To Be Argued By:
JAMES B. FISHMAN
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

HIMMELSTEIN, MCCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC., and MICHAEL MCKEE,

Plaintiffs-Appellants,

—against—

MATTHEW BENDER & COMPANY INC., A MEMBER OF LEXISNEXIS GROUP, INC.,

Defendant-Respondent.

CASE NO. 2018-1250

BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

The Plaintiff-Appellants ("Appellants") respectfully submit this brief in support of their appeal from the decision and order of the Motion Court, dated February 6, 2018, (Record on Appeal "R", pp. 23-42) which granted the Defendant-Respondent's pre-answer motion dismiss the first amended complaint ("FAC")(R43-198). The Appellants' response to that motion is set forth at R199-408. The Motion Court's decision is premised on a variety of erroneous factual and legal conclusions which render it incorrect and unsupportable. This Court should reverse the Motion Court decision and reinstate the complaint, or, at the very least, grant the Appellants leave to correct any perceived pleading deficiency by reversing the order and granting leave to replead.

FACTUAL STATEMENT

A. INTRODUCTION

This action, brought by three named Plaintiffs on behalf of themselves and a class of others similarly situated, raises serious and disturbing claims of deceptive business practices, fraud, breach of contract and breach of express warranty against LexisNexis, one of the world's largest legal information companies, and its subsidiary Matthew Bender ("Bender") a highly regarded legal publisher for well over 100 years. These claims center on Bender's longstanding, knowing and undisputed failure to update the New York City rent stabilization and rent control

laws and regulations (key laws affecting well over one-million residential apartments in the city) in the "*Tanbook-New York Landlord Tenant Law,"* (the "Tanbook") one of its annually published books, resulting in the omission or inaccurate publication of 37 key sections of those laws. In sum, for at least 12 years, Bender published and sold annual "new" editions of this book where significant legislative amendments were completely left out, some for as many as 12 years, leaving those who regularly purchased these books completely unaware that important changes in the law had taken place. Instead of actually publishing these critical updates Bender did little more than simply inserting a new year on the cover and labeled it "updated."

Not surprisingly, Bender has gone to great lengths (and obvious expense) in an effort to prevent this case from proceeding beyond the pleading stage, given its concession that it knowingly published annual editions of the purportedly updated Tanbook for years without in fact making numerous updates to the rent regulations and laws that had been enacted by the New York City Council, the New York State Division of Housing and Community Renewal ("DHCR") or the New York legislature. Even more egregious, Bender concealed its knowledge of the book's extensive defects from its known customers, allowing them to continue using it at their peril even though significant portions of it contained statements of the law that were clearly obsolete and wrong.

However, no matter how strenuously Bender attempted to raise technical or non-existent claims, or how it falsely and deceptively misrepresented the actual claims in the FAC, the fact remains that the Appellants have identified a serious and longstanding failure by Bender which has harmed thousands of purchasers of its book, as well over three million New York City rent regulated tenants who benefit from, or are impacted by, the Tanbook, either directly from their own purchase and use of the book or by its use by lawyers, tenant advocates and judges who routinely relied on what they thought was the book's accuracy and completeness.

The FAC fully, and with great detail and factual support, sets forth actionable claims against Bender. It is well established that in deciding a pre-answer motion to dismiss the court is required to accept the factual claims in the FAC as true and then determine if they state a cause of action. *Leon v. Martinez*,84 N.Y.2d 83, 87-88 (1994). There can be little doubt that the voluminous FAC, together with the documentary evidence referenced in, and attached to, it more than amply sets forth valid causes of action against the Respondent; the Motion Court improperly dismissed the FAC and its order must be reversed.

Bender's motion to dismiss the FAC below was supported only by the affidavit of Tracy Baldwin, an individual purportedly with personal knowledge of relevant facts.(R164-71) Ms. Baldwin was described as "LexisNexis' Operations

Director, Global Order to Cash, specializing in managing orders for our printed works and software."(R164-5, ¶ 2) Essentially, Ms. Baldwin's knowledge and responsibility is limited to *sales* of the Tanbook, not its *content*, editorial or otherwise. Ms. Baldwin admittedly was not involved either in the editorial content, editing or updating of the Tanbook, which is the subject of this action. Significantly, Bender did not offer the affidavit of either Jacqueline M. Morris, the "LexisNexis Matthew Bender Legal Content Editor"(R136)[1] or Eileen O'Toole, the longtime editor of the Tanbook(R176) who was apparently dropped by Bender after disclosure of the deficiencies with the 2016 Tanbook set forth in the original complaint initiating this action. Both undeniably have personal knowledge of the Tanbook's contents and Bender's admitted failure to update the New York City Rent Regulation laws in the book for at least twelve years, yet neither of them provided anything to the Motion Court about the nature, extent and breadth of its deficiencies.

Matthew Bender

Bender, a subsidiary of LexisNexis since 1998, currently publishes 865 titles, including 58 titles on New York law.[2]

[1] Ms. Morris is the LexisNexis employee who acknowledged in a December 13, 2016 email that Bender was aware of the numerous omissions in the Tanbook which she conceded "occurred long ago." (R136)

[2] https://store.lexisnexis.com/categories/publishers/matthew-bender-850?subcategory=850&query=&within=

Bender publicly describes itself as a highly reliable source of law:

> While classic expert legal resources remain its heart and soul, Matthew Bender® continues to reinvent itself to bring you innovative products.
>
> A distinguished history
>
> Matthew Bender® is a time-honored brand that offers expert resources you can trust when you need to:
>
> -Begin researching a legal issue or transaction with which you have little or no experience
>
> -Prepare materials for a matter that involves an emerging issue or one in which primary law is vague or ambiguous Find ideas on how to craft counter arguments when settled law is contrary to your position[3]

B. THE ALLEGATIONS AGAINST BENDER

I. Bender's Sale of the Tanbook to the General Public

This action alleges that the "trust" Bender promises as a "time-honored brand," is seriously misplaced, at least as it pertains to the Tanbook. The Tanbook is one of a number of annually published "Colorbooks" published by Bender each year, which each pertain to a specific subject area of New York Law.[4] Bender describes the Tanbook as a "1-volume portable publication that brings together all

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[3] *Matthew Bender Celebrating 125 Years Of Trusted Analytical Content, Forward-Thinking Innovation.* https://www.lexisnexis.com/legalnewsroom/litigation/b/productupdate/archive/2012/07/26/matthew-bender-celebrating-125-years-of-trusted-analytical-content-forward-thinking-innovation.aspx

[4] https://www.lexisnexisnow.com/view/new/mail?iID=7VftV7R5QQ4vdWvhB666. The other volumes are Goldbook (New York Commercial Law); Whitebook (New York Corporation Law); Greenbook (New York Surrogate's Court); Yellowbook (New York Family Law); Bluebook (New York Real Property Law); Redbook (New York CPLR) and Graybook (New York Criminal Statutes and Rules).

the laws and regulations governing landlord/tenant matters in New York, *providing the text of state statutes, regulations, and local laws*." (emphasis added)[5]

In reality, Tanbook editions published through 2016 were in fact grossly deficient, inaccurate and defective because, for many years, Bender failed to properly and completely update it to reflect newly enacted or amended provisions of the New York City rent regulation laws and regulations. (the "Rent Regulation Laws")[6] As a result of that failure, Bender sold thousands of books during that period which purported to contain the Rent Regulation Laws in complete and unabridged form, when, in reality, dozens of important provisions were either omitted or were flatly wrong, having been amended years ago.

The FAC further alleges that Bender knew, prior to the commencement of this action, that the book was deficient in this regard and it failed to take any steps to rectify it until May 2017, five months after this action was first commenced. At that time it belatedly published the 2017 edition of the Tanbook, which suddenly included all of the 37 previously omitted sections of the Rent Regulation laws

[5] https://store.lexisnexis.com/categories/shop-by-jurisdiction/new-york-169/new-york-landlordtenant-law-tanbook-skuusSku10353.

[6] Those laws and regulations are the Rent Stabilization Law ("RSL"), the Rent Stabilization Code ("RSC"), the New York City Rent Control Law ("RCL") (the official title is City Rent and Rehabilitation Law) and the New York City Rent Control Regulations ("RCR") (the official title is NYC Rent and Eviction Regulations).

identified in the initial complaint and at long last corrected numerous sections that had been amended over the years .

Despite having actual knowledge that the Tanbook was defective and inaccurate, Bender admittedly took no steps to warn its customers (most of whom are readily known to it in its customer database) of the book's numerous errors and instead chose to blithely remain silent while those customers continued to use, and rely upon, the book to their detriment. And, at the same time, Bender continued to charge an average of $120 for an "annual subscription" for the 2017 Tanbook, although when it was finally issued in May 2017 purchasers only had the use of the volume for slightly more than half the year.

According to the FAC, conceded by Bender, and found by the Motion Court, the Tanbook is available for sale to the general public as a print book from various sources; on Bender's open-to-the-public website known as the "Lexis/Nexis store"[7], as well as through the widely used book seller Amazon.com[8] (R48,¶4) In addition, the Tanbook is available in electronic form, both on Bender's website (R

[7] *https://store.lexisnexis.com*

[8] *https://www.amazon.com/New-York-Landlord-Tenant-Tanbook-2016 ebook/dp/B018J1Z8DA/ref=sr_1_1?ie=UTF8&qid= 1495144452&sr=8-1&keywords=tanbook*

200,¶3;203-06) as well as from the Kindle store on the Amazon website.(R200,¶ 4;214-15).[9]

The motion court erroneously held that the sale of the Tanbook is *only* "directed at professionals" (emphasis added) and therefore its purchase "is not consumer-oriented conduct" and "Plaintiffs have failed to state facts demonstrating that the sale of Tanbooks is oriented towards consumers rather than professionals." (R19)

The motion court's conclusion is not supported by the record. Instead, the book is widely offered for sale to the general public on two large and well established websites, neither of which require any professional status or standing to access, which renders the motion court's conclusion in this regard is incorrect. This is further demonstrated by the fact that a link to the Tanbook on Bender's on-line "store" comes up in a simple "Google search" for "New York Landlord Tenant Laws"[10]

And, the Motion Court fully ignored the claim in the affidavit of Plaintiff Michael McKee, that he purchased and used the Tanbook to learn and understand his rights as a New York City rent regulated tenant. ("I am, and have been for

[9] The electronic version of the Tanbook is only available as an annually purchased book and is not available in a live streamed version.

[10] *New York Landlord-Tenant Law (Tanbook |LexisNexis Store https://store.lexisnexis.com/.../new-york-landlordtenant-law-tanbook-skuusSku10353*

many years, a rent regulated tenant myself and have often referenced the Rent Regulation Laws, as well as other material, in the Tanbook in order to determine, and better understand my personal rights and obligations.")(R232,¶12) Mr. McKee's statement alone is sufficient to defeat the Motion Court's conclusion that the sale of the Tanbook is not "consumer oriented" or solely directed to "professionals."

It was not disputed below that Tanbook is issued annually, with the current year appearing prominently on the cover and that Bender issued each new edition (with the exception of the 2017 edition) in January of each year.

Even months after this action was commenced, and months after Bender issued the newly updated 2017 Tanbook edition in May 2017, the admittedly defective and deficient 2016 edition continued to be made available for sale to the general public at in the Amazon Kindle store.(R200,¶ 4, 214-15)[11]

II. The New York City Rent Regulation Laws and Bender's Deficient and Inaccurate Publication of Significant Portions of Them in the Tanbook

According to the New York City Department of Housing Preservation and Development ("HPD") the Rent Regulation Laws cover more than 1 million rent

[11] On August 12, 2017, the Appellant's attorney was able to purchase the 2016 Tanbook on the Amazon Kindle store site, demonstrating that Bender did not even bother to remove the admittedly defective book from the Amazon store website. (R215)

stabilized and 27,000 rent controlled apartments in New York City, home to over three million people.[12]

The FAC not only provides details of all 37 sections of the RSL, RSC, RCL and RCR that Appellants found had been omitted from, or inaccurately stated in, the Tanbook.(*See*, R58-69,¶¶51-69) it also attached those provisions as an Exhibit to the FAC itself (R86-133). Some of the omitted sections were added to the Rent Regulation Laws as long as 13 years ago.(R242-3,¶14)

The omitted or incorrect portions of the Rent Regulation Laws include, but are not limited to, the following:

a. The omission of an entire 125 word section of the RSL [§26-509b.2(1)] in effect since it was enacted by the NYC City Council on October 10, 2005, which contains the requirements for low-income, disabled Rent Stabilized tenants to obtain a Disability Rent Increase Exemption ("DRIE"); (R60,¶55)[13]

b. The omission of an entire 68 word subparagraph of the RSL [§26-509b.(3)(iii)] in effect since March 7, 2005, providing the mandated formula for calculating rents when a Rent Stabilized tenant who is a recipient of either a Senior Citizen Rent Increase Exemption ("SCRIE") or a DRIE also receives a rent reduction order from the NYS Division of Housing and Community Renewal(R60-61,¶56);

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[12] http://www1.nyc.gov/assets/hpd/downloads/pdf/2014-HVS-initial-Findings.pdf

[13] The very existence of the DRIE program, enacted by the New York City Council in 2005 as an amendment to the NYC Administrative Code to assist low-income disabled, rent regulated tenants, was completely omitted from the Tanbook until 2017. *https://legistar.council.nyc.gov/View.ashx?https://legistar.council.nyc.gov/View.ashx?M=F&ID=665880&GUID=70368D2B-7183-4F2B-B17E76B586352E0BM=F&ID=665880&GUID=70368D2B-7183-4F2B-B17E-76B586352E0B*

c. The inaccurate statement, in RSL §26-509(b)(2)(ii), of the income eligibility limits for SCRIE or DRIE as "sixteen thousand five hundred dollars per year," when in actuality it was amended in 2005 (Local Laws 75 and 76 of 2005) effective July 1, 2005 to increase the limit to $25,000 and amended again in 2014 (Local Law 19 of 2014),to increase the limit to $50,000 effective July 1, 2014.(R87);

d. The omission of two entire subsections of the RSC, (21 and 38 words respectively) [§§2520.11(r)(5) and (6), effective since June 24, 2011, which describe certain housing accommodations excluded from Rent Stabilization coverage.(R61,¶57);

e. The omission of an entire 78 word section of the RSC [§2520.11(s)(2)] in effect since July 1, 2011, which defines the parameters of High Income/High Rent Vacancy Deregulation of Rent Stabilized apartments.(R62,¶58);

f. The omission of an entire 266 word collection of four sub-sections of the RSC [§2522.3(f)(1)(2)(3) & (4)] which pertains to landlord applications for the adjustment of initial legal regulated rents under the RSC.(R62-63,¶59);

g. The omission of an entire 33 word section of the RSC [§2522.8(a)(3)] in effect since June 24, 2011, which limits landlords of apartments subject to the RSL from taking more than one vacancy rent increase during any calendar year.(R63-64,¶60);

h. The inaccurate description of penalties, in effect since October, 2012, faced by landlords found to have violated a DHCR order or harassed a tenant subject to the RSL, found in RSC §§2526.2(c)(1) and (2).(R64,¶61);

i. The omission of an entire 171 word section of the RCL [NYC Admin. Code §26-405m.(2)(i)] which describes the requirements for disabled Rent Controlled tenants to qualify for a DRIE.(R65,¶63);

j. The omission of an entire 65 word section of the Rent Control Regulations [§26-405(3)(a)(iii)] in effect since which provides the mandated formula for calculating rents when a Rent Controlled tenant who is recipient of either a SCRIE or a DRIE also receives a rent reduction order from the DHCR. (R66,¶64);

k. The omission of two entire subsections of the RCL, (20 and 38 words respectively) [§§2200.2(f)(19)(v) and (vi)] effective since June 24, 2011, which describe certain housing accommodations excluded from coverage of the rent control law.(R66,¶65);

l. The omission of an entire 79 word section of the rent control regulations [§2200.2(f)(20)(ii)] in effect since July 1, 2011, which defines the parameters of High Income/High Rent Vacancy Deregulation of Rent Controlled apartments.(R67,¶66);

m. The omission of two entire subsections of the ETPA regulations [§2500.9(m)(3) and (4), effective since June 24, 2011, which eliminate certain housing accommodations from coverage under the ETPA.(R67,¶67);

n. The omission of an entire 33 word section of the ETPA [§2502.7(a)(3)] in effect since June 24, 2011, which limits landlords of apartments subject to the ETPA from taking more than one vacancy rent increase during any calendar year.(R68,¶68);

o. The inaccurate description of penalties, in effect since October, 2012 faced by landlords found to have violated a DHCR order or harassed a tenant, subject to the ETPA, found in ETPA [§§2506.2(c)(1) and (2)].(R69,¶69).

Bender's omission of DRIE and SCRIE enactments from the Tanbook has a particularly widespread, and pernicious, impact on low-income disabled and senior citizen rent regulated tenants. According to the most recent report from the New York City Department of Finance as of July 20, 2018 there were 11,149 DRIE households receiving assistance under the program (and 53,913 SCRIE households). *www1.nyc.gov/assets/rentfreeze/downloads/pdf/scrie-drie_report.pdf.* These omissions are not trivial; denying low-income New Yorkers knowledge of newly enacted rent protections effectively negates the political process.

Bender claimed below that "[P]laintiffs' claim rests on the unsupportable premise that the Tanbook *guaranteed* that its 1500-plus pages would be entirely *exhaustive and error-free*."(emphasis added) Not surprisingly, Bender did not, and indeed could not, cite to a specific sentence of the FAC that makes that claim as none in fact exists and its claim was wholly concocted. To the contrary, this action pertains *only* to the portion of the Tanbook consisting of the Rent Regulation Laws, which comprise some 556 pages of the 1500-page book.[14] Appellants have not made any claims with respect to the other more than 900 pages of the book. Indeed, Bender has tried to portray this case as an overreaction to a handful of minor errors when in reality the Tanbook has been shown to have a long list of substantial errors that affect millions of New York City residential tenants which have stood uncorrected for many years until the Appellants brought this action.

Next, Bender asserted below, erroneously, that "the general descriptive statements in the Tanbook and on (Bender's) Website cannot reasonably be interpreted as guarantees of 100% accuracy or completeness." Here too, Bender did not reference any section of the FAC to support this allegation. And, once again, Bender's claim is specious as this action pertains only to Bender's failure to update the Rent Regulation Law section of the Tanbook, not any other portion of the book.

[14] Pages 3-45-3-590 of the 2016 Edition of the Tanbook.

Another example of Bender's deceptive presentation below is "(T)he Amended Complaint….(is) premised on a theory that Matthew Bender *guaranteed but misrepresented that the Tanbook would be complete and without error*." (emphasis added) Once again, the FAC made no such claim and, once again, Bender did not, and could not, point to a specific provision of the FAC that actually makes that claim.

In a subsequent assertion, the Bender made the astounding claim that it is not reasonable to expect it, a subsidiary of the largest publisher of legal data in the world, with "the world's largest online electronic library of legal opinions, public records, news and business information"[15] to keep up with the "vast and ever-changing subject matter" of New York landlord-tenant law. If LexisNexis cannot "keep up" with changes in New York landlord tenant law, and the FAC strongly suggests it cannot, it has no business being in the legal publishing business and it should stop selling the Tanbook as something it is not.

Finally, and perhaps most incredibly, Bender stated, "a conclusion that the Tanbook was promised to be an *up-to-the minute compilation of all laws and regulations pertaining to New York landlord-tenant law is not reasonable*…" (emphasis added, except "all" which is emphasized in original). This statement is breathtakingly deceptive and disingenuous. First, this action pertains to an annually

[15] *https://en.wikipedia.org/wiki/LexisNexis#cite_note-twosix-5*

issued, *paper-bound book*.[16] Nobody expects any such book to be accurate "up-to-the-minute" and Bender's contention is absurd. Instead, it is more than reasonable to expect that those who purchase an annually issued compilation of laws and regulations would at least be getting a book that was accurate "up-to-the-year." Second, and once again, this action does not pertain to Bender's publication of "*all* laws and regulations pertaining to New York landlord-tenant law" but instead it is limited to Bender's publication of the New York City Rent Regulation Laws. It is only *those* laws that Appellants contend in this action should be published in their totality, as promised and represented by Bender, and it is not unreasonable to expect a well-established legal publisher, owned by the world's largest legal data company, to be able to do so. And even, *arguendo*, that were not so, at a minimum those selections Bender publishes should at least be accurate.

Perhaps the most telling fallacy of Bender's response to this action is that in May 2017, five months *after* this action was filed, (apparently using the original complaint as a guide instead of an actual editor) it was suddenly able to publish a new edition of the Tanbook containing *all* of the dozens of provisions of the Rent Regulation Laws identified as either incorrect or missing by Appellants in their

[16] Bender does not claim that the electronic version of the Tanbook, sold as an e-book on its website or on the Amazon Kindle store, is amendable electronically. To the contrary, those versions are also updated annually and Bender requires users to purchase the newly issued annual edition.(See R224)

initial complaint. (R59,¶54) Based on that fact alone, it cannot seriously be disputed that Appellants have already achieved success in forcing Bender perform the updating of its book it had ignored for many years.[17]

A. Bender's Deceptive and Misleading Representations about the Tanbook

The Tanbook is represented as containing the Rent Regulation Laws in their entirety (R174, 179, 180, 182, 203, 205, 207, 208-9 and 214). Bender makes such representation in order to induce customers to purchase the Tanbook. And, the book itself warrants its own quality; the Tanbook's "Overview", which was submitted below by Bender as part of Exhibit 1 to the Baldwin affidavit(R182) describes the contents of the book.[18] The "Overview" states that

> [T]his book is organized into seven parts. Part I consists of two subparts. Subpart A contains *selected* provisions of various statutes of statewide applicability…
>
> Part II contains *selected* local laws from New York City, Albany and Rochester…
>
> Part III is comprised of *the* laws and regulations covering rent stabilization and rent control in New York City and in applicable areas elsewhere in the state. (This is the section of the Tanbook which is the subject of this action)…
>
> Part V contains *various* provisions of the Court Acts and Rules….(R182)

[17] At the same time, Bender claimed that the Appellants should not complain because they did not self-discover the missing sections of the Rent Regulation Laws and return the Tanbook to it within 30 days of purchase. (R167-70 ¶¶ 13,18,25,29 and 31)

[18] The same "Overview" has appeared at the beginning of the Tanbook for many years.

Similarly, the Tanbook's Table of Contents(R177-81) describes various statutes and regulations, which appear in five of the book's seven "Parts." In three of those parts, in six different places, the term "selected" appears before the particular provisions identified. That term, or any other similar term, is completely absent from Part III of the book, which is simply entitled RENT REGULATION.(R180)

Bender plainly differentiates in its description of the Tanbook's contents between laws that are only produced in part, or excerpted, while others (the Rent Regulation Laws) are represented to be produced in their entirety. Bender clearly understands how to make it clear that certain statutes and regulations are excerpted or abridged while others are not. There can be no serious dispute therefore that was eminently reasonable for Appellants, and purchasers generally, to believe that the Tanbook fully, completely, and accurately contains the Rent Regulation Laws.

III. The Harm to Appellants

The FAC asserts claims of breach of contract, deceptive business practices in violation of the Deceptive Practices Act (GBL Art. 22-A), unjust enrichment and fraud. Each of the elements of those causes of actions are fully set forth in the complaint. Bender sought dismissal, in part, on the claim that Appellants were not harmed by the omissions from, and inaccuracies in, the Tanbook. Bender made that claim while, at the same time, asserting that the newly issued 2017 edition now

contains all of the previously missing and previously uncorrected sections. If indeed there was no harm to Appellants when those sections were missing or incorrect, why was it necessary to withhold the book from publication for five months and then issue a corrected book?

In reality, Appellants were harmed by Bender's misconduct. Samuel Himmelstein, a partner at the Plaintiff Himmelstein, McConnell, *et al.,* stated,

> Our decision to purchase the Tanbook each year was substantially based on our understanding that it contained the entire text of the Rent Regulation laws and that it was accurate at the time of publication. We have now learned that our understanding was misplaced. Had we known that the defendant was not updating the Rent Regulation Laws in the Tanbook to include all changes that had occurred during the previous year we would never have purchased it because such a book would have no value to us.(R226,¶14)

IV. Housing Court Answers

Jennifer Laurie, of the Plaintiff Housing Court Answers, ("HCA") states that HCA "has long relied on the annually published Tanbook in an effort to present to tenants and tenant advocates the most current and reliable information possible about the Rent Regulation Laws.(R237,¶ 6)… HCA was shocked and dismayed to learn that the Tanbook did not fully and completely contain the Rent Regulation Laws… those laws appear to have not been updated for at least twelve years. We are very troubled that the absence in the Tanbook of key provisions from those laws has likely resulted in numerous persons being given erroneous information about the rights."(R238,¶¶,9-10).

V. Michael McKee

Mr. McKee, an individual who purchased the Tanbook for many years, in his own name, and not in connection with any organization or entity, is a New York City rent regulated tenant and has often referenced the Rent Regulation Laws, as well as other material in it, to determine, and better understand, his personal rights and obligations.(R235-36,232,¶ 12)

VI. The Harm to Appellants, the Class and Rent Regulated Tenants Generally

Bender's failure to properly update the Tanbook caused actual harm to Appellants and members of the class they seek to represent because they purchased a book they reasonably believed included the Rent Regulation Laws in their entirety (a key reason for purchasing the book) when in fact it admittedly did not. The FAC alleges that because the Tanbook has long omitted, and inaccurately published, numerous provisions of the Rent Regulation Laws, the purchasers of the book did not receive what they bargained for. Instead, they received a grossly deficient product they would never have bought had they know of those deficiencies. It is impossible to quantify the number of instances where residential tenants' claims were not fully or properly presented or adjudicated because the Tanbook either inaccurately stated a particular section of the Rent Regulation Laws or omitted it entirely.

However, the FAC includes an actual example, in at least one documented case, where it was shown that a court misapplied the law and ruled against a litigant as the result of a key omission in the Tanbook(R70-71,¶¶72-76). In that 2016 case, an Art. 78 proceeding challenging a determination by the DHCR, both the attorneys for the petitioner-tenant and the DHCR, as well as the judge hearing the case, all relied on the Tanbook for an accurate depiction of the RSL provision addressing the interplay between a rent reduction order and a DRIE. Unfortunately, that provision, and indeed the entire DRIE program, enacted in 2005,(see, ftn. 13 *supra*) was omitted from the 2016 edition, and all prior editions, of the Tanbook and the court ruled against the tenant after concluding that no such provision existed.

Thereafter, the tenant's attorney moved to reargue that decision after realizing that the provision in fact existed but had been omitted from the Tanbook, after which the court reversed itself and ruled in favor of the tenant. As a result, the harm alleged by Appellants is not hypothetical. That case, *Martorell v. DHCR* (Sup Ct., NY Co. Index No.100733/16) is detailed in the affirmation of Matthew Chachere, the petitioner's attorney in *Martorell* and the exhibits annexed to it. (R238-69)

The *Martorell* case is likely the "tip of the iceberg" of cases wrongly decided by the courts and by the DHCR over the past 12 years due to Bender's

failure to update the Tanbook with amendments to the Rent Regulation Laws.[19] As a result, there can be little doubt that the Tanbook's inaccuracies have had a broad and significant impact on numerous consumers in New York.

Despite having actual knowledge that the Rent Regulation Laws published in the 2016 Tanbook were seriously deficient, Bender continued offering the book for sale on its website(R203-13) and apparently took no steps to have it removed from Amazon's website(R214-15) Moreover, in an obvious attempt to minimize public embarrassment and to limit damage to its reputation, Bender actively concealed its knowledge of the Tanbook's deficiencies and took no steps to alert its many customers (whose names and addresses are contained in its customer files) so they could properly protect themselves. It was indeed serendipitous that a tenant lawyer, who had relied on the Tanbook for its apparent accuracy, discovered missing section which triggered an exhaustive review of the Rent Regulations contained in it.

This level of corporate malfeasance more than amply establishes a basis to pursue claims for fraud and punitive damages in the FAC.

[19] Ultimately, in the *Martorell* case DHCR conceded that Ms. Martorell was likely not the only tenant impacted by the omission of the section of the RSL missing from the Tanbook. She stated, "[S]o, what happens to the other, let's say hypothetically, 2000 cases? Should they be able to reopen every single case now?").(R261, line 14)

ARGUMENT

POINT I

WHETHER THE UNIFORM COMMERICAL CODE APPLIES TO THE SALE OF THE TANBOOK IS A MIXED QUESTION OF LAW AND FACT THAT CANNOT BE DECIDED ON A MOTION TO DISMISS PRIOR TO ANY DISCOVERY

The Appellant class alleges that the purchase by the class members of Bender's compilation of Rent Regulation Laws and regulatory enactments, contained in routinely updated printed and electronic formats, and sold explicitly to enable landlords and tenants to do "careful research of the relevant laws and regulations" so they can do "a little advance planning" to "provide the opportunity for protection of the rights of owners and tenants", was a purchase predominantly of services and not of an annually updated book. (R48,¶¶ 3, 5) The quoted remarks, from Respondent's "Overview" in each Tanbook as issued, (R182) make it clear that what Bender is selling is what its "Editorial Consultant/Commentator" Eileen O'Toole, who is purported to be a renowned lecturer and author on rent regulation, (R176) deemed to be the compendium of Rent Regulation enactments that gathers in one place what landlords and tenants, and their attorneys and representatives, need to do their "advance planning."

The Motion Court found, from the complaint alone, that what the Plaintiff class bought, year after year, was books, and not routinely updated information. (R13) This was error.

Where a sale is of both goods and services, the trier of fact must determine whether what is purchased is primarily services or goods. Unless what is purchased is primarily goods, the transaction is covered by the common law of contract, and not by Article 2 of the UCC.

"When service predominates, the incidental sale of items of personal property do not alter the basic transaction." The inquiry is to ascertain the "essence of the agreement." *Marbelite Co. v. National Sign & Signal Co.,*2 Fed. Appx. 118,120 (2nd Cir. 2001), quoting from *North American Leisure Corp. v. A&B Duplicators, Ltd.,*468 F.2d 695, 697 (2nd Cir. 1979). The predominance inquiry, requiring an examination into "the reaction, regarded in its entirety," was established by the New York Court of Appeals in *Perlmutter v. Beth David Hosp.*,308 N.Y. 100,104 (1954).

Here, the exhibits submitted by Bender establish that what was sold, and what buyers thought they were buying, in any given transaction, was a book and "any supplementation, releases, replacement volumes, new editions and revisions to a publication ('Updates') made available during the annual subscription period." (Quotation from the "Material Terms" of the Bender Agreement and Order Form,

(R185) At page V of the Tanbook, a purchaser is notified that "assistance with replacement pages" can be obtained from the Bender Customer Service Department. (R175) another offer of an ongoing service, rendering the transaction not just a one-off sale of a book.

Whether the initial volume or the "Updates" predominate, requires inquiry into what Matthew Bender produced over the years, and whether the Tanbook's contents were accurate when printed and published and whether it remained accurate until the next iteration. That inquiry requires discovery, and ultimately, a trial. See, e.g., *Wexler v Allegion (UK),*2018 U.S.Dist. LEXIS 54655, 37, (SDNY 3/29/2018). Whether a distribution agreement is predominantly a long term exclusive service agreement or a set of "one-off sale[s] of goods subject to the UCC" is a fact question that cannot be determined "without regard to the facts that may be adduced during discovery." *Id.*

The sole case cited by the Motion Court in finding that the UCC applies, as a matter of law, *Richard A. Rosenblatt & Co. v. Davidge Data Sys Corp.*,295 A.D.2d 168 (1st Dep't 2002), involves not a purchase of a good that is definitionally ephemeral and is periodically updated, but a purchase of computer hardware and software that is bought together with a repair service. The *Rosenblatt* court easily, and properly, viewed that transaction as one with two severable and independent components; the purchase of the computer with its software, and the purchase of

the repair service. *Rosenblatt* might be analogous to the instant case if the buyer only bought the right to possess a computer that would be periodically updated and replaced by new machinery and programs-a perfectly common transaction.

Each annual edition of the Tanbook is only useful for, at most, a year. That is precisely why Bender purports to sell it with annual updates. That is also why purchasers buy the Tanbook service year after year. It is the updating claimed by Bender to occur with each re-publication that makes the Tanbook useful. What Bender does to keep the Tanbook relevant and sellable, year after year, and why the Plaintiff class spends additional money, year after year, for the updates, must be explored in discovery before one can determine whether the service or the good predominates. Where, as here, Bender has admitted that its omissions "occurred long ago" and have "recently been brought to our attention", it is surely a question for the jury whether the service of updating was carried out negligently, if ever carried out at all. (R71,¶76) It is precisely the updating service component of the purchase that occasioned the damages suffered by the Plaintiff class.

POINT II

THE COMPLAINT MEETS THE NOTICE REQUIREMENTS OF UCC 2-607(3)

The Motion Court held that Appellants had failed to plead that a "buyer" had "notif(ied)" the seller of the seller's breach of warranty. (R14) Since this is a class

action, that determination is simply wrong. Actual notice of Bender's breach of its critical sales representation, that the Tanbook provides to its purchasers *the* "Rent stabilization and rent control laws and regulations" was provided directly to Bender by Matthew Chachere, an attorney at Northern Manhattan Improvement Corporation ("NMIC") which purchased the Tanbook (and is therefore a putative class member).[20] His December 5, 2016 letter lays out explicitly, and in detail, the defects in the Tanbook, the fact that practitioners "can no longer rely on it", and that NMIC, and every other class member, was directly damaged by buying a publication that could not be used for its intended purpose by its attorneys and representatives. (R134-35)[21]

The Motion Court simply invented a requirement that UCC§2-607 notice can only be provided by a named Plaintiff in a class action. It wrote: "Chachere's letter to Matthew Bender does not qualify as proper notice of breach because Chachere is not a named party." (R14-15) The Motion Court did not cite a case in support of that sentence, because none in fact exists. Rather, notice on behalf of a class may be raised by *any* class member. "[P]laintiff's letter to the Defendant *on*

[20] Mr. Chachere wrote on NMIC's letterhead and signed it as a "Senior Staff Attorney" of that organization. (R134-35)

[21] Whether the Chachere letter provided adequate notice of consequential damages, such as increased legal fees for tenants whose attorneys relied on the completeness and accuracy of the Tanbook, which arguably would raise issues of whether attorney reliance in a particular litigation can be prosecuted in a class action, is not here relevant, since the damages sought by the class are limited to return of each class member's cost of purchase.

behalf of herself and the class members was sufficient notice." *Paulino v. Conopco., Inc.*,2015 US Dist. LEXIS 108165 (EDNY)(emphasis added)(cited by the Motion Court at R16) Even in the few class action cases in which a question of the adequacy of notice is raised, courts routinely permit amendment of the pleading to establish a proper allegation of notice. See, e.g. *Hubbard v. GMC,*1996 U.S.Dist. LEXIS 6974 (SDNY May 22, 1996), followed in *Tyman v. Pfizer, Inc.*, 2017 U.S.Dist. 212879 (SDNY Dec. 27, 2017 (recommendation of Magistrate Judge), and *Tomasino v. Estee Lauder Cos.,*44 F.Supp3d 251,261 (EDNY 2014). Were there a requirement that the notifier be a named class representative, the problem is readily cured by expanding the caption to include NMIC.

In any event, as a matter of New York appellate law, notice under §2-607 is provided by a complaint which adequately alleges the underlying breach claim. "The complaint and subsequent amended complaint in this action themselves constituted such notice [under §2-607]…" *Panda Capital Corp. v. Kapo Int'l*,242 A.D.2d 690, 692 (2nd Dep't 1997). As one Justice recently wrote, citing to *Panda,* for UCC Article 2 purposes "pleadings constitute notice." *Marjam Supply Co., Inc. v. Craft Fabricators, Inc.,*28 Misc. 3d 1237(A), *aff'd* 94 A.D.3d 954 (2nd Dep't 2012). *See, Mid. Is. LP v. Hess Corp.,*41 Misc. 3d 1237 (Sup. Ct. N.Y. Co. 2013); the filing of a formal complaint, "would obviously accomplish" the notice task, citing *Panda.*

The single case from a New York court cited by the Motion Court in support of its dismissal for lack of notice, *Singleton v. Fifth Generation, Inc.*,2016 U.S.Dist. LEXIS 14000, 38-42 (N.D.N.Y.), has nothing to do with whether the notifier was a named plaintiff. Rather, there was no notice by <u>*any*</u> class member of alleged reliance by any plaintiff on false or misleading advertising in purchasing the product. The plaintiff class in that case alleged only that similar claims had been brought against defendant, and the court understandably held that no notice had been provided of the particular claims of the plaintiff class, and there was no way for the defendant, or the court, to intuit whether the action had been brought within a reasonable time from the discovery of the alleged falsehoods. No such facts exist here and *Singleton* therefore has no bearing on this issue.

<u>POINT III</u>

THE COMPLAINT AND THE RECORD BEFORE THE MOTION COURT ADEQUATELY PLED A CLAIM OF BREACH OF EXPRESS WARRANTY

The First Cause of Action in the FAC alleges that in its own description of the contents of the Tanbook, contained in the "Overview" within the Tanbook itself, and in the advertisements for the Tanbook found on Bender's website and on the Amazon website, Bender warrants that Part III of the publication "is comprised of the laws and regulations covering rent stabilization and rent control in New York City and in other areas elsewhere in the state." (R73,¶84) The FAC alleges

that "[t]he Tanbook,…at least as it pertains to those [statutes, laws, and regulations] involving rent regulated housing in New York, is rife with omissions and inaccuracies…"(R48-49,¶ 6) Appellants go on to allege that "by selling the Tanbook with numerous omissions and incomplete laws and regulations, the Defendant breached its contract with the class members who purchased the book and/or relied upon the subscription service and compilation services the book purported to provide to purchasers." (R49,¶ 7)[22]

While the words "breach of express warranty" are not found in the FAC, no experienced litigator or judge could mistake these allegations for anything other than a claim that what the target consumers were buying was the completeness and accuracy of the compilation made by Bender and sold as the Tanbook. The relevant question is only, did the Appellant class have some obligation to plead the legal components of a breach of express warranty claim in any greater detail? The answer of the case law is that they did not, but if greater specificity were required the remedy is repleading, not dismissal. In fact, the Motion Court expressly stated so much at oral argument of the motion to dismiss the complaint. "If we are going to proceed on (a) breach of warranty cause of action we should have that properly

[22] The first 80 paragraphs of the FAC are incorporated by reference into the First Cause of Action. (R72,¶ 81)

pled." (R442) Inexplicably, the Motion Court failed to afford the Appellants that opportunity, something this Court can and should remedy.

The Motion Court further wrote that "(A)n action for breach of an express warranty can only be brought if the warranty was relied on." (R15) Oddly, the Motion Court cites for that proposition *CBS, Inc. v. Ziff-Davis Pub. Co.,*75 N.Y.2d 496,508 (1990). However, the citation is to Judge Bellacosa's *dissenting* opinion, in which he laments, at page 507, that "The [majority] holding discards reliance as a necessary element to maintain a cause of action for breach of an express warranty."

It remains true that under *Ziff-Davis,* and the many cases that have referred to it, an express warranty must be "shown to have been relied on…" *Id.,* at 503 (majority opinion). But the showing is "no more than reliance on the express warranty as being a part of the bargain between the parties." *Id.* As applied to the instant case, in order to recover damages for breach of express warranty the Plaintiff class will have to prove that the contracts its members entered into were to purchase a book that contained, *inter alia,* an accurate compilation of the rent regulations applicable in the City of New York and that it was their accuracy and completeness that was a basis of the bargain. Whether each class member saw the Overview or the representation of contents in the advertisements is of no moment;

the inducement to purchase is not a prerequisite of the cause of action, Judge Bellacosa to the contrary.

In fact, the Motion Court got that part of the test right when it stated that "(P)laintiffs have to identify an affirmation, description or promise by (Bender) which became a part of the basis of the bargain."(R15)(internal citation omitted). Under any view of the FAC, Appellants specified what they relied on as being contained in the Tanbook, and that is what is required in an action on an express warranty.

The Motion Court appears to have adopted the view, however, that each Plaintiff must plead that a prerequisite of a breach of express warranty claim is that the class representative Plaintiffs at least saw the text of the warranty before consummating the purchase.(R15). See, *Gale v. IBM*,9 A.D.3d 446, 447 (2d Dept. 2004). It is the lack of such an explicit allegation in the FAC that the Motion Court relied on in dismissing the breach of express warranty claim. This was error.

It is clear from the FAC (R48,¶6, R70, ¶¶70-71) and emphasized in the supporting affidavits submitted by Plaintiffs in opposition to the motion to dismiss, (R223-38) that the representation of completeness and accuracy was in the Overview that appears front and center in every Tanbook and is on the websites from which the vast majority, if not all, of the Tanbooks are purchased. Thus, the

representations at issue here are precisely included by the words of UCC§2-313(1)(b): "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." The warranty of completeness and accuracy is part of what one purchases, which meets the *Ziff-Davis* requirement. Each named Plaintiff bought the Tanbook year after year, and thus the warranty was in the actual possession of each named Plaintiff starting with the second purchase. While it is conceivable that some class member bought the Tanbook for the first time only in 2016 and only because she wanted the text of portions of the Tanbook other than those covering rent stabilization and rent control, that issue goes not to the viability of the FAC but to the class definition. Whether the entire putative class can prove that each member bought the Tanbook because it purported to accurately and comprehensively give the reader the entire universe of New York City rent laws and regulations, as opposed to other considerations, can be explored when the issue of class certification is before the court. See *Klein v. Robert's Am. Gourmet Food, Inc.,*28 A.D.3d 63,72 (2nd Dep't 2006).

Concededly, there are decisions which can be read to require that an allegation of *Ziff-Davis* reliance must be in the pleading, and not merely the proof. See, e.g.,*Goldenberg v. Johnson & Johnson Consumer Cos.,*8 F.Supp.3d 467,482 (SDNY 2014). This is by no means the majority position, however. see,e.g.,

*Factory Assocs. & Exporters, Inc. v. Lehigh Safety Shoes Co.,LLC,*382 Fed. Appdx 110, 111-112 (2d Cir. 2010)("[t]o *prevail* on a claim of breach of express warranty, a Plaintiff must show…that the warranty was relied upon."(emphasis added).

A recent opinion by Judge Rakoff in *Manier v. L'Oreal U.S.A., Inc.,*2017 U.S.Dist. LEXIS 116139,29-30 (July 18, 2017, SDNY) is particularly instructive here. *Manier* is a nation-wide class action where African-American women allege that they were induced by statements regarding safety and performance contained in the packaging of a hair straightening compound to purchase and use the product. The motion to dismiss the pleading was denied:

> Defendants also argue that Plaintiffs' express warranty claims fail because Plaintiffs have not alleged upon which representations each class representative relied. However, under the UCC….the requirement of reliance is subsumed into the question of whether the warranty was part of the basis of the bargain, and there is a presumption that a seller's affirmations go to the basis of the bargain. The UCC provides that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty. UCC§2-313(1)(a). The official commentary to that section further explains that "affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of the goods, hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. UCC§2-313 Cmt. 3. Accordingly, courts have rejected the argument that explicit pleading of reliance is necessary in this context….Thus, because Defendants' representations may be assumed to be part of the basis of the bargain, Plaintiffs do not fail to plead reliance on the purported express warranties by Defendants.

To the extent that the pleadings requirement of cases such as *Goldenberg* is not an artifact of the Federal Courts' insistence on factual comprehensive pleading under *Ashcroft v. Iqbal*,556 U.S. 662 (2009), the omission can readily be cured by amendment. Plaintiff McKee alleges that he both knew of the warranty and relied on the completeness of the Tanbook's Part III. (R231-32¶¶ 6 – 9). Plaintiff Himmelstein law firm alleges that it relies on the annual updating to give its lawyers an accurate and complete view of changes in the rent regulations, based on the firm's continued use of the Tanbook in representing its clients, and thus the firm's knowledge of annual revising. (R224-25, ¶¶8-10). And Jennifer Laurie, of the Plaintiff HCA pleads that as a non-lawyer she and her colleagues have relied for years in training other non-lawyer representatives of tenants on the annually published Tanbook "in an effort to present to tenants and tenant advocates the most current and reliable information possible about the Rent Regulation Laws." (R237 ¶6)

The implicit holding of Motion Court, that an express warranty Plaintiff must have the opportunity to be aware of the terms of the warranty at the time of purchase is also erroneous. The cases are legion in which the representations that are enforceable as express warranties are contained on the labelling of the product when bought, or in the packaging in which the product is delivered. *Randy Knitwear, Inc. v. American Cyanamid Co.,*11 N.Y.2d 5,10 (1962) (warranty

contained on the label sewn into an article of clothing); *Imperia v. Marvin Windows of N.Y., Inc.,*297 A.D.2d 621,623-24 (2d Dep't 2002)(warranty language in brochure delivered with the product); for a recent example, see, *Mohoney v. Endo Health Services Solutions, Inc.,*2016 U.S.Dist. LEXIS 94732,5-6 (July 20, 2016, SDNY).

It makes perfect economic sense that promises delivered with, or in connection with, the delivery of the product are enforceable. As the Third Department wrote,

> we believe that while the warranty was technically handed over *after* Plaintiffs paid the purchase price, the fact that it was given to Plaintiffs at the time they took delivery of the motor home renders it sufficiently proximate in time so as to fairly be said to be part of the basis of the bargain *(compare,* UCC 2-313, official comment 7; 1 White and Summers, UCC §9-5, at 448-455 [3d ed]; *cf., Marine Midland Bank* v *Carroll,*98 AD2d 516). To accept the manufacturer's argument that in order to be part of the basis of the bargain the warranty must actually be handed over during the negotiation process so as to be said to be an actual procuring cause of the contract, is to ignore the practical realities of consumer transactions wherein the warranty card generally comes with the goods, packed in the box of boxed items or handed over after purchase of larger, non-boxed goods and, accordingly, not available to be read by the consumer until after the item is actually purchased and brought home. Indeed, such interpretation would, in effect, render almost all consumer warranties an absolute nullity. *Murphy v. Mallard Coach Co.,*179 A.D.2d 187, 193 (3rd Dep't 1992)

The warranty here is a prominent part of each annual installment as delivered, which is the precise analogue to the labelling of a medication, cosmetic or any other purchased item. Where, as here, the notice is provided at the time of

receipt of the product, because the notice is actually contained in the product itself, the reliance element is met.

POINT IV

THE REPRESENTATIONS OF COMPLETENESS AND ACCURACY THAT FORM AN INTEGRAL PART OF THE TANBOOK AND THE MARKETING OF THE TANBOOK ARE BINDING ON BENDER

A. The Statements Made In the Tanbook itself and on Bender's Online Store Are Express Warranties

What the Tanbook contains is, not surprisingly, listed in the Overview and specified in the Table of Contents. On the very cover page of the Overview Bender tells the reader that what follows are "provisions" of a set of New York statutes, "selections" from Federal statutes, "select" local laws, and "excerpts" from court acts and rules.(R182) Bender does not claim that the Tanbook contains all of any of these categories. But in the very same list, Bender informs the reader that what follows are "*the* rent stabilization and rent control laws and regulations." (*id.*)(emphasis added).

Were there any ambiguity, the promotional material that Bender supplies on its website and on Amazon's website explains that, while the Tanbook contains "selected provisions" of a set of named statutes, "selected local laws " and "various provisions" of court acts, it contains "*the* laws and regulations covering rent stabilization and rent control in New York City."(R203-13)(emphasis added). This same language appears on the Amazon.com page for the Tanbook.(R213)

Bender elected to provide an Overview that informs the reader that what follows is what the book contains, and thus what a potential purchaser is buying. Bender knows how to make it clear to its consumers that certain sections of the Tanbook do not contain a complete collection of the texts therein. Appellants were therefore reasonable in their belief that Bender was warrantying the completeness and reliability of those sections.

Where, as here, there is an affirmative representation in the descriptive literature of what the product is proclaimed to be or do, the description must be "sufficiently certain and specific so that what was promised can be ascertained." *Joseph Martin, Jr Delicatessen, Inc. v. Schumacher*,52 N.Y.2d 105, 109 (1981). That is precisely what the Overview does. Even the most unsophisticated reader can recognize the difference between selections and excerpts, on the one hand, and a listing of a compete category of laws and regulations on the other. And it is significant, perhaps critical, that Bender claims its intended audience for the Overview, and the intended purchasers of the Tanbook, includes attorneys and tenants' representatives who work with the law and regulations in question every day.

Bender argued below that the statements in the Overview and in its advertising materials were "immaterial puffery," citing to *Gillis v QRX Pharma Ltd.*,197 F.Supp.3d 557, 593 (SDNY 2016). The more relevant analogy is to the

express warranties in *Imperia v. Marvin Windows of N.Y., Inc.*,297 A.D.2d 621 (2nd Dept. 2002) ["An express warranty can arise from the literature published about a product"]. See also *Weiss v. Herman*,193 A.D.2d 383 (1st Dep't 1993). Defendant in *Imperia*, a manufacturer of a product called "flexacron prefinish" represented that its product "'lasts four to five times as long as paint' and that products treated with [its prefinish] were 'maintenance-free' and would resist 'cracking, blistering or peeling even under the toughest conditions."(*supra* at 622) These statements, like Bender's, are both express representations of fact, and used to describe a product for sale. And, like Bender's statements, they constitute express warranties.

Without conceding that the UCC applies in this case, virtually every word of N.Y. U.C.C.§2-313, regarding express warranties, is meant to ensure that such warranties are easy to create. It states:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he (sic) have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

The product that Bender sold to the Plaintiff class is itself a compendium of text. A textual description of a product is the usual venue for an examination of whether performance has been warranted: when the product is itself a document, the documentary description is of the essence of the bargain. The product holds itself out to constitute the text of the rent regulations operative in New York City. It just isn't that, and therefore what Bender sold is just not what it said it sold.

B. Bender Did Not, and Could Not, Expressly Disclaim its Warranties Because it Pertains to the Very Purpose of the Product

The Motion Court wrote that Bender's "Sales Contracts included a disclaimer wherein Matthew Bender explicitly stated that it was not warranting the accuracy or completeness of the Tanbook."(R16) The Motion Court was in error.

The disclaimer contained in the terms and conditions that are attached to the invoices used by Defendant for sales of the Tanbook provides, in capital, albeit small font, letters, that Matthew Bender does not "WARRANT THE ACCURACY, RELIABILILTY OR CURRENTNESS OF THE MATERIALS" contained in the Tanbook.(R186)(emphasis original) Significantly, Bender hid this language, on the reverse side of an invoice sent separate from the book itself. It

did not, and obviously would not, make such a statement in the body of the book itself or in any of its sales material promoting the book.

Bender simply did not disclaim its warranty of completeness, which arose from its repeated specification that the Tanbook contains "*the* laws and regulations covering rent stabilization and rent control in New York City."

The volume and breadth of Bender's omissions, specified in the FAC, are so extreme that they effectively made the Tanbook useless to the class of purchasers. For those purchasers who bought the Tanbook to have in one convenient place the laws and regulations governing New York City rent control and rent stabilization, the completeness of the publication was the *sine qua non* of the transaction.

Because the class would not have bought the Tanbook absent the promise of completeness and accuracy regarding rent regulation, even had Bender attempted to disclaim its warranty it would have been unable to do so.

For a seller cannot disclaim a warranty that nullifies the heart of the bargain. As the Court of Appeals has held,

> "[S]ection 2-719 (subd. [2]) of the UCC provides 'the general remedy provisions of the code apply when 'circumstances cause an exclusive or limited remedy to fail of its essential purpose'. As explained by the official comments to this section: 'where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must' give way to the general remedy provisions of this Article.' (UCC §2-719,

official comment 1.)"*Wilson Trading Corp. v. David Ferguson, Ltd,* 23 N.Y.2d 398,404 (1968)

While Bender purported to disclaim its warranty that the Tanbook was reliable and accurate, the very purpose of the publication was to provide its purchasers, who include attorneys, judges and tenant representatives, with a reliable and accurate statement of what New York Landlord-Tenant law is. The Tanbook is not purported to be a commentary on landlord-tenant law, or an introduction to landlord-tenant law; it purports to be a publication of New York landlord-tenant law itself. Separate and apart from the lack of any disclaimer as to completeness, that the Tanbook is rife with inadequacies and inaccuracies (again see the many instances in the FAC), the Tanbook is just not the "New York Landlord-Tenant Law" book Bender held it out to be, because as it turns out its purchasers cannot safely assume that what is in the Tanbook accurately states that law. The very statement that it is the "New York Landlord-Tenant Law" book is the fundamental basis for its publication, and the fundamental reason for its purchase.

When express statements are made to induce a buyer to purchase a product, those statements simply cannot be disclaimed by a general disclaimer. See *Uniflex, Inc. v. Olivetti Corp. of Am.*,86 A.D.2d 538(1st Dep't 1982) (express statements as to the function of a computer cannot be disclaimed by a general disclaimer); *Wintel Serv. Corp. v. MSW Elecs. Corp.*,161 A.D.2d 764 (2nd Dep't 1990) (seller's

general disclaimer was ineffective because it was inconsistent with its express warranty).

Bender's attempt to disclaim the warranty of completeness and accuracy of the New York City Rent Regulations in the Tanbook is like General Motors attempting to disclaim any warranty that an automobile it sold can be used as a means of transportation.

Bender has expressly warranted both on its online store, and in the book itself, that the Rent Regulations set forth in the Tanbook are complete, reliable and accurate. They are not. Defendant cannot escape these warranties with a general disclaimer.

POINT V
BENDER'S SALE OF AN INNACCURATE, INCOMPLETE AND DEFECTIVE TANBOOK VIOLATES THE COVENANT OF GOOD FAITH AND FAIR DEALING

> Encompassed within the implied obligation of each promisor to exercise good faith are 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included'. This embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.' *Dalton v. Educ. Testing Serv.*,87 N.Y.2d 384 (1995)(internal citations omitted).

This doctrine is fundamental to all New York contracts, whether or not they are governed by U.C.C. Article 2. See, e.g., *Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc.*, 97 A.D.3d 781, 783 (2nd Dep't 2012),

> Implicit in every contract is a covenant of good faith and fair dealing which encompasses any promise that a reasonable promise would understand to be included… Even if a party is not in breach of its express contractual obligations, it "may be in breach of the implied duty of good faith and fair dealing. . .when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denies or to deprive the other party of the fruit (or benefit) of its bargain" (internal citations omitted).

In *BMW Grp., LLC v. Castle Oil Corp.*,139 A.D.3d 78 (1st Dep't 2016) this Court declined to dismiss a complaint alleging that there were latent defects in the oil sold by defendant, even though defendant did not warrant it would be free from such defects. Even without a breach of express warranty, the defect amounted to the seller's "failure to uphold its end of their bargain and to deliver what was promised."

As we have demonstrated, the representations contained in the Overview, and the advertising promoting the Tanbook, constitute express warranties. But even if they do not, they define the promise of Bender to its potential customers. If one wants to buy what Bender believes to be useful excerpts from the New York and Federal statutes that relate to landlord-tenant law, one might buy the Tanbook, knowing that it does not purport to contain "the" relevant laws. That might make sense for a general practice attorney or a real estate broker who occasionally wants to see if a particular issue comes up often enough to have triggered legislation that a company like Bender believes should be readily available in a single volume.

But the New York City Rent Regulation laws are not readily available in such a form, and as the named Appellants made clear in their affidavits here, it is these categories for which those class members rely on the completeness and accuracy of the Tanbook. The class members buy the Tanbook because, as reasonable users, they understand that the entire body of regulations governing New York City rent control and rent stabilization are in it and are accurately rendered therein.

A claim of breach of good faith and fair dealing does not require a demonstration of reliance or inducement at the time of purchase. Rather, if one expects the Tanbook to include the rent regulations in their entirety, one need not compare it page-by-page with the official government publication to check out what one is getting. It is as if a publisher of an annual calendar randomly omitted days of the week, inaccurately gave the names of the months or failed to include newly created national holidays. A purchaser of that product, that is represented to be a particular year's calendar, would reasonably expect it to include everything that one reasonably expects to be included in an annually published calendar, and where those elements were missing an actionable claim would exist and the product would have no value to the purchaser.

POINT VI

BENDER'S FAILURE TO PROMPTLY NOTIFY ITS CUSTOMERS WHO HAD PURCHASED THE 2016 TANBOOK THAT IT HAD OMITTED OR INCORRECTLY SET FORTH NUMEROUS SIGNIFICANT REGULATIONS GOVERNING NEW YORK CITY RENT CONTROL AND RENT STABILIZATION WAS A BREACH OF CONTRACT AND AN ONGOING FRAUDULENT MISREPRESENTATION

At the very latest, Bender learned of the material omissions and errors in the Tanbook from Mr. Chachere's December 5, 2016 letter(R134-35) although it admitted it knew of the book's problems before that(R136) It was then on notice that the 2016 Tanbook could not be relied upon to fully and correctly provide the rent control and rent stabilization laws and regulations operative in New York City. Yet Bender did nothing to inform its customers who had purchased, and were presumably still using, the 2016 Tanbook of those errors and omissions, even though it readily could determine the name and address of every such purchaser from its own records. Despite having been shown by Mr. Chachere an example of a decided case in which counsel and the court, relying on the accuracy and completeness of the Tanbook, had misinterpreted the law, Bender allowed its customers to continue under the misapprehension that the Tanbook was both accurate and complete for at least a full six months, until it finally issued the 2017 Tanbook in May 2017.

As we have noted earlier, the "Material Terms" of the Bender Agreement and Order Form promise "supplementation" and "revisions…made available during the annual subscription period." What could call for a "supplementation" or "revision" more than actual knowledge that the Tanbook was incomplete and in places simply wrong. Yet Bender admittedly did nothing.

Perhaps more egregiously, Bender continued in 2016 to accept orders for the 2017 Tanbook on an "annual subscription period" basis knowing that it could not deliver the 2017 Tanbook until it had corrected its mistakes and cured its omissions. That apparently did not take place until late May, 2017. So the new subscribers not only were deprived of the use of the 2017 Tanbook for 5/12s of the subscription period, for which they were charged the full 12 month price but were left assuming that the 2016 Tanbook remained reliable, accurate and complete. Selling the 2017, Tanbook while knowing that it would not be timely delivered, and necessarily aware that its annual purchasers would continue to use the discredited 2016 edition, was an ongoing fraudulent inducement.

Selling an annual subscription to the 2017 Tanbook, then not delivering it until late May, and letting the purchasers of the 2017 annual subscription remain in ignorance of the inaccuracy and incompleteness of that year's publication, is like selling a 2017 calendar in May 2017, and only after that five month delay telling

the purchaser that the earlier calendar they were using was on the Julian year system, not the Gregorian.

At the very least, every purchaser of the 2017 Tanbook is entitled to a return of 5/12ths of the cost, whether by subscription or by single purchase, because the subscription price and the single purchaser price are identical. To sell something for 12 months of use and deliver only 7 months of use is *per se* fraud. To accept money for 12 months of use and deliver only 7 months of use is a breach of a fundamental term of the sale.

POINT VII

THE FIRST AMENDED COMPLAINT AMPLY STATES A CLAIM THAT BENDER ENGAGED IN DECEPTIVE BUSINESS PRACTICES IN VIOLATION OF GENERAL BUSINESS LAW §349

The New York Deceptive Practices Act (General Business Law Article 22-A) is directed at deterring and punishing deceptive business practices that are "consumer–oriented." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 85 N.Y.2d 20,25 (1995). The Motion Court was simply wrong in holding that a Deceptive Practices claim is not "consumer-oriented" if the deceptive behavior is "oriented towards consumers rather than professionals". (R19)

As this Court has recognized,

> …the requirement that the challenged conduct be "consumer-oriented" may be met by a showing that the practice has a broader impact on the consumer at large. *Sheth v. New York Life Ins. Co*., 273 A.D.2d 72, 73 (1st Dept. 2000), citing *Cruz v NYNEX Information Resources*, 263 A.D.2d 285, 290 (1st Dept 2000).

While "(I)n New York law, the term 'consumer' is consistently associated with an individual or natural person who purchases goods, services or property primarily for personal, family or household purposes" (*Cruz, supra,* at 289), where the deceptively sold product or service is purchased by businesses, or non-profit entities, who then use that product to provide services to large numbers of individuals, who are undeniably consumers under this definition, the "broader impact" test is met where a Plaintiff can "show how the complained-of conduct might either *directly or potentially* affect consumers." (*Cruz, supra* at 291) (emphasis added) This point was affirmatively presented to the motion court at oral argument. (R421-22)

In order to ensure an honest marketplace, the General Business Law permits any "person" (not any "consumer") to enforce its prohibition against *all* deceptive practices, including false advertising, 'in the conduct of *any* business, trade or commerce or in the furnishing of *any* service in this state" (GBL§349 [a]; §350; Governor's Approval Mem, L 1970, ch 43, 1970 McKinney's Session Laws of NY, at 3074). (emphasis added). The breadth of the law's reach was early emphasized by the Court of Appeals in *Karlin v. IVF Am. Inc.,*93 N.Y.2d 282, 287 (1999),

when it held that the Deceptive Practices Act reached medical procedures that were marketed in a deceptive manner, although until then such claims were limited to allegations of medical malpractice. Just as the tort remedy was inadequate in the *Karlin* case, contract and fraud remedies are inadequate here. Deception must be punished to protect the ultimate consumers of the product, whether or not a particular ultimate consumer has suffered compensable injury.

Significantly, although the Legislature has defined consumer transactions in other sections of the GBL as involving "personal, family or household" (See, e.g., GBL §399-c (barring mandatory arbitration clauses in consumer contracts); GBL §399-p (regulating telemarketer's practices) it did not do so when it added a private right of action to GBL§349 in 1980, instead making it clear that it could be enforced by "any person" because of its intent since the statute was originally enacted in 1970 that it have a broad remedial purpose.

The Court of Appeals has, since *Karlin*, often reiterated that broad remedial purpose and its application to virtually all economic activity occurring in the State of New York. *Goshen v. Mut. Life Ins. Co.*,98 N.Y.2d 314 (2002); *Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*,3 N.Y.3d 200 (2004).

In the face of this broad mandate by the Court of Appeals, itself based on the broad mandate of the Legislature, Bender claimed, erroneously, that the Act must be read narrowly to exclude the mass sale of a $120.00 book by a large national

data company, using form contracts, to the general public where numerous provisions of the Rent Regulations were omitted, even though they have long been represented as produced in their entirety. Bender's attempt to narrow the application of GBL§349 far beyond where any court has previously gone is legally and factually baseless and must be rejected by this Court. Instead, the FAC fully and amply states *all* of the elements of a deceptive practices claim as those elements have repeatedly been set forth by the Court of Appeals and the Appellate Division in each of the departments of the state.

I. The FAC Fully and Amply Asserts All of the Elements of a Deceptive Practices Claim

A. The Elements of a GBL§349 Claim

In *Oswego Laborers'*, the Court of Appeals set forth the elements of a GBL§349 claim, at the same time delineating what is not required under the Act.

Accordingly, a Plaintiff must allege that the challenged conduct is "consumer oriented" and that the "act or practice that is deceptive or misleading in a material way and that Plaintiff has been injured by reason thereof (*Varela v Investors Ins. Holding Corp.,*81 N.Y.2d 958, 961; Givens, Practice Commentaries, McKinney's Cons Laws of NY, Book 19, GBL§349 at 565)."(*Oswego, supra* at 25) Additionally, Plaintiffs must allege and establish that the challenged deceptive conduct caused actual, although not necessarily pecuniary, harm. (*id.*)

Appellants are not, however, required to either allege, or establish, that Bender engaged in *intentional* conduct or that they justifiably relied on Bender's misrepresentation or deception. (*id*.) Instead, in *Oswego Laborers* the Court of Appeals adopted an "objective definition of deceptive acts and practices; whether representations or omissions, limited to those *likely to mislead a reasonable consumer acting reasonably* under the circumstances. Such a test complements the definition applied by the Federal Trade Commission to its antifraud provision (15 USC §45) upon which the New York statute is modeled (Givens, Practice Commentaries, McKinney's Cons Laws of NY, Book 19, GBL§349, at 565; Note, *op. cit.*,48 Brook L Rev 509,520)" (emphasis added).

The Motion Court implicitly found that the Appellants had met three of the four prongs of the "consumer oriented" test set by this Court in *Cruz, supra*, "(1) whether the goods are modest in value,(2) whether numerous parties with a disparity of economic power and sophistication are involved in the transactions, and (3) whether the contract is a form contract."(R18, citing *Cruz, supra* at 291).

The only basis cited by the Motion Court for dismissing the Appellant's GBL §349 claim was its erroneous determination that the FAC failed to allege that the Tanbook is directly used for "personal family or household purposes." The Motion Court erroneously, and over restrictively, applied this Court's "consumer-oriented" transaction rule established in *Cruz, supra.* There, this Court stated, in

dismissing the claim by purchasers of Yellow Page ads that the statute does not apply to a "widely sold service that *can only be used by businesses*." (*Cruz, supra* at 263(emphasis added). No such facts exist here as the Tanbook is undeniably marketed to the general public and the FAC alleges that it is in fact purchased by individuals, such as Plaintiff Michael McKee, for personal use. Additionally, it has been shown that the purchase of the Tanbook by entities such as the non-individual named Plaintiffs has the *potential* to cause harm to individual consumers; the standard set by this Court in *Cruz, supra*.

B. The FAC meets the "Consumer Oriented" Test of Oswego Laborers and its Progeny

Since *Oswego Laborers'* the Court of Appeals has repeatedly clarified the "consumer oriented" requirement of the Act. *New York Univ. v. Continental Ins. Co*., 87 N.Y.2d 308 (1995) (private contract dispute between two large well-funded entities is not "consumer oriented"); *Karlin, supra*;(deceptive marketing of in vitro fertilization medical services is "consumer oriented");*Gaidon v Guardian Life Insurance Co. of America.*,94 N.Y.2d 330 (1999)(deceptive marketing of "vanishing premium" life insurance policies is "consumer oriented"); *Goshen v. Mut. Life Ins. Co.*,98 N.Y.2d 314 (2002) (same).

Bender claimed below, erroneously, that the "consumer oriented" requirement means that no business, professional person, entity or non-profit organization can *ever* seek relief under GBL§349. Bender is incorrect and this

Court expressly stated in *Cruz* that it was not foreclosing that possibility. ("The statute's consumer orientation does not preclude disputes between businesses *per se* but it does severely limit it."*Cruz* at 290) This case presents the factual scenario where the statute's application is warranted.

Bender also stated below, erroneously, that "the First Department has *only* defined consumer-oriented conduct as involving the "purchase (of) goods and services for personal, family or household use." (emphasis added) However, this Court has previously permitted GBL§349 claims to proceed that do not meet this standard and the Court of Appeals has never limited the Act in this manner. And, even if the "personal, family or household use" standard is strictly applied here there can be no serious claim that the allegations of Plaintiff Michael McKee fail to meet that standard. (personal use of the Tanbook as a New York City Rent Stabilized tenant) (R231-32 ¶¶4-5,12)

The purchase of the Tanbook by the Himmelstein law firm and the non-profit organization Housing Court Answers are also "consumer-oriented transactions" (as that term has repeatedly been applied by the Court of Appeals) in that their purchase of the Tanbook from Bender was functionally no different than its purchase by Mr. McKee or any other individual purchaser. In *Oswego* the Court held that a pension labor fund was a "consumer" engaged in "consumer oriented conduct" for purposes of the Act because it acted no differently than any

individual consumer would in obtaining the Defendant bank's services in entering the same transaction. *See also, Blue Cross & Blue Shield, supra.*(Court expressly declined to bar business entities from asserting GBL§349 claims, "[I]n concluding that derivative actions are barred, we do not agree with Plaintiff that precluding recovery here will necessarily limit the scope of section 349 to *only consumers*, in contravention of the statute's plain language permitting recovery by *any person* injured "by reason of" any violation (citations omitted) And, in *City of New York v. Smokes-Spirits.Com, Inc.*,12 N.Y.3d 616, (2009), the Court of Appeals stated "(I)n a proper case, (even) the City (of New York) may be able to avail itself of a remedy pursuant to GBL 349(h)" further demonstrating beyond dispute that the "personal, family or household use" standard is *not* required for such claims.

No such differentiation exists in this case. Bender conceded below that the Tanbook is readily available to anyone through its online store as well as through the well-known Amazon website. Bender does not require purchasers to certify that they are using the book for professional use and it is happy to sell it to anyone who wishes to buy it. As a result, this case is readily distinguishable from *Cruz,* (where this Court emphasized that it was dismissing the GBL§349 claim because "advertisement space in the Yellow Pages is, by definition, a commodity *available to businesses only*, and plaintiffs fail to show how the complained-of conduct

might either *directly or potentially* affect consumers)(Cruz at 291)(emphasis added) The Motion Court's almost exclusive reliance on *Cruz* is misplaced.

Nor is *Cruz* the first case where this Court has left open the use of GBL§349 in cases brought by a business. *Unibell Anesthesia, P.C. v. Guardian Life Ins. Co. of Am*.,239 A.D.2d 248 (1st Dep't. 1997)(GBL §349 claim brought by an employer against a health insurance provider who misrepresented an employee's coverage) *NYPIRG, Inc. v. Insurance Information Institute,*140 Misc. 2d 920(Sup. Ct., NY Co. 1988), *aff'd* 161 A.D.2d 204 (1st Dep't.1990)(court declined to reverse lower court determination allowing GBL§349 claim by NYPIRG and instead upheld dismissal of the complaint on First Amendment grounds.) *See also, Brine v. 65th St. Townhouse LLC*, 20 Misc. 3d 1138 (Sup. Ct. NY Co. 2008)(GBL§349 claim permitted where sale of condominium units offered to the general public); *Freefall Express, Inc. v. Hudson Riv. Park Trust,* 16 Misc. 3d 1135(A) (Sup. Ct. NY Co.2007)(" the mere fact that (Plaintiff) is a business is insufficient to defeat a GBL§349 claim.") Recently, in *AT&T Corp. v. Voice Stream Network, Inc.,2017 U.S. Dist. LEXIS 15714(SDNY)* the court, (Magistrate Judge's Report subsequently adopted by the District Court) analyzed this Court's, and the Court of Appeals' GBL§349 jurisprudence, carefully viewing the case through the *Cruz* and *Sheth* lens, and found that AT&T had standing to assert a claim under the statute in an action against another telecommunication entity,

> Though (defendant's) conduct was not directly targeted at consumers, but rather at other telecommunications carriers, it ultimately—and foreseeably—affected consumers by duping AT&T into improperly billing them. Though it is a close question given AT&T's status as a large, sophisticated corporation, given that AT&T's damages are a direct product of Voice Stream's consumer-directed conduct, I find that AT&T does have standing to bring a § 349 suit under the somewhat unique circumstances presented here. 2017 U.S. Dist. LEXIS 15714 at 26[23]

GBL§349 claims brought by businesses and professionals have long been upheld by every other department of the Appellate Division. *North State Autobahn, Inc. v. Progressive Ins. Group Co.,*102 A.D.3d 5(2d Dep't 2012);*Elacqua v. Physicians' Reciprocal Insurers*,52 A.D.3d 886 (3rd Dep't 2008)(GBL§349 claim brought by OB/GYN Health Center Associates, LLP, a medical partnership, against an insurance company*);Jeffrey's Auto Body, Inc. v Allstate Ins. Co.,*125 A.D.3d 1342 (4th Dep't 2015)(GBL §349 claim asserted by auto body repair shops against insurance company);*Crawford Furniture Mfg. Corp. v Pennsylvania Lumbermens Mut. Ins. Co*.,244 A.D.2d 881 (4th Dep't 1997)(GBL§349 claim asserted by a furniture manufacturer against its insurer).

North State Autobahn is particularly instructive here. In that case a group of automobile repair shops alleged that the Defendant insurance company engaged in deceptive practices which deceived individual claimants who sought to have their

[23] Ultimately, the Court in *AT&T* dismissed the GBL§349 claim on territorial grounds not present here.

vehicles repaired at Plaintiff's repair shops that did not participate in its direct repair program by making misrepresentations as to their workmanship, price, timeliness of service, and character. In upholding the claim by businesses, the court emphasized,

> "(T)he Court (of Appeals) has never explicitly held that section 349h only confers standing on individual members of the consuming public. To the contrary, the Court has indicated that "limit[ing] the scope of section 349 to only consumers" would be "in contravention of the statute's plain language permitting recovery by any person injured 'by reason of' any violation" (*Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc*., 3 NY3d at 207).(id.)(emphasis added)

In *North State*, the court held that "harm to the public at large" occurs where a business that provides services to the general public is the victim of deceptive business practices. Here, it is alleged, and demonstrated, that Bender's failure to include all of the sections of the Rent Regulations in a book sold to Appellants has an adverse impact on the public at large who rely on professionals and tenant rights organizations to knowledgably represent them. The *Martorell* case, described in the Chachere affidavit (R239-46) graphically illustrates the harm directly caused to tenants where their lawyers, the government entity charged with enforcing the law, and the court itself, rely to their detriment on Bender's deficient book.

The Appellants are plainly *not* asking this Court to pry open the courthouse doors to a floodgate of business claims under the statute. Instead, the Appellants'

claim pertains only to the narrowly focused analysis of whether the product or service that is the subject of the transaction is the same, or inherently similar to, transactions that can and are entered by individuals for personal use or which potentially affect consumers generally or where the harm caused by the deception ultimately harms the general public. For example, a "mom and pop" grocery store that purchases a deceptively represented laptop for the store's bookkeeping purposes is functionally no different than an individual who purchases the exact same computer for her personal use. Yet, Bender's, and the Motion Court's, overly narrow view of this jurisprudence would bar the former from seeking relief, individually or collectively, under the state's broad remedial statute designed to provide redress against pernicious and egregious business practices. The FAC plainly meets this standard and this Court should reinstate the GBL§349 claim.

The Motion Court's dismissal of the Plaintiff's GBL§349 is plainly erroneous and must be reversed.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that the Court issue an Order reversing the Motion Court and reinstating the Complaint, or, at the very least, permitting the Appellants to replead any claims found to require such repleading.

Dated: New York, NY
December 10, 2018

Respectfully submitted,

JAMES B. FISHMAN

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STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

HIMMELSTEIN, MCCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC., and MICHAEL MCKEE,

Plaintiffs-Appellants,

—against—

MATTHEW BENDER & COMPANY INC., A MEMBER OF LEXISNEXIS GROUP, INC.,

Defendant-Respondent.

New York County Clerk's Index No. 650932/17

Appellate Division Case No. 2018-1250

1. The index number of the case is 650932/17.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about February 22, 2017 by service of summons and verified class action complaint; the amended verified complaint was served on or about May 23, 2017; a motion to dismiss was served on or about June 30, 2017.

5. The nature and object of the action is to recover damages for omissions and inaccuracies in the New York-Tenant Law (Tanbook) published by defendant.

6. This appeal is from the Decision and Order of the Honorable Charles E. Ramos, entered in favor of defendant, against Plaintiffs on February 20, 2018, which granted Defendant's motion to dismiss the amended verified class action complaint with prejudice.

7. The appeal is on a full reproduced record.