maintain an office in New York.

FACTUAL ALLEGATIONS

Background: USGBC and LEED

14. USGBC was founded in 1993 by a real estate developer, David Gottfried, and a marketing executive, Richard Fedrizzi.
15. In 2000, USGBC trademarked the LEED rating system.

16. According to USGBC, the purpose of LEED is to “provid[e] 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...”
17. The LEED rating system is not based on objective scientific criteria, e.g. BTUs of energy consumed per square foot per year but rather on computer modeling of anticipated energy use levels of a building’s performance in terms of energy use, air quality, toxicity of building materials, or any objective scientific criteria.
18. Under the current the LEED rating system guidelines, a bike rack earns one point, an electric vehicle charging station earns one point, installing a floor grate to trap debris earns point, one point, use of “non-emitting materials” for adhesive and sealants earns one point, use of “non-emitting materials” in paints and coating earns one point, use of “non-emitting materials” in flooring systems earns one point.
19. Upon information and belief, USGBC and/or its affiliates have authorized or accredited approximately 140,000 individuals to serve as certified designers of LEED buildings (hereinafter, “USGBC sales representatives”). The hiring of a USGBC sales representative to prepare the certification application earns one point.
20. Obtaining LEED certification is not cheap. The minimum price for LEED certification is \$2,900. For buildings over 50,000 square feet the cost is \$.04 per square foot, plus membership fees, plus an initial \$900 “registration” fee.
21. USGBC and/or its affiliates also receive significant fees from the individuals that it certifies as being LEED-accredited professionals. These professionals spend hundreds of dollars on exam fees and on exam materials, e.g. USGBC LEED Associate Study Guide (\$85), USGBC LEED Core Concepts Guide (\$35), USGBC LEED AP Building Design + Construction

Study Guide (\$85), and the Green Building Design and Construction Reference Guide, 2009 Edition (\$185)).

22. Although USGBC may technically have 501(c)(3) status, it is a big business and, in 2008, reported revenues of \$64,000,000.00 in 2008. Upon information and belief, in 2008, USGBC created Green Building Certification Institute, to develop and administer the professional certificate exams, which reported revenue of \$18,675,810.00 in 2008.
23. The revenues that USGBC and its affiliates receive from LEED are just the tip of the iceberg. USGBC drives and represents the business of the 140,000 individuals who it has accredited.
24. Upon information and belief, these individuals have received billions of dollars for designing and constructing LEED buildings.

USGBC's Energy Savings Advertising

25. Given the high fees that USGBC charges for its certifying a building as a LEED building and the massive fees received by LEED-certified professionals for designing and constructing LEED buildings, USGBC has strong financial incentives to encourage as many buildings as possible to seek LEED certification. Unsurprisingly, USGBC makes great efforts to advertise, promote, and market LEED for the purpose of encouraging and expanding the use of the LEED certification system.
26. USGBC's website states that “[b]y using less energy, LEED-certified buildings save money for families, businesses and taxpayers[.]”
27. Its website also states that LEED verifies that a building was “designed and built using strategies aimed at improving performance across all the metrics that matter most: energy savings...”

28. USGBC promotes LEED in brochures. For instance, a 2006 brochure published by USGBC entitled “Transforming the Built Environment” (which was still available on the world wide web as of February 6, 2011,) displays a table that shows “Average Bottom Line Savings” in LEED buildings were “30% energy savings” and “30-50% water use savings”.
29. In July 2007, USGBC published “The LEED Guide” (which was still available on the world wide web as of February 6, 2011,) which stated that “Studies show that, on average, buildings that have been certified as green by the Leadership in Energy and Environmental Design (LEED) Green Building rating System, cost a mere 1 to 2 percent more than conventional construction — and the investment is paid back in full within the first year based on energy savings alone.”
30. USGBC also advertises LEED in press releases. For instance, on April 3, 2008, USGBC issued a press release (which was still available on the world wide web as of February 6, 2011,) stating that LEED buildings use 25-30% less energy than non-LEED buildings: “third party certified buildings outperform their conventional counterparts across a wide variety of metrics, including energy savings, occupancy rates, sales price and rental rates. In the [New Buildings Institute] Study, the 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.”
31. USGBC concealed the fact that it sponsored the March 2008 New Buildings Institute Study (the "NBI Study" or "USGBC Study") referenced in the April 3, 2008 press release.
32. USGBC’s claims regarding the 2008 study are literally false on several grounds:
 - a. The USGBC Study sample was comprised of just 22% of LEED-certified buildings, not all LEED-certified buildings. Five hundred and fifty-two buildings had been LEED-certified at the time of the NBI study but only 252 responded to

the survey, and only 121 were included in the study. Less than half of LEED certified buildings responded to the survey, and half of those were eliminated from the sample. A building with a staff member motivated enough to respond to the survey will be more likely to have energy efficient operations regardless of whether the building is LEED or not. Furthermore, owners of LEED certified buildings could be expected to indulge in puffery, given their vested interest in increasing the value of the LEED certification for which they paid a substantial premium. The self-selection bias is so obvious, it's about as reliable as using breathalyzer tests of drivers who volunteer to be tested as a gauge of how many people drink and drive.

- b. The NBI Study compared a set of new buildings to a set of old buildings. LEED buildings were compared in the NBI study to a database of 5,215 buildings maintained by the United States Energy Information Administration's Commercial Buildings Energy Consumption Survey's catalog (hereinafter "CBECS"). CBECS includes buildings that were built as early as 1920. The LEED sample consists exclusively of buildings built or renovated after 2000. The energy use data of the LEED buildings reflect at least in part energy savings inherent in the post-2000 building practices, e.g. modern lighting fixtures, cooling equipment, insulation, etc., and are not necessarily attributable to LEED elements.
- c. USGBC compares the *median* average BTUs used per square foot used in LEED buildings to the *mean* average used in CBECS buildings. Mean average can be a much higher number than a median, e.g. the median price of a Manhattan townhouse in 2009 was \$3.4 million, the mean average price was over \$5 million.
 - a. When asked why the NBI Study compared median to mean values rather than mean to mean values, an NBI analyst said, "[W]e did use the median in this data to avoid being skewed by the extreme results."
 - b. The NBI Study measured the total number of BTUs of energy per square foot per year used by each building and determined that the LEED building sample had a median energy use index of 69²¹, meaning that they use a total of 69,000 BTUs of energy per square foot per year. If all 121 LEED-certified building had been included, i.e. if the mean average were calculated, it would show a mean average

energy use value of 105, which is 29% higher than the mean average energy use of the CBECS.

33. Upon information and belief, the NBI Study is the only study or research on which USGBC relies in making its claim that LEED buildings have lower energy costs than non-LEED buildings.
34. Upon information and belief, USGBC has advertised LEED building as using less energy than non-LEED buildings in a variety of media, including but not limited to print and electronic media.
35. USGBC's false advertising has caused others to advertise LEED buildings as using less energy than non-LEED buildings. For instance, the business magazine *Fast Company*, published an article on December 19, 2007 (which was still available on the world wide web as of February 6, 2011,) that stated: "Anything that cuts [electricity use and greenhouse-gas emissions] as USGBC-certified buildings do—by an average of 25% to 30%—is surely a plus." Additionally, What'sGreen.com advertises that "[b]uildings certified under the [USGBC] LEED certification system are, on average, performing 25-30% better than non-LEED certified buildings in terms of energy use." Similarly, LAI engineering states that "[n]ew LEED certified buildings are, on average, performing 25-30% better than non-LEED certified buildings in terms of energy use."
36. In light of USGBC's decision to use select data and sham methods to analyze that data, USGBC's false promotion and advertising of LEED's purported energy savings was willful.

USGBC's Advertising about Third-Party Verification

37. In another attempt to mislead consumers in order to get them to utilize the LEED system and USGBC-certified professionals, USGBC claims that LEED is "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...”

38. This claim is false on its face in several ways:

- a. There is no verification of the applications submitted for LEED certification;
- b. Certification does not require actual energy use data;
- c. USGBC does not have the staff or expertise to evaluate these applications.

39. Far from providing “verification” “that a building or community was designed and built using strategies aimed at improving performance,” USGBC essentially allows applicants to self-certify.

40. For instance, in 2008, a group of Wisconsin residents sought a refund of the certification fees they paid for LEED Gold certification of a \$28M high school built in Eagle River (Northland Pines High School). Northland Pines was heralded as the nation’s first LEED Gold high school. People who served on the Northland Pines’ building committee appealed the LEED certification after licensed engineers found complete failure to comply with LEED’s own mandatory energy and atmosphere quality requirements for certification. Their appeal was disregarded by USGBC. The appellants’ Executive Summary reads: “Not completely complying with all the LEED prerequisites is a plaque removal event. This experience makes it very clear that USGBC scrutiny of LEED applications is severely lacking. While some instances of non-compliance with LEED may be minor or innocent, it is abundantly obvious that the granting of LEED Certification at [Northland Pines High School] left a lot to be desired...The violations of the LEED prerequisites in this building are numerous and are neither minor nor innocent. Unfortunately, most designers and owners are not inclined to

dispute or question LEED Certification after it is granted, especially if it might reflect unfavorably on them.”

41. The Northland Pines appeal is best summed up by the public statement released by the appellants who served on the building committee:

“On behalf of the taxpayers of Vilas County who would like to know with certainty whether they got what they paid for or not, we ask the engineering community to look at this file and tell us, did we miss something here? How can it be all right to certify a building that doesn’t fully comply with the rules set forth by the body that is doing the certifications?”

42. Upon information and belief, USGBC frequently certifies buildings as LEED buildings despite the fact that they do not meet USGBC's own requirements to be certified as a LEED building.

43. Upon information and belief, USGBC has falsely advertised LEED-certification as being verified by a third-party in a variety of media, including but not limited to print and electronic media.

44. USGBC knows it does not adequately verify how LEED-certified buildings are designed and constructed and USGBC's advertising about verification was intentionally false.

USGBC Makes Other False Claims

45. Upon information and belief, USGBC's advertisements are false in other material aspects.

46. For instance, USGBC advertises that LEED-certified and other allegedly “green” buildings “Boost Employee Productivity.”

47. Upon information and belief, this claim is false.

Plaintiffs' and Consumers' Injuries

48. Plaintiffs compete with USGBC in providing advice to consumers about how to design and construct energy-efficient and sustainable buildings.

49. USGBC's false advertising has injured Plaintiffs in the following ways:

- a. USGBC's false advertising causes consumers of building design and construction advice to utilize a LEED-certified professional instead of Plaintiffs because consumers mistakenly believe that LEED-certified professionals will design a LEED-certified building that is verified by a third-party to be more energy-efficient than the building that Plaintiffs would design;
- b. USGBC's false advertising causes consumers of building design and construction services to purchase the design and construction advice contained in the LEED certification system as opposed to purchasing Plaintiffs' design and construction advice;
- c. Dollars spent on LEED are dollars not available for more productive, performance-based designs like the ones designed by Plaintiffs.

50. USGBC's false and misleading advertising campaign has resulted in actual injury to the public. Consumers are being deceived into believing that the LEED-certification will be verified by a third-party to reduce their energy costs. Not only will these consumers suffer in many cases by actually using more energy, rather than less, but they will have to spend thousands of dollars on LEED certification they believed would help them use less energy.

51. As a result of USGBC's intentional, deliberate and willful misrepresentations, the Plaintiffs and the public have been injured. Unless USGBC is enjoined by this Court and ordered to retract and correct its false and misleading advertising and statements, USGBC's statements

will continue to mislead the public and cause the Plaintiffs to suffer a loss of consumer confidence, sales, profits, and goodwill, along with the cost of remedial corrective consumer education.

FIRST CAUSE OF ACTION

FALSE ADVERTISING
VIOLATION OF § 43(a) of THE LANHAM ACT

52. The Plaintiffs repeat and reallege the paragraphs above as if fully rewritten herein.
53. The Lanham Act, Section 43(a)(1)(B), 1125(a)(1)(B) prohibits any “false or misleading description of fact, or false or misleading representation of fact, which... in 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.”
54. USGBC’s advertising expressly and impliedly conveys the false message to the market that if a building is granted LEED certification it is verified by a third-party to be more energy efficient.
55. This advertising is false on its face and is material to consumers’ real estate spending decisions and to the policy decisions of voters, taxpayers, developers, municipalities, and legislators at the local, state and federal levels.
56. At all relevant times, USGBC knew that its advertisements were false and intended them to be false.
57. USGBC’s misrepresentations have and will continue to deceive consumers and voters, taxpayers, developers, municipalities, and legislators at the local, state and federal levels.

58. Upon information and belief, USGBC claims have appeared in commercial advertising and promotions in several states, including print advertisements in national publications and internet advertising, and are therefore in interstate commerce.
59. USGBC's false advertising has a massive impact on interstate commerce because billions of dollars have been spent on LEED-certified buildings that would not have been spent had USGBC told the truth about LEED certification.
60. Plaintiffs are entitled to injunctive relief, damages, and attorney fees.

SECOND CAUSE OF ACTION

DECEPTIVE TRADE PRACTICES

New York State General Business Law § 349 (a) and §349 (h)

61. The Plaintiffs repeat and reallege reallege the paragraphs above as if fully rewritten herein.
62. Pursuant to New York State General Business Law § 349 (a), deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in the State of New York are unlawful.
63. Pursuant to New York State General Business Law § 349 (h), any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions.
64. Plaintiffs repeat and reallege the allegations contained above as if fully set forth herein.
65. USGBC's promotion, marketing and advertising of its LEED rating system is false or misleading, deceptive, and is directed at the general public and consumers, including those within the State of New York.

66. USGBC's products have been, and continue to be, advertised and sold within the State of New York.
67. USGBC's false advertising, marketing and promotion described hereinabove intentionally, deliberately, willfully or knowingly deceives the public and consumers, confuses or is likely to confuse the public and consumers, and materially mislead consumers as to the nature, characteristics and/or qualities of its product.
68. Consumers have reasonably relied and/or are likely to rely upon these misrepresentations in making purchasing decisions and have been injured and damaged and are likely to be further damaged by USGBC's statements and actions described hereinabove violation of New York General Business Law § 349 (a) and (h).
69. USGBC's statements and actions described herein entitle the Plaintiffs to increased damages, reasonable attorneys' fees and injunctive relief under New York General Business Law § 349 (h).

THIRD CAUSE OF ACTION

FALSE ADVERTISING

New York State General Business Law § 350, §350-a, and § 350-e

70. The Plaintiffs repeat and reallege reallege the paragraphs above as if fully rewritten herein.
71. USGBC's promotion, marketing and advertising of its product is misleading, deceptive, and is directed at the general public and consumers, including those within the State of New York.
72. USGBC's products have been, and continue to be, advertised and sold within the State of New York.

73. USGBC's false advertising, marketing and promotion described hereinabove intentionally, deliberately, willfully and knowingly deceive the public and consumers, confuses or is likely to confuse the public and consumers, and materially misleads consumers as to the nature, characteristics and/or qualities of its product.
74. Consumers have reasonably relied and/or are likely to reasonably rely upon these misrepresentations in making purchase decisions and have been injured and damaged and are likely to be further injured and damaged by Defendants' statements and actions described hereinabove in violation of New York General Business Law §§ 350 and 350-a.
75. USGBC's statements and actions described hereinabove entitle the Plaintiffs to increased damages, reasonable attorneys' fees and injunctive relief, under New York General Business Law § 350-e.

FOURTH CAUSE OF ACTION

VIOLATION OF COMMON LAW

76. The Plaintiffs repeat and reallege the paragraphs above as if fully rewritten herein.
77. USGBC's conduct constitutes false advertising, unfair competition, and unfair business practices under the common law.
78. USGBC's actions demonstrate an intentional, willful and bad faith intent to harm the Plaintiffs for which there is no adequate remedy at law, and the Plaintiffs are entitled to injunctive relief at common law.

The Plaintiffs are also entitled to recover USGBC's profits, and the Plaintiffs' actual damages, costs, and attorneys' fees under common law.

PRAYER FOR RELIEF

73. The Plaintiffs request that the Court issue a permanent injunction ordering USGBC, its officers, agents, employees, and all other persons or entities acting in concert with them, to

a. immediately cease the dissemination of any advertising, marketing, or promotional statements, whether made expressly or by implication: 1) that LEED buildings are “performing 25-30% better than non-LEED certified buildings.”; 2) that LEED buildings use less energy than non-LEED buildings; 3) that LEED-certification is proof, or verification in any way, that a building has been built according to plans or; 4) in any way misrepresenting or exaggerating the benefits of the LEED system;

b. issue appropriate corrective advertising and literature;

c. compel USGBC to disclose the actual energy use of LEED properties, e.g., all LEED certified sites should be required to submit utility bills, for the entire year, once a year, for ten years after LEED certification, and upload those utility bills into an online database, accessible to the public, and searchable by street address, city, state, zip code, and containing PDFs of actual utility bills for said properties, along with the square footage as reflected by tax assessments, and indicating the CBECS use type category that the building fits within;

74. Award the Plaintiffs damages pursuant to 15 U.S.C. § 1117 and the statutory law of New York, in particular:

1) all of USGBC’s profit derived from the unlawful conduct;

2) all the Plaintiffs' damages sustained by reason of USGBC’s unlawful acts, to be trebled in accordance with 15 U.S.C. § 1117;

3) all expenditures required to correct the false and misleading statements alleged herein;

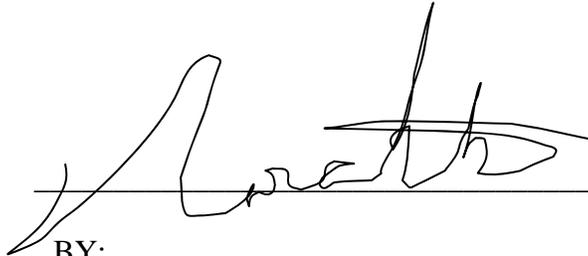
- 4) costs, including expenses and fees, of bringing this action; and
- 5) attorneys' fees incurred by the Plaintiffs in this action;
- 6) exemplary damages to punish USGBC for past willful conduct and to deter future willful conduct;
- 7) pre-judgment and post-judgment interest on the foregoing sums; and
- 8) such other relief as the Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiffs demand a trial by jury of all issues so triable as a matter of right.

DATED: February 7, 2011

By: _____

A handwritten signature in black ink, appearing to read 'Norah Hart', is written over a horizontal line. The signature is stylized and cursive.

BY:

Norah Hart (NH 5153)

Attorney for the Plaintiffs of the Putative Class

305 Broadway, 14th Floor

New York New York 10007

Tel: (212) 897-5865

Fax: (646) 537-2662

E-mail: nhart@consumerclasslaw.com