To be Argued by:
ANTHONY J. DREYER
(Time Requested: 30 Minutes)

APL-2020-00008
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Court of Appeals

of the

State of New York

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.

BRIEF FOR DEFENDANT-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, Respondent Matthew Bender & Company, Inc. states that:

(1) The following are Matthew Bender & Company, Inc.'s corporate parents:

- RELX Inc.
- RELX US Holdings Inc.
- RELX Overseas Holding Ltd
- RELX (Holdings) Ltd
- RELX Group plc
- RELX plc

(2) The following are Matthew Bender & Company, Inc.'s affiliates:

- LexisNexis Puerto Rico, Inc.
- LexisNexis Rule of Law Foundation
- Moreover Technologies Ltd
- PCLaw Time Matters LLC
- Portfolio Media, Inc.
- Reed Technology And Information Services Inc.

(3) Matthew Bender & Company, Inc. has no subsidiaries.

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Respondent Matthew Bender & Co., Inc. ("Matthew Bender") respectfully submits this brief in response to the appeal filed by Appellants Himmelstein, McConnell, Gribben, Donaghue & Joseph, LLP ("Himmelstein"), Housing Court Answers, Inc. ("HCA"), and Michael McKee ("McKee") (together, "Appellants"), in which Appellants seek reversal of the unanimous May 2, 2019 Decision and Order of the Appellate Division (First Department) that affirmed the Commercial Division's dismissal with prejudice of Appellants' twice-pled causes of action.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, on this appeal, Appellants may rely on allegations, arguments, and causes of action that were never presented to the Commercial Division.

2. Whether Appellants can avoid the legal effect of a provision in their written agreement with Matthew Bender stating (in all capital letters) that Matthew Bender "DISCLAIMS ALL WARRANTIES WITH RESPECT TO PUBLICATIONS, EXPRESS OR IMPLIED," and does "NOT WARRANT THE ACCURACY, RELIABILITY, OR CURRENTNESS" of the Tanbook, when Appellants (a) concede that the written agreement governed all of their Tanbook purchases, and (b) never challenged the enforceability of the disclaimer language in the proceedings below.

3. Whether Appellants have sufficiently pled the requisite causation of injury to support their GBL 349 claim when they have never alleged that they ever

saw—let alone were deceived by—any of the allegedly deceptive statements on which the GBL 349 claim is based.

4. Whether this Court's holding in *Small v. Lorillard Tobacco Co.*, which expressly rejected the argument "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," bars Appellants' GBL 349 claim when their sole alleged injury is that they would not have purchased the 2016 Tanbook had they not been purportedly deceived regarding that book's contents.

5. Whether Appellants have failed to state a claim for breach of the implied covenant of good faith and fair dealing when they have never disputed—and do not challenge on this appeal the First Department's holding—that the claim is impermissibly duplicative of their contract claim.

6. Whether Appellants can maintain a claim for breach of express warranty when it is undisputed, and not challenged on this appeal, that Appellants never provided the pre-suit notice of breach required by New York Uniform Commercial Code § 2-607(3).

7. Whether Appellants can credibly maintain that a "promise of completeness and accuracy" is the "*sine qua non* of the transaction" to purchase the Tanbook or otherwise constitutes an "express warranty" when (a) the parties'

undisputedly binding written agreements include an express disclaimer of "ALL WARRANTIES" and disclose that Matthew Bender does "NOT WARRANT THE ACCURACY, RELIABILITY, OR CURRENTNESS" of the Tanbook, and (b) Appellants have continued to purchase the Tanbook despite being repeatedly informed (including in this litigation) that Matthew Bender is *not* guaranteeing the Tanbook's content.

8. Whether Appellants have sufficiently pled the requisite reliance to support their express warranty claim when they have never alleged that they ever saw—let alone relied on—the alleged "express warranties" regarding Tanbook content on which the claim is based.

9. Whether Appellants can state a claim that they were defrauded into paying full price for a purportedly "late" publication of the 2017 Tanbook in May 2017 when Appellants affirmatively decided to buy that book and opted to pay the full requested price *after* receipt of that edition in May 2017.

PRELIMINARY STATEMENT[1]

It is hardly a fluke that all six justices of the Supreme Court who have considered the Amended Complaint have agreed that all of Appellants' causes of action fail as a matter of law. Although each of those causes of action is fatally deficient for numerous, independent reasons, Appellants' overarching failure is that they are trying to transform an alleged unfortunate mistake on the part of Matthew Bender—publishing an incomplete section of a legal text—into actionable misconduct. Simply put: a mistake does not a cause of action make.

This fundamental distinction explains why—despite Matthew Bender's acceptance as true at this stage of the litigation that Part III of the 2016 Tanbook was incomplete—Appellants continually have failed to state any viable claim. That "errors" may exist does not excuse Appellants from having to plead facts sufficient to support each and every element of the claims they assert.

Nor does the mere alleged incompleteness of Part III of the 2016 Tanbook mean that Matthew Bender (1) defrauded or deceived anyone—certainly not Appellants, none of whom ever even *saw* the allegedly deceptive statements by Matthew Bender before purchasing the Tanbook, or (2) breached any express contractual guarantee that Part III of the book would be error-free. To the

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[1] The Amended Complaint is located at R47-136. "Br." refers to Appellants' May 15, 2020 brief to this Court. Unless otherwise noted, all emphasis is added.

contrary, Matthew Bender (or any publisher for that matter) cannot promise perfection, and thus its written agreement with all three Appellants—*an agreement that Appellants have conceded is binding*—contains an express disclaimer that the company does "NOT WARRANT THE ACCURACY, RELIABILITY OR CURRENTNESS" of the Tanbook.

Appellants only sought leave to appeal—and this Court's review should be limited to—narrow grounds concerning the claim under General Business Law § 349 ("GBL 349") and the alleged breach of an implied covenant. Nevertheless, Appellants now take a "kitchen sink" approach, raising every argument and cause of action they can dream up, even when the issues were never raised below and are plainly unpreserved. Moreover, those few arguments that are preserved are meritless, academic (due to other pleading infirmities), and divorced from the Record. As discussed in greater detail below, Appellants' claims all fail for a variety of reasons:

GBL 349: Tellingly, Appellants focus on the issue of whether Tanbook sales were "consumer oriented" despite the fact that the Appellate Division did not even mention that issue, and instead affirmed dismissal on two other, independent grounds: (1) Appellants' inability to demonstrate the requisite *causation of injury* when they have repeatedly failed to allege that they ever saw the alleged misrepresentations on which the GBL 349 claim is based; and (2) the fact that

Appellants' sole allegation of injury—that they were deceived into purchasing the 2016 Tanbook and should be reimbursed the entire purchase price—is *precisely* the alleged injury that this Court found not cognizable in *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43 (1999). Appellants' attempts to avoid the foregoing are unavailing. For example:

- Contrary to all authorities, Appellants suggest that their lack of awareness of allegedly deceptive statements is irrelevant because GBL 349 does not require "reliance." Appellants completely misunderstand the caselaw; as this Court and others have explained, while a GBL 349 plaintiff need not show *justifiable* reliance to state a claim, that does not in any way abrogate the need to show *causation*, which cannot be established if the challenged statements were never seen.

- Appellants attempt to avoid the plain import of the (all capitals) language in their contracts that Matthew Bender "DOES NOT WARRANT THE ACCURACY, RELIABILITY, OR CURRENTNESS" of the Tanbook, ignoring the legion of analogous cases in which GBL 349 claims were dismissed because of disclosures in binding agreements. Appellants now baselessly suggest that this disclosure is unenforceable, but that argument is unpreserved (having never been raised below) and meritless.

- Appellants now suggest that *Small* does not apply to this case. Even if this argument was preserved for review by this Court—and it is not—the application of *Small* could not be any more straightforward, and Appellants' belated attempts to impose additional limitations on *Small's* holding are baseless. Moreover, to the extent Appellants imply that *Small* should be overturned, there is no justification for doing so, and *stare decisis* compels adherence to *Small's* longstanding, uncontroversial, and oft-applied statutory interpretation.

At all events, Appellants misunderstand the relevant caselaw concerning the "consumer oriented" requirement for GBL 349 claims, and its contention that the

First Department's approach is incompatible with the analysis of this Court or other Departments of the Appellate Division is simply wrong.

Implied Covenant of Good Faith and Fair Dealing: Appellants' latest arguments concerning their implied covenant claim are unpreserved, academic, and meritless. The Appellate Division correctly concluded that the plain disclaimer of warranties in the parties' contracts disproves the purported "implied covenant" regarding Tanbook content; Appellants' response that the disclaimer is unenforceable is both unpreserved and incorrect. But the Court need not even reach this issue, because Appellants do not mention—and have never disputed—the independent ground on which the Appellate Division rejected the implied covenant claim: it is impermissibly duplicative of Appellants' contract claim.

Express Warranty: Appellants did not seek leave to appeal the dismissal of their claim for breach of an express warranty to this Court, and their arguments regarding that cause of action should be stricken. But even if considered, the express warranty claim was properly dismissed. Appellants do not appeal their failure to provide the pre-suit notice of breach required by Section 2-607(3)(a) of the Uniform Commercial Code, which alone necessitates affirmance. Regardless, both the contractual disclaimer of "ALL WARRANTIES" and Appellants' undisputed failure to plead "reliance" on the alleged "express warranties"—statements on the Matthew Bender website and in the "Overview" page of the

Tanbook that Appellants have never alleged that they even *saw*—constitute independent grounds for affirmance. Moreover, Appellants' suggestion that Matthew Bender's supposed "promise of completeness and accuracy" of the Tanbook must be an express warranty because it is the "*sine qua non* of the transaction" (Br. at 52) is not only wrong, but also not credible. Appellants have continued to purchase later editions of the Tanbook (at full price) *despite repeatedly being informed—including in this litigation—that Matthew Bender does not and cannot guarantee completeness of Tanbook content*.

"Failure to Promptly Notify" Claims: Appellants' contract and fraud claims based on an alleged "failure to promptly notify" customers of errors in the 2016 Tanbook were neither pled nor otherwise raised in the Commercial Division; they thus fail for that reason alone. But the claims also fail on their merits for numerous reasons. As the Appellate Division recognized, the parties' contracts do not contain any language obligating Matthew Bender to provide the "notification" that Appellants demand. Appellants also fail to satisfy multiple elements of their "fraudulent inducement" claim, including that they: (1) do not and cannot allege the requisite "reliance" on fraudulent conduct, because none of them purchased a 2016 Tanbook after the December 2016 date on which Matthew Bender is alleged to have learned of errors in that publication; and (2) ignore the independent ground for dismissal that the fraud claim is impermissibly duplicative of the contract

claim. Finally, to the extent that Appellants seek a refund of "5/12ths" of the cost of the *2017* Tanbook because it was purportedly published late (in May 2017 instead of January 2017), that claim is both waived and nonsensical. Appellants chose to pay full price for the 2017 Tanbook *after* receiving it in May 2017; had they felt it was not worth the price in May of 2017, they had no obligation to purchase it.

STATEMENT OF THE CASE

Appellants' "Statement of the Case" (Br. at 3-26) is strikingly unmoored from the Record. Despite the fact that this appeal concerns dismissal of the Amended Complaint, Appellants largely ignore the actual allegations in that pleading and instead proffer new alleged "facts" that are outside the Record and could not possibly have had any bearing on the proceedings below. Appellants also impermissibly rely on arguments and legal theories that undisputedly were never presented to the Commercial Division, and thus are unpreserved in addition to having been unanimously rejected by the Appellate Division on numerous, independent grounds.

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

Since 1990, Matthew Bender has sold a compilation of statutes, regulations, and other legal and editorial materials entitled "New York Landlord-Tenant Law," commonly referred to as the "Tanbook." (R165 ¶ 4.) New editions are published on an annual basis. (*Id.* ¶ 5; R48 ¶¶ 2-3.)

The 2016 edition was over 1,500 pages long and divided into seven "Parts." (R166 ¶ 7.) The introductory "Overview" (on page xi, after the Table of Contents) briefly described 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 new edition of the Tanbook was issued in May 2017, and contained certain updates of statutes, regulations, and other content. (R59 ¶ 54; R166 ¶ 8.)

B. Appellants and Their Annual Purchases of the Tanbook

Notwithstanding their attempts to rely on (i) phantom members of an uncertified putative class of Tanbook purchasers, and (ii) "rent regulated tenants generally" (Br. at 19), there are only three Appellants in this case, each of whom alleged 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 purchases Tanbooks "for use by its attorneys and non-attorney staff." (R51 ¶¶ 19-20.)

- HCA is a nonprofit whose staff "use the Tanbook in connection with its work on behalf of pro se Housing Court litigants." (R52-53 ¶¶ 25, 28.)

- McKee is a "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 "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 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 it is undisputed that none of Appellants' Tanbook purchases were made online.[2] (R166 ¶ 10; R168 ¶ 20; R170 ¶ 27.)

Rather, all three Appellants had a "Non-Service Subscription with Automatic Update Shipments." (R185; R188; R191; R194.) Under the terms of this subscription, new editions of the Tanbook were automatically shipped 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; R167 ¶¶ 13-14; R168-69 ¶ 21; R170 ¶ 29.) *In every instance* in which Appellants received shipments of the Tanbooks, *Appellants expressly and*

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[2] Information concerning Appellants' purchases is drawn in part from the Affidavit of a Matthew Bender employee, Tracy Baldwin, that accompanied the Motion to Dismiss. (R164-198.) Although Appellants now speculate that Ms. Baldwin lacked knowledge about the "editing or updating" of the Tanbook (Br. at 23), any such challenge to the affidavit is both waived and irrelevant. Appellants did not raise this issue in the Commercial Division, and have *never* contended that any of the factual information in the affidavit is inaccurate or that any of the accompanying exhibits—such as the parties' binding contracts—are not what they purported to be. Moreover, Ms. Baldwin did not even opine on Tanbook "editing or updating" because that is irrelevant to dismissal; as the trial judge reminded Appellants' counsel at oral argument, at this stage, Matthew Bender is "not taking the position that there weren't errors in the [20]16 book." (R418.)

separately opted to pay, and did pay, for the books. (R167 ¶ 16; R169 ¶ 22; R170 ¶ 30.) Automatic payments are not possible. (R167-68 ¶ 16.)

Himmelstein and McKee were shipped copies of the 2017 edition in May 2017—several months after filing this suit—and both Appellants opted to pay the full price for the publication at that time. (R228 ¶¶ 24-26; R235 ¶¶ 23-24.) As of June 2017, HCA had ceased receiving automatic shipments, and did not request or receive the 2017 Tanbook. (R169 ¶ 26.)

C. The Undisputed Terms and Conditions Governing Appellants' Tanbook Purchases

Appellants' purchases were governed by "Material Terms" and "Additional Terms and Conditions" (collectively, the "**T&C**") set forth in "Agreement and Order Forms" accompanying Tanbook shipments. (R166-67 ¶¶ 11-12; R169 ¶ 24; R170 ¶ 28.) Critically, Appellants have *never* disputed that the T&C—which were introduced as documentary evidence (*see, e.g.*, R184-98)—constitute a binding and valid contract governing all of their Tanbook acquisitions; in fact, Appellants rely on the T&C in this appeal, arguing (albeit incorrectly) that Matthew Bender breached the express terms of that contract. (*See infra* at VI.B.)

The T&C expressly constitute the "entire agreement" with the purchaser that "supersedes all prior understandings and agreements, oral, written or otherwise." (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.*) Accordingly, Matthew Bender expressly informed Appellants that it was not providing any guarantees with respect to Tanbook content.

D. Procedural History in the Commercial Division

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

Himmelstein filed the initial Complaint on February 23, 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 and purported representatives of a New York class of Tanbook purchasers. (R47-136.) None of the Appellants notified Matthew Bender that it had any concerns about the Tanbook 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 and violation of GBL 349 premised on a theory that Matthew Bender guaranteed that Part III of the Tanbook

would be complete and without error.[3] (*See, e.g.*, R49 ¶ 7.) Appellants listed purported 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 have never suggested that the 2017 edition of the Tanbook contained errors.

As in the initial pleading, the sole "injury" alleged (repeatedly) in the Amended Complaint was that Appellants would not have purchased the 2016 Tanbook had they not been purportedly deceived concerning the book's content (*e.g.*, R48-49 ¶ 6; R49 ¶¶ 8, 10; R74 ¶ 92; R81 ¶ 133)—an allegation that was expressly reiterated both in Appellants' opposition filing to the motion to dismiss (R450.44-450.45) and accompanying affidavits from Himmelstein and McKee (R226 ¶ 14; R235 ¶ 22). Notably, none of the Appellants alleged that it ever saw, much less relied, on the alleged misrepresentations that formed the basis for their claims.

The Amended Complaint added a claim of "fraud" based on an alleged, but unseen, affirmative misrepresentation on the Website regarding the Tanbook's completeness. (R50 ¶ 11.) Citing solely to a December 2016 email from a Matthew Bender representative stating that issues with the Tanbook "have only

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[3] Appellants have confirmed that this litigation "pertains *only*" to Part III and that they "do not make any claims with respect to the other 700 pages of the book." (Br. at 11.)

recently been brought to our attention," Appellants pled (inconsistently with that email) that Matthew Bender knew that the representation on the Website was false during the entire alleged six-year "class period." (R54 ¶ 36; R80-81 ¶¶ 130-32.)[4]

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

2. *Appellants' Modification of Their Claims in Opposition to Matthew Bender's Motion to Dismiss*

In their opposition filing in the Commercial Division, Appellants did not attempt to address many of the numerous reasons for dismissal raised by Matthew Bender. (R450.3-450.35.) For example, Appellants did not dispute that they failed to allege "reliance" for the fraud claim, and that claims related to the allegedly late publication of the 2017 Tanbook were undercut completely by the fact that Appellants chose to pay full price for that edition once receiving it in May, rather than cancel their subscription or return the book for no cost. (R450.12-450.13.) Nor could Appellants disagree that all of their purchases were governed by written agreements that disclaimed "ALL WARRANTIES . . . EXPRESS OR IMPLIED,"

[4] Appellants' contention that Matthew Bender made a "concession that for years it knowingly published annual editions . . . without making numerous updates" (Br. at 4) is patently false.

and expressly provided that Matthew Bender did not guarantee that Tanbooks were 100% current, accurate, or reliable.

Notwithstanding these fatal concessions, Appellants overhauled their contract theory by asserting that, pursuant to the New York Uniform Commercial Code ("UCC"), Matthew Bender breached an "express warranty" of completeness and accuracy created by language on the Website and Amazon. (R450.56-450.58.) As with all of the other purported representations concerning Tanbook content, none of the Appellants ever alleged or argued that they saw these online statements that purportedly constituted an express warranty.

The opposition brief also raised for the first time an argument that "The UCC Imposes an Obligation of Good Faith on Merchants." (R450.55.) Appellants provided no specifics regarding Matthew Bender's supposed violation of an implied covenant, but defaulted to the general theory underlying all of their other claims: that there was "dishonest dissemination of misinformation" and "Matthew Bender failed to deliver the annual compilation, in its entirety." (*Id.*)

3. *The Trial Court's Dismissal of the Amended Complaint*

On February 6, 2018, the Commercial Division dismissed the Amended Complaint, holding, in pertinent part:

- The express warranty claim failed because: (i) Appellants failed to satisfy the pre-suit notice requirements of UCC § 2-607(3); and (ii) alleged statements on the Website and in the Tanbook's "Overview" did not constitute an "express warranty" of completeness both because

the T&C specifically disclaimed any such warranty and because Appellants never alleged "that they relied upon, or otherwise ever saw" those statements. (R34.)

- Any implied covenant claim failed because Appellants' theory imposed an obligation on Matthew Bender inconsistent with the T&C, and "a reasonable person could not have understood that Matthew Bender was warranting the accuracy of the Tanbook" given the disclaimer. (R35-36.)

- The implied contract claim failed because there already was an express contract between the parties covering the subject matter of the alleged implied contract (the T&C), and the T&C made clear that Matthew Bender "was not bound to deliver the new Tanbook at the beginning of each year." (R36.)

- The GBL 349 claim failed because the allegations did not support a finding that Tanbook sales were "consumer-oriented." (R36-39.) The court did not address Matthew Bender's additional arguments that Appellants failed to plead (1) causation and (2) a cognizable injury. (R450.27-450.30; R450.71-450.74.)

- Noting the heightened pleading requirements of CPLR 3016(b), the fraud claim failed for lack of allegations that Matthew Bender knew of inaccuracies in the Tanbook prior to 2016. (R39-40.) The court did not address Matthew Bender's additional arguments that Appellants failed to satisfy other required elements of fraud claims, or that the claim was impermissibly duplicative of the contract claim. (*Id.*; R450.30-450.33; R450.81-450.84.)

E. Appellants' New Arguments and Claims on Appeal, and the Appellate Division's Unanimous Affirmance of Dismissal

Before the Appellate Division, Appellants did *not* challenge the dismissal of the implied contract or fraud claims. Appellants did, however, purport to assert new causes of action—namely: (1) "ongoing fraudulent misrepresentation" based on an alleged "failure to promptly notify customers who had purchased the 2016

Tanbook" of concerns about Tanbook content prior to issuance of the 2017 edition; (2) breach of the express terms of the T&C based on that same alleged "failure to promptly notify;" and (3) "fraudulent inducement" for "[s]elling the 2017 Tanbook while knowing it would not be timely delivered" until later in the year (despite Appellants' purchase of that edition after its May 2017 release).

On May 2, 2019, five justices of the First Department unanimously affirmed the dismissal of all claims. (R452-55.) Most pertinent to the issues for which Appellants sought leave to appeal to this Court, the panel found the implied covenant and GBL 349 claims each fatally deficient for multiple reasons.

With respect to the implied covenant, the court agreed with the Commercial Division that the disclaimer in the T&C precluded a claim, but also affirmed on the independent ground that the claim was impermissibly "duplicative of the breach of contract claim." (R454.) With respect to GBL 349, the panel did not address the Commercial Division's conclusion that Tanbook sales were not "consumer-oriented," but instead relied on two other grounds argued by Matthew Bender from the outset of the case: (1) the requisite causation was lacking because Appellants never alleged that they saw the purportedly "deceptive representations;" and (2) Appellants' alleged injury was not cognizable under the statute in light of this Court's 1999 holding in *Small v. Lorillard*. (*Id.*)

The First Department also affirmed dismissal of the other claims that have not been presented to this Court in Appellants' motion for leave to appeal. The court refused to address Appellants' new "fraud" theory because it was impermissibly raised for the first time in the "appellate reply brief." (R455.) Dismissal of the express warranty claim was affirmed in light of both the specific disclaimer in the T&C and Appellants' independent failure to plead reliance on the purported warranty statements. (R453.)

On August 6, 2019, the panel denied Appellants' motion for reargument or, in the alternative, for leave to appeal to this Court.

F. Appellants' Limited and Modified Arguments for Leave to Appeal to This Court

When Appellants moved this Court for leave to appeal, they set forth only four "grounds for Court of Appeals review." (Sept. 4, 2019 Motion, at 2-8.) One of those grounds was the baseless speculation that the litigation affects "millions" of New Yorkers,[5] while the other three issues presented to this Court concerned only the implied covenant and GBL 349 claims:

1) whether the First Department properly concluded that the disclaimer of Tanbook's content in the T&C precluded the implied covenant claim (*id.* at 8);

[5] This suggestion was neither relevant nor credible because Appellants have never even been able to identify any injury that Appellants *themselves* suffered, and "tenants" would not share in any of the damages sought for the putative class of Tanbook *purchasers*—i.e., solely recoupment of the book's purchase price.

2) whether the First Department properly applied this Court's holding in *Small v. Lorillard* when concluding that Appellants failed to allege a cognizable injury under GBL 349 (*id.* at 5); and

3) whether the Commercial Division properly determined that Tanbook sales were not "consumer-oriented" under GBL 349 (*id.* at 3-5).

Appellants did not challenge dismissal of the express warranty or "fraud" claims.

ARGUMENT

As detailed above, Appellants' arguments and causes of action have changed at every stage of this litigation. As a result, many of Appellants' contentions were waived long ago. Indeed, Appellants do not genuinely attempt to comply with the requirement that its jurisdictional statement include "citations to the pages of the record or appendix" where its presented questions "have been preserved" (*see* 22 NYCRR § 500.13(a)), but instead include only one general reference to the pages in the Record corresponding to its Amended Complaint. (Br. at 1.)[6]

Even for those arguments that are preserved, however, Appellants ignore not only many reasons why those arguments are meritless, but also the independent grounds for dismissal that render the arguments academic and inappropriate for review by this Court.

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[6] Appellants also flout the 14,000 word limit in Rule 500.13(c)(1). (Br. at 63.)

I. APPLICABLE REVIEW STANDARDS

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

This Court has long recognized that it "has no power to review . . . unpreserved error." *Elezaj v. P.J. Carlin Constr. Co.*, 89 N.Y.2d 992, 994-95 (1997) (citation omitted); *see also Bingham v. N.Y.C. Transit Auth.*, 99 N.Y.2d 355, 359 (2003) ("Unlike the Appellate Division, we lack jurisdiction to review unpreserved issues in the interest of justice."). "To preserve an argument for review by this Court, a party must 'raise the specific argument[ ]' in Supreme Court 'and ask [that] court to conduct that analysis' in the first instance." *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 84, 89 (2019) (first alteration in original) (citation omitted). Accordingly, any argument now presented by Appellants that they did not specifically raise in the Commercial Division may not be reviewed by this Court. *See, e.g.*, *id.* (acknowledging "no power" to review argument never mentioned in Supreme Court); *Gaines v. City of N.Y.*, 29 N.Y.3d 1003, 1005 (2017) (argument was "unpreserved for our review" because party "did not argue [it] before [the] Supreme Court"); *JF Capital Advisors, LLC v. Lightstone Grp., LLC*, 25 N.Y.3d 759, 767 (2015) (refusing to consider issue "raised for the first time . . . at the Appellate Division").

B. Merely "Academic" Issues Unnecessary to the Disposition of the Appeal Are Inappropriate for Review

This Court also has recognized that it is "prohibited from giving advisory opinions or ruling on 'academic, hypothetical, moot, or otherwise abstract questions.'" *Saratoga Cty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 810-11 (2003) (quoting *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980)). That is because this Court is "bound, of course, by principles of judicial restraint not to decide questions unnecessary to the disposition of the appeal." *People v. Carvajal*, 6 N.Y.3d 305, 316 (2005); *see also Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 252 (1999) (explaining that "courts cannot go beyond the issues necessary to decide the case at hand"); *N.Y. Pub. Interest Research Grp., Inc. v. Carey*, 42 N.Y.2d 527, 530 (1977).

Here, even if this Court disagreed with the Appellate Division's holdings concerning the few substantive issues actually preserved and presented on this appeal, there exist independent grounds—many of which are undisputed—warranting affirmance of the dismissal of all claims. These grounds render the other issues entirely moot.

II. THE GBL 349 CLAIM WAS PROPERLY DISMISSED AND APPELLANTS' LATEST ARGUMENTS (POINT I) ARE UNPRESERVED, ACADEMIC, AND MERITLESS

The crux of Appellants' GBL 349 claim is that Matthew Bender deceived them by purportedly misrepresenting the accuracy and completeness of Part III of

the 2016 Tanbook in statements made on the Website and in the "Overview" on page xi. Appellants were required, but failed, to plead facts that would have allowed the Commercial Division to infer that (1) Tanbook sales were "consumer-oriented," (2) those sales were "misleading in a material way," and (3) Appellants "suffered injury as a result." *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000).

Appellants focus nearly all of their efforts on the first element despite the fact that it was never even mentioned by the Appellate Division, let alone the grounds for affirmance. Although Appellants' contention that Tanbook sales are "consumer oriented" is wrong, this Court need not even reach that issue because, of the two grounds for dismissal relied on by the Appellate Division, Appellants essentially ignore one, and make unpreserved and meritless arguments about the other.

A. The GBL 349 Claim Necessarily 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

As Appellants note, GBL 349 requires them to demonstrate that Matthew Bender's alleged deceptive statements were "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Stutman*, 95 N.Y.2d at 29 (citations omitted). Appellants neglect to mention, however, that this encompasses a "requirement of 'causation'"—i.e., a plaintiff must show that defendant's deceptive act *actually caused injury*. *Id.*; *see also Oswego Laborers' Local 214*

Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 26 (1995). Appellants cannot make this showing for at least two reasons.

First, despite multiple opportunities to do so, Appellants have never alleged that they even *saw* the alleged misrepresentations on the Website and in the Overview, much less that they were misled by those statements when they purchased the Tanbook. Appellants obviously cannot plausibly contend that they were deceived by statements of which they were never even aware, let alone that such unseen statements caused them any injury. *See, e.g.*, *Bibicheff v. PayPal, Inc.*, No. 2:17-cv-4679, 2020 U.S. Dist. LEXIS 78162, at *10 (E.D.N.Y. May 4, 2020) (dismissing claim where "Plaintiff has not shown causation" because she "did not see the [deceptive] Representations until after" the alleged harm had occurred); *Gale v. Int'l Bus. Machs. Corp.*, 9 A.D.3d 446, 447 (2d Dep't 2004) (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*, Index No. 653936/2012, 2014 N.Y. Slip Op. 32180(U), at *33 (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).

However much Appellants seek to blur the issue, it is *not disputed* that they never saw the alleged misrepresentations on which the GBL 349 claim is based. In

fact, sworn affidavits submitted in response to Matthew Bender's motion to dismiss confirm that, at most, Appellants had only a vague and sourceless impression regarding the content of Part III of the 2016 Tanbook. For example, Himmelstein's affiant never mentions the Overview or Website (or any other alleged statement by Matthew Bender concerning the content of Part III of the Tanbook), but instead states that it has "long been my understanding, and reasonable *assumption*, that the Tanbook is a *useful source* for the entire collection of rent regulation laws."[7] (R224, ¶ 9.) Appellants use similarly cautious and telling wording in their current brief, stating that "[e]ach Appellant alleged below that they purchased the Tanbook for many years because of their *general understanding and belief* that it contained the entire text of the Rent Regulation laws." (Br. at 18.) This alleged "assumption" and "general understanding and belief," unattributable to any particular statement or conduct by Matthew Bender, completely undercuts the possibility that the alleged misrepresentations by Matthew Bender could have *caused* any injury to Appellants as required to set forth a GBL 349 claim.

[7] The Appellate Division implied that the failure to allege the necessary "reliance" for the express warranty claim might have been cured with respect to Himmelstein (but *not* HCA or McKee) in light of this affidavit. (R453.) We respectfully submit that the foregoing language cannot support that conclusion.

Appellants attempt to excuse their failure to plead causation by making the inapposite argument that GBL 349 does not require "reliance." (Br. at 29.) That argument both ignores the foregoing authorities and misses the point.

As this Court explained in the very case cited by Appellants, when courts state that "reliance" is not an element of a GBL 349 claim, they are referring only to the fact that a plaintiff need not show *justifiable* reliance, *not* that a plaintiff need not be aware of the deceptive statements that allegedly caused them injury: "[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." *Oswego Laborers*, 85 N.Y.2d at 26; *see also Gale*¸ 9 A.D.3d at 447 ("Reliance is not an element of a claim under [GBL] § 349. However, the plaintiff must show that the defendant's material deceptive act caused the injury." (citations omitted)). Indeed, only a few months ago, in another decision cited by Appellants (Br. at 28, 34), this Court found that a plaintiff satisfied causation because he "claimed that he *relied* on" deceptive materials when making a purchasing decision, "thereby *causing* plaintiff's alleged damages." *Plavin v. Grp. Health Inc.*, 35 N.Y.3d 1, 12 (2020) (emphasis added).

In short, the causation requirement for GBL 349 claims has never been abrogated. The First Department's affirmance on the grounds that Appellants

failed to allege that they "ever saw the allegedly deceptive representations that purportedly harmed them" (R454) therefore was proper.

Second, the existence of the clear disclaimer language in the T&C forecloses any claim that a "reasonable consumer" in Appellants' shoes could be deceived. Although Matthew Bender has repeatedly raised this point in proceedings below, Appellants ignore the legion of decisions in which GBL 349 claims were dismissed because conditions of a transaction were disclosed to consumers in terms of use or other documents similar to the T&C. *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); *Ludl Elecs. Prods., Ltd. v. Wells Fargo Fin. Leasing, Inc.*, 6 A.D.3d 397, 398 (2d Dep't 2004) (dismissing claim where allegedly deceptive auto-renewal practice "is specifically provided for" in parties' contract "and thus was fully disclosed"); *Against Gravity Apparel, Inc. v. Quarterdeck Corp.*, 267 A.D.2d 44, 44 (1st Dep't 1999) (dismissal where contract disclaimed that company "[did] not warrant that the operation of the Software will be uninterrupted or error free"); *Derbaremdiker v. Applebee's Int'l, Inc.*, No. 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); *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"). Dismissal was warranted for this independent reason, as well.

B. Contrary to Appellants' Unpreserved Arguments, This Court's Longstanding Precedent Plainly Establishes that Appellants Have Failed to Allege Any Legally Cognizable Injury Under GBL 349

1. *Appellants' Arguments Concerning the Applicability of This Court's Holding in* Small v. Lorillard *Are Unpreserved*

In its motion to dismiss, Matthew Bender explained that Appellants "do not allege any legally cognizable injury" because their alleged injury was precisely the kind that this Court found insufficient over twenty years ago in *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43 (1999). (R450.28-450.30.) As Matthew Bender subsequently noted in its Supreme Court reply brief, Appellants' opposition to the motion "ignore[d] the issue entirely" and never even mentioned *Small*. (R450.72.) Because Appellants' entirely new arguments to this Court (Br. at 38-43) were not presented to the Commercial Division, they are beyond this Court's review.

2. *The Application of* Small *to the Allegations in the Amended Complaint Is as Straightforward as Can Be*

Even if this Court were to consider Appellants' unpreserved arguments that *Small* does not apply, those arguments are meritless. In *Small*, this Court expressly rejected the notion "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." 94 N.Y.2d at 56. Instead, GBL 349 requires a

showing of an independent, definable injury resulting from the challenged practice; the deception itself may *not* constitute "both act and injury." *Id.*

That seminal holding has been routinely and regularly applied by courts to reject GBL 349 claims that relied on such a "deception as injury" theory. *See, e.g.*, *id.* (allegation that plaintiffs "never would have purchased cigarettes" if not for alleged deception was legally insufficient); *Baron v. Pfizer, Inc.*, 42 A.D.3d 627, 629 (3d Dep't 2007) (affirming dismissal where 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); *Meyer, Suozzi, English & Klein, P.C. v. Higbee*, No. 2:18-cv-03353, 2020 U.S. Dist. LEXIS 40472, at *7 (E.D.N.Y. Mar. 9, 2020) (dismissing claim because "the New York Court of Appeals explicitly rejected the theory" that being induced by deception into buying product is itself "an injury under [GBL] 349"); *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").

As the First Department correctly concluded, Appellants' allegations in the Amended Complaint set forth precisely the kind of injury found insufficient in *Small*. Even applying the most charitable reading of the pleading, the sole alleged "injury" is that Appellants would not have purchased the 2016 Tanbook had they not been purportedly deceived regarding its contents. In that regard, the Amended Complaint repeatedly alleges that the 2016 Tanbook had "no value" and that they sought only damages in the amount of the *full* purchase price. (*See, e.g.*, R48-49 ¶¶ 6, 8; R74 ¶ 92; R78 ¶ 112; R81 ¶ 133). When confronted with these allegations in the motion to dismiss (*see* R450.28-450.30), Appellants doubled and tripled down on this same alleged injury in their opposition and subsequent appeal filings, stating expressly that they never would have bought the 2016 Tanbook had they known it contained errors.[8] Indeed, it is clear that Appellants are incapable of asserting any other "injury;" despite owning and using the 2016 Tanbook for more than a year, none of the Appellants has ever suggested that it relied on an incomplete or inaccurate provision, let alone did so to their detriment.

These circumstances are in all material respects identical to those presented to the Second Department when it dismissed a GBL 349 claim in *Rice v. Penguin*

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[8] *See, e.g.*, R450.44-.450.45 (asserting "actual harm" that Appellants "received a deficient product they would never have bought had they know[n] of those deficiencies"); R450.51 (seeking "to recover the amount they paid" for the book); R226 ¶ 14; R235 ¶ 22 (asserting in Appellants' sworn affidavits that they "would never have purchased" the Tanbook "[h]ad [they] known that [it was] so deficient").

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, when in fact that person died before the novel was completed and another author wrote half of the content. *Id.* at 318. Plaintiff asserted that class members "would not have purchased the novel had they known the true facts about its authorship" and thus that they should receive "reimbursement of the purchase price." *Id.* Relying on *Small*, the court dismissed the GBL 349 claim for failure to allege a cognizable injury. *Id.* at 319.

Just like both the plaintiff in *Rice* who sought only to recoup the novel's purchase price and the plaintiffs in *Small* who "chose expressly to confine the relief sought solely to monetary recoupment of the purchase price of the cigarettes," 94 N.Y.2d at 56, Appellants are undisputedly contending only that they would not have purchased the 2016 Tanbook in the absence of alleged deception, and they seek only to recover the book's purchase price. It is difficult to conceive of a more straightforward application of this Court's precedent.

3. *Appellants' Belated Attempts to Narrow or Distinguish the Unequivocal Holding in* Small *Lack Any Merit*

Ignoring the numerous analogous cases, Appellants now seek to impose limitations on the holding in *Small* that were neither suggested by this Court nor

would be applicable to Appellants' allegations. In fact, Appellants do not cite to a single authority that expresses or endorses their theories.

For example, Appellants suggest that *Small* only applies where "proof of the injury is too remote or speculative" and the value of a product is "provably different" from consumers' expectations. (Br. at 42-43.) But *Small* said no such thing, and "remoteness" of the alleged injury had nothing to do with this Court's analysis or rationale. To the contrary, this Court acknowledged that a GBL 349 claim may have been viable had the *Small* plaintiffs not "chose[n] to expressly confine the relief sought to monetary recoupment of the purchase price" and instead sought "recovery for injury to their health as a result of their ensuing addiction" to the deceptively marketed cigarettes—something that certainly would have faced obstacles of proof. 94 N.Y.2d at 56.[9]

Similarly, Appellants suggest that the court in *Rice* applied *Small* only because "there was no viable claim that the product sold was overpriced compared to what the product actually cost or was worth." (Br. at 42.) But that theory is nowhere to be found in *Rice*. It also is baseless; the identity of an author may be relevant to purchasing decisions for a variety of reasons (*e.g.*, fan loyalty or the

[9] Reflecting their total misunderstanding of *Small*, Appellants wrongly assert that the *Small* plaintiffs' only remedy for addiction "would have been under products liability law" (Br. at 40), not GBL 349, despite this Court's recognition that a GBL 349 claim could have been pled adequately had a cognizable damages theory been asserted.

quality of a particular author's writing). At all events, Appellants' interpretation of *Rice* is irrelevant because Appellants have *not* alleged in their pleading that the Tanbook was "overpriced" for what it provided; rather, they allege that the 2016 Tanbook had "no value" to them (despite using it for many months with no issue)—a point that they reiterate in their current brief. (*See, e.g.*, *id*. at 41-43.)

Appellants also rely heavily on a suggestion that this case presents an actionable "bait and switch" while *Small* and other cases did not, but this is yet another unsupported and false distinction. In *Small*, *Rice*, and this case, the nature of the sole alleged injury is exactly the same: being deceived into purchasing a product that was not what the purchaser believed they had bargained for. In *Small*, the plaintiffs claimed they purchased cigarettes that were more addictive than was represented in marketing. In *Rice*, the plaintiffs purchased a book that was co-authored by someone who was not listed on the cover. Here, Appellants claim they purchased a book that was not as "complete" as allegedly promised. Whether or not one uses the term "bait and switch" is mere semantics; in all instances, the deception is the injury, and under *Small* that is insufficient under GBL 349.

Moreover, Appellants' attempt to distinguish *Small* on this "bait and switch" theory—while ultimately irrelevant—is circular: Appellants proclaim that the plaintiffs in *Small* "didn't lose the benefit of their bargain" because they "got exactly what they bargained for." (Br. at 40.) But that is obviously not true; the

Small plaintiffs expressly alleged that they did *not* receive what they bargained for (i.e., nonaddictive cigarettes). Without explanation, Appellants appear to find it relevant that the cigarettes in *Small* were not missing a *physical* component like "filter tips" (*id.*), but there is no principled reason why the presence of a physical difference should be dispositive of the issue of whether a purchaser's expectations in acquiring a product are met. Just as Appellants contend that the plaintiffs in *Small* got what they bargained for because they "bought cigarettes" and "presumably smoked them" (*id.*), one can just as easily state that the Appellants in this litigation got what they bargained for because they "bought the 2016 Tanbook" and presumably used it.

Appellants' unpreserved and erroneous arguments notwithstanding, it is an immutable fact that the only alleged injury in this case is that Appellants claim they bought a product that they otherwise would not have bought. This Court—and legions following it—could not have been any more clear that such an allegation is insufficient to support a GBL 349 claim.

4. *To the Extent Appellants Imply That* Small *Should Be Overturned, There Is No Basis to Do So*

Without expressly arguing for *Small* to be overturned—in fact, arguing that the decision "need not be abandoned" (Br. at 39)—Appellants criticize this Court for purportedly "not citing to a single decision" in reaching its holding (*id.*). If

Appellants are now inviting this Court to overturn *Small*, the doctrine of *stare decisis* compels rejection of that invitation.

As this Court explained in *State Farm Mutual Automobile Insurance Co. v. Fitzgerald*, 25 N.Y.3d 799 (2015), this Court must apply its own precedent interpreting New York statutes, even if it disagrees with a prior holding, unless there are "extraordinary and compelling" reasons not to do so:

> Even if we were to disagree with our holding in *Amato*, we would nevertheless be bound to follow it under the doctrine of stare decisis. . . . Even under the most flexible version of the doctrine applicable to constitutional jurisprudence, prior decisions should not be overturned unless a 'compelling justification' exists for such a drastic step. As we recently reiterated, *an even more extraordinary and compelling justification is needed to overturn precedents involving statutory interpretation* . . . because unlike in constitutional cases, "if the precedent or precedents have misinterpreted the legislative intention [embodied in a statute], the Legislature's competency to correct the misinterpretation is readily at hand."

Id. at 819-20 (citations omitted); *see also Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 150 (2014) (*stare decisis* required application of prior statutory interpretation despite openly "question[ing] the continued utility or wisdom" of that interpretation).

Appellants fail to identify any justification—much less an "extraordinary and compelling" one—to overturn *Small*. In the 21 years since the decision was issued, the "deception as injury" bar to GBL 349 claims has been applied routinely by lower courts in New York and federal courts applying New York law. *See, e.g.*,

supra at II.B.2 (listing New York cases); *Naimi v. Starbucks Corp.*, 798 F. App'x 67, 70 (9th Cir. 2019) (relying on *Small* when explaining that "a plaintiff's allegation that she would not have purchased a product but for a deceptive act, standing alone, is not a cognizable injury"); *Dacorta v. AM Retail Grp., Inc.*, No. 16-CV-01748, 2018 U.S. Dist. LEXIS 10733, at *16-17 (S.D.N.Y. Jan. 23, 2018) (finding plaintiff failed to properly plead GBL 349 injury under *Small*); *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, MDL No. 09-02067, 2014 U.S. Dist. LEXIS 3554, at *27-28 (D. Mass. Jan. 10, 2014) (quoting *Small* and rejecting GBL 349 claim "because New York courts have soundly rejected" theory that being induced into a purchase by deception itself constitutes cognizable injury).[10]

Appellants identify no conflict in the case law that overturning *Small* is necessary to resolve, and there is no indication that the New York Legislature has concerns about its holding. Nor is *Small* inherently problematic in any way; plaintiffs can (and regularly do) adequately plead and ultimately establish GBL 349 claims when, unlike Appellants, they allege and can establish an actual injury separate and apart from the alleged deceptive act itself. Under these

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[10] Appellants' suggestion that *Small* is out of step with "virtually every other state" (Br. at 41) is irrelevant because only New York's consumer protection statute is at issue here. But Appellants are also wrong on that score. *See, e.g.*, *Shaulis v. Nordstrom, Inc.*, 865 F.3d 1, 13 (1st Cir. 2017) (rejecting claim under Massachusetts law and explaining that "[a]ppellate courts reviewing the consumer protection statutes of other states also have consistently rejected similar purchase-as-injury claims").

circumstances, there is no reason to overturn this Court's longstanding holding. *See, e.g.*, *Hinton v. Vill. of Pulaski*, 33 N.Y.3d 931, 932-33 (2019) (refusing to overrule 20-year old precedent interpreting New York statute when the Legislature "has done nothing to 'signal disapproval' of this interpretation" (citation omitted)); *State Farm*, 25 N.Y.3d 799, 820 (*stare decisis* compelled application of 17-year old precedent where "there is no evidence that [the precedent] has become unworkable, is unjust, or has created an irreconcilable conflict in our case law").

C. Whether Tanbook Sales Are "Consumer Oriented" Is Academic, But at All Events Appellants Misconstrue First Department Law

As noted, the Appellate Division did not address whether Matthew Bender's sale of the Tanbook was "consumer oriented" because it affirmed the dismissal of the GBL 349 claim on two independent grounds. Nevertheless, Appellants principally contend that the First Department's precedent incorrectly interprets GBL 349's "consumer oriented" requirement to "exclud[e] entities victimized by deceptive business practices," as opposed to individuals. (Br. at 32.)

As an initial matter, this issue is academic. Because the GBL 349 claim fails for lack of causation and a cognizable injury, whether Appellants alleged the remaining required element of their claim is of no consequence, and the Court should not reach the issue.

But Appellants are also wrong; in fact, their argument is based entirely on the false premise that the First Department's analysis precludes "entities,

businesses, or professionals" from bringing GBL 349 claims. (*Id*. at 35.) As Matthew Bender has pointed out (*e.g.*, R450.74-450.75), the "personal, family, or household purpose" language in *Cruz v. NYNEX Information Resources*, 263 A.D.2d 285, 289 (1st Dep't 2000)—the decision so maligned by Appellants—does no such thing. In fact, *Cruz* explained that GBL 349's "consumer orientation" requirement "does not preclude its application to disputes between businesses per se." *Id.* at 290.

The dispositive question in determining whether there is "consumer oriented" conduct to support a GBL 349 claim is whether *the defendant's practices are targeted* to, and/or had a broader impact on, "consumers at large."[11] *Oswego Laborers*, 85 N.Y.2d at 25. GBL 349 claims thus are properly rejected—irrespective of the "personal, family, or household purpose" analysis—where challenged practices are directed to businesses or specialized industries as opposed to the general consuming public. *See, e.g.*, *Shaw v. Club Managers Ass'n of Am., Inc.*, Index No. 012012/09, 2010 N.Y. Slip Op. 30511(U), at *5 (Sup. Ct. Nassau Cty. Mar. 1, 2010) (affirming dismissal where alleged conduct was directed at "various country clubs"), *aff'd in relevant part*, 84 A.D.3d 928, 929-30 (2d Dep't 2011); *Med. Soc'y of N.Y. v. Oxford Health Plans, Inc.*, 15 A.D.3d 206, 207 (1st

[11] This does not require that conduct be literally "directed to *all* members of the public." *Plavin*, 35 N.Y.3d at 13.

Dep't 2005) (affirming dismissal where challenged practices were "directed at physicians") The *Cruz* court's understanding of what constitutes a "consumer"—which, as Appellants acknowledge, aligns with other provisions of the General Business Law (Br. at 33)—is entirely consistent with the foregoing approach.[12]

Even if Appellants' interpretation of *Cruz* were correct—and it is not—their claim that "[n]o other department . . . has recognized or adopted" the same analysis is false. *See, e.g.*, *Benetech , Inc. v. Omni Fin. Grp, Inc.*, 116 A.D.3d 1190, 1190-91 (3d Dep't 2014) (applying same definition of "consumers" and rejecting GBL 349 claim where alleged deceptive practices were targeted to school districts rather than "aimed at the general public"); *In re Opioid Litig.*, Index No. 400000/2017, 2018 N.Y. Slip Op. 31228(U), at *21 (Sup. Ct. Suffolk Cty. June 18, 2018) (noting that, "though the term 'consumers' has been construed to mean those who purchase goods and services for personal, family or household use, courts have recognized the standing of business entities and business-like entities" to invoke the statute). For this reason as well, Appellants are wrong to suggest that the First Department's approach is fringe.

[12] Appellants wrongly conclude that the First Department would bar a GBL 349 claim in their hypothetical about "owners of a Bronx 'mom and pop' grocery store who purchase a laptop." (Br. at 37.) Even putting aside that a laptop is a product frequently intended for "personal, family, or household use," if the store owners were deceived by marketing of laptops that was directed to consumers at large, their status as grocery store owners is irrelevant.

In this case, the Commercial Division correctly recognized that Appellants "failed to state facts demonstrating that the sale of Tanbooks is oriented towards consumers rather than professionals." (R38.) Indeed, the pleading plainly conceded that the Tanbook is directed to specialists rather than the consuming public at large—*e.g.*, that the Tanbook "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." (R76 ¶ 104.) This was further confirmed by allegations specifically regarding the three Appellants and their purchasing activities, all of whom use the Tanbook specifically in connection with provision of legal and advocacy services. (*See, e.g.*, R51 ¶ 20; R53 ¶¶ 28, 30, 32.)

Accordingly, whether this Court expressly endorses the "personal, family, or household purpose" language is, respectfully, a red herring. Regardless, Appellants failed to sufficiently plead that Tanbook sales are "consumer-oriented."

III. THE IMPLIED COVENANT CLAIM WAS PROPERLY DISMISSED, AND APPELLANTS' LATEST ARGUMENT (POINT IV) IS UNPRESERVED, ACADEMIC, AND MERITLESS

The Commercial Division properly dismissed the implied covenant claim because the proposed covenant was contradicted by the express terms of the T&C, which both "DISCLAIM ALL WARRANTIES" and provide that Matthew Bender "DO[ES] NOT WARRANT THE ACCURACY, RELIABILITY OR CURRENTNESS OF THE MATERIALS CONTAINED" in the Tanbook. The

Appellate Division affirmed both on that ground and for the independent reason that the claim was impermissibly "duplicative of the breach of contract claim." (R454.)

On this appeal, Appellants argue only that the T&C's express and binding language can simply be disregarded because it is supposedly "barely noticeable" and "eviscerates the very purpose of the product." (Br. at 59-61.) These arguments, however, fail for at least three reasons.

First, the arguments are unpreserved, as reflected by the fact that Appellants have never attempted to satisfy their obligation to "identify the particular portions of the record" where they previously presented those arguments. *See* 22 NYCRR § 500.22(b)(4). Appellants never suggested to the Commercial Division either that enforcing the disclaimer violated an implied covenant or that the disclaimer was hidden or difficult to notice, let alone unenforceable. Accordingly, to the extent that Appellants are now raising a new "unconscionability" argument, that argument is waived.

Second, even if the issue had been preserved, the enforceability of the disclaimer is academic because Appellants do not now appeal—and in fact have *never* disputed—that the implied covenant claim is duplicative of the contract

claim. This is an unassailable independent ground for affirmance on which the Appellate Division relied.[13]

Third, Appellants are wrong on the merits. Appellants recognize, as they must, that the implied covenant cannot encompass any "obligations 'inconsistent with other terms of the contractual relationship.'" (Br. at 59 (quoting *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 304 (1983)).) Since it is undisputed that the T&C governed Appellants' purchases, and the T&C expressly disclaim the "ACCURACY, RELIABILITY OR CURRENTNESS" of the Tanbook, the alleged implied guarantee regarding the Tanbook's content cannot be squared with the parties' written agreement. Any implied covenant claim thus must fail. *See, e.g.*, *Moran v. Erk*, 11 N.Y.3d 452, 457 (2008) (rejecting claim where "the plain language of the contract in this case makes clear" that an alleged implied promise did not exist); *Roberts v. Weight Watchers Int'l, Inc.*, 712 F. App'x 57, 60-61 (2d

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[13] As Matthew Bender has previously explained, implied covenant claims are impermissibly 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 also TAG 380, LLC v. ComMet 380, Inc.*, 10 N.Y.3d 507, 512 n.3 (2008) (refusing to "disturb" rejection of implied covenant claim "as duplicative of the breach of contract claim"). There can be no dispute that Appellants' implied covenant claim is redundant; indeed, Appellants conceded in their brief to the First Department (at p. 43) that the alleged conduct giving rise to the implied covenant and express warranty claims is identical: "[T]he 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 customer."

Cir. 2017) (rejecting claim where agreement "expressly provided that Weight Watchers did not warrant that its services would be 'uninterrupted or error-free'").

Despite their false assertion that the Appellate Division "ignored all of this Court's precedents" (Br. at 60), Appellants do not cite a single decision that compels a result contrary to this Court's holding in *Murphy*. Instead, Appellants rely on an unpreserved and circular argument that the disclaimer cannot apply because it "destroys the 'basic purpose' of the Tanbook." (*Id*. at 61.) That argument not only is foreclosed by Appellants' failure to challenge the application of the T&C at the Commercial Division, but it is also disingenuous. Appellants cannot seriously contend that the disclaimer destroys the "*sine qua non*" of their Tanbook purchases (*id.* at 60) when they have decided to purchase the Tanbook for full price even after Matthew Bender, *in this litigation*, highlighted the disclaimer and explained that it did not warrant the completeness of the publication. If Appellants truly believed that Matthew Bender's refusal to guarantee Tanbook content deprived them of "the fruit of the contract," they would have stopped purchasing the Tanbook long ago.

IV. POINTS II AND III OF APPELLANTS' BRIEF SHOULD BE STRICKEN BECAUSE THEY CONCERN CLAIMS THAT APPELLANTS DID NOT SEEK TO APPEAL TO THIS COURT

Although Appellants' latest (1) theories of their express warranty claim and (2) contract and fraud claims based on an alleged failure to "promptly notify" customers were not preserved below and are meritless, this Court should not even

reach those issues because they were not discussed—much less identified as one of the specific "grounds for Court of Appeals review"—in Appellants' motion for leave to appeal. To the contrary, those "grounds" for review included only certain arguments regarding the implied covenant and GBL 349 claims. Points II and III of Appellants' brief therefore should be stricken, and the rejection of the "failure to promptly notify" claims and the express warranty claim should be summarily affirmed. *See Arrowhead Capital Fin., Ltd. v. Cheyne Specialty Fin. Fund L.P.*, 32 N.Y.3d 645, 650-51 (2019) (striking portions of appeal brief outside scope of limited issues raised in motion for leave to appeal); *Quain v. Buzzetta Constr. Corp.*, 69 N.Y.2d 376, 380 (1987) (same).

V. EVEN IF THIS COURT COULD REVIEW THE CLAIM FOR BREACH OF EXPRESS WARRANTY (POINT II), THAT CLAIM WAS PROPERLY DISMISSED ON MULTIPLE GROUNDS

A. Appellants' Undisputed Failure to Provide Pre-Suit Notice Under the UCC Independently Warrants Dismissal

One of the grounds for the Commercial Division's dismissal of the warranty claim was Appellants' failure to provide the prior notice of breach required by UCC § 2-607(3), which provides that a "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. Law § 2-607(3)(a). Appellants do not address this issue, and it is undisputed that none of them provided any notice of the

alleged breach of any warranty to Matthew Bender prior to bringing suit.[14] (R168 ¶ 18; R169 ¶ 25; R170 ¶ 31.) These facts alone necessitate affirmance of dismissal of the claim for breach of express warranty, rendering Appellants' other arguments entirely academic.

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

Appellants theorize that an express warranty regarding the completeness of Part III can be inferred from one sentence in the "Overview" on page xi of the Tanbook, and on the Website that refers to "*the* rent stabilization and rent control laws and regulations" rather than "provisions" or "excerpts" thereof. (Br. at 6-7, 44-45.) As both the Commercial Division and Appellate Division recognized, this argument fails for at least two reasons: (1) the T&C clearly and expressly disclaim *all* warranties regarding Tanbook content; and (2) Appellants cannot claim that the statements were express warranties when they do not allege that they ever saw—much less relied on—those statements before purchasing Tanbooks.

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[14] In the Appellate Division, Appellants improperly attempted to rely on a third party's email to Matthew Bender raising concerns about the 2016 Tanbook. As Matthew Bender explained, UCC § 2-607(3) requires that "the buyer" 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.). Notice from a third party cannot suffice. *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).

1. *The Lower Courts Correctly Held That the Disclaimer in the <u>T&C Foreclosed Any "Express Warranty" of Tanbook Content</u>*

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. *See Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109 (1981). But even assuming *arguendo* that merely using "the" somehow constitutes a guarantee of "completeness," the T&C make clear 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 concede that their Tanbook purchases are governed by the T&C, and have never challenged the T&C's merger clause—i.e., that the T&C constitutes the "entire agreement" with Appellants.

These facts conclusively demonstrate that Appellants' proposed "express warranty" does not exist, 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.*, 171 A.D.3d 440, 441 (1st Dep't 2019) (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”), *leave to appeal denied*, 33 N.Y.3d 912 (2019); *Simone v. Homecheck Real Estate Servs., Inc.*, 42 A.D.3d 518, 521 (2d Dep’t 2007) (recognizing 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”). Indeed, Appellants’ theory would compel the absurd result that a purported statement concerning Tanbook content on page xi of the 2016 Tanbook forms the “basis” of the parties’ agreement while the unambiguous, all-capitals provision within the four corners of the parties’ written agreement does not.

Appellants seek to avoid the lower courts’ straightforward conclusion that the disclaimer is dispositive by making three meritless arguments.

First, Appellants suggest that the disclaimer is inapplicable because it only disclaims any warranty of “ACCURACY, RELIABILITY OR CURRENTNESS” of Tanbook materials, and does not specifically mention “*completeness*.” (Br. at 48-49.) Once again, this argument was never raised in the lower courts, and thus is unpreserved. But the argument also is meritless, if not disingenuous, because Appellants have expressly equated “completeness” with the accuracy, reliability, and currentness throughout this litigation—indeed, the following allegations are in the Amended Complaint alone:

- Although the Tanbook was "represented by the defendant as *complete* and unedited," it is "rife with omissions and *inaccuracies*, rendering it of no value . . . ." (R48-49, ¶ 6);

- "[T]he Tanbook is replete with omissions and *incomplete* laws and regulations . . . rendering it an *unreliable* resource . . . " (R56, ¶ 43(a));

- "[T]he defendant knew that the Tanbook's compilation of these laws and regulations was *incomplete* and *inaccurate*" (R59, ¶ 53);

- "Nor are such editions a *complete* compilation of [rent regulation] laws and regulations. Instead, such editions of the Tanbook are an *unreliable* and incomplete resource . . ." (R73, ¶ 87);

- "The defendants made uniform statements to the general public on its website that the Tanbook contained a *complete* and *accurate* compilation of the New York City rent regulation laws. . . . [but defendant] was aware that the Tanbook *had not been updated* . . . ." (R80, ¶¶ 126, 128).

Even the "Introduction" of Appellants' current brief confirms that their new argument is just a game of semantics; Appellants state that their "claims center on Bender's . . . *failure to update*" the New York rent laws, and that the 2016 edition contained provisions "that were clearly *obsolete* and/or *inaccurate*." (Br. at 4-5.)

Simply put, there is no difference between "completeness" and "accuracy, reliability, or currentness" in the context of this litigation, and the existing disclaimer in the T&C plainly disproves any alleged "express warranty" of "completeness" posited by Appellants.

Second, Appellants argue that the disclaimer was "ineffective" because it was not sufficiently "conspicuous" under UCC § 2-316(2) and "hid[den] on the reverse side of an order form." (*Id*. at 49.) As noted above, this argument, too,

was never raised in the Commercial Division, and thus is unpreserved. But even if the issue was not waived, Section 2-316(2) is inapposite because it applies only to certain *implied* warranties that are not alleged in this litigation. N.Y. U.C.C. § 2-316(2). Moreover, the notion that the all-capitals disclaimer in the T&C was not sufficiently prominent is wrong as a factual matter, nor can Appellants genuinely claim that the disclaimer was not sufficiently conspicuous when they have never suggested they were unaware of that disclaimer.

Third, Appellants contend that the disclaimer is ineffective because it it "pertains to the very purpose of the product" and "nullifies the heart of the bargain." (Br. at 52-53.) As discussed above, that is circular: Appellants presume that a "promise of completeness and accuracy" was "the *sine qua non* of the transaction" (*id*. at 52), and from that unsupportable presumption alone refuse to credit contract language that plainly demonstrates that Matthew Bender has made *no* such promise. Again, had Appellants truly believed that Matthew Bender's supposed guarantee of Tanbook content was "the heart of the bargain," they would not have continued purchasing the Tanbook following Matthew Bender's repeated clarification that it is *not* providing any such guarantee.

Appellants also mischaracterize UCC § 2-719 by suggesting that it impacts Matthew Bender's ability to disclaim warranties. (*Id*. at 53.) In fact, Section 2-719 only requires that a contract "provide a fair quantum of remedies for breach;"

"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). The official comments to the provision even confirm that "[t]he seller in all cases is free to disclaim warranties in the manner provided in § 2-316." N.Y. U.C.C. Law § 2-719, cmt. 3.

2. *The Lower Courts Correctly Held That the "Express Warranty" Claim Failed for the Independent Reason That Appellants Did Not Sufficiently Allege Reliance on the Statements At Issue*

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 46-47), 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'g 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 claim because "plaintiff failed to establish that he relied on oral and written express warranties of defendant in purchasing" product).

Despite being made aware of the issue by Matthew Bender as early as in the motion to dismiss the *initial* Complaint, Appellants repeatedly have failed to allege that they even actually *saw* the Website or the "Overview" prior to purchase, much less that they *relied* on the purported guarantees of Tanbook content therein when making their purchases. As numerous cases demonstrate, this requires dismissal of the express warranty claim. *See, e.g.*, *Gale*, 9 A.D.3d at 447 (affirming dismissal 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*, Index 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. Co.*, 255 F. Supp. 2d 219, 230 (S.D.N.Y. 2003).

Appellants make three misguided attempts to avoid their clear failure and inability to plead reliance. All fail.

First, Appellants ask the Court to *assume* reliance on the alleged warranty in the "Overview" on page xi of the Tanbook because "[a] textual description of a product is the usual venue for an examination of whether performance has been

warranted . . . ." (Br. at 47.) Appellants have never suggested this before in this litigation, and thus the argument is unpreserved. The argument also is entirely self-serving, speculative, and without a shred of support.

Second—in stark contrast to the above jurisprudence—Appellants suggest that reliance is *not* a pleading requirement, but rather an issue of ultimate "proof." (*Id*. at 51.) In so arguing, Appellants mischaracterize the relevant authorities. Contrary to Appellants' assertion, this Court did *not* suggest in *Ziff-Davis* that reliance was not required, or that a statement never even seen by the purchaser somehow could still be a "basis of the bargain." Rather, this Court only addressed whether "reliance" for an express warranty claim requires that the purchaser actually "believe in the truth of the warranted information," as with a tort claim. *Ziff-Davis*, 75 N.Y.2d at 503. Unlike the current case, there was no dispute in *Ziff-Davis* 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 in their brief also concerned situations where, unlike here, there was an express allegation that the plaintiffs reviewed and considered warranty language prior to (or contemporaneous with) finalizing their transaction. *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 17, 2017) (citing to a dozen paragraphs

in the complaint alleging "that each of the named Consolidated Plaintiffs decided to purchase the product after seeing [deceptive] advertisements for it and its packaging"); *Imperia v. Marvin Windows of N.Y., Inc.*, 297 A.D.2d 621, 623 (2d Dep't 2002) (noting that plaintiffs alleged that they relied upon the representations in agreeing to the purchase). Far from supporting Appellants' position, the foregoing decisions confirm that pleading reliance *is* required, and that Appellants' express warranty claim is deficient as a matter of law.[15]

Third, Appellants suggest that their failure to allege reliance should be excused because the Appellate Division "seems to have forgotten that this is a class action." (Br. at 50.) But it is Appellants that are confused—not the First Department—because no class has yet been certified in this litigation, and conclusory allegations regarding hypothetical class members are irrelevant at this stage. To the extent that Appellants now suggest that they may satisfy their pleading requirements by merely referring to phantom class members prior to certification, that argument is meritless: "A representative action cannot be maintained unless it appears from proper allegations in the complaint that *the plaintiff* not only *has a cause of action*, but that he is representative of a common

[15] Appellants also are wrong to suggest that the pleading requirement was disregarded in the Second Circuit's decision in *Factory Associates & Exporters, Inc. v. Lehigh Safety Shoes Co.*, 382 F. App'x 110 (2d Cir. 2010). That decision concerned summary judgment, not a motion to dismiss.

or general interest of others." *Bouton v. Van Buren*, 229 N.Y. 17, 22 (1920); *see also Murray v. Empire Ins. Co.*, 175 A.D.2d 693, 694 (1st Dep't 1991) ("The procedural device of a class action may not be used to bootstrap a plaintiff into standing that is otherwise lacking."); 3 New York Civil Practice: CPLR P 901.06 (explaining that a putative class representative "must have an individual injury that is cognizable at law"). Appellants' repeated references to broad allegations of harm to putative class members are thus not only entirely unsupported, but irrelevant.[16]

VI. EVEN IF THIS COURT COULD CONSIDER THE UNPRESERVED CONTRACT AND FRAUD CLAIMS BASED ON AN ALLEGED "FAILURE TO PROMPTLY NOTIFY" (POINT III), THOSE CLAIMS WERE PROPERLY DISMISSED ON MULTIPLE GROUNDS

A. The Claims Are Unpreserved

Appellants raised the new contract and fraud claims for the first time on appeal, and thus—as the First Department expressly acknowledged with respect to the fraud claim (R455)—they are unpreserved for review by this Court.

[16] Further highlighting their own inability to plead any harm to themselves, the only specific instance of alleged harm concerns *a third party that is not a plaintiff in this litigation*, Mr. Chachére. But even putting aside Mr. Chachére's non-party status, the allegations are of no benefit to Appellants because there has never been any allegation that Mr. Chachére ever saw—much less relied on or was deceived by—the purported warranties or representations about the 2016 Tanbook. Accordingly, any claim on his behalf is as deficient as the claims brought by Appellants.

B. The New Contract Claim Is Meritless and Contradicted by the Plain Terms of the T&C

Appellants newly theorize that the express terms of the T&C obligated Matthew Bender to immediately update the Tanbook or notify customers of any changes in New York law, and that Matthew Bender somehow breached the T&C by failing to "inform" customers of omissions prior to issuing the 2017 edition of the Tanbook. (Br. at 55-56.) But as the Appellate Division correctly concluded, this unpled theory necessarily fails because Appellants have "identified no contractual provisions that required [Matthew Bender] to update the 2016 edition of the book" or "notify publishers of errors in it." (R454.) In fact, the contractual language selectively and misleadingly quoted by Appellants provides merely that purchasers "will receive the [annual Tanbook] and *any* supplementation, releases, replacement volumes, new editions and revisions to a publication ("Updates") *made available during the annual subscription period*." (R191.) 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), then it will deliver such updates. Nothing mandates issuance of updates at any particular time or requires that Matthew Bender "notify" purchasers of any concerns about Tanbook content.

C. The New "Fraudulent Inducement" Claim Is Meritless

Appellants have abandoned the affirmative fraud theory asserted in the Commercial Division and instead now make the unpled and unpreserved claim that

the supposed failure to update the 2016 Tanbook constituted an "ongoing fraudulent inducement."

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 Credit All. Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 554 (1985). Appellants' new inducement theory falls well short of meeting even a more modest pleading standard.

Most saliently, Appellants cannot point to any "reliance" whatsoever on a false statement by Matthew Bender that caused them injury. As the Commercial Division acknowledged in connection with Appellants' previously rejected (and since abandoned) affirmative "fraud" claim—and as Appellants did not dispute on appeal—the allegations in the Amended Complaint reflected, at most, that Matthew Bender learned of concerns about the 2016 Tanbook in December 2016. (R28; R39-40.) 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, and thus is it impossible for them to have relied on that statement or been harmed by it. *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 also fails for the independent reason that it is wholly duplicative of Appellants' theory that Matthew Bender breached the T&C. Fraud claims are dismissible where, as here, a plaintiff alleges nothing outside 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 Havell Capital Enhanced Mun. Income Fund, L.P. v. Citibank, N.A.*, 84 A.D.3d 588, 589 (1st Dep't 2011) (fraud claim duplicative where it "sought identical damages" to and therefore was "redundant of the contract claim"). Appellants could not be any more explicit that the new fraud and contract theories are redundant: the title of "Point III" of their brief is that Matthew Bender's alleged "failure to promptly notify its customers . . . constituted a breach of contract *and* an ongoing fraudulent misrepresentation." (Br. at 55.) The alleged damages for both claims (and Appellants' other claims) are identical as well. (*Id.* at 57-58.)

D. Appellants' Attempt to Recast Their "Implied Contract" Claim Concerning the *2017* Tanbook Is Waived and Meritless

Appellants now suggest that their new contract and fraud theories also encompass alleged damages arising from the fact that the 2017 Tanbook was not issued until May of that year, rather than in January. (Br. at 57-58.) Appellants claim that Matthew Bender was compelled to issue the 2017 Tanbook in January and thus Appellants should be refunded "5/12ths" of that book's cost. (*Id.* at 58.)

As noted, Appellants unsuccessfully sought the same remedy under a theory of "implied contract" in the Commercial Division, which expressly held that "Matthew Bender was not bound to deliver the new Tanbook at the beginning of each year." (R36.) Appellants *did not appeal* the dismissal of that implied contract claim, and thus it has been waived.

Nor would any express contract claim or fraud claim based on the timing of the 2017 Tanbook make any sense. Appellants cannot point to anything in the T&C creating a timing requirement for publication of the Tanbook (which presumably is why they had asserted an "implied" contract). Nor can Appellants explain how a sale of a 2017 edition of the Tanbook in May 2017 could be fraudulent when Appellants unquestionably knew they were buying the Tanbook at that time, and for that price. But what makes the new claim truly bizarre is that Appellants claim to have been defrauded and entitled to a partial refund despite the fact that *none of them paid for the 2017 Tanbook until after they received it in*

May. When Himmelstein and McKee received their copies of the 2017 Tanbook at that time—well after the filing of this lawsuit—they had the option not to purchase the book and to have no payment obligation. Instead, they chose to keep the product and pay full price, consciously deciding that receiving a Tanbook in May was worth that price. There could be neither any "fraud" nor any "inducement."

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

Appellants suggest that they should be permitted "to replead any claims found to require such repleading" (Br. at 62), but do not—and cannot—explain what "repleading" could accomplish in this case, which already has been litigated for over three years at substantial expense.

Matthew Bender notified Appellants of the fatal deficiencies in their claims in 2017 when it moved to dismiss the *initial* Complaint. Since then, Appellants have filed a new pleading, an opposition brief, three sworn affidavits, and multiple appeal briefs. In none of those documents has Appellants alleged any cognizable injury or actionable misrepresentation. That is because, despite legal theories that shift like the sand, Appellants cannot plead around certain immutable facts:

- Appellants have never seen the alleged misrepresentations about Tanbook content that are the basis for all of their claims;
- The binding, written agreements undisputedly governing Appellants' Tanbook purchases contain an express, conspicuous disclaimer of "ALL WARRANTIES" regarding the content of the Tanbook;

- Despite using the 2016 Tanbook for over a year, the only "injury" that Appellants allegedly have suffered is being deceived into purchasing the 2016 Tanbook; and

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

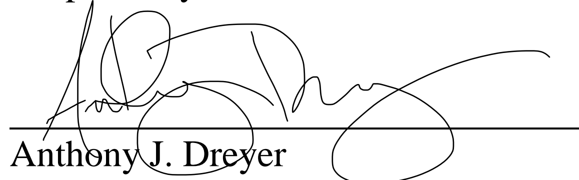
These facts conclusively demonstrate that no amount of repleading could generate a viable cause of action, and neither Matthew Bender nor the courts should be required to devote even more time and resources to this meritless litigation.

CONCLUSION

For the reasons set forth above, Matthew Bender respectfully submits that the Appellate Division, First Department's unanimous affirmance of the dismissal with prejudice of the Amended Complaint should be affirmed in its entirety.

Dated: July 17, 2020

Respectfully submitted,



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