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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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
REPLY STATEMENT OF FACTS	1
ARGUMENT	2
POINT I— ALL POINTS RAISED IN APPELLANTS' PRINCIPAL BRIEF WERE PRESENTED BELOW AND ARE PRESERVED FOR APPEAL	2
POINT II— THE MOTION COURT'S DISMISSAL OF APPELLANTS' BREACH OF EXPRESS WARRANTY CLAIM WAS ERROR	3
A. Tanbook sales are not governed by Article 2 of the Uniform Commercial Code	3
B. Bender provided an Express Warranty to Tanbook purchasers under New York Contract Law	6
C. Bender's limited disclaimer does not bar the claim for breach of express warranty.	7
D. Appellants adequately pled reliance	12
E. The Complaint Meets the Notice Requirements of UCC 2-607(3)	14

POINT III—
BENDER'S REFUSALTO PROMPTLY CURE ITS FAILURE TO DELIVER THE COMPLETE AND ACCURATE SET OF RENT CONTROL AND RENT STABILIZATION STATUTES AND REGULATIONS WAS WELL PLED AND CONSTITUTES A BREACH OF CONTRACT AND FRAUD 16

POINT IV—
APPELLANTS PROPERLY PLED A FRAUD CLAIM BASED ON BENDER'S KNOWING SALE OF AN INCOMPLETE AND INNACCURATE PRODUCT WHOSE DEFECTS IT HID FROM ITS CUSTOMERS 19

POINT V—
THE APPELLANTS PROPERLY STATED A GBL § 349 CLAIM 24

CONCLUSION 30

TABLE OF AUTHORITIES

PAGE(S)

Cases

Aracena v. BMW
159 A.D. 3d 664 (2nd Dept. 2018) 13

Cruz v. NYNEX Resources,
263 A.D.2d 285 (1st Dept., 2000) 24, 25

Franklin Nursing Home v Power Cooling Inc.,
227 AD2d 374 (2nd Dept. 1996) 5

Gaidon v Guardian Life Ins. Co. of Am.,
94 NY2d 330 (1999) 27

Goshen v Mut. Life Ins. Co.,
98 NY2d 314 (2002) 27

J.C. Construction v. Nassau-Suffolk Lumber,
15 A.D. 623 (2nd Dept. 2005) 13

Karlin v IVF Am., Inc.,
93 NY2d 282 (1999) 27

Koch v Acker, Merrall & Condit Co.,
18 NY3d 940 (2012) 28

Levin v. Hoffman Fuel Co.,
94 A.D.2d 640 (1st Dept. 1983) 6

Manier v. L'Oreal U.S.A., Inc.,
2017 U.S.Dist. LEXIS 116139 (SDNY) 13

Meyer v. Alex Lyon,
67 A.D. 3d 547 (1st Dept., 2009) 13

Nebraskaland, Inc. v. Sunoco, Inc.,
2011 U.S.Dist. LEXIS (EDNY 2011) 6

New York v. Orbital Publ. Group,
2019 N.Y. App.Div. LEXIS 1253 (1st Dept. 2/21/2019) 11, 12, 25

PAGE(S)

Nicosia v Board of Mgrs. of the Weber House Condominium,
77 A.D.3d 455 (1st Dept., 2010) (Acosta, J. dissenting) 24

Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.,
85 NY2d 20 (1995) 24, 27

Panda Capital Corp. v. Kapo Int'l,
242 A.D.2d 690 (2nd Dept. 1997) 14, 16

People v. Northern Leasing Sys. Inc.,
2019 N.Y. App. Div. LEXIS 1168
(1st Dept., February 19, 2019) 25

Pludeman v. Northern Leasing Sys., Inc.
10 N.Y.3d 486 N.E.2d 184, 860 N.Y.S.2d 422 (2008) 22

Price v. L'Oreal USA, Inc.
2018 U.S.Dist. LEXIS 138473 (SDNY) 7

Recovery Consultants, Inc. v. Shih-Hsieh,
141 A.D.2d 272 (1st Dept. 1988) 2

Sawyer v. Camp Dudley,
102 AD2d 914 (3rd Dept. 1984) 5

Simone v. Homecheck Real Estate Servs., Inc.,
42 AD3d 518 (2nd Dept. 2007) 9

Small v. Lorillard Co.,
94 N.Y.2d 43 (1999) 28

Teller v Bill Hayes, Ltd.,
213 AD2d 141 (2d Dept 1995) 30

Von Ancken v. 7 E. 14 LLC,
166 AD3d 551 (1st Dept. 2018) 9

Wexter v. Allegion (U.K.),
2018 U.S.Dist.LEXIS 54655 (SDNY) 4

Wilson Trading Corp. v. David Ferguson, Ltd.,
23 N.Y.2d 398 (1968) 9

PAGE(S)

Wuhu Imp. & Exp. Corp. v. Capstone Capital, *LLC*,
39 AD3d 314 (1st Dept. 2007) 5

Statutes

CPLR 3016 (b) 22, 23

GBL § 349 .... *passim*

Regulations

UCC 2-607(3) 14

PRELIMINARY STATEMENT

The Plaintiff-Appellants ("Appellants") submit this brief in reply to the Respondent Matthew Bender's ("Bender") brief ("RAB") and in further support of their appeal from the Motion Court Order, (Record on Appeal "R", pp. 23-42) which granted Bender's pre-answer motion to dismiss the First Amended Complaint ("FAC")(R43-198). For the reasons set forth here, and in the Appellants' principal brief ("APB") this Court should reverse the Motion Court 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.

REPLY STATEMENT OF FACTS

A detailed response to Bender's factual recitation is not necessary, with one exception. Bender continues to misrepresent, and minimize, the fundamental nature of this case, calling it a dispute over whether it failed to produce a book that was "exhaustive and 100% free from any omissions" as if this were a case about a handful of missing commas or semi-colons. (RAB 1) It is not. The APB, at 10-12, details some of the significant inaccurate and omitted provisions of the rent regulations in the Tanbook, involving hundreds of missing or inaccurate words from laws affecting tens of thousands of New Yorkers. Not surprisingly, Bender

fully ignores the shocking breadth of its admitted failure to publish a complete and accurate compilation of those laws.

ARGUMENT

POINT I

ALL POINTS RAISED IN APPELLANTS' PRINCIPAL BRIEF WERE PRESENTED BELOW AND ARE PRESERVED FOR APPEAL

Every argument in the APB was presented to the Motion Court, and each was preserved for appeal. In each section of the APB, Appellants identify the factual predicate for each of their arguments. That is all New York law requires; as this Court wrote in *Recovery Consultants, Inc. v. Shih-Hsieh*, 141 A.D.2d 272, 276 (1st Dept. 1988), relied on by Bender in its answering brief ("RAB") at page 18. "Factual assertions not properly contained in the record may not be considered by an appellate court." Respondent's cavil is not with preservation of points for appeal, but rather that certain characterizations of liability, such as the words "express warranty" and "breach of the covenant of good faith and fair dealing" are not contained *in haec verba* of the FAC. Bender's arguments below confirm that such issues were presented. ("They have now shifted to a breach of warranty theory, that we breached the expressed [*sic*] warranty on our website and on amazon.com's website. Now that is not in the complaint. Its only in opposition papers…") Oral argument below, R416. ("Appellants did not plead any claim for

breach of the covenant of good faith and fair dealing, but rather argued in their opposition to the motion to dismiss that it is an 'additional safeguard' for purchasers 'assuming arguendo that the UCC does apply.") RAB at 35.

Appellants demonstrate at APB Points III and V that the FAC meets all of New York's pleading requirements. If, as Justice Ramos recognized, such theories of liability as breach of express warranty ought to be "properly pled", the remedy is amendment, not dismissal. Oral argument R441.

All of the claims and arguments in the APB were fully preserved for appeal and Bender's effort to distract the Court from its obvious, and blatant, misconduct should be rejected.

POINT II

THE MOTION COURT'S DISMISSAL OF APPELLANTS' BREACH OF EXPRESS WARRANTY CLAIM WAS ERROR

A. Tanbook sales are not governed by Article 2 of the Uniform Commercial Code

Respondent argues (RAB 12-23) that Tanbook sales are governed by the New York UCC. As demonstrated in APB Points I and IIIB, Respondent is wrong.

While books, in and of themselves, are no doubt "goods", the sale of subscriptions to periodically revised, renewed and updated books is a sale both of the initial volume itself and the updating service explicitly promised by Bender in

the form of "supplementation, releases, replacement volumes, new editions and revisions" (APB at 23). Whether buying a particular year's Tanbook is a "one-off sale" or, as alleged by Appellants, an ongoing service of annually updated compilations of the rent laws and regulations at the time of each publication (APB at 18-19) requires at least discovery and, in all likelihood, trial.[1]

It is precisely because the Appellants bought a new Tanbook every year, to ensure that they received the most current and updated New York rent regulations, that buying a Tanbook subscription is a service and not a set of yearly one-off sales. Bender undeniably slaps a new year on the front cover of each year's edition of the Tanbook, and describes in the newly issued book's editorial content, what it claims were the changes in the law occurring during the previous year. Just inside the cover page of the "2016 Edition" of the Tanbook Bender described its contents, falsely, as including, *inter alia,* "Rent stabilization and rent control laws and regulations….*As amended by the 2015 Regular Legislative Session."* (emphasis added) (R 217-8)[2]

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[1] Respondent purports to distinguish the dispositive "one-off sale " case, *Wexter v. Allegion (U.K.),* 2018 U.S.Dist.LEXIS 54655 (SDNY) as an "oral agreement". That is an irrelevant distinction; "At this stage of the litigation, the Court is unable to determine whether the essence of the agreements was for the sale of goods or the provision of services." *Id.* at 37.

[2] No doubt because of this lawsuit Bender discontinued including a reference to the prior year's legislative amendments on this page of the 2018 and 2019 Editions of the Tanbook. https://sample3567167a399e4ec2bcab574f0d56117d.read.overdrive.com/?d=eyJvdXRsZXQiOiJyZWFkIiwidG9rZW4iOiI4ZGY3ODQ0NS1kNTBjLTQwNWQtOGVkMi01ZjE0ZDU0ZDYyMDkiLCJhY2Nlc3MiOiJzIiwiZXhwaXJlcyI6InNlc3Npb24iLCJ0aGVtZSI6InNhbXBsZSIsInN5bmMiOjAsIm9mZmxpbmUiOjAsInBwYXJhbSI6Il9leUp6YkhWbklqb2libVYzTFhsdmNtc3RiR0

Bender does so precisely so it will encourage its customers to purchase an entire new book every year. Otherwise, there would be no need to call it the 2016 Edition of the Tanbook as a purchaser could simply buy it once, as a single reference book, and not as an ongoing updating service. Bender obviously profits handsomely by repeatedly obtaining the $134 purchase price from its customers every year.

Bender's cited cases (RAB 21) do not support its claim but rather provide stark contrast to this case. *Franklin Nursing Home v Power Cooling Inc.*, 227 AD2d 374 (2nd Dept. 1996)(sale of one particular air conditioning unit, including incidental repairs); *Sawyer v. Camp Dudley*, 102 AD2d 914 (3rd Dept. 1984)(agreement to "screen and deliver to defendant's place of business a certain amount of sand and gravel of specified sizes" for a particular construction with no ongoing obligations of any kind); *Wuhu Imp. & Exp. Corp. v. Capstone Capital,* LLC, 39 AD3d 314 (1st Dept. 2007)(a ***single*** shipment of men's apparel, all

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mQtdGVuYW50LWU4NWNjYyIsImZvcm1hdCI6IjYxMCJ9;

https://www.amazon.com/New-York-Landlord-Tenant-Law-Tanbook-
ebook/dp/B07LB3R2QT/ref=sr_1_1?s=books&ie=UTF8&qid=1550954501&sr=1-
1&keywords=New+York+Landlord+Tenant+Law+Tanbook

definitionally one-off transactions). Bender's other cases, cited at RAB 22, in which a claim that a contract was outside the UCC, *Levin v. Hoffman Fuel Co.*, 94 A.D.2d 640 (1st Dept. 1983) and *Nebraskaland, Inc. v. Sunoco, Inc.,* 2011 U.S.Dist. LEXIS (EDNY 2011), involve requirements contracts for delivery of fuel or diesel oil, in which the claimed "service" was nothing more than scheduling the delivery dates and calculating the product cost.

B. Bender provided an Express Warranty to Tanbook purchasers under New York Contract Law

Bender seems to argue that Appellants' breach of express warranty claim can only be maintained under UCC Article 2. RAB at 22. Not only is breach of express warranty a time-honored concept under New York contract law, separate and apart from the UCC, the elements of the claim squarely cover the sales that are the subject of this litigation.

> To state a claim for common law breach of warranty, a plaintiff must show that (1) plaintiff and defendant entered into a contract; (2) containing an express warranty by the defendant with respect to a material fact; (3) which warranty was part of the basis of the bargain; and (4) the express warranty was breached by defendant. *Price v. L'Oreal USA, Inc.* 2018 U.S.Dist. LEXIS 138473, *17 (SDNY) (internal citations omitted).

As demonstrated in APB at 30-34, and below (Supplemental Record "SR" 56-58) Appellants adequately pled the elements of beach of express warranty, in particular their reliance on the warranty as construed under New York common

law. The parties agree that the UCC employs a "basis of the bargain" conception of reliance. RAB brief at 27. That is precisely the same approach under New York contract law: "New York uses a basis of the bargain conception of reliance for express and common law warranty claims." *Price*, *supra,* at 17-18. While Appellants meet the UCC reliance requirement, the New York common law test is more relaxed than the UCC,

> Under New York law, if the warranty at issue is material to the agreement, a party need not prove that it had actually relied on that warranty when entering into the transaction. See *CPC Int'l Inc. v. McKesson Corp.,* 134 Misc. 2d 834, 513 N.Y.S. 2d 319, 323 (Sup. Ct. 1987)("This court declines to require a finding of reliance to permit recovery for breach of the warranties in the contract."); see also *CBS Inc. v. Ziff-Davis Publ'g*, 75 N.Y.2d 496, 553 N.E.2d 997, 1001, 554 N.Y.S.2d 449 (N.Y. 1990)(affirming the *CPC* court's "view of 'reliance' … as requiring no more than reliance on the express warranty as being part of the bargain between the parties. *LaSalle Bank Nat'l Assn v. CAPCO Am. Securitization Corp.,* 2005 U.S.Dist. LEXIS 27781, *15 (SDNY).

C. Bender's limited disclaimer does not bar Appellant's claim for breach of express warranty

Appellants demonstrated (APB at 16-17 and 36-37) that Bender did not even attempt to disclaim its warranty that the Tanbook contains "the laws and regulations covering rent stabilization and rent control in New York". Bender's obscure effort to disclaim other matters, hidden on the reverse of its "Agreement and Order Form" asserts two very different, and contradictory things. It "disclaims

all warranties with respect to publications," and "does not warrant the accuracy, reliability, or currentness of the materials contained in the publications". (emphasis added)

The only purpose of subscribing to the Tanbook is to obtain that "publication", called "New York Landlord-Tenant Law." The Tanbook purports to contain "New York Landlord-Tenant Law", and were a purchaser to look there for New York law governing estates and trusts this disclaimer might well apply. Appellants' complaint is not that the Tanbook doesn't deal with New York Landlord-Tenant Law, instead it does not contain what it promised: "the laws and regulations covering rent stabilization and rent control in New York". The Appellants' affidavits explicitly assert that they subscribed to the Tanbook each year precisely to have, in one convenient volume, those laws and regulations, not "selected" or "excerpted" sections or "various provisions" of them. ("It has…been my longstanding understanding, and reasonable belief, that the Tanbook purports to produce the Rent Regulation laws each year in *their entirety.* This understanding and belief is based on the fact that (it) represents …that includes only "selected" provisions of *other* state and federal statutes, while no such selectivity has ever been similarly applied to the Rent Regulation Laws." Himmelstein affidavit, R 225, para. 10) (emphasis original)(See also, R 231, paras. 6-9; R 238, para. 9)

As for the second purported disclaimer sentence, there is simply no disavowal of the completeness and accuracy of the rent regulation materials found in the Tanbook and instead the disclaimer purports to apply to the entire book. Where disclaimer language arguably is of general applicability but also enumerates particular aspects of the contractual promises as not warranted, the particularization controls over the more expansive. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 405 (1968).

Bender's New York cases cited to support its argument of total disclaimer actually demonstrate the limited role of disclaimers that go to the very purchase contemplated by the contract. Both *Von Ancken v. 7 E. 14 LLC,* 166 AD3d 551 (1st Dept. 2018) and *Simone v. Homecheck Real Estate Servs., Inc.*, 42 AD3d 518 (2nd Dept. 2007)(cited at RAB 24), involve "as is" sales of real estate, with disclaimers of any implied or express warranties, and deal with the frustration of the essential purpose of the contract by providing for a right of pre-closing inspection of the premises. The equivalent here would be a sale of the Tanbook, on a preapproval basis, with a right to return for a full refund if some would-be buyer took the trouble to review the entire 500 page corpus of New York rent stabilization and rent control statutes and regulations to see if anything substantial was missing or inaccurate. Of course, to expect a buyer of a $134 per year book to make such a

review, when the precise purpose of the purchase is to relieve the purchaser of that exhaustive task, is ludicrous.

Nor does Bender ever explain why, if the disclaimer is such a critical element of its contract, it hides it on the reverse side of its "Agreement and Order Form". (R 186, 189, 192, 195, 198) where it is only likely to be seen, if at all, by someone in the accounts receivable department of any of the numerous law firms, courts, libraries or other institutional users of the book.[3] If Bender wanted the disclaimer to be viewed by any actual *user* of the book it could have, and should have, prominently placed it inside the front cover of the book. Bender obviously chose not to place the disclaimer where it could be seen by actual users of the book because it would completely eviscerate the reliance on its completeness and accuracy that each of the Appellants (and no doubt countless others) have about the Tanbook.

Significantly, Bender makes another disclaimer about the Tanbook, one that it has, for good reason, chosen not to mention in this case. On page 2 of the book, directly opposite the title page, the 2016 Tanbook Bender states,

> This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert

[3] Bender's Order Forms for the Tanbooks it sold to the Himmelstein firm are addressed to Marisol Dones, the firm's non-lawyer Office Manager. (R 184, 187, 190)

> assistance is required, the services of a competent professional should be sought." (R 175) [4]

This disclaimer is problematic for Bender, for several reasons. First, it demonstrates that when Bender wants actual users of the Tanbook to be aware of a particular disclaimer it knows how to place it where it will be seen by such users. Next, the statement that the Tanbook is "designed to provide authoritative information in regard to the subject matter covered" flatly contradicts its hidden disclaimer that the book may not actually be accurate, complete or current. Finally, the last sentence of the disclaimer confirms that Bender knows full well that the book will be purchased and used by non-professional individuals who are buying and using it for their own "personal, family or household purposes." (See Point V, *infra*)

Just last week this Court confirmed that hiding a disclaimer on the back of a solicitation is itself sufficient reason to deny its effectiveness. *New York v. Orbital Publ. Group*, 2019 N.Y.App.Div. LEXIS 1253 (1st Dept. 2/21/2019). Like in O*rbital Publ.,* the disclaimer here "consists of two dense paragraphs of block text," and "is not referenced on the front" of the invoice." Further, the disclaimer does

[4] Bender will no doubt complain that Appellants did not reference this disclaimer in the FAC. Like its many such assertions in the RAB, such a claim would be erroneous as its claim of "authoritative" content is actually referenced in the FAC at least 3 times. [R 48 (paras. 2 and 6); 77 (para. 108)]

not appear in the Tanbook itself at all, whereas in *Orbital Pub'l*, at least it appeared in the same document that included the text which was supposedly disclaimed."

Even more significantly, the disclaimer in *Orbital Pub'l* this Court found to be ineffective, was contained in the defendant's product "solicitation" and thus some minimal effort was made to provide it to purchasers ***before*** they chose to purchase the product. Bender is not as forthcoming with its disclaimer, only providing it in its "Agreement and Order Forms" that are provided ***after*** a sale occurs. ("As per our Standard Practices, Agreement and Order Forms are typically sent to purchasers ***following*** the placement of orders…" Baldwin Affid., R167, para. 12)

For all of the foregoing reasons, Bender's effort to disclaim any warranties of completeness or accuracy of the Tanbook must be rejected.

D. Appellants adequately pled reliance

The Respondent continues to claim, incorrectly, that the Appellants have not adequately pled reliance on Bender's descriptions of the Tanbook. RAB at 27. In reality, the FAC expressly states "(T)he plaintiffs…. 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. (R 49) (emphasis added)

Appellants exhaustively argue (APB at 30-36) that the reliance which New York law requires a breach of warranty plaintiff to prove is adequately pled in their complaint. APB at 34 also details the specific reliance asserted by the Appellants on Bender's representations. Because Bender warranted that the Tanbook contained "the laws and regulations covering rent stabilization and rent control in New York," and because that is stated by the class representatives to have been an essential basis of the bargain they entered into, "explicit pleading of reliance " is not required. *See*, *Manier v. L'Oreal U.S.A., Inc.,* 2017 U.S.Dist. LEXIS 116139 (SDNY) analyzed in APB at 33. Each of Bender's cases (RAB 27) deceptively cited for the proposition that reliance must be explicitly alleged in a breach of warranty complaint, *Aracena v. BMW 159* A.D. 3d 664 (2nd Dept. 2018), *Meyer v. Alex Lyon,* 67 A.D. 3d 547 (1st Dept., 2009) instead support Appellants because they dismiss a complaint *only after full discovery yielding no evidence that the plaintiff relied on the warranty in question*. Respondent's other case, *J.C. Construction v. Nassau-Suffolk Lumber,* 15 A.D. 623 (2nd Dept. 2005) involves a dismissal after trial. The plaintiff class welcomes Bender to depose its named representatives who will establish that it is precisely the warranty of completeness that induced them to buy the Tanbook in the first place and continues to induce them to buy the annual republications so that they are confident they have, in one volume, all of New York's rent stabilization and rent control enactments.

Bender's principal cavil is that Appellants do not allege that the Appellants saw the Bender website or the "Overview" page which contains the warranty in question. (RAB 27) As Appellants demonstrate (APB at 34 – 36) of their principal brief, seeing a warranty before purchase is fanciful in today's eBay and Amazon – driven market environment. It is enough that the warranty is provided on the product itself. And, sales of the Tanbook are not one-off sales. Each named class representative bought the Tanbook year after year, in each case relying on the warranty that the New York rent regulation laws and regulations were contained therein. In fact, as Attorney Chachere learned, to his horror, in the *Martorell* litigation, his reliance on completeness, accuracy and currentness – and that of his adversary and the Judge -- had caused a misapplication of the law. Mr. Chachare then immediately advised Bender of the omissions and defects in its product. (R239-246; 134-36)

E. The Complaint Meets the Notice Requirements of UCC 2-607(3)

Bender's argument (RAB at 31-33) that dismissal was proper under UCC 2-607(3) betrays a fundamental misreading of the controlling case law. As the Second Department held in *Panda Capital Corp. v. Kapo Int'l*, 242 A.D.2d 690,692 (2nd Dept. 1997), a complaint constitutes notice under the UCC. Whether the notice was given "within a reasonable time" is the fact question that

legitimately remains. Therefore, by definition, dismissal prior to discovery on the timeliness point is error.

The notice from Mr. Chachere, an employee of class member Northern Manhattan Improvement Corporation, was timely. After years of relying on the Tanbook's containing New York rent regulations and laws he learned it was incomplete and inaccurate after a Supreme Court Justice ruled against his client on how to apply a rent reduction order issued by DHCR where the tenant had a Disability Rent Increase Exemption ("DRIE") provided by RSL§26-509. Relying on the version of the cited section contained in the 2016 Tanbook, Attorney Chachere, the counsel for DHCR and the Court all assumed, erroneously, that the Tanbook contained complete and accurate text of §26-509. Shortly thereafter, Attorney Chachere learned that the section had been amended in 2005 and language added which modified the law in favor of the tenant. The incomplete and inaccurate §26-509 had been republished by Bender, year after year, for 12 years, and it never noticed. (R240-43)

On December 5, 2016 Attorney Chachere promptly notified Bender's Legal Content Editor Jacqueline Morris of its incorrect publication of the regulation, as well as of numerous other provisions of the RSL and RCL he discovered were missing or inaccurately published in the 2016 Tanbook. (R134-5) Ms. Morris

responded, "sincerely apologizing" for its long-standing omissions and promising to "replace all the current contents of the Tanbook" by "early 2017." (R136)

By February 22, 2017, just 2 months after this exchange of correspondence, Bender had published nothing; no correction, no supplementation, not even an announcement to its previous Tanbook purchasers (all surely known to Bender's sales operations) that the Tanbook was incomplete and inaccurate. Appellants commenced this action on that date, explicitly based on Bender's "deficient performance." Such speed in initiating litigation definitionally meets the notice criteria of *Panda*.

POINT III

BENDER'S REFUSALTO PROMPTLY CURE ITS FAILURE TO DELIVER THE COMPLETE AND ACCURATE SET OF RENT CONTROL AND RENT STABILIZATION STATUTES AND REGULATIONS WAS WELL PLED AND CONSTITUTES A BREACH OF CONTRACT AND FRAUD

Bender alleges, incorrectly (RAB at 33–35) that Appellants' never pled that Bender's continued sale of a defective 2016 Tanbook for some six months, and failing to deliver the corrected 2017 Tanbook until May 2017, constituted actionable breach of contract and fraud, requiring, at the least, a refund of five–twelfths of the $134 per sale price charged and collected for the 2017 edition.

Before making this allegation it might have behooved Bender to actually read the FAC. Had it done so, Bender would have realized that "among the

questions of law and fact common to the Class are …whether the defendant has been unjustly enriched by charging its full price for the 2017 Tanbook because it was not published and issued until almost one-half of the year had elapsed." (FAC para. 43(e) and paras. 96-98; R56, 74-75) specifying this element of liability and damages.

Bender's failure to promptly correct the 2016 Tanbook yields damages under the breach of warranty and breach of contract causes of action. Bender's purported sale of a book that set forth the complete set of promised laws and regulations for the year 2017, which was the key inducement to class members to buy the Tanbook annually, breaches the representation that the Tanbook would be complete at least as each year began. To deliver the 2017 edition without any indication that it had markedly changed from the admittedly incomplete and inaccurate 2016 edition, without letting its subscribers know in December 2016 that the 2016 edition was defective and could not be relied on, was deceitful. Bender's continued sale of a Tanbook where it had actual knowledge of its incompleteness, inaccuracy and omissions defines a breach of good faith and fair dealing. (APB Point V). Charging the same $134 per book in May 2017 that Bender had in prior years charged in January was an implied ratification of the representation that the 2016 Tanbook could be used reliably for the first five

months of 2017, and thus each purchaser was getting the full year of service it assumed was being provided.

Bender bizarrely claims that it could have, but was not required under the contract, issued "a pocket part supplement for the 2016 Tanbook" (RAB at 34) as each purchaser of the 2016 edition would be entitled to it as part of their subscription. But Bender never issued such a pocket part, or did anything but maintain complete radio silence of its known Tanbook problems. It is not as if Bender's "Legal Content Editor" was not on actual notice, by the latest on December 5, 2016, that no one could rely on the 2016 Tanbook to provide the complete text of the rent laws and regulations it purported to contain. Bender is owned by Lexis, and Lexis manages to update its case and statute online legal research service every day. As Mr. Chachere said in his December 5, 2016 letter (R 134) Lexis' online legal research service already included the very 2005, 2009, 2014 and 2015 amendments that were omitted from the 2016 Tanbook; Mr. Chachere had done Bender's editorial research for it, and for free!

It apparently never occurred Bender that, at the very least, it could email its known Tanbook subscribers in December 2016 and advise them that the 2016 Tanbook had accuracy and completeness deficiencies and provide the accurate text. For a legal publisher to actually know that text it had disseminated to its purchasers, including to members of the bench and bar, was just wrong, and to do

nothing to cure the error, is not merely deceitful, it is unethical. And while perhaps only Mr. Chachere could prove consequential damages from the Tanbook's incompleteness, were he to bring an individual action, every purchaser of the Tanbook who assumed, until May 2017, that the 2016 edition had been accurate and complete when it was purchased, lost five months of the knowledge that was the primary purpose of buying Tanbook on an annual basis in the first place.

Bender's response defines corporate indifference, not unlike the many large corporations who long hid massive data breaches that put their customers at risk of identity theft. ["The contract language (drafted by Bender) ….does nothing to *compel* Matthew Bender to `promptly notify' purchasers of anything."] (RAB at 34)(emphasis added) Bender's inability to recognize, let alone follow, the concept of good faith and fair dealing is jaw-dropping.

POINT IV

APPELLANTS PROPERLY PLED A FRAUD CLAIM BASED ON BENDER'S KNOWING SALE OF AN INCOMPLETE AND INNACCURATE PRODUCT WHOSE DEFECTS IT HID FROM ITS CUSTOMERS

The FAC added, *inter alia*, a fraud claim not asserted in the original complaint, based upon Ms. Morris' admission, in her December 13, 2016 email, that Bender knew of the problems with completeness and inaccuracy of the Tanbook and that such problems had occurred "long ago." (R 136) The email added that as a result of the 2016 edition's problems Bender "plan(ed) to replace

all of the content of the Tanbook for the 2017 edition which will ship in early 2017." Bender (*id.*)

The FAC states that "(T)he plaintiffs… 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. (R 49) (emphasis added)

The FAC further alleges, "(T)he plaintiffs…. also allege that the defendant committed fraud by making uniform statements to the general public on its website in which it materially misrepresented that the Tanbook contained a complete and accurate compilation of the New York City rent regulation laws, that the defendant knew such representations to be false when made, that it made such representations with the intent of inducing members of the class to purchase the book and, as a result, they suffered damage in the amount of the purchase price they paid for the book. (R 50)

The FAC's fraud claim is contained in its Fourth Cause of Action (R80-81). In addition to a recitation of the specific factual allegations of fraud, the Appellants attached, as Exhibit B to the FAC, Mr. Chachare's letter to Bender advising it of the numerous instances he had discovered where the Tanbook inaccurately and/or

incompletely published significant sections of the New York rent laws and regulations. Mr. Chachare advised Bender that as a result of the numerous errors and omissions "we can no longer rely on (the Tanbook)." (R 134) In addition , the Appellants also attached, as Exhibit C, Ms. Morris' December 13, 2016 response. (R 135)

Obviously, the Appellants did not include, and could not have included, anything more specific about the extent, duration or cause of Bender's acknowledged failure to properly update the Tanbook as that information is held solely by Bender and its employees. It is rare for any plaintiff to have such information before filing suit except in those rare cases where a "whistleblower" comes forward and publicizes what a corporation actively seeks to hide. That is precisely why discovery is needed to fully explore and obtain information about the nature, extent and duration of Bender's fraud.

In the face of ample factual allegations of fraud, the Motion Court dismissed the claim solely on its erroneous finding that,

> (P)laintiffs fail to allege facts to support their allegation that Matthew Bender knew that the book contained inaccuracies *before 2016* and that Matthew Bender made the representation that the Tanbook was complete and accurate in order to induce customers to buy the Tanbook. In support of their claim, Plaintiffs only cite the Morris Email to show that Matthew Bender was already

> aware of the inaccuracies when Morris received the Chachere letter. But the Morris Email stated… that Matthew Bender had *just* learned of the inaccuracies, recognized its mistakes in the Tanbook and intended to correct them·(Complaint, Ex. C). If anything, this suggests that Matthew Bender took corrective action soon after learning of the inaccuracies. The Morris Email does not support Plaintiffs' claims. Plaintiffs therefore failed to meet their burden. (R 21) (emphasis added)

The Motion Court's description of the actual facts is plainly erroneous and it incorrectly applied the pleading requirements of CPLR 3016(b). Appellants did not have to allege that Bender knew of the Tanbook's inaccuracies *before* 2016. Instead they alleged (and indeed established) that Bender knew, *in December 2016*, well *after* the 2016 edition had been published 12 months earlier, that the book was incomplete, inaccurate and out of date. Ms. Morris confirmed this fact and the Appellants fully met the pleading standard of CPLR 3016(b).

Next, the Motion Court made the unwarranted assumption that Ms. Morris's claim of "only recently" learning of the Tanbook's defects meant it had "just" learned of them, as if had happened "just" the day before. Nothing in the record supports that leap and Bender certainly did not provide an affidavit from Ms. Morris that would have clarified the point. Bender has desperately used every weapon at its disposal to prevent the nature, extent and duration of its Tanbook "issue" from ever seeing the light of day.

The Court of Appeals forcefully instructed in Pludeman v. Northern Leasing Sys., Inc. 10 N.Y.3d 486, 491, 890 N.E.2d 184, 860 N.Y.S.2d 422, (2008),

> *The purpose of (CPLR)section 3016 (b)'s pleading requirement is to inform a defendant with respect to the incidents complained of. We have cautioned that section 3016 (b) should not be so strictly interpreted 'as to prevent an otherwise valid cause of action in situations where it may be' impossible to state in detail the circumstances constituting a fraud*'" (citations omitted) Thus, where concrete facts "*are peculiarly within the knowledge of the party" charged with the fraud* ((*id.)* it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings (*id.)* ["Misrepresenters have not been known to keep elaborate diaries of their fraud for the use of the defrauded in court"]).
>
> ….Although under section 3016 (b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct. (citations omitted). . . .
>
> Although plaintiffs have not alleged specific details of each individual defendant's conduct, *we have never required talismanic, unbending allegations… sometimes such facts are unavailable prior to discovery. Lest we willfully ignore the obvious--or the strong suspicion of a fraud--we have always acknowledged that, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud* (citations omitted). (emphasis added)

See also, "The statutory requirement that `the circumstances constituting the wrong shall be stated in detail' (CPLR 3016 [b]) `should not be confused with unassailable proof of fraud'; `section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct.'" *Nicosia v Board of Mgrs. of the Weber House Condominium*, 77 A.D.3d 455 (1st Dept., 2010) (Acosta, J. dissenting)

The FAC amply pleads fraud and the Motion Court's dismissal of the claim must be reversed and the claim reinstated.

POINT V

THE APPELLANTS PROPERLY STATED A GBL § 349 CLAIM

As fully stated in the APB, at 48, this Court has repeatedly held that GBL § 349 is not exclusively limited to claims by individuals who purchase goods or services solely for "personal family or household purposes" but instead can also apply to businesses or non-profits. In the seminal case, *Cruz v. NYNEX Resources,* 263 A.D.2d 285, 290 (1st Dept., 2000) this Court, recognizing that the successful GBL §349 plaintiff in *Oswego* a labor union, stated,

> The potentially affect[s] similarly situated consumers" phraseology seems particularly effective in assessing the claims of businesses or other atypical plaintiffs in that it allows them the leeway to state their claims but nevertheless maintains the statutory focus on consumers at large…. in *Oswego*… the Court found that defendant's

> conduct fell within the statutory ambit where the union pension funds were treated "as any customer entering the bank to open a savings account." (citation omitted)

The Motion Court simply got it wrong by concluding, without any evidence, that "(T)he sale and marketing of the Tanbooks…were not directed at consumers at large using the book for "personal, family or household use." (citation omitted) (R 39) The Motion Court came to this erroneous conclusion although it acknowledged Appellant McKee's allegation that he repeatedly purchased the Tanbook for his own edification as a rent stabilized tenant and that other individuals did so as well. (R38, R53, para. 32; R231, para. 5) Next, the Motion Court ignored this Court's express refusal in *Cruz* to limit GBL §349 claims to those involving personal family or household use but instead permitting such claims where the alleged deceptive claim was directed to non-individuals no differently than to individuals.[5] And, the Motion Court reached its conclusion without permitting discovery which would likely show that numerous individuals other than Mr. McKee also bought the Tanbook for the same reason he did. That

[5] This dichotomy was seen just last week in two GBL § 349 decisions issued by this Court. In *People v. Northern Leasing Sys. Inc.,* 2019 N.Y. App. Div. LEXIS 1168 (1st Dept., February 19, 2019) this Court upheld the dismissal of the claim where the underlying transaction involved the leasing of credit card processing equipment to merchants; a product that is not usable by individuals for personal family or household purposes. Two days later, in *Orbital Publ. Group, supra,* this Court upheld the claim involving the deceptive marketing of magazine subscriptions, a service and product that can be, and often is, used not only by individuals but also by many professionals and institutions.

information however is hidden in the Bender's records as it knows exactly who purchased the book.

Finally, Bender concedes that the Tanbook is marketed to, and purchased and used by, not just lawyers but also non-professionals because it makes sure to warn such persons to obtain "the services of a competent professional" rather than rely on the book without it. (R 175)

At this stage of the litigation it is both premature, and legally incorrect, to conclude that Appellants cannot establish, after discovery and at trial, that the sale of the Tanbook is "consumer-oriented." Whether or not the Tanbook is exclusively sold to and used by "professionals" or whether it is also a "consumer-oriented" product used for "personal, family or household purposes is a question that should be determined at trial or, at the very least, after discovery is completed.

Throughout this litigation Bender has distorted and misrepresented the Appellant's claims, particularly their GBL § 349 claim. First, Bender asserts that the Appellants "do not even try to ***establish*** that they can satisfy the second or third elements of a GBL § 349 claim."(Respondent's brief at 39)(emphasis added) Bender is obviously confused as this is an appeal from a pre-answer dismissal motion, not summary judgment, and, at this stage of the case Appellants are not required to "establish" their claims, just plead them.

Next, Bender repeats the canard that the Appellants "never purport to have seen" its deceptive representations. Actually they did, and said so below. ("…the Tanbook…represents, and has long represented, that it includes only 'selected' provisions of *other* state and federal statutes, while no such selectivity representation has ever been similarly applied (in the Tanbook) to the Rent Regulation Laws;" "My belief is…the book is issued on an annual basis with the accompanying representation that each year's book consists of all of the previous year's content plus any changes that occurred…") (Himmelstein affid., R 225, paras. 10-11, emphasis added; McKee affid., R. 231-2, para. 8 (same)

Moreover, it is well established that "deception" focuses not on what the plaintiff may have actually seen but rather whether a "reasonable consumer, acting reasonably" would be deceived by the defendant's conduct. (*Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.,* 85 NY2d 20, at 26 [1995]) (*Karlin v IVF Am., Inc.,* 93 NY2d 282 [1999]); (*Gaidon v Guardian Life Ins. Co. of Am.,* 94 NY2d 330 [1999]) (*Goshen v Mut. Life Ins. Co.,* 98 NY2d 314, 324 [2002] and, as Bender acknowledges (RAB 46) "proof (not an allegation) of justifiable reliance" on a business' deceptive practices is ultimately required. *Oswego* at 26.

Bender also misstates the law on the effect of a purported disclaimer on a deceptive practices claim by asserting that "the existence of the clear and conspicuous disclaimer (in the Agreement and Order Form)…forecloses any claim

that a ‘reasonable consumer’ in Appellants’ shoes would be deceived.” (RAB at 47) Respondent is wrong, for at least two reasons. First, as shown in Point IIIC *supra*, the disclaimer, hidden on the reverse of the sales form, and not mentioned at all in the Tanbook itself, is not aimed at, or directed to, users of the Tanbook but rather to those who write the check to pay for it. Under Bender’s absurd theory, a “reasonable consumer” would have to read all the fine print in a sales agreement, rather than what is affirmatively represented in the product itself, in order to avoid being deceived.

More importantly, in *Koch v Acker, Merrall & Condit Co.,* 18 NY3d 940, 941 [2012]) the Court of Appeals reversed this Court on this issue. [“plaintiff sufficiently pleaded (GBL § 349) causes of action, and the disclaimers set forth in defendant's catalogs "do not … bar (plaintiff's) claims for deceptive trade practices at this stage of the proceedings, as they do not establish a defense as a matter of law"] (citations omitted)[6] For the same reasons stated in Point IIIC, *supra*, the purported disclaimer relied on by Bender is both ineffective and unenforceable to defeat Appellants’ GBL § 349 claim.

Finally, Bender misstates its “deception as injury” claim (RAB at 42-43) which was not even considered by the Motion Court, relying on *Small v. Lorillard*

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[6] Not only did Bender disingenuously fail to cite this dispositive Court of Appeals decision, all the cases it does cite on this point pre-date *Koch*. (RAB at 47-48)

Co., 94 N.Y.2d 43 (1999). The facts of *Small*, and other similar cases, renders it entirely distinguishable from this case and Appellants have amply pled the requisite injury required under GBL § 349. *Small* involved the plaintiffs' claims that the defendants lied about the addictive nature of nicotine and suppressed information that would have alerted them to it before deciding to buy cigarettes. It was the absence of information that plaintiffs claimed caused them injury. The *Small* plaintiffs did not allege, however, that the defendant called the product "cigarettes" and then sold them something other than cigarettes. Yet that is precisely what occurred here. Bender called the Tanbook "New York Landlord-Tenant Law". It's described as "designed to provide authoritative information" (R 175). Bender further described it as containing, "selected sections" of, "excerpts from" and "various provisions of" various laws and regulations as well as "*the* laws and regulations covering rent stabilization and rent control in New York City…" (R 174, 177-182) In reality, the Tanbook has been undeniably shown to be something quite different than what Bender described, as at least three dozen significant and sizeable sections of the rent laws and regulations, enacted years ago, are either flatly inaccurate, or omitted in their entirety. (APB at 10-12) Appellants are not claiming Bender left out a handful of commas or semi-colons. Where a consumer purchases a product that is not in fact the product it is deceptively purported to be, that is not "deception as injury" it is "bait and switch"

which is a classic deceptive practice. (*Teller v Bill Hayes, Ltd.,* 213 AD2d 141 [2d Dept 1995]).

The Appellants properly pled a GBL §349 claim and their complaint must be reinstated.

CONCLUSION

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.

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Respectfully submitted,

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