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

Colin W. Maguire

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

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1. *Gifford v. USGBC*, 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 MEALEY’S LITIGATION REPORT: CONSTRUCTION DEFECTS, Jan. 2011, at 20, available at <http://www.lowenstein.com/publications/articles/List.aspx?view=rest>; Tim 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 (Feb. 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. Sulkowski, *supra* note 3, at 414.
 5. Cf. Stephen Del Percio, *The Top 5 Stories in Green Real Estate Law: 2011*, GREEN REAL EST. L.J. BLOG (Jan. 9, 2012), <http://www.greenrealestatelaw.com>.

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 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

com/2012/01/the-top-5-stories-in-green-real-estate-law-2011/ (stating that "full-blown 'LEEDigation' [has] remained elusive").

6. See Colin W. Maguire, *The Imposing Specter of Municipal Liability for Exclusive Promotion of Private Green Building Certifications*, 1 U. BALT. J. LAND & DEV. 157, 157-60 (2012).
7. To fully disclose my position, I used to be a 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.
8. Maguire, *supra* note 6, at 158 (quoting Basic Information on Green Building, ENVTL. PROT. AGENCY, <http://www.epa.gov/greenbuilding/pubs/about.htm> (last updated Dec. 19, 2012)).

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 reduce 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 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

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

10. Amended Complaint and Demand for Jury Trial at 8, *Gifford v. USGBC*, No. 10 Civ. 7747, 2011 WL 4343815 (S.D.N.Y. Aug. 16, 2011), 2011 WL 1302413.

11. E.g., Tim 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, at 158; USGBC, <http://www.usgbc.org/> (last visited January 11, 2012).

13. Maguire, *supra* note 6, at 158.

14. *Id.*

15. See *Gifford*, 2011 WL 4343815, at *1 (citing Defense Motion to Dismiss at 5).

16. Amended Complaint, *supra* note 10, at 7.

17. *Id.* at 1.

18. Complaint and Demand for Jury Trial at 4, *Gifford*, 2011 WL 4343815, 2010 WL 4087620.

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 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 would not be acceptable; rather, the complaint needed to be

19. Sherman Act § 2, 15 U.S.C § 2 (2006).

20. Complaint and Demand for Jury Trial, *supra* note 18, at 4.

21. Lanham Act § 43(a)(1)(B), 15 U.S.C § 1125(a)(1)(B) (2006).

22. Complaint and Demand for Jury Trial, *supra* note 18, at 14-17.

23. RICO Act § 901(a), 18 U.S.C § 1961 (2006).

24. Complaint and Demand for Jury Trial, *supra* note 18, at 22-23.

25. Amended Complaint, *supra* note 10, at 3-4.

26. 15 U.S.C § 1125(a)(1)(B).

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

28. Amended Complaint, *supra* note 10, at 14-16.

29. Amended Complaint, *supra* note 10, at 16.

30. Amended Complaint, *supra* note 10, at 16.

31. FED. R. CIV. P. 12(b)(6).

32. Gifford v. USGBC, No. 10 Civ. 7747, 2011 WL 4343815, at *2 (S.D.N.Y. Aug. 16, 2011); *see* McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007).

"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.

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

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) (quoting *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).

35. *Gifford*, 2011 WL 4343815, at *2 (discussing the broad language of the Lanham Act which requires that "any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, 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" (quoting 15 U.S.C. § 1125(a)(1)(B))).

36. *Gifford*, 2011 WL 4343815, at *2; *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 112 (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))).

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. Cospropfar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994)).

39. *Gifford*, 2011 WL 4343815, at *3.

40. *Gifford*, 2011 WL 4343815, at *3 (citing Plaintiff's Opposition Motion to Dismiss at 5).

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-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 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

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

42. *Smithers*, 2001 WL 761076, at *5.

43. *Gifford*, 2011 WL 4343815, at *3.

44. *E.g.*, LEED 2009 FOR NEW CONSTRUCTION AND MAJOR RENOVATION, USGBC (2009 Updated July 2012), <http://www.usgbc.org/ShowFile.aspx?DocumentID=8868>.

45. *Gifford*, 2011 WL 4343815, at *3.

46. *Id.* (citing *Smithers*, 2001 WL 761076, at *5).

47. *See 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).

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

50. *Cf. Gifford*, 2011 WL 4343815, at *1.

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 causal 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, 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 a motion to dismiss 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

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 *3-4 (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 (citing *ITC Ltd. V. Punchgni, Inc.*, 482 F.3d 135, 170 (2d Cir. 2007))).

55. *Gifford*, 2011 WL 4343815, at *4.

56. *Gifford*, 2011 WL 4343815, at *4.

57. *Gifford*, 2011 WL 4343815, at *4.

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

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 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

59. *Gifford*, 2011 WL 4343815, at *3.

60. *Assessing the Performance of LEED Buildings*, ENERGY DESIGN UPDATE, Oct. 2008, at 1 (quoting HENRY GIFFORD, A BETTER WAY TO RATE GREEN BUILDINGS, ENERGYSAVINGSSCIENCE.COM (2008), available at <http://www.energysavingscience.com/articles/henrysarticles>).

61. HENRY GIFFORD, A BETTER WAY TO RATE GREEN BUILDINGS, ENERGYSAVINGSSCIENCE.COM (2008), available at <http://www.energysavingscience.com/articles/henrysarticles>.

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

63. *Id.*

64. *Id.*

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 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 difficult 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 buildings in Suburbia, North Carolina. Unfortunately, ACME is unable to certify any buildings in Suburbia, 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 Suburbia, 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 benefits of LEED®

65. See *Assessing the Performance of LEED Buildings*, *supra* note 60, at 2-3.

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

67. *Gifford*, 2011 WL 4343815, at *2.

68. *Gifford*, 2011 WL 4343815, at *3-4 (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 (citing *ITC Ltd. V. Punchgni, Inc.*, 482 F.3d 135, 170 (2d Cir. 2007))).

69. See *Gifford*, 2011 WL 4343815, at *3-4.

70. *Alicia Ravetto LEED Fellow*, LINKEDIN, <http://www.linkedin.com/in/aliciaravettoarchitect> (last visited Dec. 29 2012).

certified buildings while citing figures⁷¹ 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 Suburbia, North Carolina Town Council is a LEED® AP. As if this whole hypothetical analysis is not strange enough, you begin to wonder if the State of North Carolina 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

71. *In re* Integrated Resource Planning - 2005, 251 P.U.R. 4th (Public Utilities Reports) 469, 488-89 (N.C. Utilities Comm'n Aug. 31, 2006) (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*, EPA, <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 THOMAS A. MATTHEWS & BYRON S. MATTHEWS, MATTHEWS MUNICIPAL ORDINANCES § 37:65(1) (4th ed. 2010).

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.⁷⁵

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 Suburbia is using if the choice of green building standards is non-exclusive. Failing to do so probably puts the Town of Suburbia in violation of state law and in violation of the Dormant Commerce Clause⁷⁶ (though not the Equal Protection Clause because of section 3 of the ordinance).⁷⁷ 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 the fictitious ACME, a certifier of green buildings, is a direct competitor of USGBC per the first element of the standing test.⁷⁸ 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 Suburbia 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.' "⁷⁹ Further, we now know that a claim subject to a motion to dismiss must be

75. N.C. GEN. STAT. § 153A-340(i) (2011).

76. See, e.g., Maguire, *supra* note 6, at 172.

77. MATTHEWS, *supra* note 74, at § 37:65(3).

78. *Gifford v. USGBC*, No. 10 Civ. 7477, 2011 WL 4343815, at *3 (S.D.N.Y. Aug. 16, 2011).

79. *Gifford*, 2011 WL 4343815, at *2 (quoting *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 113 (2d Cir. 2010)).

considered by a trier of fact as “ ‘plausible on its face’ ”⁸⁰ while “not [being] limited to the four corners of the complaint. . . .”⁸¹

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 situation-specific as one might think. Perhaps in reliance on USGBC studies, numerous cities across the country have adopted LEED®-specific building standards.⁸² LEED® specific programs may be found in many states.⁸³ 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.’ ”⁸⁴ 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

80. *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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)))).

81. *Gifford*, 2011 WL 4343815, at *2.

82. Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 704 & n.160 (2010) (discussing LEED® legislation in various cities and quoting a 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.” quoting 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>)).

83. Les Lo Baugh, LEED(R) Green Building Incentives, in GREEN REAL ESTATE SUMMIT 2008, at 39 (PLI Real Estate Law and Practice, Course Handbook Ser. No. 556, 2008).

84. Maguire, *supra* note 6, at 158 (quoting USGBC, <http://www.usgbc.org/> (last visited Feb. 15, 2012)).

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.

Currently, USGBC publicly relies on numbers consistent with those in question during their suit with Mr. Gifford.⁸⁵ One might think that, in the wake of *Gifford*, USGBC would shy away from using specific figures to promote their product. Instead, USGBC offers a comprehensive online kit complete with attractive and informative literature, charts, and even a press release to assist those who wish to make LEED® the law.⁸⁶ Part of this website includes an explanation of USGBC's Building Performance Partnership (BPP), a program that tacitly acknowledges that the energy-efficiency of a building needs to be measured individually. Therefore, owners of LEED® certified buildings must submit energy use data to USGBC so that both parties can benefit from actual energy bench-marking.⁸⁷ This is a responsible approach to energy-efficiency measurements in green buildings especially considering that USGBC stated, on the record, in *Gifford* that LEED® certification does not guarantee benefits like energy-efficiency.⁸⁸ Yet, USGBC still encourages government units to adopt LEED® standards, possibly as a requirement, using information from a 2011 study of 22 buildings conducted by the U.S. Department of Energy which indicates that LEED® certified buildings "[c]onsume 25% less energy and 11% less water . . . [h]ave 19% lower maintenance costs; 27% higher occupancy satisfaction; [and] 34% lower greenhouse gas emissions."⁸⁹

Specifically, the energy efficiency number used in USGBC's fact sheet is consistent with the study indicating LEED® buildings were 25-30% more energy-efficient than other buildings that Mr. Gifford based his suit on.⁹⁰ Problems similar to the ones cited by Mr. Gifford exist in these specific numbers as well. First, the study was actually conducted by the General Services Administration (GSA) for 22 GSA

85. USGBC, GREEN BUILDING FACTS (2012), <http://new.usgbc.org/sites/default/files/Docs18693.pdf>; GSA PUB. BLDG. SERV., GREEN BUILDING PERFORMANCE: A POST OCCUPANCY EVALUATION OF 22 BUILDINGS 2 (Aug. 2011), http://www.gsa.gov/graphics/pbs/Green_Building_Performance.pdf.

86. *Fact Sheets & Policy Briefs*, USGBC, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=2501> (last visited Dec. 29, 2012).

87. USGBC, ENERGY PERFORMANCE IN THE LEED RATING SYSTEM (2011), http://new.usgbc.org/sites/default/files/PolBrief_EnergyPerfinLEED.pdf.

88. See *Gifford v. USGBC*, No. 10 Civ. 7747, 2011 WL 4343815, at *1 (S.D.N.Y. Aug. 16, 2011) (citing Defense Motion to Dismiss at 5).

89. USGBC, *supra* note 85.

90. See Amended Complaint, *supra* note 10, at 7.

buildings; only 16 of the buildings were LEED® Certified.⁹¹ Assuming the GSA did not overstate the efficiency of their buildings, their baseline point of comparison for their buildings was a study published in 2003 by the Department of Energy based upon a voluntary survey.⁹² Therefore, USGBC is campaigning for government adoption of LEED® with numbers that are: 1) based on a sample group of buildings which include 27% non-LEED® certified buildings, 2) based upon comparisons from figures that are almost 10 years old, and 3) provided by a third party that spent money LEED® certifying 16 buildings and now finds itself having to justify its spending habits in front of Congress.⁹³

If USGBC continues to rely on suspect figures in advertising, then it stands to reason they continue to open themselves up to attacks by quasi-competitors like Mr. Gifford and direct competitors. The USGBC's specific use of questionable figures to induce government adoption of LEED standards is the kind of direct causal nexus for standing under the Lanham Act that Mr. Gifford could not prove.⁹⁴ Beyond the scope of a green building's energy-efficiency analysis, an interested party could investigate the fact that USGBC also promotes a study which claims that "LEED buildings avoided 0.35% of total U.S. CO2 emissions in 2011."⁹⁵ The percentage of CO2 avoidance attributed to LEED buildings is estimated to be 4.92% in 2030.⁹⁶ There remain numerous unexplored claims and issues involving the Lanham Act and the types of advertising claims Mr. Gifford took issue with. In the context of the right kind of cause of action, (probably a situation in which a unit of government has exclusively adopted the LEED® standards) a true competitor of USGBC has a sound basis for making a *prima facie* case and, at least, gaining standing under the Lanham Act.

91. GSA PUB. BLDG. SERV., *supra* note 85, at 2-3.

92. *See id.*; DEPT. OF ENERGY, ENERGY INFO. ADMIN, 2003 COMMERCIAL BUILDING ENERGY CONSUMPTION SURVEY (Oct. 2008), http://www.eia.gov/emeu/cbecs/cbecs2003/detailed_tables_2003/2003set19/2003pdf/alltables.pdf.

93. *E.g.*, Ed O'Keefe, *House to Vote to Prevent GSA-like Spending*, 2CHAMBERS BLOG (Apr. 25, 2012, 6:00 AM), http://www.washingtonpost.com/blogs/2chambers/post/house-to-vote-to-prevent-gsa-like-spending/2012/04/24/gIQAvWylfT_blog.html.

94. *Gifford v. USGBC*, No. 10 Civ. 7477, 2011WL 4343815, at *3-4 (Aug. 16, 2011 S.D.N.Y) (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 (citing *ITC Ltd. V. Punchgni, Inc.*, 482 F.3d 135, 170 (2d Cir. 2007))).

95. GREEN BUILDING FACTS, *supra* note 85, at 1.

96. *Id.*; ROB WATSON, GREEN BUILDING MARKET AND IMPACT REPORT: 2011, GREENBIZ GRP., INC., 30-33 (2011), http://www.greenbiz.com/sites/all/themes/greenbiz/doc/GBMIR_2011.pdf.

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.*

Mr. Gifford chose to drop his claim under the Sherman Antitrust Act Sec. 2, when he amended his complaint.⁹⁷ This is likely because Mr. Gifford was not a competitor of USGBC in the most literal sense,⁹⁸ 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.⁹⁹ 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.¹⁰⁰

The problem with antitrust actions involving government influence is that they will have to pass muster under the *Noerr-Pennington* doctrine.¹⁰¹ This doctrine involves a principal laid out in both *Eastern Railroad Conference v. Noerr Motor Freight*¹⁰² and *United Mine Workers of America v. Pennington*.¹⁰³ 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.¹⁰⁴ 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 advocacy falls within the Sherman Antitrust Act.¹⁰⁵ 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.”¹⁰⁶

97. Cf. Amended Complaint, *supra* note 10, at 8-11.

98. *Gifford*, 2011 WL 4343815, at *3.

99. See Sherman Act § 2, 15 U.S.C § 2 (2006).

100. See, e.g., LOUIS ALTMAN & MALLA POLLACK, 1 CALLMAN ON UNFAIR COMPETITION TRADE AND MONOPOLY § 3:8 (4th ed. 2011); see also, e.g., WILLIAM C. HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK § 8:8 (2011-2012 ed. 2011).

101. See HOLMES, *supra* note 100, at § 8:8.

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

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

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

105. E.g., *id.* at 664.

106. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 143 (1961)).

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.¹⁰⁷ 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 protection¹⁰⁸ However, this well-reasoned doctrine was refined to the point of requiring rhetorical gymnastics in *City of Columbia v. Omni Outdoor Advertising, Inc.*¹⁰⁹ The Court has long recognized the previously stated exception to the *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.”¹¹⁰ The new wrinkle that *Omni* adds is that only activities that directly interfere with a government’s decision-making can be considered a sham (and not subject to *Noerr-Pennington* immunity) and not the government activity itself because 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.¹¹¹

This seems like poison to many 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.¹¹² 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 as-

107. *Allied Tube*, 486 U.S. at 499; *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

108. *Allied Tube*, 486 U.S. at 507 (“[Activities tending to enjoy immunity from antitrust litigation] ‘bear[s] little if any resemblance to the combinations normally held violative of the Sherman Act. . .’” (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961))).

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

110. *Omni*, 499 U.S. at 380 (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961)).

111. *Omni*, 499 U.S. at 380-81.

112. 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 (1978))); *id.* (“[A]ntitrust ‘immunity drives a large hole in the framework of a nation’s competition laws’” (quoting SECTION OF ANTITRUST LAW, AM. BAR ASS’N, *THE STATE OF ANTITRUST ENFORCEMENT—2001*, at 42 (2001), http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_antitrustenforcement.authcheckdam.pdf)).

sume a true competitor of USGBC sought a Lanham Act claim and a Sherman section 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,"¹¹³ 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 section 2 of the Sherman Antitrust Act, 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 passage of the municipal code.¹¹⁴ 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 generally¹¹⁵ 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?¹¹⁶

113. 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).

114. *Gifford v. USGBC*, No. 10 Civ. 7747, 2011 WL 4343815, at *2 (S.D.N.Y. Aug. 16, 2011) (quoting *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 112 (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)))).

115. *Gifford v. USGBC*, No. 10 Civ. 7747, 2011 WL 4343815, at *2 (quoting *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 111 (2d Cir. 2010)).

116. 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 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) ("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 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))); see, e.g., Tymokzko, *supra* note 113, at 511 ("Determining whether a claim is plausible is a 'context-specific task' requiring the exercise of 'judicial experience and common sense' " (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009)))).

USGBC's studies would only have been useful at the preliminary lobbying stage.¹¹⁷ 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 building."¹¹⁸ 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 Act¹¹⁹ and in the eyes of a legislature or administrative body in violation of the Sherman Antitrust Act.¹²⁰ 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?¹²¹

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."¹²² 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 manifested only by activities carried on in its behalf

117. See *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380-81 (1991).

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

119. *Gifford*, 2011 WL 4343815, at *3-4 (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 (citing *ITC Ltd. V. Punchgni, Inc.*, 482 F.3d 135, 170 (2d Cir. 2007))).

120. See *Omni*, 499 U.S. at 380-81.

121. See, e.g., *id.*

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

by those who are authorized to act for it."¹²³ The power of agency is an old one in our jurisprudence and it involves the power to affect the legal position of a principal.¹²⁴ It is the authority of the agent to act for the benefit of the principal that established the relationship.¹²⁵ Most importantly, the source of the power of agency must not be the agent but the principal.¹²⁶

Still, the existence of any type of agency will not be presumed in most jurisdictions.¹²⁷ Rather, the plaintiff in a potential lawsuit must establish agency by a showing of substantial evidence.¹²⁸ 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."¹²⁹ We also know that buildings gets credit for using a LEED® AP on a building's LEED® certification process.¹³⁰ 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 contracts or other writings between the parties.

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."¹³¹ That seems appropriate because it may be very difficult to scientifically assess the actual environmental impact of a building, in

123. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316-7 (1945) (citation omitted).

124. 3 AMER. JUR. 2D *Agency* § 68 (3d ed. 2002) (citing *Wen Kroy Realty Co. v. Public Nat. Bank & Trust Co.*, 183 N.E. 73, 74 (N.Y. 1932)).

125. *Id.* (citing *Fuller v. Fasig-Tipton Co.*, 587 F.2d 103, 106-7 (2d Cir. 1978)).

126. *Id.* (citing *Alar v. Mercy Mem'l Hosp.*, 529 N.W.2d 318, 323 (Mich. Ct. App. 1995)).

127. 3 C.J.S. *Agency* § 509 (2011) (citing *John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 166 S.E.2d 141, 146 (W. Va. 1969)).

128. *Id.* (citing *Lincoln Log Home Enter., Inc. v. Autrey*, 836 So. 2d 804, 806 (Ala. 2002)).

129. *Gifford v. USGBC*, No. 10 Civ. 7747, 2011 WL 4343815, at *1 (S.D.N.Y. Aug. 16, 2011).

130. LEED 2009 FOR NEW CONSTRUCTION AND MAJOR RENOVATION, *supra* note 44, at 86.

131. *Gifford*, 2011 WL 4343815, at *1 (citing *Defense Motion to Dismiss* at 5).

part, because the definition of sustainability can vary.¹³² 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?¹³³ Green building professionals¹³⁴ certainly understand the demands of a marketplace where the customer wants a concrete answer to questions regarding investment and efficiency.

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.¹³⁵ 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.¹³⁶ Still, green building certification providers should not necessarily feel any kind of pressure to show return on investment, especially because this pressure is often marginally greater from internal sources than from the most important external source: the consumer.¹³⁷

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.¹³⁸ 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 environmen-

132. See Tristan Roberts, *Green Manufacturers Examine Their Impacts*, GREEN-SOURCE, July-Aug. 2011, at 42, 44-45.

133. See *Assessing the Performance of LEED Buildings*, supra note 60, at 1 (quoting HENRY GIFFORD, A BETTER WAY TO RATE GREEN BUILDINGS, ENERGYSAVINGS-SCIENCE.COM (2008), available at <http://www.energysavings-science.com/articles/henrysarticles>).

134. A group which I count myself a part of.

135. *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.

136. *Id.*

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

138. *Id.* (citing 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).

tally conscientious.¹³⁹ 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 to the content of Internet advertisement, while looking for ways to poke holes in a company's claims.¹⁴⁰ For instance, companies like New Balance, Reebok, General Mills, and Yoplait USA, Inc., have all recently been sued based upon Internet ads.¹⁴¹ The Federal Trade Commission is also coming down on various companies who market acai berries on the Internet.¹⁴² So while it may be worth 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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵

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

139. *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).

140. Gary Beaver, *Avoiding Lawsuits Over False Advertising on the Internet*, ABA SECTION OF LITIGATION (Nov. 3, 2011), <http://apps.americanbar.org/litigation/committees/commercial/articles/fall2011-avoiding-lawsuits-false-advertising-internet.html>.

141. *Id.*

142. *Id.*

143. *Id.*

144. *E.g.*, SERF, THOMAS M. COOLEY LAW SCHOOL AUBURN HILLS CAMPUS (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.

145. *See, e.g.*, *Federal Green Building Requirements*, EPA, <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).

lies in municipal requirement of LEED® and its imposition on the consumer and the marketplace.¹⁴⁶ 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.

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.¹⁴⁷ 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? 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 their buildings?¹⁴⁸

146. See 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).

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

148. See *Sustainable Design Program*, GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/content/104462> (last visited Feb. 17, 2012).