

## Court Dismisses False Advertising Claim Against USGBC

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Earlier this month, a Federal district court issued a ruling in a lawsuit that has been closely watched by those in the fields of energy efficiency and green construction: *Gifford v. U.S. Green Building Council*. In 2010, Henry Gifford, an environmental engineering consultant, filed a class action lawsuit in the United States District Court for the Southern District of New York, alleging that the U.S. Green Building Council (USGBC) had violated Federal and state law for fraudulently representing the performance of LEED-certified buildings and for engaging in unfair competition by seeking a monopoly on the green building market. In February 2011, Gifford revised his complaint, dropping the class and narrowing his claims, alleging only that the USGBC had violated Federal and state law prohibiting false advertising and consumer fraud.

At the core of Gifford's false advertising claim was a 2008 statement by USGBC that LEED certified buildings perform, on average, "25-30% better than non-LEED certified buildings in terms of energy use." Gifford claimed this statement to be false, in violation of the Lanham Act, a Federal law that prohibits the misrepresentation of the nature and qualities of one's goods and services. Gifford further claimed the statement caused him to suffer "a loss of consumer confidence, sales, profits, and goodwill." The Court rules that Gifford's claim could not be sufficiently supported, for several reasons.

First, Gifford could not demonstrate a reasonable basis for believing that his consulting services would be damaged by USGBC's advertising, in part because Gifford's services are "not obviously in competition with" USGBC's services. Gifford and his company provide consulting services to real estate developers and other clients, advising them on how to design and construct energy-efficient buildings. USGBC provides a building rating system, offering certification of "green" buildings and accreditation of professionals trained in the criteria used to evaluate LEED certification. Because Gifford's services do not include the certification of "green" buildings or the accreditation of professionals, the Court found that Gifford and USGBC are not in competition for customers of the services they provide. In addition, USGBC's advertisements "do not draw direct comparisons" between Gifford's services and the LEED rating system.

Further, Gifford could not show how he was harmed by USGBC's allegedly false statement about the increased energy efficiency of LEED-certified buildings. Even if Gifford could identify a customer that he had "lost" to USGBC, Gifford could not establish that the loss was caused by the customer's reliance on USGBC's allegedly false statement. Ultimately, the Court found Gifford's claim that he had lost sales as a result of USGBC's behavior to be too speculative.

The Court left unresolved the question of whether USGBC has violated New York State law, and it remains to be seen whether Gifford will continue to pursue that claim.

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