UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GIFFORD et al.,

Plaintiffs,

v.

U.S. GREEN BUILDING COUNCIL et al.,

Defendants.

10 Civ. 7747 (LBS)

**MEMORANDUM & ORDER**

SAND, J.

Plaintiffs Henry Gifford, Matthew Arnold, Andrew Äsk, Elisa Larkin, and Gifford Fuel Savings, Inc. bring this action against Defendant U.S. Green Building Council ("USGBC") pursuant to the Lanham Act, 15 U.S.C. § 1125 *et seq.*, and New York state law. USGBC moves to dismiss the First Amended Complaint ("FAC") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth herein, the Motion is granted, and the FAC is dismissed in its entirety.

## I. Background

Plaintiffs are professionals in the environmental engineering and design industry. Specifically, Gifford is "a consultant who provides advice about how to reduce energy costs," Arnold is a licensed architect, Äsk is an engineer specializing in heating and cooling systems, and Larkin specializes in moisture barrier design and mold remediation. FAC ¶¶ 8–11. Gifford Fuel Savings, Inc. provides energy saving heating and cooling system designs. FAC ¶ 8.

Defendant USGBC is a 501(c)(3) exempt organization based in Washington, D.C. USGBC created, owns, and operates the Leadership in Energy and Environmental Design ("LEED") certification system, which purports to certify buildings as being designed and

constructed in an environmentally friendly manner. LEED certification is point-based, with points awarded for the use of sustainable materials, efficient use of water, and other features aimed at improving the environmental performance of the building in question. FAC ¶ 18; Reddy Decl. Ex. B, at 12–13, 34–35. In general, "the LEED certification process does not assess the *actual* environmental performance of any of the structures for which certification is sought or granted," but certifies that they were designed in a way that should result in better performance. Def. Mot. Dismiss 5.

USGBC also 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. FAC ¶¶ 2, 20, 21. A USGBC affiliate, the Green Building Certification Institute, awards LEED certification and manages the accreditation program for individuals.

USGBC advertises and promotes LEED for the purpose of encouraging expanded use of the certification system. Plaintiff alleges that this advertising contains false statements regarding the energy and money-saving aspects of LEED certification. Specifically, Plaintiff points to a USGBC press release dated April 3, 2008, which states that the results of a 2008 study "indicate that new buildings certified under the [USGBC's] LEED certification system are, on average, performing 25–30% better than non-LEED certified buildings in terms of energy use."[1] FAC ¶ 30. Plaintiffs posit that this claim is false, and the study, which was sponsored by USGBC, was seriously flawed. Because the statement misleads consumers, Plaintiffs allege that it diverts

[1] The FAC alleges two other false statements: (1) that the LEED system provides "third-party verification" that a building was designed and built using energy saving strategies; and (2) that LEED certified buildings "Boost Employee Productivity." FAC ¶¶ 37–38, 45–47. However, Plaintiffs apparently drop their claims with respect to all but the energy use statement. Oral Arg. Tr. 34, 37 ("I'm not calling anything false except the energy claim.").

customers from Plaintiffs' businesses to LEED accredited professionals. Thus, Plaintiffs allege that they have suffered or will suffer "a loss of consumer confidence, sales, profits, and goodwill, along with the cost of remedial corrective consumer education." FAC ¶ 51. They also allege that the misstatement "harms consumers who may spend significant amounts of money on LEED certification but will not experience energy savings." FAC ¶ 51.

Plaintiffs Gifford and Gifford Fuel Savings, Inc. filed their initial Complaint on October 8, 2010, alleging violations of the Lanham Act, RICO, the Sherman Act, and New York law. The FAC, filed on February 7, 2011 by all current Plaintiffs, dropped all but the Lanham Act and New York state law claims.

**II. Standard of Review**

In deciding a motion to dismiss a complaint pursuant to Rule 12(b)(6), the Court must "accept as true all factual statements alleged in the complaint and draw reasonable inferences in favor of the non-moving party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007) (internal citations omitted). While detailed factual allegations are not required, "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570).

On a motion to dismiss, a court is not limited to the four corners of the complaint; a court may also consider "documents attached to the complaint as an exhibit or incorporated in it by reference, . . . matters of which judicial notice may be taken, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

## III. Discussion

### a. Standing Under the Lanham Act

Section 43(a) of the Lanham Act creates a statutory tort of false representation of goods or services in commerce. The language of the Act is "extremely broad." *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 111 (2d Cir. 2010). It states, in pertinent part, that any person who uses "any false designation of origin, false or misleading description of fact, or false or misleading representation of fact" that "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." 15 U.S.C. § 1125(a).

In assessing prudential standing under the Lanham Act, courts in the Second Circuit have applied both the "strong categorical" and the "reasonable commercial interest" tests. *Famous Horse*, 624 F.3d at 112–13 (discussing cases but finding it unnecessary to adopt either test). The strong categorical test provides that "the plaintiff must be a competitor of the defendant and allege a competitive injury." *Id.* at 112 (quoting *Telecom Int'l Am., Inc. v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001). Under the reasonable commercial interest approach, "a plaintiff must 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 alleged false advertising." *Id.* at 113. Although this test does not require that the litigants be competitors, the United States Court of Appeals for the Second Circuit has "frequently stressed the importance of competition between litigants in evaluating Lanham Act claims" as "a strong indication of why the plaintiff has a reasonable basis for believing that its interest will be damaged." *Id.* at 112–13. Where a plaintiff's products are "not obviously in competition with

the defendant's products, [and] the defendant's advertisements do not draw direct comparisons between the products," a plaintiff must make a "more substantial showing" of injury and causation to satisfy the reasonable basis prong of the standing requirement. *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994).

Plaintiffs cannot establish standing under either test. Plaintiffs plainly do not compete with USGBC in the certification of "green" buildings or the accreditation of professionals.[2] Rather, they purport to compete with USGBC in what they call the "market for energy efficient building expertise." Pl. Opp'n Mot. Dismiss 5. This broad label does little to obviate the clear differences between the two "products." Plaintiffs are alleged to provide "real estate developers and other clients advice about how to design and construct energy efficient buildings." FAC ¶ 1. USGBC does not provide clients with advice about energy-efficient design; nor does it provide design services relating to any of the fields in which Plaintiffs specialize. Rather, it is a not-for-profit organization that reviews and rates designs created by others. While some of Plaintiffs' competitors in their individual fields may be LEED accredited, Plaintiffs and USGBC "operate in different arenas."[3] *Christopher D. Smithers Found., Inc. v. St. Luke's-Roosevelt Hosp. Ctr.*, No. 00 Civ. 5502 (WHP), 2001 WL 761076, at *5 (S.D.N.Y. July 6, 2001) (finding parties were not competitors where defendants provided alcoholism treatment services to patients and plaintiff was foundation that endowed programs and institutions to increase public awareness of alcoholism).

[2] Nor do Plaintiffs allege that USGBC directly referred to Plaintiffs' products or services in their advertising.
[3] This differs from the circumstances of *Famous Horse*, in which the plaintiff and defendant operated on different levels of a supply chain for the same product. 624 F.3d at 113 ("Although Famous Horse sells at retail, and Appellees primarily sell at wholesale, the goods they sell are in direct competition in the marketplace, and Appellees' products are supplied to retailers in direct competition with Famous Horse.").

Likewise, Plaintiffs do not adequately allege a reasonable commercial interest that is likely to be damaged by USGBC's alleged false statement—the press release indicating that new LEED certified buildings perform on average "25–30% better than non-LEED certified buildings in terms of energy use." FAC ¶ 30. "The 'reasonable basis' prong requires the plaintiff to show 'both likely injury and a causal nexus to the false advertising.'" *ITC Ltd. v. Punchgini, Inc*., 482 F.3d 135, 170 (2d Cir. 2007) (quoting *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 130 (2d Cir. 2000)). As to likely injury, Plaintiffs' allegation that "LEED has begun to subsume the Plaintiffs' roles" is entirely speculative. Opp'n Mot Dismiss 8. With the exception of Gifford,[4] each Plaintiff designs and consults on specific elements of individual buildings, including heating and cooling systems, moisture and mold remediation, and architectural design. Plaintiffs do not allege that LEED certified buildings do not require such services or that those services must be provided by a LEED-accredited professional in order to attain certification. Because there is no requirement that a builder hire LEED-accredited professionals at any level, let alone every level, to attain LEED certification, it is not plausible that each customer who opts for LEED certification is a customer lost to Plaintiffs. *Cf. Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 190–91 (2d Cir. 1980) (where parties were not direct competitors, plaintiff established standing because purchases of defendants' product resulted in "corresponding decline" in purchases of plaintiff's product).

Even if Plaintiffs were to amend the FAC to include the proffered allegation that a single developer, Steve Bluestone, chose a LEED certified consultant rather than Gifford, Plaintiffs would not establish the required causal nexus: that Bluestone did so in reliance on the alleged false statement contained in a 2008 press release. The required inference is not plausible in light

[4] Gifford is alleged broadly to "provide[] advice about how to reduce energy costs," but his company, Gifford Fuel Savings, Inc. is alleged to provide energy saving heating and cooling system design. FAC ¶ 8.

of Bluestone's statement that he chose a LEED professional "because everyone has heard of LEED, but not everyone has heard of Henry Gifford," and because the developer will "get more credibility by simply saying we're going to build a LEED-rated building." Oral Arg. Tr. 33–34. Whatever the merits of Plaintiffs' claim that the conclusion of the study was false, their allegation that their "sales are specifically affected by [Defendant's] behavior" is too speculative to permit recovery under Lanham Act. *Famous Horse*, 624 F.3d at 115; *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level.").

In a last-ditch effort to save their claims, Plaintiffs assert, for the first time in their Opposition brief, damage to the reputation of "green" building sciences. Plaintiffs claim that consumers who learn that Defendant's claim is false will discount all claims of energy saving through design and construction. Even if this allegation were contained in the FAC, it is entirely too vague and speculative to serve as a basis for standing.

Accordingly, Plaintiffs' Lanham Act claims are dismissed with prejudice. Plaintiffs' Motion to Amend the Complaint to add the Bluestone statement is denied as futile. *See Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999) ("[W]here the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied.").

**b. New York Deceptive Trade Practices Claim**

Plaintiff also brings false advertising and deceptive trade practices claims under New York law. Gen. Bus. §§ 349, 350. Because the federal claims upon which jurisdiction is

predicated are dismissed, Plaintiffs' state law claims are properly dismissed as well.[5] *Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998) ("In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well."). Plaintiffs' New York law claims are dismissed without prejudice.

**IV. Conclusion**

For the reasons set forth herein, Defendant's Motion to Dismiss the Complaint is granted.

SO ORDERED.

Dated: August 15, 2011
New York, NY

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U.S.D.J.

[5] Had the Court found a lack of Article III standing, it would have no discretion to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 55 (2d Cir. 2004) (holding court may exercise supplemental jurisdiction where federal claim is dismissed for lack of statutory standing but not where it is dismissed for lack of Article III standing). The Court's decision to decline supplemental jurisdiction renders this distinction is moot.

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