To be Argued by:
ANTHONY J. DREYER
(Time Requested: 15 Minutes)

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.

Appellate Case No.: 2018-1250

BRIEF FOR DEFENDANT-RESPONDENT

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Defendant-Respondent Matthew Bender & Co., Inc. ("Matthew Bender") respectfully submits this brief in response to the appeal of the dismissal with prejudice of the Amended Verified Class Action Complaint ("Amended Complaint") filed by Plaintiffs-Appellants Himmelstein, McConnell, Gribben, Donaghue & Joseph, LLP ("Himmelstein"), Housing Court Answers, Inc. ("HCA"), and Michael McKee ("McKee") (collectively, "Appellants").[1]

PRELIMINARY STATEMENT

Despite filing two complaints and three sworn affidavits—and having introduced unpled theories and claims in briefing in the court below, and additional unpled (and thus waived) theories on appeal—Appellants have failed to allege any cognizable injury or actionable misrepresentation to support their claim that the asserted omissions in Matthew Bender's 2016 "Tanbook" publication violated New York law. Instead, Appellants continue to rest their claims on the unsupportable premises that (i) Matthew Bender guaranteed and warranted that specific sections of the 1500-plus page Tanbook would be exhaustive and 100% free from any omissions, and (ii) such omissions automatically are actionable and eliminate the need for Appellants to plead each and every element of their asserted causes of action.

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[1] The Amended Complaint is located in the Record at R47-136. "Br." refers to Appellants' appeal brief. The Supplemental Record is referred to as "SR."

In dismissing the Amended Complaint with prejudice, the Commercial Division correctly identified many, albeit not all, of the fatal deficiencies in Appellants' pleading. Among the many, independent reasons why dismissal should be affirmed here:

Express Warranty: As an initial and dispositive matter, the court below properly held that the sale of the book at issue involves a "good" and not a "service," and because Appellants undisputedly failed to provide Matthew Bender with the presuit notice required by UCC § 2-607, they are barred from asserting a claim for breach of express warranty (or any other breach of contract).

The court below also correctly concluded that, even if notice had been provided, there can be no "express warranties" regarding the accuracy or completeness of the Tanbook because (1) the written terms and conditions that undisputedly govern Appellants' Tanbook purchases contain a clear and conspicuous disclaimer that Matthew Bender does "NOT WARRANT THE ACCURACY, RELIABILITY OR CURRENTNESS" of the publication, and (2) Appellants cannot plead the required element of "reliance" to make out a claim for breach because they have never alleged that they even saw (much less relied upon) the purported "express warranty" statements when purchasing Tanbooks. Contrary to Appellants' arguments on appeal, the law is clear that the foregoing facts are dispositive.

Finally, Appellants' entirely new claim on appeal that Matthew Bender breached the parties' written terms and conditions by "fail[ing] to promptly notify" purchasers of alleged errors in the 2016 Tanbook is waived, and at all events not remotely supported by the actual terms of the contract; nothing therein creates any obligation to "notify" or requires publication of a new edition of a Tanbook at any particular time of the year.

Implied Covenant of Good Faith and Fair Dealing: Appellants' implied covenant claim, which is found nowhere in either complaint, should be rejected on the ground that it is unpled. But even if the Court were to consider the claim, it fails for two separate, independent reasons. First, as the court below correctly held, the asserted implied obligation to produce an error-free publication cannot exist because it is contrary to the aforementioned express terms of the parties' agreement, which unambiguously disclaim any obligation regarding the accuracy, currentness, or reliability of the Tanbook. Second, the implied covenant claim is entirely and impermissibly duplicative of Appellants' warranty claim.

GBL 349: Appellants cannot satisfy *any* of the required elements to state a GBL 349 claim. First, as the court below properly found, the sale of the Tanbook is not "consumer oriented"—i.e., concerning goods for personal, family, or household use; rather, it is directed only at parties that specialize in New York landlord-tenant law (of which all three Appellants are prime examples). Second, it

is undisputed that Appellants' only alleged "injury" is that they would not have purchased the Tanbook but for "deceptive acts;" however, the Court of Appeals has made clear that this "deception as injury" theory is not legally cognizable under GBL 349. Third, Appellants fail to plead the requisite element that the purportedly misleading statements by Matthew Bender *caused* them any injury; indeed, Appellants cannot conceivably plead causation because they never allege that they even saw the purportedly deceptive statements at issue.

Fraud: Appellants' fraud claim has morphed dramatically on appeal. Recognizing that they did not plead a viable fraud claim below, Appellants now suggest, for the first time, that Matthew Bender's "failure to promptly notify" consumers of Tanbook concerns as of December 2016 constitutes an "ongoing fraudulent misrepresentation." This new theory is both waived and fails on its merits for numerous reasons, including that Appellants have not pled, and cannot legitimately plead, the requisite reliance and injury to support any fraud claim when none of their purchases of the Tanbook occurred after the commencement of the alleged "failure to notify." The new fraud claim also fails because, like the fraud claim below, it is entirely duplicative of Appellants' contract theory.

Finally, the dismissal of the complaint *with prejudice* was entirely proper. Appellants, who are represented by able counsel, had two opportunities to file complaints and state a claim arising out of the sale and marketing of the 2016

Tanbook. Indeed, the second complaint was filed *after* Matthew Bender served a motion to dismiss that pointed out the myriad pleading deficiencies in the first complaint. Moreover, in opposing the motion to dismiss the second complaint—which included three client affidavits—Appellants had yet another opportunity to identify any plausible cause of action and the facts to support the elements of that cause of action; as the court below recognized, Appellants utterly failed to do so. Even now on appeal, Appellants have not done so. Under these circumstances, neither the court nor Matthew Bender should be forced to expend further time and resources on a third complaint.

STATEMENT OF THE CASE[2]

A. Matthew Bender's Production and Sale of the Tanbook

Since 1990, Matthew Bender has sold a book entitled "New York Landlord-Tenant Law," commonly referred to as the "Tanbook." (R165 ¶ 4.) The Tanbook is a compilation of statutes, regulations, and other materials accompanied by

[2] Much of the following information is drawn either from the Amended Complaint or the Affidavit of Tracy Baldwin (R164-98) that accompanied the Motion to Dismiss. Although Appellants assert, for the first time on appeal, that Ms. Baldwin lacks knowledge regarding the "editing or updating of the Tanbook" (Br. at 4), Appellants have never contended that any of the factual information in her affidavit is inaccurate, or that the attached exhibits—including Appellants' binding contracts with Matthew Bender—are not what they claim to be. Regardless, Ms. Baldwin's knowledge of the process of editing the Tanbook is irrelevant to dismissal; as Judge Ramos reminded Appellants' counsel at oral argument, at this stage, Matthew Bender is "not taking the position that there weren't errors in the '16 book." (R418.)

editorial content such as summaries and commentaries. (*Id.*) New editions are published on an annual basis. (*Id.* ¶ 5; R48 ¶¶ 2-3.)

The 2016 edition is over 1500 pages long and divided into seven "Parts." (R166 ¶ 7.) The introductory "Overview" on page xi of the book (after the Table of Contents) briefly describes each of the Parts, including Part III, which "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." (R182.) A newer edition of the Tanbook was issued in May 2017. (R59 ¶ 54; R166 ¶ 8.) The 2017 edition is divided into the same seven "Parts" as the 2016 edition, and contains certain updates of statutes, regulations, and other content. (R166 ¶ 8.)

B. Appellants and Their Annual Purchases of the Tanbook

Notwithstanding their attempts to rely on the members of an uncertified class and "rent regulated tenants generally" (e.g., Br. at 19), there are only three Appellants in this case, each of whom alleges to have purchased Tanbooks in connection with specialized professional or advocacy operations concerning New York landlord-tenant law. Himmelstein is a law firm that handles "disputes over evictions, rent increases, [and] rental-owner conversions," and which has purchased Tanbooks "for use by its attorneys and non-attorney staff." (R51 ¶¶ 19-20.) HCA is a nonprofit group that seeks "'to promote and protect the true administration of justice in the housing courts of New York City,'" and whose staff "use the Tanbook in connection with its work on behalf of pro se Housing Court

litigants." (R52 ¶¶ 25, 28.) McKee is a "New York tenant advocate and tenant organizer" who uses the Tanbook in connection with his work at "various tenant advocacy organizations" (R53 ¶¶ 30, 32) as well as his live "weekly cable television program," on which he and a "tenant lawyer" answer callers' questions about their legal rights. (R232 ¶ 10.)

Appellants recognize that customers may purchase hard copies of the Tanbook in many different ways, including via automatic shipments, Matthew Bender's online store (the "Website"), and amazon.com ("Amazon"). (R76 ¶ 102.) The Amended Complaint, however, contains no allegation that Appellants ever visited the Website or Amazon, and in fact none of Appellants' Tanbook purchases during the alleged "class period" were made online. (R166 ¶ 10; R168 ¶ 20; R170 ¶ 27.)

Rather, all three Appellants had a "Non-Service Subscription with Automatic Update Shipments," pursuant to which Tanbooks were automatically shipped each year along with printed invoices; upon receipt, Appellants could either (1) retain the books and pay the invoices or (2) return the shipment within 30 days without paying. (R48 ¶ 3; R166 ¶¶ 13-14; R168-69 ¶ 21; R170 ¶ 29.) In every instance in which Appellants received shipments of the Tanbooks through the 2016 edition, whether through automatic shipments or discrete "one off" purchases for additional copies that they made by contacting Matthew Bender,

Appellants expressly and separately opted to pay for the books. (R167 ¶ 16; R169 ¶ 22; R170 ¶ 30.) Matthew Bender does not store payment information, so automatic payments are not possible. (R167-68 ¶ 16.)

Himmelstein and McKee were automatically shipped copies of the 2017 edition of the Tanbook in May 2017—several months after the filing of the current lawsuit—and both Appellants opted to pay full price for the publication at that time. (R228 ¶¶ 24-26; R235 ¶¶ 23-24.) At least as of the briefing of the motion to dismiss, HCA was no longer receiving automatic Tanbook shipments, and had not requested, received, or paid for the 2017 edition. (R169 ¶ 26.)

C. Terms and Conditions Governing Tanbook Sales to Appellants

Appellants' Tanbook purchases are governed by "Material Terms" and "Additional Terms and Conditions" (collectively, the "**T&C**") set forth in "Agreement and Order Forms" generated at the time that Tanbooks are ordered. (R166-67 ¶ 11.) As part of Matthew Bender's standard operating procedures, these forms are sent to purchasers following the placement of orders. (R167 ¶ 12.) For example, forms including the T&C were created (i) for McKee, in December 2006 (R196-98); (ii) for Himmelstein, in January 2012, November 2014, and October 2016 (R184-92); and (iii) for HCA, in August 2016 (R193-95). *Appellants have never disputed that the T&C constitute binding and valid contracts governing their*

Tanbook purchases;[3] in fact, Appellants rely on the T&C on appeal (e.g., Br. at 23-24, 46), including in connection with a newly raised (but deficient) claim on appeal for breach of contract (discussed *infra* at Section III).

The T&C provide that (1) the purchaser's "access" to the subscription "indicates your acceptance of the terms and conditions," and (2) it constitutes the "entire agreement" with the purchaser that "supersedes all prior understandings and agreements, oral, written or otherwise." (*E.g.*, R185-86; R188-89; R191-92; R194-95.) The T&C further set forth, in all capital letters, that:

> *WE DISCLAIM ALL WARRANTIES WITH RESPECT TO PUBLICATIONS, EXPRESS OR IMPLIED*, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND THOSE ARISING FROM A COURSE OF DEALING. *WE DO NOT WARRANT THE ACCURACY, RELIABILITY OR CURRENTNESS OF THE MATERIALS CONTAINED IN THE PUBLICATIONS*. . . .

(*Id.* (emphasis added).)

D. Procedural History

1. *The Filing of the Current Lawsuit by Himmelstein Without Prior Notice to Matthew Bender, and Subsequent Amendment to Add New Causes of Action and New Plaintiffs*

Himmelstein filed the initial Complaint in this action on February 22, 2017. (R139-63.) On June 6, 2017, in response to Matthew Bender's motion to dismiss, Appellants filed the Amended Complaint, adding HCA and McKee as plaintiffs

[3] Appellants have only contended (incorrectly, as discussed *infra* at Section II.B.1) that the specific disclaimer of warranty provision is "unenforceable." (SR58.)

and purported class representatives. (R47-136.) None of the Appellants notified Matthew Bender that it had any concerns about the Tanbook—or any purported breach of a "warranty"—prior to bringing suit. (R168 ¶ 18; R169 ¶ 25; R170 ¶ 31.)

The Amended Complaint largely reiterated the allegations in the initial pleading, reasserting claims for breach of contract, violation of GBL 349, and unjust enrichment, all premised on a theory that Matthew Bender absolutely guaranteed that Part III of the Tanbook would be complete and without error.[4] (*See, e.g.*, R49 ¶ 7.) Appellants specified alleged errors or omissions in Part III of the 2016 Tanbook, and alleged "upon information and belief" that there were errors in "prior editions." (R60-69 ¶¶ 55-61, 63-69.) Appellants do *not* allege any errors or omissions in the 2017 Tanbook, and state on appeal that the new edition "corrected numerous sections." (Br. at 7.)

As in the initial pleading, the Amended Complaint repeatedly alleged that Appellants would not have purchased the 2016 Tanbook had they not been deceived by purported misrepresentations concerning the book's completeness (*e.g.*, R48-49 ¶ 6; R49 ¶¶ 8, 10; R74 ¶ 92; R81 ¶ 133)—an allegation that was expressly reiterated both in Appellants' opposition brief (SR44-45) and in

[4] On appeal, Appellants have clarified that this litigation "pertains *only*" to Part III, and that they "have not made any claims with respect to the other more than 900 pages of the book." (Br. at 13.)

accompanying sworn affidavits submitted by Himmelstein and McKee (R226 ¶ 14; R235 ¶ 22).

The Amended Complaint added a claim of "fraud" based specifically on an alleged misrepresentation on the *Website* regarding the completeness of the Tanbook. (R50 ¶ 11.) Based solely on a December 2016 email from a Matthew Bender representative stating that issues with the Tanbook "have only recently been brought to our attention," Appellants pled that Matthew Bender knew that the representation on the Website was false during the entire "class period," dating back six years prior to the commencement of the action. (R54 ¶ 36; R80-81 ¶¶ 130-132.)

The Amended Complaint also included a new theory that Matthew Bender breached an unspecified "implied contract" and is liable for a "pro rata amount of the 2017 Tanbook price" that Appellants "were billed and paid" because that edition was not published until May 2017 rather than in January. (R79 ¶ 121; R80 ¶ 124.)

2. *Appellants' Modified Contract Claims Raised for the First Time in Their Opposition to Matthew Bender's Motion to Dismiss*

In its motion to dismiss the Amended Complaint, Matthew Bender explained that all of Appellants' claims failed for numerous, independent reasons. (SR3-35.)

Appellants did not even attempt to address several of those reasons;[5] for example, that they could not show the requisite "reliance" for their fraud claim or that claims related to the May 2017 publication of the 2017 edition of the Tanbook could not lie because Appellants decided to purchase the Tanbook at full price *after* receiving it in May. (SR12-13.)

Appellants also completely revised their theory of contract liability. Appellants did not dispute that the T&C governed their purchases, but asserted a new claim that, pursuant to the New York Uniform Commercial Code ("**UCC**"), Matthew Bender breached an *express warranty* of completeness and accuracy created by language solely on the Website and Amazon. (SR56-58.) As with all of the other purported representations concerning Tanbook content, none of the Appellants alleged either in the pleading or in their sworn affidavits that they ever saw these online statements.

The opposition brief also raised for the first time an argument that "The UCC Imposes an Obligation of Good Faith on Merchants." (SR55.) Rather than expressly asserting a new claim, Appellants claimed that this obligation was an "additional safeguard" for Appellants "assuming arguendo that the UCC does

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[5] As discussed below, many grounds for dismissal were not expressly ruled upon by the court below but serve as alternative bases for affirmance. Matthew Bender will cite to its motion papers to demonstrate that its positions are fully set forth in the record, and that Appellants had an opportunity to (and often did) respond to those positions.

apply" (which Appellants currently dispute). (SR54.) Appellants provided no specifics regarding Matthew Bender's supposed violation of this obligation, but only defaulted to the general theory underlying all of their claims: that there was "dishonest dissemination of misinformation" and "Matthew Bender failed to deliver the annual compilation, in its entirety." (SR55.)

3. *The Dismissal of the Amended Complaint*

On February 6, 2018, Judge Charles E. Ramos of the Commercial Division dismissed the Amended Complaint in its entirety. (R23-41.) As Judge Ramos made clear at oral argument, the question before him on the motion to dismiss was *not* whether the 2016 Tanbook contained any errors, but rather whether Appellants had stated "any recognizable cause of action" based on those alleged errors. (R418.) The court dismissed with prejudice Appellants' unjust enrichment and implied contract claims—neither of which Appellants have appealed. In pertinent part, the court's other conclusions and holdings were as follows:

Dismissal of the Contract and Implied Covenant Claims: The court concluded that the UCC applies to the sales of the Tanbooks, and Appellants failed to satisfy the notice requirements of UCC § 2-607(3) prior to bringing suit. (R32-34.) The court also rejected the theory that the statements in the Tanbook's "Overview" and the Website constituted "express warranties" both because (1) the undisputedly binding T&C expressly disclaimed any such warranties, and (2) the alleged warranties could not constitute the "basis of the bargain" under UCC § 2-

313 because Appellants never alleged "that they relied upon, or otherwise ever saw, the Overview and Online Statements before ordering the books." (R34.)

The court dismissed the implied covenant claim because Appellants' theory that a covenant guaranteed the completeness and accuracy of the Tanbook would impermissibly impose an obligation on Matthew Bender that is flatly inconsistent with the T&C, which disclaims any such obligation. Moreover, given the unambiguous disclaimer language in the T&C, "a reasonable person could not have understood that Matthew Bender was warranting the accuracy of the Tanbook." (R35.)

Finally, the court rejected Appellants' claim that Matthew Bender impliedly contracted with Appellants to issue the 2017 Tanbook in the beginning of the year rather than in May, recognizing that there already was an express contract (the T&C) covering the subject matter of the alleged implied contract. (R36.) Moreover, the T&C contained language suggesting that Matthew Bender "was not bound to deliver the new Tanbook at the beginning of each year." (*Id.*)

Dismissal of the GBL 349 Claim: Judge Ramos dismissed Appellants' GBL 349 claim, concluding that Appellants failed to plead facts that would allow a court to reasonably infer that sales of the Tanbook were "consumer-oriented" as required by the statute. (R36-39.) Citing to First Department precedent establishing that "consumers" are those "who purchase goods and services for

personal, family, or household use," the court noted that sales of the Tanbook were directed to professionals and specialists such as the three Appellants, not consumers at large. (R37-38.) The court did not reach Matthew Bender's argument that Appellants also failed to satisfy the remaining elements of a GBL claim. (SR27-30, 71-74.)

Dismissal of the Fraud Claim: Noting that CPLR 3016(b) required fraud claims to be pled with particularity, the court dismissed the fraud claim for failure to adequately allege facts suggesting that Matthew Bender knew that the Tanbook contained inaccuracies prior to 2016. (R39-40.) The court noted that Appellants could only cite to one email from a Matthew Bender representative in December 2016 that "stated in relevant part that Matthew Bender had just learned of the inaccuracies." (R40.) The court did not address Matthew Bender's remaining arguments that Appellants failed to satisfy other required elements of fraud claims, or that the fraud claim was entirely duplicative of the breach of contract claim. (SR30-33, 81-84; R39.)

E. Appellants' Modified Claims on Appeal

With respect to the issues being appealed, several of Appellants' legal theories have shifted yet again, and some claims are being raised for the first time on appeal. Most saliently:

- While confirming that their contract claim is limited to an "express warranty" theory, Appellants now contend (incorrectly) that warranties were present not only on the Website and Amazon, but also in the "Overview"

page. (Br. at 37.) Appellants still do not allege, however, that they ever saw or relied on these statements in the "Overview" or anywhere else.

- Instead of arguing, as they did in the lower court, that the UCC "is not applicable to this action" (SR51), Appellants now posit (incorrectly) that whether the UCC applies "cannot be decided on a motion to dismiss." (Br. at 22.)

- The fraud claim is no longer based on affirmative misstatements regarding the Tanbook, but rather an alleged "ongoing fraudulent misrepresentation" due to a "failure to promptly notify [Matthew Bender's] customers who had purchased the 2016 Tanbook" of issues from December 2016 until the issuance of the new edition in May 2017. (*Id.* at 45.) Appellants do not allege, however, any injury that they suffered due to this supposed "failure to notify."

- The same "failure to promptly notify" is also alleged to constitute a breach of the express terms of the T&C. (*Id.* at 46.)

- Appellants argue that "[s]elling the 2017 Tanbook while knowing it would not be timely delivered" until later in the year also constitutes "ongoing fraudulent inducement" despite the fact that they all agreed to purchase that edition at full price *after* it was released in May 2017. (*Id.*)

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

A. Motion to Dismiss Standards

CPLR 3211(a)(1) permits dismissal of a cause of action when "a defense is founded upon documentary evidence." N.Y. C.P.L.R. 3211(a)(1). Dismissal is thus "appropriate 'where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" *Benetech, Inc. v. Omni Fin. Grp., Inc.*, 116 A.D.3d 1190, 1192 (3d Dep't 2014) (citation omitted). For example, the Court should consider the terms of a written

agreement warranting dismissal where, as here, those terms "unambiguously contradict[ ] the allegations supporting a litigant's cause of action for breach of contract." *150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004).

CPLR 3211(a)(7) permits dismissal of a complaint that "fails to state a cause of action." N.Y. C.P.L.R. 3211(a)(7). Although facts pled in a complaint are generally presumed to be true, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled" to such presumption or favorable inferences. *Quatrochi v. Citibank, N.A.*, 210 A.D.2d 53, 53 (1st Dep't 1994). "[A]ffidavits and other evidentiary material may be considered to 'establish conclusively that [the] plaintiff has no cause of action.'" *Lin v. Cty. of Sullivan*, 100 A.D.3d 1076, 1077 (3d Dep't 2012) (citation omitted).

B. Claims and Legal Theories Raised for the First Time on Appeal Are Unpreserved and Should Not Be Considered

It is well established that parties may not raise new arguments and assert new causes of action for the first time on appeal. *See Zacharius v. Kensington Publ'g Corp.*, No. 652460/12, 7831, 2018 N.Y. App. Div. LEXIS 8306, at *2 (1st Dep't Dec. 6, 2018) (noting that contention was "improperly raised for the first time on appeal"); *Murray v. City of N.Y.*, 195 A.D.2d 379, 381 (1st Dep't 1993) (explaining that "issues raised on appeal were not presented" to the lower court and

"cannot be raised now at the appellate level for the first time"); *Recovery Consultants, Inc. v. Shih-Hsieh*, 141 A.D.2d 272, 276 (1st Dep't 1988). Accordingly, the numerous new theories of liability that were not raised by Appellants in the Commercial Division—let alone pled—are "not preserved for review" and should not be considered by this Court. *Pirraglia v. CCC Realty NY Corp.*, 35 A.D.3d 234, 235 (1st Dep't 2006).

C. This Court May Affirm Dismissal for Reasons That Were Not Expressly Addressed by the Court in the Decision Below

"An appellate court need not rely on the rationale articulated in the court of original jurisdiction to affirm a decision." *Am. Dental Coop., Inc. v. Att'y Gen. of N.Y.*, 127 A.D.2d 274, 279 n.3 (1st Dep't 1987); *see* 10A Carmody-Wait, New York Practice 2d § 70:491 ("The appellate court is not confined to the grounds assigned by the court below for its decision but may sustain a judgment on other grounds."). Indeed, it is common for this Court to "affirm for reasons other than those stated by the motion court." *J. Remora Maint. LLC v. Efromovich*, 103 A.D.3d 501, 502 (1st Dep't 2013); *see, e.g., id.*; *Plaza ex rel. Rodriguez v. N.Y. Health & Hosps. Corp.*, 97 A.D.3d 466, 466 (1st Dep't 2012).

Although the Commercial Division dismissed each and every cause of action based on sound reasoning and analysis, there were numerous additional grounds raised below (but not addressed by the court) as to why dismissal was warranted. This Court may affirm on these alternative grounds.

II. APPELLANTS' CLAIM FOR BREACH OF EXPRESS WARRANTY UNDER THE UCC WAS PROPERLY DISMISSED

As discussed above, an express warranty claim based only on alleged online statements was first raised in Appellants' opposition brief, and does not appear anywhere in their pleading. Nevertheless, Matthew Bender and the Commercial Division fully addressed the merits of that claim.[6] Appellants' express warranty claim still does not constitute a viable cause of action for several reasons.

A. The Lower Court Correctly Concluded That Tanbook Sales Are Governed by the New York Uniform Commercial Code

To avoid the plain fact that they did not provide the required prior notice of breach under UCC § 2-607(3) before commencing suit (discussed *infra* at Section II.C), Appellants previously contended that the UCC does not apply to Tanbook sales, and now posit that whether the UCC applies cannot be decided prior to discovery. (Br. at 22.) Neither position has any merit.

1. *The Tanbook Is Not a "Service"*

Article 2 of the UCC "applies to transactions in goods," which are defined to include "all things . . . which are movable at the time of identification to the contract for sale." N.Y. U.C.C. §§ 2-102, 2-105(1). As the Commercial Division correctly observed (R31-32), books plainly fall within that broad definition. *See, e.g., Simon & Schuster, Inc. v. Howe Plastics & Chems., Co.*, 105 A.D.2d 604,

[6] Appellants' position that they had no "obligation to plead the legal components" of the claim "in any greater detail" is therefore moot. (Br. at 29.)

605-06 (1st Dep't 1984) (applying the UCC to dispute concerning books); *Paramount Pictures Corp. v. Carol Publ'g Grp., Inc.*, 25 F. Supp. 2d 372, 375 (S.D.N.Y. 1998) (same); *Publ'ns Int'l, Ltd. v. Marbowe Corp.*, No. 93-C-2942, 1995 U.S. Dist. LEXIS 7579, at *10-11 (N.D. Ill. May 25, 1995) (applying Illinois UCC to books); *Lawyers Coop. Publ'g Co. v. Muething*, 65 Ohio St. 3d 273, 275, 603 N.E.2d 969, 971 (Ohio 1992) (applying Ohio UCC to a book of attorney forms).

The Commercial Division also correctly rejected Appellants' contention that they purchased an "annual updating and compiling service," making the commonsense observation that "[t]he fact that the content of the book was modified does not change the fact that [Appellants] were buying goods." (R32.) Appellants do not and cannot allege that they commissioned Matthew Bender to conduct research, or that they paid any separate fees for services such as "updating." To the contrary, every time that Appellants purchased Tanbooks, they received separate invoices and expressly authorized separate payments, reflecting simple transactions in which money was exchanged for movable goods. (R167-70 ¶¶ 16-17, 22-24, 29-30.) Appellants recognize as much in their affidavits, referring only to their annual acquisitions of *books*, and nothing else. (*See, e.g.*, R226 ¶ 14; R228 ¶ 23 (referring to Himmelstein's "decision to purchase the Tanbook each year" and that it "chose to purchase copies of the 2017 book"); R234 ¶ 20; R235 ¶

24 (noting McKee's decision to "purchase a newly minted edition of the book each year" and "the 2017 edition").)[7]

Even if Tanbook sales somehow included provision of a "service"—and they do not—the lower court correctly determined that any such service would have been rendered to facilitate the sale of the Tanbook, and the UCC therefore would still apply. *See, e.g.*, *Levin v. Hoffman Fuel Co.*, 94 A.D.2d 640, 640-41 (1st Dep't 1983) (applying UCC to contract "to supply heating fuel oil . . . on an automatic delivery basis" because "the agreement was essentially one for the sale of oil, to which the promised service [of automatic delivery], however important, was incidental"), *aff'd*, 60 N.Y.2d 665 (1983); *Franklin Nursing Home v. Power Cooling Inc.*, 227 A.D.2d 374, 375 (2nd Dep't 1996) (applying UCC to contract to acquire and have installed air conditioning unit because contract "was predominantly for sale of" that unit); *Sawyer v. Camp Dudley*, 102 A.D.2d 914, 914 (3rd Dep't 1984) (applying UCC to contract to screen and deliver a specific amount of sand and gravel because screening and delivery "were merely incidental or collateral to the sale of the sand and gravel" itself).

Finally, Appellants are flatly wrong to suggest that the application of the UCC cannot be determined prior to discovery; courts routinely make this

[7] Even Appellants' subscription types, as stated in the T&C governing their Tanbook purchases, include the term "Non-Service" in the title. (R184; R187; R190; R193.)

determination at the pleading stage. *See, e.g.*, *Wuhu Imp. & Exp. Corp. v. Capstone Capital, LLC*, 39 A.D.3d 314, 314 (1st Dep't 2007) (affirming motion to dismiss based on holding that UCC applied to agreement); *Levin*, 94 A.D.2d at 641 (same); *Power Cooling*, 227 A.D.2d at 375 (same); *Nebraskaland, Inc. v. Sunoco, Inc.*, No. 10 CV 1091, 2011 U.S. Dist. LEXIS 142127, at *19 (E.D.N.Y. July 13, 2011) (dismissing claim because UCC applied to contract that could not be deemed "predominantly service oriented"). Appellants' reliance on the federal decision in *Wexler v. Allegion (UK)* is misplaced; in that case, discovery was deemed necessary to determine whether an *oral* agreement was primarily for goods or services only because, unlike here, the parties disputed whether any contract even existed. No. 16 Civ. 2252, 2018 U.S. Dist. LEXIS 54655, at *36-37 (S.D.N.Y. Mar. 30, 2018). In fact, *Wexler* confirms that the UCC applies to a set of "one-off sale[s] of goods"—precisely what took place when each of the Appellants separately decided to purchase and pay for Tanbooks each year. *Id.* at *37.

2. *Even If Appellants Are Correct Regarding the UCC, the Express Warranty Claim Must Be Dismissed*

Appellants themselves do not seriously believe that the UCC does not apply, given that *their breach of express warranty claim is entirely contingent on the application of the UCC*. Throughout this litigation, Appellants have expressly and consistently relied on UCC § 2-313 and cases addressing warranties (or the enforceability of contract provisions) under the UCC in support of their claims.

(*E.g.*, SR57-59; Br. at 38-42.) Without these statutes and cases, the express warranty claim falls away.

B. The Lower Court Correctly Concluded That There Are No "Express Warranties" Regarding the Content of the Tanbook

Appellants' latest iteration of its theory is that an express warranty regarding the content of Part III of the Tanbook can be inferred from the presence of the word "the." According to Appellants, because the Overview on page xi of the Tanbook and a statement on the Website provide that Part III contains "*the* rent stabilization and rent control laws and regulations" rather than referring to "provisions" or "excerpts," Matthew Bender somehow made an *express* contractual promise to all Tanbook purchasers that Part III was 100 percent complete and up-to-date. (Br. at 36-37.)

As Judge Ramos recognized, this argument fails as a matter of law for at least two reasons: (1) the T&C governing Appellants' purchases contain a clear and conspicuous disclaimer of any and all warranties regarding Tanbook content; and (2) Appellants cannot claim that the alleged statements were express warranties when they do not allege that they ever saw—much less relied on—those statements when purchasing Tanbooks.

1. *The Clear and Conspicuous Disclaimers in the T&C Foreclose Any "Express Warranty" Regarding Tanbook Content*

As an initial matter, the mere presence of the word "the" is not "sufficiently certain and specific so that what was promised can be ascertained," and thus

cannot create the contractual promises that Appellants suggest. *Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109 (1981). But even assuming *arguendo* that Appellants point to language that even ambiguously suggests some sort of representation by Matthew Bender regarding Tanbook content, the T&C unequivocally provide that Matthew Bender "DISCLAIM[S] ALL WARRANTIES WITH RESPECT TO PUBLICATIONS, EXPRESS OR IMPLIED," and "DO[ES] NOT WARRANT THE ACCURACY, RELIABILITY, OR CURRENTNESS OF THE MATERIALS CONTAINED IN THE PUBLICATIONS." (R186; R189; R192; R195; R198.) Appellants do not dispute that their Tanbook purchases are governed by the T&C, which also expressly state that they constitute the "entire agreement" with Appellants. (*Id.*) These facts alone conclusively demonstrate that there can be no express warranty regarding Tanbook content, and there is no basis for Appellants to suggest that parol evidence on the Website or in the Overview can modify—much less nullify—the parties' plain contractual language. *See* N.Y. U.C.C. § 2-202; *see, e.g., Von Ancken v. 7 E. 14 L.L.C.*, 166 A.D.3d 551, 552 (1st Dep't 2018) (noting that "any purported representation or warranty is refuted by the clear terms of the purchase agreement, which contains a merger clause" and "states that no representations are being made by the sponsor"); *Simone v. Homecheck Real Estate Servs., Inc.*, 42 A.D.3d. 518, 521 (2d Dep't 2007) (recognizing application of a merger clause and dismissing claim because "[w]here

the contract specifically disclaims the existence of warranties . . . , a cause of action alleging a breach of contract based on such a warranty . . . cannot be maintained"); *Martino v. MarineMax NE, LLC*, No. 17-CV-4708, 2018 U.S. Dist. LEXIS 201582, at *11-12 (E.D.N.Y. Nov. 28, 2018) (dismissing express warranty claim where purchase agreement stated that it was the "entire agreement between the parties" and "disclaims any express warranties").

Moreover, the UCC requires that "[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other." N.Y. U.C.C. § 2-316(1). Appellants' theory that alleged extrinsic statements by Matthew Bender expressly guarantee the completeness and accuracy of Part III of the Tanbook runs afoul of this canon of interpretation, and compels the nonsensical proposition that the inclusion of the single word "the" embedded in page xi of the Tanbook is a basis of the parties' contractual agreement but that a clear provision within the four corners of the parties' written agreement is not.[8]

Appellants' only response is to argue that the disclaimer provision is ineffective because it "pertains to the very purpose of the product" and "nullifies

[8] The decisions relied on by Appellants prove the point, because in each of them the warranties were express, specific statements regarding products, while the disclaimers were "general" and/or vague—precisely the opposite of the current circumstances. *See Wintel Serv. Corp. v. MSW Elecs. Corp.*, 161 A.D.2d 764 (2d Dep't 1990); *Uniflex, Inc. v. Olivetti Corp. of Am.*, 86 A.D.2d 538, 539 (1st Dep't 1982).

the heart of the bargain." (Br. at 39-40.) That argument, however, is circular: Appellants simply presume that a "promise of completeness and accuracy" was "the *sine qua non* of the transaction" (Br. at 40), and from that presumption alone refuse to credit contract language that plainly demonstrates that Matthew Bender has made *no* such promise. For the reasons discussed above, that presumption is unsupportable for multiple reasons.

Finally, contrary to Appellants' argument, UCC § 2-719 in no way impacts Matthew Bender's ability to disclaim any warranty for the Tanbook. (Br. at 40-42.) Section 2-719 only requires that a contract "provide a fair quantum of remedies for breach," and "nothing in that section precludes parties to a contract from disclaiming remedies." *Brampton Textiles, Ltd. v. Argenti, Inc.*, 162 A.D.2d 314, 314 (1st Dep't 1990); *see also City of New York v. Bell Helicopter Textron, Inc.*, No. 13 CV 6848, 2015 U.S. Dist. LEXIS 81467, at *20 (E.D.N.Y. June 16, 2015). Indeed, the official comments to the UCC provision confirm that "[t]he seller in all cases is free to disclaim warranties in the manner provided in § 2-316."[9] N.Y. U.C.C. § 2-719, cmt. 3.

[9] Appellants make a passing reference to the disclaimer being in "small font" and "on the reverse side of an invoice." (Br. at 39.) To the extent that Appellants are suggesting (baldly) that the size or location of the language impacts the provision's enforceability, that argument is irrelevant to whether an express warranty was created but at all events is waived because it is being raised for the first time on appeal.

2. *Appellants Do Not Allege That They Relied on the Statements Such That They Could Constitute "Express Warranties"*

Even if the T&C did not exist, the claim for breach of express warranty still would fail as a matter of law. As Appellants note (Br. at 38), UCC § 2-313 provides that an "affirmation of fact or promise made by the seller to the buyer" only creates an "express warranty" if that affirmation is "part of the basis of the bargain." N.Y. U.C.C. § 2-313(1)(a). New York authority also makes clear that no action for breach of express warranty may lie where a buyer has not actually *relied* on that *specific* affirmation in making the purchase. *Aracena v. BMW of N. Am., LLC*, 159 A.D.3d 664, 665 (2d Dep't 2018) ("A cause of action alleging breach of an express warranty requires evidence that the defendant breached a specific representation made by a manufacturer regarding a product upon which the purchaser relied.") (citing *CBS Inc. v. Ziff-Davis Publ. Co.*, 75 N.Y.2d 496, 503 (1990)); *Meyer v. Alex Lyon & Son Sales Mgrs. & Auctioneers, Inc.*, 67 A.D.3d 547, 548 (1st Dep't 2009) (affirming dismissal of express warranty claim where no reliance could be shown); *J.C. Constr. Mgmt. Corp. v. Nassau-Suffolk Lumber & Supply Corp.*, 15 A.D.3d 623, 623 (2d Dep't 2005) (rejecting express warranty claim because "plaintiff failed to establish that he relied on oral and written express warranties of defendant in purchasing" product).

Despite having multiple opportunities to do so, Appellants have never claimed that they even *saw* the Website or the "Overview" page, much less that

they *relied* on statements in either location when deciding whether to purchase Tanbooks. Indeed, it is clear that Appellants cannot so allege; they were informed of this very issue in Matthew Bender's Motion to Dismiss the *initial* Complaint, but did not fix the problem in either their amended pleading or in any of their affidavits opposing Matthew Bender's second Motion to Dismiss.[10]

As numerous analogous cases demonstrate, this alone requires dismissal of the express warranty claim. *See, e.g.*, *Gale v. Int'l Bus. Machs. Corp.*, 9 A.D.3d 446, 447 (2d Dep't 2004) (affirming dismissal of express warranty claim where plaintiff failed to allege that he relied on the statements at the time of his purchase); *Schimmenti v. Ply Gem Indus., Inc.*, 156 A.D.2d 658, 659 (2d Dep't 1989); *Kuperstein v. Lawrence*, No. 21071/07, 2010 N.Y. Slip Op. 32361(U), at *9 (Sup. Ct. Nassau Cty. Aug. 16, 2010) (dismissing claim for lack of reliance where statement "was not read by the plaintiffs prior to their purchase of the product"); *Williams v. Dow Chem.*, 255 F. Supp. 2d 219, 230 (S.D.N.Y. 2003) (same).

[10] Appellants suggest that their affidavits confirm that they can "cure" this conceded "omission" in their pleading, but that suggestion is disingenuous. Appellants argue, for example, that McKee "alleges that he both knew of the warranty and relied on the completeness of the Tanbook's Part III." (Br. at 34.) Yet that is *not* what the cited paragraphs of his affidavit state (R231-32 ¶¶ 6-8), and even if they did, Appellants' statement conspicuously avoids claiming that McKee relied *on the alleged express warranty* itself. For the same reason, the claims that Himmelstein "relies on the annual updating" and that HCA "relied . . . on the annually published Tanbook"—without claiming reliance on the warranty itself—are equally irrelevant. (Br. at 34.)

Appellants make two misguided attempts to avoid their clear failure and inability to plead reliance. Both fail.

First, Appellants imply that they did not need to expressly allege that they saw the purported warranty language because it "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." (Br. at 31.) Appellants cannot explain why language being "front and center" should matter when their two complaints and subsequent sworn affidavits dutifully *avoided* pleading that they ever saw that language. But even more fundamentally, Appellants' statement is false as an undisputed factual matter. The "Overview" does not appear "front and center" in every Tanbook, but rather on page xi; the alleged "warranty" about Part III is one sentence in the middle of dozens of others on that page. (R182.) Nor is there any basis whatsoever in the record for Appellants to speculate that most or all Tanbooks are purchased online. (Br. at 31.) To the contrary, it is undisputed that *none* of the purchases by Appellants—the only purchases that matter at this stage of the litigation—were made online. (R166 ¶10; R168 ¶ 20; R170 ¶ 27.)

Second, in stark contrast to the jurisprudence discussed above, Appellants try to do away with the reliance requirement altogether by contending that it is "of no moment" whether or not they actually saw the "warranty." (Br. at 30.) None of the cases cited by Appellants support that position.

For example, in *CBS Inc. v. Ziff-Davis Publishing Co.*, 75 N.Y.2d 496 (1990), the Court of Appeals did not suggest that reliance was not necessary, or that a statement that was never even seen by the purchaser could be a "basis of the bargain" and thus an express warranty. That court only addressed whether "reliance" for an express warranty claim requires that the purchaser actually "believe[s] in the truth of the warranted information," as is the case with a tort claim. *Id.* at 503. There was no dispute that the plaintiff had both seen and evaluated the warranty language at issue prior to executing the written agreement in which the language was contained. *Id.* at 500, 502.

The other cases cited by Appellants also concerned situations, unlike here, where there was an express allegation that the plaintiffs reviewed and considered warranty language prior to or contemporaneous with finalizing their transaction.[11] *See, e.g.*, *Manier v. L'Oreal U.S.A., Inc.*, Nos. 16-cv-6593, 2017 U.S. Dist. LEXIS 116139, at *43 (S.D.N.Y. July 18, 2017) (citing to a dozen paragraphs in the complaint alleging "that each of the named Consolidated Plaintiffs decided to purchase the product after seeing advertisements for it and its packaging," including alleged misrepresentations); *Imperia v. Marvin Windows of N.Y., Inc.*,

[11] Although the discussion of express warranties in *Mahoney v. Endo Health Services Solutions* deals only with privity, not reliance, the decision notes that the alleged misrepresentations on pharmaceutical labels were relied upon by pharmacists in filling prescriptions. No. 15cv9841, 2016 U.S. Dist. LEXIS 94732, at *5 (S.D.N.Y. July 20, 2016).

297 A.D.2d 621, 623 (2d Dep't 2002) (noting allegations that plaintiffs received representations "before purchasing" the products, and that "plaintiffs alleged that they relied upon these representations in agreeing to purchase"); *Murphy v. Mallard Coach Co.*, 179 A.D.2d 187, 192-93 (3d Dep't 1992) (in case under Magnuson-Moss Warranty Act rather than the UCC, noting that the separate, written warranty for motor home was only "technically" provided after payment of purchase price); *Randy Knitwear, Inc. v. Am. Cyanamid Co.*, 11 N.Y.2d 5, 9 (1962) (noting that plaintiff "agreed to pay the additional charge . . . 'in reliance upon' Cyanamid's representations"). Far from supporting Appellants' position, the foregoing decisions confirm that pleading reliance is required, and why Appellants' express warranty claim is deficient as a matter of law.

C. The Lower Court Correctly Concluded That None of the Appellants Provided the Notice Required by UCC § 2-607(3)

Pursuant to UCC § 2-607(3), "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." N.Y. U.C.C. § 2-607(3)(a). This is "known as the 'slam-dunk' rule because of its absolutely preclusive effect." 14 Richard A. Lord, *Williston on Contracts* § 40:20 (4th ed. 2015); *see, e.g., Suraleb, Inc. v. Int'l Trade Club, Inc.*, 13 A.D.3d 612, 613 (2d Dep't 2004) (rejecting contract claim for failure to notify of nonconformity within reasonable time).

It is undisputed that none of the Appellants provided any notice of the alleged breach of an express warranty to Matthew Bender prior to bringing suit. (R168 ¶ 18; R169 ¶ 25; R170 ¶ 31.) Instead, Appellants contend that notice was satisfied because a "putative class member" separately alerted Matthew Bender to concerns about the Tanbook in December 2016. (Br. at 26.)

UCC § 2-607(3) clearly states that "the buyer" must provide the requisite notification because the purpose of the provision is to ensure that the seller is notified of the buyer's *claim for breach*, not the facts underlying that claim. *See Am. Mfg. Co. v. U.S. Shipping Bd. Emergency Fleet Corp.*, 7 F.2d 565, 566 (2d Cir. 1925) (Learned Hand, J.); *Tomasino v. Estee Lauder Cos.*, 44 F. Supp. 3d 251, 260 (E.D.N.Y. 2014). For that reason, courts—like the Commercial Division in this case (R33-34)—have expressly rejected Appellants' argument that third-party notice suffices.[12] *See, e.g.*, *Singleton v. Fifth Generation, Inc.*, No. 5:15-CV-474, 2016 U.S. Dist. LEXIS 14000, at *40 (N.D.N.Y. Jan. 12, 2016) (rejecting argument that lawsuits by other parties constituted notice because awareness "of similar claims involving [the product's] labels did not put Defendant on notice of

[12] As amply demonstrated by the quotation in Appellants' brief (Br. at 27), the only decision on which Appellants rely involved a named plaintiff who sent a presuit letter to the defendant "on behalf of herself"; there was no suggestion in that decision that named plaintiffs could eschew the § 2-607(3) obligation. *Paulino v. Conopco, Inc.*, No. 14-CV-5145, 2015 U.S. Dist. LEXIS 108165, at *3 (E.D.N.Y. Aug. 17, 2015). But even if Appellants were correct, the letter from the "putative class member" to Matthew Bender in this case did not provide notice of any lawsuit or class action (R134-35), so Appellants fail to provide notice even under their own incorrect test.

Plaintiff's particular claims"); *In re Frito-Lay N. Am., Inc.*, No. 12-MD-2413, 2013 U.S. Dist. LEXIS 123824, at *87 (E.D.N.Y. Aug. 29, 2013).

Nor is it accurate to contend that the filing of a complaint alone constitutes proper notice; the appellate decision on which Appellants rely does not hold otherwise. *See Panda Capital Corp. v. Kopo Int'l, Inc.*, 242 A.D.2d 690, 692 (2d Dep't 1997) (noting that there was an "issue of fact" regarding whether notice of breach was timely, because "the plaintiff had repeatedly made its objections to [defendant's] pattern of deficient performance known prior to the shipments reflected in the invoices"). Indeed, Appellants' argument makes little sense, as such a principle would obviate UCC § 2-607(3) altogether.

III. APPELLANTS' NEW CLAIM THAT MATTHEW BENDER BREACHED THE T&C BY NOT PROMPTLY NOTIFYING CUSTOMERS OF ISSUES WITH THE 2016 TANBOOK IS WAIVED BUT AT ALL EVENTS FAILS AS A MATTER OF LAW

Recognizing their myriad pleading deficiencies, Appellants' appeal adds entirely new, unpled theories of contract and fraud liability based on an alleged "failure to promptly notify" customers of errors in the 2016 Tanbook starting in December 2016. Appellants' apparent theory is that Matthew Bender was obligated to provide such notification because the T&C somehow require that "supplementation" and "revisions" be "made available during the annual subscription period." (Br. at 46.)

As an initial matter, this new claim is being raised for the first time on appeal, and thus is waived. (*See supra* at Section I.B.)

But even if the Court did consider the claim, it fails on its merits. The contract language relied upon by Appellants does nothing to compel Matthew Bender to "promptly notify" purchasers of anything. The T&C provide that purchasers "will receive the product(s) listed in this Order Form and *any* supplementation, releases, replacement volumes, new editions and revisions to a publication ("Updates") *made available during the annual subscription period*." (R191 (emphasis added).) The clear import of that language is merely that, *if Matthew Bender issues any updates to a Tanbook edition during the year* (*e.g.*, a pocket supplement for the 2016 Tanbook), then it will deliver such updates automatically. Nothing in the provision remotely bears on whether Matthew Bender must "notify" purchasers if concerns are raised about Tanbook content.

To the extent that this new contract claim is simply a new spin on Appellants' rejected (and not appealed) implied contract theory that Matthew Bender was compelled to issue the 2017 Tanbook in January 2017 rather than in May (Br. at 46-47), nothing in the T&C creates that obligation. As Judge Ramos recognized, the T&C provide that updates would be automatically shipped "with an invoice . . . on a semi annual or annual basis *as the Updates become available*," and thus "Matthew Bender was not bound to deliver the new Tanbook at the

beginning of each year." (R36.) Nor would any express contract claim based on the timing of the 2017 Tanbook make any sense insofar as Appellants chose to pay full price for the 2017 Tanbook *after* receiving it in May of 2017.

IV. APPELLANTS' UNPLED, UCC-BASED CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING WAS PROPERLY REJECTED

As discussed above, 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."[13] (SR54.) Notwithstanding this fatal error, the lower court dismissed the claim on its merits, explaining that Matthew Bender's alleged duties are contradicted by the express terms of the parties' written agreement. Appellants do not even attempt to address this particular holding on appeal. For this additional reason—as well as the fact that the unpled claim improperly duplicates Appellants' warranty claim—the unpled implied covenant claim should be rejected.

A. The Implied Covenant Claim Fails Because It Is Flatly Contradicted by the Express Terms of the Parties' Contract

An obligation of good faith cannot be implied when it is "inconsistent with other terms of the contractual relationship." *Sheth v. N.Y. Life Ins. Co.*, 273

[13] Like the express warranty claim, if the UCC does *not* apply, the covenant of good faith would have to be dismissed.

A.D.2d 72, 73 (1st Dep't 2000) (citation omitted); *see also Peter R. Friedman, Ltd. v. Tishman Speyer Hudson Ltd. P'ship*, 107 A.D.3d 569, 570 (1st Dep't 2013) (noting that the covenant "cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights"). The T&C governing Appellants' Tanbook purchases state unequivocally that Matthew Bender is *not* warranting the content of its publication. Appellants' proposed implied covenant squarely contradicts that contract language and cannot be acknowledged as a matter of law. *See, e.g.*, *Transit Funding Assocs., LLC v. Capital One Equip. Fin. Corp.*, 149 A.D.3d 23, 29-30 (1st Dep't 2017) (dismissing claim because the implied covenant "cannot negate express provisions of the agreement, nor is it violated where the contract terms unambiguously" permit the conduct being challenged as a violation of the covenant); *Roberts v. Weight Watchers Int'l, Inc.*, 712 F. App'x 57, 60-61 (2d Cir. 2017) (rejecting implied covenant claim under New York law where the pertinent subscription agreement "expressly provided that Weight Watchers did not warrant that its services would be uninterrupted or error-free").

Relatedly, the existence of the disclaimer language in the T&C negates any implied obligation because no reasonable purchaser could have understood Matthew Bender to be warranting the accuracy of Part III of the Tanbook. An implied covenant may only consist of "'promises which a reasonable person in the

position of the promisee would be justified in understanding were included.'" *Weight Watchers*, 712 F. App'x at 61 (quoting *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995)). As Judge Ramos correctly recognized, no reasonable person in Appellants' position could have understood a promise to have been made regarding the content of the Tanbook when their written agreement expressly disclaims such a promise. *See, e.g., Moran v. Erk*, 11 N.Y.3d 452, 456-57 (2008) (rejecting implied covenant claim where "the plain language of the contract in this case makes clear" that the alleged implied promise did not exist, "as any reasonable person in the [plaintiffs'] position should have understood").

B. The Implied Covenant Claim Fails Because It Is Duplicative of Appellants' Breach of Warranty Claim

Implied covenant claims must be dismissed as redundant when they arise from the same facts as a contract claim and are "intrinsically tied to the damages allegedly resulting from a breach of the contract." *Apogee Handcraft Inc., v. Verragio, Ltd.*, 155 A.D.3d 494, 495-96 (1st Dep't 2017); *see, e.g., Superior Officers Council Health & Welfare Fund v. Empire HealthChoice Assurance, Inc.*, 85 A.D.3d 680, 682 (1st Dep't 2011), *aff'd*, 17 N.Y.3d 930 (2011); *Shilkoff, Inc. v. 885 Third Ave. Corp.*, 299 A.D.2d 253, 253 (1st Dep't 2002) (noting that implied covenant claim was "properly dismissed as redundant of the insufficient contract cause of action" because it was "predicated on the same allegations"); *N.Y. Univ. v. Galderma Labs., Inc.*, 689 F. App'x 15, 18 (2d Cir. 2017) ("New York law does

not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled.").

There can be no dispute that Appellants' implied covenant claim is entirely redundant of their breach of contract claim. Indeed, Appellants concede that the alleged conduct giving rise to the implied covenant claim and the express warranty claim is *exactly the same*:

> 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.*

(Br. at 43 (emphasis added).) Nor do Appellants suggest that the damages arising from breach of the implied covenant would be any different from the warranty claim; in either case—and as with their GBL 349 and fraud claims—Appellants seek the exact same thing: recoupment of the entire purchase price of the Tanbook.

This Court has made abundantly clear that a "claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim." *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 252 (1st Dep't 2003); *see also Sheth*, 273 A.D.2d at 73. Appellants' implied covenant claim is a textbook example of trying to make that improper substitution, and it should be rejected as a matter of law.

V. APPELLANTS' CLAIM FOR VIOLATION OF GENERAL BUSINESS LAW 349 WAS PROPERLY DISMISSED

The crux of Appellants' GBL 349 claim is that Matthew Bender deceived them by purportedly misrepresenting that the Tanbook includes a "complete" and "authoritative source of rent regulation laws and regulations." (R73 ¶ 87.) The alleged "misrepresentations" are the same statements that Appellants contend are "express warranties"—i.e., statements about Part III of the Tanbook on the Website and in the "Overview" page that, fatally, *Appellants never allege that they have seen.*

To assert a GBL 349 claim, a plaintiff must plead facts that allow a court to reasonably infer that: (1) the challenged act by the defendant was "consumer-oriented;" and (2) "misleading in a material way," and (3) the plaintiff "suffered injury as a result." *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000). The lower court correctly dismissed the GBL 349 claim for failure to satisfy the first of those elements (R36-39).

As Matthew Bender explained in the lower court, however, Appellants cannot establish *any* of the three elements. Indeed, Appellants do not even try to establish that they can satisfy the second or third element. (Br. at 47-58.) Thus, the GBL 349 claims are invalid for the reason identified by the lower court as well as for two additional reasons.

A. The Lower Court Correctly Concluded That the Allegedly Deceptive Conduct Was Not "Consumer-Oriented"

This Court has defined "consumers" under the General Business Law as "those who purchase goods and services for personal, family or household use." *Med. Soc'y of the State of N.Y. v. Oxford Health Plans, Inc.*, 15 A.D.3d 206, 207 (1st Dep't 2005) (quoting *Sheth*, 273 A.D.2d at 73). GBL 349 claims are thus routinely rejected where the challenged practices are directed to businesses or specialized industries as opposed to the general consuming public. *See, e.g.*, *Med. Soc'y*, 15 A.D.3d at 207 (affirming dismissal where challenged practices were "directed at physicians"); *Sheth*, 273 A.D.2d at 73 (dismissing claim where alleged misconduct was "directed . . . only at prospective insurance agents"). *Cf. BitSight Techs., Inc. v. SecurityScorecard, Inc.*, 143 A.D.3d 619, 621 (1st Dep't 2016) (affirming dismissal of GBL 350 claim due to lack of "consumer oriented conduct" because "the parties provide [cybersecurity] services to *businesses*, not individuals").

Judge Ramos correctly recognized that "Plaintiffs have failed to state facts demonstrating that the sale of Tanbooks is oriented toward consumers rather than professionals." (R38.) Indeed, the pleading repeatedly acknowledges that the statutory and regulatory compilation is intended to be used, and is purchased by, parties operating in the specialized field of landlord-tenant law. For example, it is alleged that the "Tanbook subscription service is purchased by lawyers, law firms,

individuals, tenant advocacy and other groups and entities such as law libraries where it is used by law students, as well courts [sic], where it is used by judges and court staff," and that *those* purchasers, specifically, are what Appellants consider to be Tanbook purchasers. (R76 ¶ 104.) Other allegations about "consumers" clarify that the term is used by Appellants only to refer to those "who are involved in Landlord/Tenant legal issues." (R57 ¶ 46.)

The allegations specifically regarding the three Appellants and their purchasing activities, as well as statements in their affidavits, further confirm that the category of Tanbook purchasers is directed to a specialized group, not the general consuming public. As detailed above : (1) Himmelstein is a law firm that purchases Tanbooks specifically "for use by its attorneys and non-attorney staff" (R51 ¶ 20); (2) HCA's staff "use[s] the Tanbook in connection with its work on behalf of pro se Housing Court litigants" (R53 ¶ 28); and (3) McKee is a "tenant organizer" who uses the Tanbook in connection with his work at "various tenant advocacy organizations" (*id.* ¶¶ 30, 32), including a live television program that he hosts along with a "tenant lawyer" (R232 ¶ 10).

Just as in their opposition brief in the lower court (SR47), Appellants' response is to take issue with an argument that Matthew Bender never made. According to Appellants, Matthew Bender has argued that "the 'consumer oriented' requirement means that no business, professional person, entity or non-

profit organization can <u>*ever*</u> seek relief under GBL § 349." (Br. at 52.) Not so. The relevant analysis is whether *Matthew Bender's practices are targeted* at "consumers" or impact "consumers at large," not whether every single person that might encounter or be impacted by those practices is a "consumer." *Sheth*, 273 A.D.2d at 73; *Cruz v. NYNEX Info. Res.*, 263 A.D.2d 285, 290 (1st Dep't 2000). Appellants further compound their error by relying on the fact that the Tanbook is technically "available to anyone" through the Website and Amazon (Br. at 54); however, the mere fact that a member of the public can buy a good does not render it a "consumer" good. *See, e.g.*, *Teamwikit, Inc. v. Douglas*, 53 Misc. 3d 1214(A), 2016 N.Y. Slip Op. 51651(U), at *2 (Civ. Ct. N.Y. Cty. 2016) (website and app design services held not to be "consumer-oriented"); *Triple Z Postal Servs., Inc. v. United Parcel Serv., Inc.*, 13 Misc. 3d 1241(A), 2006 N.Y. Slip Op. 52202(U), at *14-15 (Sup. Ct. N.Y. Cty. 2006) (rejecting characterization of a franchisee as a "consumer" despite allegation that a franchise is "the sale of a business . . . through marketing to the public at large").

B. The GBL 349 Claim Also Fails for the Independent Reason <u>That Appellants Do Not Allege Any Legally Cognizable Injury</u>

To state a GBL 349 claim, Appellants must allege that they have "been injured by reason" of a deceptive or misleading act. *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55 (1999) (citation omitted). Critically, however, the Court of Appeals has expressly rejected the contention "that consumers who buy a product

that they would not have purchased, absent a manufacturer's deceptive commercial practices, have suffered an injury under [GBL] § 349." *Id.* at 56. It is therefore well established that a "deception as injury" theory is legally insufficient and cannot support a GBL 349 claim. *See, e.g., id.* (explaining that allegation that plaintiffs "never would have purchased cigarettes" if not for alleged deception was legally insufficient); *see also Baron v. Pfizer, Inc.*, 42 A.D.3d 627, 629 (3d Dep't 2007) (affirming dismissal where the sole alleged injury was being deceived into purchasing a prescription drug); *Donahue v. Ferolito, Vultaggio & Sons*, 13 A.D.3d 77, 78 (1st Dep't 2004) (affirming dismissal of claim that plaintiffs were deceived into purchasing beverages); *Sokoloff v. Town Sports Int'l, Inc.*, 6 A.D.3d 185, 185-86 (1st Dep't 2004) (affirming dismissal where plaintiff did not "claim any kind of monetary loss other than "return of membership fees" due to deception); *Borenkoff v. Buffalo Wild Wings, Inc.*, No. 16-cv-8532, 2018 U.S. Dist. LEXIS 8888, at *12 (S.D.N.Y. Jan. 19, 2018) (dismissing claim because "[c]ourts applying New York law have routinely held that the loss of the purchase price of an item, standing alone, does not constitute an 'actual injury' under GBL § 349").

The foregoing authority plainly bars any GBL 349 claim here. Even applying the most charitable reading of the Amended Complaint, the sole alleged "injury" suffered by Appellants is that they would not have purchased the Tanbook had they not been purportedly deceived by Matthew Bender. In that regard,

Appellants refer to the Tanbook being "of no value" (R49 ¶ 6) and reiterate several times in the pleading that they seek monetary damages in the full amount that they paid for the publication (*see, e.g.*, R49 ¶ 8; R74 ¶ 92; R78 ¶ 112; R81 ¶ 133). Appellants embraced this same impermissible damages theory in their opposition submissions below. For example:

- In their opposition brief, Appellants posited that the "actual harm to [Appellants] and members of the class" is that "they received a deficient product they would never have bought had they know[n] of those deficiencies" (SR44-45), and that "they are entitled to recover the amount they paid" for that book (SR51).

- In their sworn affidavits, both Himmelstein and McKee reiterated that they "would never have purchased" the Tanbook "[h]ad [they] known" about purported deficiencies. (R226 ¶ 14; R235 ¶ 22.)

Indeed, Appellants once again reaffirm this theory on appeal. In the section of their appeal brief titled "The Harm to Appellants, the Class and Rent Regulated Tenants Generally," Appellants state that Tanbook purchasers "received a grossly deficient product they would never have bought had they know[n] of those deficiencies."[14] (Br. at 19.)

[14] It is unclear why Appellants believe that one instance of an alleged "harm" to a *non-plaintiff* (Br. at 20) is relevant at this stage; they certainly do not cite any authority to support that position. But even if that third party was a plaintiff, it would not cure the deficiencies in the GBL 349 claim. The sole redress sought in the Amended Complaint remains the recovery of the Tanbook purchase price, and, like Appellants, there is no allegation that the third party ever saw or relied on the alleged misrepresentations at issue.

The circumstances here are in all material respects identical to those presented to the Second Department when it dismissed a GBL 349 claim in *Rice v. Penguin Putnam, Inc.*, 289 A.D.2d 318 (2d Dep't 2001). In *Rice*, the plaintiff filed a putative class action complaint on behalf of purchasers of a novel, asserting that they were misled into believing that a particular person was the sole author, rather than a co-author. *Id*. at 318. The theory of GBL 349 liability was that class members "would not have purchased the novel had they known the true facts about its authorship." *Id.* Relying on the Court of Appeals' decision in *Small*, the Second Department held that the claim must be dismissed because the plaintiff did not allege a cognizable injury under the statute. *Id.* at 319.

Just like the plaintiff in *Rice*, Appellants are, at most, contending only that they and other putative class members would not have purchased the Tanbook from Matthew Bender in the absence of an alleged deception regarding that publication.[15] The GBL 349 claim here thus fails for the same reasons.

[15] In their opposition filing below, Appellants baldly claimed that *Rice* is "worlds apart" because the alleged deception in that case concerned "the true authorship of a novel." (SR51.) This is a distinction without a difference. Both *Rice* and this case concern allegations that class members would not have purchased a book if not for an alleged deception regarding a characteristic of that book. Whether that characteristic concerned authorship or the substantive text is entirely irrelevant.

C. The GBL 349 Claim Also Fails Because Appellants Cannot Show That a "Reasonable Consumer" in Their Circumstances Would Have—or Even Could Have—Been Misled by Alleged Misrepresentations That They Never Even Saw

The GBL 349 claim fails for yet another independent reason that Appellants have consistently ignored: Appellants cannot satisfy the requirement that the alleged deceptive actions of Matthew Bender were "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Stutman*, 95 N.Y.2d at 29 (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995)). Appellants cannot make this showing as a matter of law for at least two reasons.

First, Appellants do not and cannot allege facts indicating that Matthew Bender's misrepresentations caused them any harm; indeed, they do not allege that they ever saw those misrepresentations. An essential element of a GBL 349 claim is *causation* of injury—i.e., "that the defendant's material deceptive act caused the injury." *Stutman*, 95 N.Y.2d at 29; *see also Oswego Laborers*, 85 N.Y.2d at 26 ("[W]hile [GBL § 349] does not require proof of *justifiable* reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual . . . harm." (emphasis added)).

Appellants claim that they were wrongfully induced into purchasing the Tanbook by misrepresentations on the Website, Amazon, and in the Tanbook's "Overview." But that claim necessarily fails as a matter of law because Appellants

cannot demonstrate that they were harmed by statements *that they never purport to have seen*, much less to have seen prior to making decisions to purchase Tanbooks. This alone requires dismissal of the GBL 349 claim. *See, e.g.*, *Gale*, 9 A.D.3d at 447 (affirming dismissal because "[i]f the plaintiff did not see any of these statements, they could not have been the cause of his injury, there being no connection between the deceptive act and the plaintiff's injury"); *Valle v. Popular Cmty. Bank*, No. 653936/2012, 2014 N.Y. Misc. LEXIS 3684, at *50 (Sup. Ct. N.Y. Cty. Aug. 4, 2014) (dismissing for failure to state a claim where plaintiffs claimed deception based on agreements that they never alleged having seen); *Karakus v. Wells Fargo Bank, N.A.*, 941 F. Supp. 2d 318, 341 (E.D.N.Y. 2013) (finding no "link" between alleged error in disclosure statement and purported injuries, and one plaintiff "did not even *read*" the statement).

Second, the existence of the clear and conspicuous disclaimer language in the T&C governing Appellants' Tanbook purchases forecloses any claim that a "reasonable consumer" in Appellants' shoes would be deceived. GBL 349 claims are frequently dismissed where conditions of an allegedly deceptive transaction were disclosed to consumers, such as in contracts or terms of use. *See, e.g.*; *Ballas v. Virgin Media, Inc.*, 60 A.D.3d 712, 713 (2d Dep't 2009) (disclosure of terms in subscription contract mandated dismissal of GBL 349 claim); *Against Gravity Apparel, Inc. v. Quarterdeck Corp.*, 267 A.D.2d 44, 44 (1st Dep't 1999) (contract

disclaimed that company "[did] not warrant that the operation of the Software will be uninterrupted or error free"); *Diop v. Daily News, L.P.*, 11 Misc. 3d 1083(A), 2006 N.Y. Slip Op. 50671(U), at *5 (Sup. Ct. Bronx Cty. 2006) (dismissing claim for alleged failure to ensure accuracy of the publication of a contest's "winning numbers" where contest rules "indicate[d] that mistakes in designating the winning number are possible"); *Derbaremdiker v. Applebee's Int'l, Inc.*, 12-CV-01058, 2012 U.S. Dist. LEXIS 138596, at *15 (E.D.N.Y. Sept. 26, 2012) (citing multiple Appellate Division cases), *aff'd*, 519 F. App'x 77 (2d Cir. 2013). So, too, should Appellants' GBL 349 claim be dismissed.

VI. APPELLANTS' NEW "FRAUDULENT MISREPRESENTATION" CLAIM IS WAIVED, BUT AT ALL EVENTS FAILS AS A MATTER OF LAW

As described above, Appellants' "fraud" claim has morphed dramatically on appeal. Rather than continue to charge Matthew Bender with making affirmative misrepresentations about the content of the Tanbook—a claim that plainly fails for the reasons stated by the lower court (R39-40) as well as other reasons set forth in Matthew Bender's moving papers (SR30-33; SR81-84)—Appellants now contend that Matthew Bender's "failure to promptly notify" customers of issues with the 2016 Tanbook constitutes an "ongoing fraudulent misrepresentation." (Br. at 45.) Appellants further argue that Matthew Bender engaged in "ongoing fraudulent inducement" by "selling the 2017 Tanbook while knowing it would not be timely delivered"—that is, until later in the year. (*Id.* at 46.)

Even if this new claim was not waived by Appellants' failure to raise it in the proceedings below—which it is—it fares no better on their merits than Appellants' prior fraud claim.

To state a claim for fraud, Appellants must have alleged that (1) Matthew Bender made a statement of material fact, (2) which it knew to be false at the time, (3) with the intention to induce Appellants to rely on the statement to their detriment, and that Appellants both (4) actually relied on the alleged misrepresentations and (5) suffered injury as a result. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011). Fraud allegations are held to a heightened standard of pleading, and must be stated with particular detail to survive a motion to dismiss. N.Y. C.P.L.R. 3016(b); *see MP Cool Invs. Ltd. v. Forkosh*, 142 A.D.3d 286, 287, 291 (1st Dep't 2016). Appellants' new fraud theories fail to, and cannot, sufficiently plead these elements.

Most saliently, Appellants cannot point to any "statement of material fact," much less one that they relied on or that caused them injury. *See, e.g., Fitch v. TMF Sys., Inc.*, 272 A.D.2d 775, 777 (3d Dep't 2000) (rejecting fraud claim because, inter alia, "[p]laintiffs do not charge defendant with any specific misrepresentation in their complaint"); *Andre Strishak & Assocs., P.C. v. Hewlett-Packard Co.*, No. 4332/01, 2001 N.Y. Misc. LEXIS 350, at *5 (Sup. Ct. Kings Cty. July 13, 2001) (dismissing fraud claim where plaintiffs "failed to plead, with

specificity, any material false representation, instead importing their own interpretation in order to support their allegation"). As the lower court acknowledged—and as Appellants do not dispute on appeal—the allegations in the Amended Complaint reflect, at most, that Matthew Bender learned of concerns about the 2016 Tanbook in December 2016. (R28, 39-40.) Even if Appellants could demonstrate that Matthew Bender made some false "statement" about Tanbook content after that date—which they cannot—none of the Appellants purchased the 2016 Tanbook after that date, completely undercutting any allegation that they either *relied* on a fraudulent statement or were *harmed* by any supposed "fraud." *See, e.g.*, *Eitan Ventures, LLC v. Peeled, Inc.*, 94 A.D.3d 614, 616 (1st Dep't 2012) (affirming dismissal of fraud claim where "plaintiff sustained no out-of-pocket loss").

Appellants' new fraud theory based on the alleged "failure to promptly notify" also fails for the additional reason that—just like Appellants' fraud claim in in the lower court was wholly duplicative of their express warranty theory—the new fraud theory is wholly duplicative of Appellants' theory that Matthew Bender breached the T&C. Fraud claims are dismissible where, as here, a plaintiff "allege[s] no misrepresentations collateral or extraneous to the agreements" and/or seeks the same damages as contract claims. *RGH Liquidating Tr. v. Deloitte & Touche LLP*, 47 A.D.3d 516, 517 (1st Dep't 2008); *see also MMCT, LLC v. JTR*

Coll. Point, LLC, 122 A.D.3d 497, 499 (1st Dep't 2014) (affirming dismissal where fraud claim "duplicates the breach of contract claim because plaintiff has not alleged any representation that is collateral to the contract"); *Havell Capital Enhanced Mun. Income Fund, L.P. v. Citibank, N.A.*, 84 A.D.3d 588, 589 (1st Dep't 2011) (fraud claim held impermissibly duplicative where it "sought identical damages" to and therefore was "redundant of the contract claim"). Appellants' appeal brief cannot be any more explicit that the new fraud and contract claims—although both waived—are entirely redundant of each other: the *title* of "Point VI" of the brief is that Matthew Bender's alleged "failure to promptly notify its customers . . . was a breach of contract *and* an ongoing fraudulent misrepresentation." (Br. at 45 (emphasis added).) Nor do Appellants ever suggest that the damages for the alleged fraud differ in any way from the damages for their contract (and every other) theories; in all instances, they simply seek recoupment of the entire purchase price of the Tanbook. Accordingly, to the extent that the new fraud claim is considered on its merits, it fails as a matter of law on this basis as well.

Finally, the new theory that Matthew Bender's delivery of the 2017 Tanbook in May of that year instead of January constitutes an "ongoing fraudulent inducement" makes no sense whatsoever. As discussed above, Matthew Bender has never promised that the Tanbook would be published or issued at any

particular time of the year, and as Judge Ramos recognized, the T&C belie any such promise. But what makes Appellants' new claim truly bizarre is that they claim to have been defrauded and "entitled to a return of 5/12ths of the cost" of the 2017 Tanbook despite the fact that *none of them paid for that publication until after they received it* in May of 2017. When Himmelstein and McKee received their copies of the 2017 Tanbook in May—well after the filing of this lawsuit—they had the option to return the new edition and not have any payment obligation. Instead, they chose to keep the product and pay the full price, clearly making their own conscious determinations that receiving a Tanbook in May was worth the full price. Thus, there was no "fraud" and no "inducement" as a matter of law.

VII. APPELLANTS SHOULD NOT BE PERMITTED TO FILE A THIRD PLEADING IN THIS ACTION

Matthew Bender notified Appellants of many of the fatal deficiencies in their claims when it moved to dismiss the *initial* Complaint in this action. Since then, Appellants have filed a new pleading (with two new plaintiffs), an opposition brief, three sworn client affidavits, and an appeal brief. Yet in none of those documents have Appellants alleged any cognizable injury or actionable misrepresentation to support their claim that the asserted omissions in the 2016 Tanbook violated New York law. That is because no such injury or misrepresentation exists.

Despite jumping from one theory of liability to the next, Appellants cannot plead around certain immutable (and never disputed) facts—most saliently, that:

- Appellants have never seen the alleged misrepresentations that are the basis for the contract, express warranty, GBL 349, and fraud claims appearing in their pleading;

- The binding, written agreements governing Appellants' Tanbook purchases contain an express, conspicuous disclaimer that unequivocally disclaims all warranties regarding the content of the Tanbook;

- The only "injury" that Appellants have allegedly suffered is being deceived into purchasing the 2016 Tanbook, which the Court of Appeals has held is not cognizable on a GBL 349 claim; and

- Appellants that purchased the 2017 edition of the Tanbook when it was published in May of 2017 were under no obligation to make that purchase, yet freely elected to do so at that time.

These facts alone are sufficient to demonstrate that no amount of repleading could permit Appellants to plead a viable cause of action. Nor can Appellants plead around the clear judicial authority discussed above barring Appellants' claims as a matter of law.

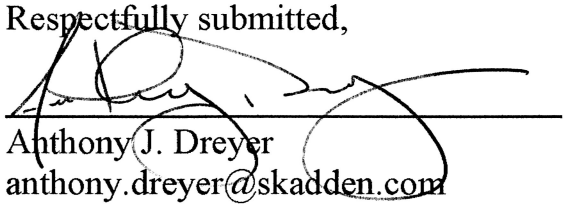
Accordingly, as Judge Ramos recognized when he entered judgment, a third pleading would be futile, and neither Matthew Bender nor the Court should be required to devote even more time and resources to this meritless litigation. *See Carrero v. N.Y. City Hous. Auth.*, 162 A.D.3d 566, 567 (1st Dep't 2018); *Triad Int'l Corp. v. Cameron Indus., Inc.*, 122 A.D.3d 531, 532 (1st Dep't 2014).

CONCLUSION

For the reasons set forth above, Matthew Bender respectfully submits that this Court should affirm the Commercial Division's dismissal of the Amended Complaint with prejudice.

Dated: New York, New York
January 30, 2019

Respectfully submitted,



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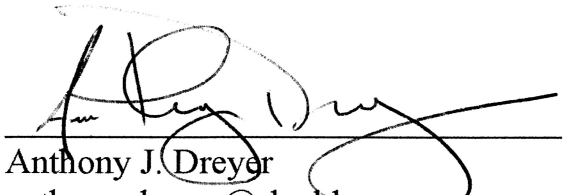

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