To Be Argued By:
JAMES B. FISHMAN
Time Requested: 30 Minutes

APL-2020-00008
Appellate Division, First Department Case No. 2018-1250
New York County Clerk's Index No. 650932/17

Court of Appeals

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 PLAINTIFFS-APPELLANTS

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May 15, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. §§ 500.1(f) and 500.13(a), Plaintiff-Appellant Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP, ("HMGDJ") states that it is a limited liability partnership duly registered as such in the State of New York. HMGDJ has no shares, parents, subsidiaries or affiliates.

Pursuant to 22 N.Y.C.R.R. §§ 500.1(f) and 500.13(a), Plaintiff-Appellant Housing Court Answers, Inc. ("HCA") states that it is a domestic not-for-profit corporation duly registered as such in the State of New York pursuant to Not For Profit Corporation Law Section 402. HCA has no shares, parents, subsidiaries or affiliates.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal pursuant to CPLR 5602(a)(1)(i) because it granted the Appellants' motion for leave to appeal from the May 2, 2019 order of the Appellate Division, First Department.

The questions presented were preserved below. (See, Record on Appeal, pp. 47-136)

QUESTIONS PRESENTED

1. Whether the "consumer-oriented conduct" requirement established by this Court in *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 85 N.Y.2d 20 (1995) for claims under GBL §349 is limited to transactions entered for a "personal, family or household purpose."
2. Whether a plaintiff asserting a GBL §349 claim is required to allege that she saw, or relied upon, a defendant's allegedly deceptive representation.
3. Whether the "deception as injury" limitation on GBL §349 claims, established by this Court in *Small v Lorillard Tobacco Co.*, 94 NY2d 43 (1999) bars "bait and switch" claims whereby a seller promises an "authoritative" and complete product but fails to honor that promise by providing a product that is neither authoritative or complete.
4. Whether a hidden, obscure disclaimer of warranties is effective where its terms eviscerate the very purpose of the product.

5. Whether an express warranty of completeness can be avoided by a disclaimer that fails to disclaim completeness.
6. Whether a plaintiff alleging a breach of express warranty must plead she relied on the warranty.
7. Whether a seller of a law book with knowledge that its product is materially deficient because it fails to accurately and completely depict significant legislative enactments made years before engages in fraudulent inducement by remaining silent while continuing to offer the product for sale.
8. Whether a seller commits fraud by charging its full price for an annually issued product it delivers after almost half the year has elapsed.
9. Whether a seller of an annually published law book purchased with the understanding that it is "authoritative" and complete, breaches the implied covenant of good faith and fair dealing by seeking to disclaim a warranty of accuracy, reliability and currentness where it knows the book is neither accurate, reliable or current because of its years long failure to update it.

PRELIMINARY STATEMENT

The Plaintiffs-Appellants, Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP, Housing Court Answers, Inc. and Michael McKee (collectively, "Appellants" or "Plaintiffs") respectfully submit this brief in support of their appeal to this Court from the decision and order of the Appellate Division, First Department, dated May 2, 2019 (Record on Appeal "R", pp. 452-55) which affirmed the decision and order of the Motion Court, (Supreme Court, New York County, Ramos, J.) dated February 6, 2018, which granted the Defendant-Respondent Matthew Bender & Company's ("Respondent," "Defendant" or "Bender") pre-answer motion dismiss the First Amended Complaint ("FAC")(R5-22).

By Order dated January 14, 2020, this Court granted Appellants' motion for leave to appeal from the Appellate Division order. (R456)

STATEMENT OF THE CASE

I. Introduction

This action, brought by three named Plaintiffs, on behalf of themselves and a class of others similarly situated, raises serious and disturbing claims of deceptive business practices, fraud, breach of contract, breach of express warranty and breach of the implied warranty of good faith and fair dealing against Bender, a

subsidiary of LexisNexis, ("Lexis") one of the world's largest legal information companies.

Bender has gone to great lengths (and obvious expense) to prevent this case from proceeding beyond the pleading stage, given its concession that for years it knowingly published annual editions of the purportedly updated *Tanbook New York Landlord-Tenant Law* ("Tanbook") without making numerous updates to the rent regulations and laws that had been enacted by the New York City Council, the New York State Division of Housing and Community Renewal ("DHCR") or the New York Legislature. Even more egregious, Bender concealed its knowledge of the book's extensive defects from its customers, allowing them to continue purchasing and using it at their peril, even though it knew that significant portions of it contained statements of the law that were clearly obsolete and/or inaccurate.

No matter how strenuously Bender attempted to raise technical or non-existent claims in response to this action, or how it falsely and deceptively misrepresented the actual claims in the FAC, the fact remains that the Appellants identified a serious and longstanding failure by Bender, which harmed thousands of purchasers of its book, as well as the over three million New York rent regulated tenants who benefit from, or are impacted by, the Tanbook, either directly from their own purchase and use of the book or from its use by lawyers, tenant

advocates and judges who routinely relied on what they thought was the book's accuracy and completeness.

Bender is a highly regarded legal publisher for well over 125 years.[1] The Appellants' claims center on Bender's longstanding, knowing and undisputed failure to update the New York City rent stabilization and rent control laws and regulations (key laws affecting well over one-million residential apartments in the city as well as the rent regulations applicable to thousands of apartments in various counties outside New York City) in the Tanbook, one of its annually published books, resulting in the inaccurate publication, or outright omission, of at least 37 key sections of those laws.[2] In sum, for at least 11 years, (from 2005-2016) Bender published and sold annual "new" editions of the Tanbook with significant legislative amendments to the rent regulation laws completely left out, some for as many as 12 years, leaving those who regularly purchased the book completely unaware that important changes in these laws had taken place. Instead of actually publishing these critical updates, Bender did little more than simply slap a new year on the cover and labeled it "updated."

[1] Bender became a subsidiary of Lexis in 2000. https://www.nytimes.com/1998/04/28/business/the-media-business-times-mirror-sells-legal-unit-to-british-dutch-publisher.html

[2] The Rent Regulation section of the Tanbook, "denoted as Part III" comprises approximately 565 of the approximately 1265 pages of the 2016 edition. (R177-81)

II. Bender's deceptive and misleading representations about the Tanbook

The Tanbook is repeatedly represented as containing the Rent Regulation laws in their entirety (R174, 179, 180, 182, 203, 205, 207, 208-9 and 214). Bender makes such representations in its online "store" to induce customers to purchase the Tanbook as well as in the pages of the book itself. In the book's Overview it warrants its own quality; Located near the beginning of the book, the Overview states[3] that

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

Similarly, the Tanbook's Table of Contents (R177-81) describes various statutes and regulations, which appear in five of the book's seven "Parts." In three of those parts, in six different places, the term "selected" describes the particular provisions identified. That term, or any other similar

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

term, is not used to describe the contents of Part III of the book, which is simply entitled RENT REGULATION.(R180)

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

Just inside the front cover of the book, on the copyright page, Bender prominently warrants, "This publication is designed to provide *authoritative* information in regard to the subject matter covered" (R 175)(emphasis added)[4] further confirming that it intends purchasers to believe it is a source of New York Landlord-Tenant laws that should be relied upon.

[4] This statement has appeared on the copyright page of the Tanbook for many years.

III. Bender's deficient and inaccurate publication of significant portions of the Rent Regulation laws in the Tanbook.

The FAC not only provided details of all 37 sections of the RSL, RSC, RCL, RCR and ETPA that Appellants found had been omitted from, or inaccurately presented in, the Tanbook. (*See*, R58-69,¶¶51-69) it also attached all of those provisions as an Exhibit to the FAC itself (R86-133).

The omitted, or incorrectly portrayed, portions of the Rent Regulation laws include, but are not limited to, the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The omitted, or incorrectly portrayed, portions of the Rent Regulation laws include, the elimination, or materially misstated specifics, of the Disability Rent Increase Exemption ("DRIE"), and Senior Citizen Rent Increase Exemption ("SCRIE") the coverage of, and the mechanics for regulating increases in rent stabilized apartments, the exemption of certain apartments from regulatory protection, and the penalties imposed on non-complying landlords. (R60 ¶55, R87)

The very existence of the DRIE program, enacted by the New York City Council in 2005 as an amendment to the NYC Administrative Code to assist low-income disabled, rent regulated tenants, was completely omitted from the Tanbook until 2017.[5] Bender's omission of DRIE and SCRIE enactments, including those increasing income eligibility from $16,500 to $50,000 (see R87-9 for the specifics of the omission) had a particularly widespread, and pernicious, impact on low-

[5] The DRIE program was enacted by the New York City Council in 2005 as an amendment to the NYC Administrative Code and never appeared in the Tanbook until 2017. *https://legistar.council.nyc.gov/View.ashx?https://legistar.council.nyc.gov/View.ashx?M=F&ID=665880&GUID=70368D2B-7183-4F2B-B17E-76B586352E0BM=F&ID=665880&GUID=70368D2B-7183-4F2B-B17E-76B586352E0B*

income disabled and senior citizen rent regulated tenants. According to the most recent report from the New York City Department of Finance, as of July 20, 2018 there were 11,149 DRIE households receiving assistance under the program (and 53,913 SCRIE households).[6] These omissions are neither trivial nor mere typographical errors; denying low-income New Yorkers, and tenant advocates who assist them, of knowledge of newly enacted rent protections effectively negates the political process.

Bender argued below that "[P]laintiffs' claim rests on the unsupportable premise that the Tanbook *guaranteed* that its 1500-plus pages would be entirely *exhaustive and error-free*." (emphasis added) Not surprisingly, Bender did not, and could not, cite to a specific sentence of the FAC that makes that claim as none in fact exists. To the contrary, this action pertains *only* to the portion of the Tanbook consisting of the Rent Regulation Laws, which comprise some 565 pages of the 1265-page book.[7] Appellants did not make any claims with respect to the other 700 pages of the book. Bender has tried to portray this case as an overreaction to a handful of minor errors, when in reality the Tanbook has been shown to have a long list of substantial errors and omissions that affect millions of New York's

[6] *www1.nyc.gov/assets/rentfreeze/downloads/pdf/scrie-drie_report.pdf.*

[7] See, ftn. 2 *supra.*

residential tenants and which stood uncorrected for many years until Appellants brought this action.

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

Bender also made the astounding claim that it is not reasonable to expect it, (a subsidiary of the largest publisher of legal data in the world, with "the world's largest online electronic library of legal opinions, public records, news and business information")[8] to keep up with the "vast and ever-changing subject matter" of New York landlord-tenant law. If LexisNexis cannot "keep up" with changes in New York landlord tenant law, on at least an annual basis, and this case strongly suggests it cannot, it has no business being in the legal publishing business and it should stop selling the Tanbook as something it is not.

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

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

is breathtakingly deceptive and disingenuous. First, this action pertains to an annually issued, *paper-bound book*.[9] Nobody expects a paper-bound book to be accurate "up-to-the-minute" and Bender's contention is absurd. Instead, it is more than reasonable to expect that those who purchase an annually issued paper-bound compilation of laws and regulations would at least be getting a book that was accurate "up-to-the-year." Second, and once again, this action does not pertain to Bender's publication of "*all* laws and regulations pertaining to New York landlord-tenant law" but instead it is limited to its publication of the Rent Regulation Laws. It is only *those* laws that Appellants contend should have been published in their totality, as they had always been promised and represented by Bender. It is not unreasonable to expect a well-established legal publisher, owned by the world's largest legal data company, to be able to do so. Assuming, *arguendo*, that were not so, at a minimum those selections Bender published should have at least been accurate.

Perhaps the most telling fallacy of Bender's response to this action is that in May 2017, five months *after* this action was filed, (apparently using the original complaint as a guide instead of an actual editor) it was suddenly able to publish a

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

new edition of the Tanbook containing *all* of the dozens of provisions of the Rent Regulation laws identified as either incorrect or missing in this case. (R59,¶54) Based on that fact alone, it cannot seriously be disputed that Appellants achieved success in forcing Bender to perform the updating of its book that it had ignored for many years.[10]

IV. Bender's deceptive sale of the Tanbook to the general public

A. Bender's pre-suit deceptive sales practices

This action alleges that the "trust" Bender promises, as a "time-honored brand," is seriously misplaced, at least as it pertains to the Tanbook, one of a number of annually published "Colorbooks" published by Bender each year, that each pertain to a specific subject area of New York Law.[11] Bender describes the Tanbook as a "1-volume portable publication that brings together all the laws and regulations governing landlord/tenant matters in New York, *providing the text of state statutes, regulations, and local laws*." (emphasis added)[12]

However, Tanbook editions published for many years, including and through 2016, were in fact grossly deficient, inaccurate and defective because Bender failed

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

[11] https://www.lexisnexisnow.com/view/new/mail?iID=7VftV7R5QQ4vdWvhB666.

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

to properly and completely update them to reflect newly enacted, or amendments to, provisions of New York's rent regulation laws and regulations, (the "Rent Regulation laws")[13] or to remove sections that had been repealed. As a result of that failure, Bender sold thousands of books which purported to contain these laws in complete and unabridged form, when, in reality, dozens of important amendments and revisions were either omitted entirely or were published as current when they had been repealed years earlier.

B. Bender's post-suit deceptive sales practices

The FAC further alleged that Bender knew, prior to the commencement of this action, that the Rent Regulation section of the Tanbook was deficient in this regard and it failed to take any steps to rectify it until May 2017, five months after this action was first commenced. (R71¶¶ 76,77) That belatedly published 2017 edition of the Tanbook suddenly included all of the 37 previously omitted, or inaccurately presented sections of the Rent Regulation laws identified in this action and, at long last, corrected numerous provisions of those laws that had been either amended or repealed over the years. (R59 ¶54)

[13] Those laws and regulations are: Rent Stabilization Law ("RSL"), Rent Stabilization Code ("RSC"), New York City Rent Control Law ("RCL") New York City Rent Control Regulations ("RCR") the Emergency Tenant Protection Act ("ETPA") which regulates tenancies in certain counties outside New York City.

Despite having actual knowledge that the 2016 Tanbook was defective and inaccurate, Bender admittedly took no steps to warn its customers (most of whom are readily known to it in its customer database) of the book's numerous errors and instead chose to blithely remain silent while they continued to use, and rely upon, the book to their detriment. And, at the same time, Bender continued to charge an average of $120 for an "annual subscription" for the 2017 Tanbook, although when it was finally issued in May 2017 purchasers only had the use of the volume for slightly more than half the year.

Even months after this action was commenced, and months after Bender issued the newly updated 2017 Tanbook edition in May 2017, it admittedly continued to offer the defective and deficient 2016 edition for sale to the general public at the Amazon Kindle store.(R200,¶ 4, 214-15)[14]

C. Bender's post-appeal deceptive sales practices

Even after the First Department gave Bender a free pass on its 2016 publication of an admittedly incomplete, inaccurate and defective publication of the Rent regulation laws, Bender continued its deceptive marketing practices. In June 2019 the Legislature dramatically revised virtually all of the laws governing residential landlord-tenant matters, including the Rent Regulation laws

[14] On August 12, 2017, the Appellant's attorney was able to purchase the 2016 Tanbook on the Amazon Kindle store site, demonstrating that Bender did not even bother to remove the admittedly defective book from the Amazon store website. (R 215)

which are the subject of this action. The "Housing Stability and Tenant Protection Act of 2019," ("HSTPA) comprises over 75 pages of procedural and substantive amendments to, and repeals of, significant parts of the Real Property Law, the Real Property Actions and Proceedings Law, the General Obligations Law, the General Business Law, the Rent Control Law, the Rent Stabilization Law and the New York City Administrative Code involving virtually every aspect of landlord-tenant law in New York which make up almost the entire Tanbook. Many of those amendments were made effective immediately or shortly after enactment. [15]

However, for months after the Legislature acted Bender not only failed to issue an update to purchasers of the 2019 Tan Book, it continued to sell and deliver it, at full price, and without any warning that it was woefully out of date, inaccurate and incomplete as it contained no mention whatsoever of the sweeping revisions to the laws covered by the HSTPA.[16] Instead, Bender had the audacity to falsely state on its August 8, 2019 invoice to Appellant Housing Court

[15] 2019 N.Y. ALS 36, 2019 N.Y. Laws 36, 2019 N.Y. Ch. 36, 2019 N.Y. SB 6458. This court may take judicial notice of these amendments, CPLR Rule 4511(a).

[16] The Table of Contents of the 2019 Tanbook received by HCA in August 2019 contains no reference whatsoever to the sweeping amendments to virtually all New York landlord-tenant laws in the HSTPA and it is no different from the 2019 Tanbook Bender began selling in January 2019 before the Legislature acted. This Court may take judicial notice of the indisputable fact that defendant's publication contains the statements referenced herein. "To be sure, a court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy" (*People v. Jones*, 73 N.Y.2d 427, 431, 541 N.Y.S.2d 340, 539 N.E.2d 96 [1989], quoted in *Hamilton v. Miller*, 23 N.Y.3d 592, 603 (2014).

Answers, Inc., ("HCA") sent with the 2019 Tanbook, "This material updated your publication *with the latest information available*." (emphasis added)

Months after the Legislature acted, Bender's website not only blithely ignored the HSTPA in its entirety, it shockingly continued to describe the 2019 Tanbook, as "Contain(ing) all the laws and regulations governing landlord/tenant matters in New York, providing the text of state statutes, regulations, and local laws."[17] Obviously, since the lower courts did nothing to remedy Bender's undeniable failure to update the Tanbook between 2005 and 2016, Bender has been emboldened to continue its deceptive and misleading business practices.

V. The Appellants' reasonable belief and understanding of the Tanbook's purported completeness, accuracy and reliability

Each 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 and that it was updated annually to include any changes in those laws. Samuel Himmelstein, a partner at Appellant Himmelstein, McConnell, *et al.,* stated,

> Our decision to purchase the Tanbook each year was substantially based on our understanding that it contained the entire text of the Rent Regulation laws and that it was accurate at the time of publication. We have now learned that our understanding was misplaced. Had we known that the defendant was not updating the Rent Regulation Laws

[17] https://store.lexisnexis.com/products/new-york-landlordtenant-law-tanbook-skuusSku10353

> in the Tanbook to include all changes that had occurred during the previous year we would never have purchased it because such a book would have no value to us. (R226,¶14)

See the analogous representations of Jennifer Laurie, Executive Director of Appellant HCA, (R 238) and Appellant Michael McKee (R 235-36).

Appellants' reliance on the Tanbook's completeness and accuracy is also derived from Bender's self-promotion for "trusted analytical content." Bender, which currently publishes 865 titles, including 58 titles on New York law, publicly describes itself as a highly reliable source of law:

> "While classic expert legal resources remain its heart and soul, Matthew Bender® continues to reinvent itself to bring you innovative products.
>
> A distinguished history
>
> Matthew Bender® is a time-honored brand that *offers expert resources you can trust* when you need to:
>
> -Begin researching a legal issue or transaction with which you have little or no experience
>
> -Prepare materials for a matter that involves an emerging issue or one in which primary law is vague or ambiguous Find ideas on how to craft counter arguments when settled law is contrary to your position." (emphasis added)[18]

VI. The harm to Appellants, the class and rent regulated tenants generally.

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

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

VII. The Martorell case demonstrates actual harm to the class.

The FAC also includes an actual example where it was demonstrated that a judge misapplied the law and ruled against a litigant because of a key omission in the Tanbook(R70-71,¶¶72-76). In that 2016 case,[19] an Art. 78 proceeding challenging a determination by the DHCR, both the attorneys for the petitioner-tenant and the DHCR, as well as the State Supreme Court Justice hearing the case,

[19] *Martorell v. DHCR* (Sup Ct., NY Co. Index No.100733/16)

all claimed to have relied on the 2016 edition of the Tanbook for an accurate depiction of an RSL provision addressing the interplay between a DHCR issued rent reduction order and a DRIE. However, that provision, and indeed the entire DRIE program, enacted in 2005,(see, ftn. 13 *supra*) was omitted from the 2016 edition, and indeed all prior editions, of the Tanbook and the court ruled against the tenant after concluding that no such provision existed. (R241-2 ¶12)

The tenant's attorney moved to reargue that decision after realizing that the provision in fact existed but had been omitted from the Tanbook. The court then court reversed itself and ruled in favor of the tenant. Thus, the harm alleged by Appellants is not hypothetical. The *Martorell* case is detailed in the affirmation of the tenant's attorney. Matthew Chachere, and the exhibits annexed to it. (R238-69)

The *Martorell* case is likely the "tip of the iceberg" of cases wrongly decided by the courts and by the DHCR until 2017 due to Bender's failure to update the Tanbook with amendments and revisions to the Rent Regulation Laws.[20] As a result, there can be little doubt that the Tanbook's inaccuracies have had a broad and significant impact on numerous consumers in New York.

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

VIII. Bender's admitted knowledge of the Tanbook's errors

On December 5, 2016, following his experience with the Tanbook in the *Martorell* case, Mr. Chachere wrote to Lexis "to complain and inform it that these omissions had resulted in my office having to make the reargument motion in *Martorell*. I urged LexisNexis to `take prompt corrective action so that others do not unknowingly rely on obsolete law to their detriment.'" (R243; 134-5)

On December 13, 2016 Jacqueline M. Morris, the Tanbook's "Legal Content Editor," emailed Mr. Chachere, stating,

> We sincerely apologize for these issues which occurred long ago and have only recently been brought to our attention. We are discussing next steps with the Product Manager. We plan to replace all of the content of the Tanbook for the 2017 edition which will ship in early 2017." (R136)

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

IX. The Appellants' complaint and motion practice below.

The FAC fully, and with great detail and factual support, sets forth actionable claims against Bender. (R47-136) It is well established that in deciding a pre-answer motion to dismiss the court is required to accept the factual claims in the FAC as true and then determine if they state a cause of action. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The voluminous FAC, together with the documentary evidence referenced in, and attached to, it amply sets forth valid causes of action against Bender.

Bender's motion to dismiss the FAC below was supported only by the affidavit of Tracy Baldwin, an individual purportedly with personal knowledge of relevant facts. (R164-71) However, Ms. Baldwin, described as LexisNexis' "Operations Director, Global Order to Cash, specializing in managing orders for (its) printed works and software"(R164-5, ¶ 2) only claimed to have knowledge of, and responsibility for, *sales* of the Tanbook, not its *content*, editorial or otherwise. Undeniably, Ms. Baldwin was not involved either in the editorial content, editing or updating of the Tanbook, which is the subject of this action. Significantly, Bender did not offer the affidavit of either Ms. Morris (*See,* Section VIII*, supra)* or Eileen O'Toole, the longtime editor of the Tanbook (R176) who was apparently dropped by Bender after this action disclosed deficiencies with the 2016 Tanbook.

Both undeniably have personal knowledge of the Tanbook's contents and Bender's admitted failure to update the Rent Regulation laws in it for at least twelve years.

X. The First Department's decision

The First Department erroneously held that Appellants' failed to allege a cognizable injury under §349 (R454) (See Point I F, *infra*) and also that they failed to allege that they saw Bender's deceptive representations before purchasing the book, even though this Court has never imposed such a requirement on a §349 claim. In fact, each Appellant expressly alleged that they had a well-established understanding, based upon their repeated purchase, and longstanding use, of the Tanbook, that its publication of the Rent Regulation laws was authoritative, current and complete. (*See*, Section V, *supra*)

The court further held that Appellants had not demonstrated a "cognizable" injury, relying on *Small v Lorillard Tobacco Co.*, 94 NY2d 43 (1999). As demonstrated in Point I F, *infra,* this reliance was misplaced as Appellants properly alleged that they did not receive the product they had long been promised; the complete Rent Regulation laws. As a result, the "deception as injury" limitation on §349 claims has no applicability to the classic "bait and switch" claim asserted here.

Imposing a requirement that a §349 plaintiff must claim to have seen the specific deceptive words ignores the fact that this Court has expressly held that

reliance on the deceptive conduct is not required and the test is whether a "reasonable consumer, acting reasonably" would be deceived by the conduct, not whether any particular plaintiff was.[21] (See Point I B 3, *infra*)

Next, the First Department implicitly upheld dismissal of the §349 claim on the grounds found by the Motion Court; that the sale of the Tanbook was not "consumer-oriented conduct" as that term has been re-defined solely, and erroneously, by that court, because it is purportedly used only by professionals and not individuals for a "personal, family or household purpose." (R19) The First Department's grafting of this additional requirement on a §349 claim has never been adopted by this Court, let alone any of the other departments of the Appellate Division, and is therefore improper, as a matter of law. (See Point I D, *infra*)

The Appellate Division also erroneously held that the Appellants' breach of express warranty claim was properly dismissed because Bender had inserted a disclaimer of the "accuracy, reliability or currentness" (although not "completeness") of the book's contents on the reverse side of its order form. (R453) (See, Point II C, *infra*) The court further held that the complaint failed to allege that the Appellants relied on the express warranty even though, at the same

[21] The sole case cited by the First Department, *Gale v. IBM,* 9 AD 3d 446 (2nd Dept., 2004) involved claims under both GBL 349 and 350, the latter involving claims of false advertising, which does require actual reliance on the allegedly false advertisement

time, it acknowledged that at least one of the Appellants had in fact alleged such reliance. (R453) (See Point II E*, infra*)

Finally, the First Department improperly rejected Appellants' claim of breach of the implied covenant of good faith and fair dealing, relying exclusively on a single First Department decision, while ignoring substantial caselaw to the contrary from this Court. (See Point IV*, infra*)

ARGUMENT

POINT I

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

A. The Deceptive Practices Act is a broad remedial statute intended to apply To "virtually all economic activity" in the state.

In order to ensure an honest marketplace, New York's Deceptive Practices Act (General Business Law Art. 22-A) permits *any person* (not simply any "consumer") to enforce its prohibition against *all* deceptive practices, including false advertising, 'in the conduct of *any* business, trade or commerce or in the furnishing of *any* service in this state" (GBL§349(a), (h); §350; Governor's Approval Mem, L 1970, ch 43, 1970 McKinney's Session Laws of NY, at 3074);

see, also L 1980, chs 345, 346; Governor's Approval Mem, Bill Jacket, adding a private right of action enforceable by "any person." (emphasis added).

The breadth of the law's reach was emphasized over twenty years ago by this Court in *Karlin v. IVF America, Inc.,* 93 NY2d 282 (1999) when it held that the Act reached medical procedures that were marketed in a deceptive manner, although until then such claims were limited to allegations of medical malpractice. Just as the tort remedy was inadequate in the *Karlin* case, contract and fraud remedies are inadequate here. Deception must be deterred and punished to protect the ultimate consumers of the product.

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

Since *Karlin*, this Court has repeatedly reiterated the Act's broad remedial purpose and its application to "virtually all economic activity" occurring in the state. *Small v Lorillard Tobacco Co.*, 94 NY2d 43 (1999); *Goshen v. Mut. Life Ins. Co.*,98 N.Y.2d 314 (2002); *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris*

USA Inc.,3 N.Y.3d 200 (2004); *Matter of Food Parade, Inc. v. Off. of Consumer Affairs of Nassau*, 7 NY3d 568 (2006)(dissent, Graffeo, J.) This overarching principle was unanimously reaffirmed by this Court just two months ago in *Plavin v Group Health Inc.*, ___NY3d___, 2020 NY Slip Op 02025, March 24, 2020 where it affirmatively answered the Third Circuit's certified questions as to whether the conduct of a large insurance carrier in misrepresenting its health insurance policies in its written summaries and on its website constituted "consumer oriented conduct" required for a §349 claim. *See also, Collazo v. Netherland Prop. Assets LLC*, ___NY3d___, 2020 NY Slip Op 02128, *1 April 2, 2020) ("Section 349 prohibits `deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state'".)

B. The FAC fully and amply asserts all of the elements of a deceptive practices claim

1. The elements of a §349 claim

In *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 85 N.Y.2d 20 (1995) this Court enumerated the elements of a §349 claim, at the same time delineating what is not required under the Act.

A "(P)laintiff must allege that the challenged conduct is "consumer oriented" and that the "act or practice that is deceptive or misleading in a material way and that Plaintiff has been injured by reason thereof (*Varela v Investors Ins. Holding Corp.,*81 N.Y.2d 958, 961; Givens, Practice Commentaries, McKinney's

Cons Laws of NY, Book 19, GBL§349 at 565).”(*Oswego, supra* at 25) Additionally, plaintiffs must allege and establish that the challenged deceptive conduct caused actual, although not necessarily pecuniary, harm. (*id.*)

2. The FAC properly alleges “consumer-oriented” conduct

The purchase of the Tanbook by the Appellant Himmelstein law firm and the non-profit HCA are undeniably “consumer-oriented transactions,” as that term has repeatedly been applied by this Court, in that their purchase of the Tanbook was functionally no different than its purchase by Appellant Mr. McKee, or any other individual purchaser. In *Oswego*, this Court held that a pension labor fund was a “consumer” engaged in “consumer-oriented conduct” for purposes of the Act because it acted no differently than any individual consumer would in obtaining the defendant bank’s services in entering the same transaction.

3. Neither intentional conduct nor reliance is required to be alleged.

Appellants are not required to either allege, or establish, that Bender engaged in *intentional* conduct or that they justifiably relied on Bender’s misrepresentation or deception. (*Oswego, supra*) Instead, this Court adopted an “objective definition of deceptive acts and practices; whether representations or omissions, limited to those *likely to mislead a reasonable consumer acting reasonably* under the circumstances. (*id.*) Such a test complements the definition applied by the Federal Trade Commission to its antifraud provision (15 USC §45)

upon which the New York statute is modeled (Givens, Practice Commentaries, McKinney's Cons Laws of NY, Book 19, GBL§349, at 565; Note, *op. cit.*,48 Brook L Rev 509,520)"(*id.*) (emphasis added).

Given that reliance by Appellants is not a §349 pleading requirement, the Appellate Division's observation that "the complaint fails to allege that the individual plaintiff and plaintiff Housing Court Answers, Inc. (but not Appellant Himmelstein) ever saw the allegedly deceptive representations…" is erroneous, as a matter of law. (R454)

And, even if that was correct, it is more than well established that §349 claims are not subject to a heightened pleading standard, recognizing the broad remedial purpose of the statute. See, *City of N.Y. v. T-Mobile United States*, 2020 NYLJ LEXIS 791(Sup. Ct., NY Co., April 15, 2020), citing, *Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.3d 508, 511 (2d Cir. 2005); *Koenig v. Boulder Brands, Inc.,* 995 F. Supp. 2d 274, 287 (S.D.N.Y. 2014); *M & T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 570 (E.D.N.Y. 2010).

C. Both the Motion Court, and, implicitly, the First Department, erroneously found the sale of the Tanbook was not "consumer oriented conduct."

1. §349 claims are not limited to those involving "personal, family or household" transactions.

Bender argued below that the Tanbook was marketed to, and exclusively used by, professionals and judges and therefore was not purchased by consumers

for a "personal, family or household purpose," relying on the First Department's decision in *Cruz v NYNEX Information Resources*, 263 A.D.2d 285, 290 (1st Dept 2000).[22] Initially, the Motion Court agreed that the FAC met all of the other criteria for a §349 claim "(1) whether the goods are modest in value,(2) whether numerous parties with a disparity of economic power and sophistication are involved in the transactions, and (3) whether the contract is a form contract."(R18, citing *Cruz, supra* at 291). But, relying exclusively on *Cruz*, the court dismissed the claim finding that it did not meet the "personal, family or household purpose" test, agreeing with Bender that it was intended to be used only by professionals. (R19) The First Department implicitly upheld this determination when it rejected all of the Appellant's other claims. (R455)

[22] Bender made this claim even though one of the Appellants, Michael McKee, alleged in both the FAC and his affidavit to the Motion Court that he purchased the Tanbook as an individual consumer to learn more about his own rights as a New York City rent stabilized tenant. (R53 ¶32; R231¶5)

D. The First Department improperly created a "personal, family or household purpose" test for a §349 claim.

In *Oswego* this Court (as well as in every subsequent §349 case here) declined to make an exception to its "consumer-oriented" test by excluding entities victimized by deceptive business practices. To the contrary, this Court made clear that such entities *are* covered by the Act, recognizing that the plaintiff in *Oswego* was a labor union pension fund, not an individual ("as a threshold matter, plaintiffs claiming the benefit of 349--whether individuals *or entities such as the plaintiffs now before us*--must charge conduct of the defendant that is consumer oriented.") (*id*). (emphasis added)

Yet, that is exactly what the First Department did, five years later, in *Cruz,* a case involving the sale of Yellow Pages advertisements; a product the court found could not be used by anyone but businesses. In rejecting the §349 claim, the court initially recognized that the transactions at issue otherwise met the criteria for a claim under the Act: "…they are modest in value…are repeated regularly with numerous parties…(they) rely on a form contract…and involve parties with a large disparity in economic power and sophistication." (citations omitted) (*id.* at 291)

The First Department then grafted the additional element of a "personal, family or household purpose" in the underlying transaction onto the requirements for a §349 claim. In doing so, the court did not rely on any case authority, either

from this, or any other, court. Instead, it cited, by analogy, two other, wholly unrelated sections of the GBL enacted well after § 349(h) (§399-c involving mandatory arbitration clauses, enacted in 1984 and §399-p involving telemarketing schemes, enacted in 1988), both of which define "consumer" utilizing the "personal, family or household purpose" standard, as well as sections from the GOL, the CPLR and the UCC.

In assuming that a "personal, family or household purpose" must be inserted in a statute that is otherwise silent on this point, the First Department violated the fundamental canon of statutory construction, *expressio unius est exclusio alterius,* an omission of a term in a statute from a set of statements including the specified term is intentional and is to be honored by an interpreting court. This Court applied the canon restricting the application of a statute enumerating the scope of immunity of municipal corporations from tort liability: "[W]e can only construe the Legislature's enumeration of six specific locations in the exception (i.e. street, highways, bridges, culverts, sidewalks or crosswalks) as evincing an intent to exclude any others not mentioned." *Walker v. Town of Hempstead*, 84 NY2d 360, 367 (1994) (emphasis added)

That the Legislature did not include a "personal, family or household purpose" when it enacted §349(h), but subsequently did so in GBL §399-c and §399-p, renders the First Department's addition fundamentally wrong.

Further, the First Department ignored the fact that the Legislature never defined "consumer" in §349(h) (although it easily could have) and instead made it broadly enforceable by "any person." Nor did the First Department acknowledge, or has it since acknowledged, this Court's repeated instruction that the Act is to be interpreted broadly and apply to virtually "all economic activity" in the state, *Karlin, supra; Small, supra; Polonetsky, supra; Goshen supra; Plavin, supra*; an instruction wholly at odds with a limitation that carves out a substantial amount of economic activity.

Since *Cruz*, the First Department has repeatedly applied its self-created, overly restrictive, "personal, family or household purpose" test in rejecting §349 claims. *Sheth v NY Life Ins. Co*., 273 AD 2d 72 (1st Dept. 2000)("Plaintiffs do not allege that the challenged practices were directed at consumers, but, rather, only at prospective insurance agents."); (*Medical Society v Oxford Health Plans, Inc.,* 15 AD 3d 206 (1st Dept. 2005) ("Defendants' acts and practices are directed at physicians, not consumers") (*BitSight Tech., Inc. v SecurityScorecard, Inc.*, 143 AD3d 619 (1st Dept. 2016)(deceptive sale of computer security programs to businesses); (*Scarola v Verizon Communications, Inc.*, 146 AD3d 692 (1st Dept. 2017)(deceptive telecommunication billings to a business); (*Matter of People v Northern Leasing Sys., Inc.,* 169 AD 3d 527 (1st Dept. 2019) ("mom and pop" stores victimized by deceptive marketing of credit card terminals).

And, since 2000, lower courts within the First Department have repeatedly applied the *Cruz* "personal, family or household purpose" test in dismissing §349 claims. *Baytree Capital Assoc., LLC v AT&T Corp.*, 10 Misc 3d 1053[A], 2005 NY Slip Op 51927[U] (Sup Ct. NY Co. 2005)(deceptive practices by telephone service provider); *Triple Z Postal Servs., Inc. v United Parcel Serv., Inc.*, 13 Misc 3d 1241[A], 2006 NY Slip Op 52202[U] (Sup Ct. NY Co. 2006)(dismissing claim by franchisee); *Jack Kelly Partners LLC v Zegelstein*, 2009 NY Slip Op 32999[U] (Sup Ct, NY County 2009)(claim by office tenant against landlord); *Cooper Sq. Realty, Inc v Bldg. Link, LLC*, 2010 NY Slip Op 30197[U] (Sup Ct, NY County 2010)(claim by property management company); *Mid Is. LP v Hess Corp.*, 41 Misc 3d 1237[A], 2013 NY Slip Op 52043[U] (Sup Ct, NY County 2013)(claim by building owner against heating oil distributor).

E. No other department of the Appellate Division has recognized or adopted the First Department's "personal, family or household purpose" test.

Contrary to the First Department's narrow view, *all* of the other departments of the Appellate Division have followed this Court's broad §349 jurisprudence and recognized that claims can be asserted, in appropriate cases, either by entities, businesses or professionals:

1. Second Department

In *Corsello v Verizon NY, Inc.,* 77 AD 3d 344, 366-367 (2d Dept. 2010) a case brought by the landlord of an apartment building, the court stated,

> the plaintiffs themselves need not be consumers (*see, Securitron Magnalock Corp. v Schnabolk*, 65 F3d 256, 264 (1995), *cert denied* 516 US 1114, 116 S Ct 916, 133 L Ed 2d 846 (1996) (noting that for purposes of General Business Law § 349(h), `(t)he critical question . . . is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor'); *New York v Feldman*, 210 F Supp 2d 294, 301 (2002); *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY 3d 200, 207, 818 NE2d 1140, 785 NYS 2d 399 (2004) (noting that the scope of General Business Law § 349 (h) is not limited solely to consumers, but includes any person injured by reason of any violation)."

In *North State Autobahn, Inc. v. Progressive Ins. Group Co.,*102 AD 3d 5 (2d Dept. 2012) the court similarly upheld a §349 claim asserted by a group of auto repair shops against an insurance company.

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

See also*, Burlington Ins. Co. v Clearview Maintenance & Servs., Inc.,* 150 AD 3d 954, 956 (2d Dept. 2017) (§349 claim upheld where "the defendant is a roofing company. The plaintiff is an insurance brokerage firm in the business of property and casualty insurance.")

2. Third Department

In *Elacqua v. Physicians' Reciprocal Insurers*, 52 AD 3d 886 (3d Dept. 2008) the court upheld a §349 claim brought by OB/GYN Health Center Associates, LLP, a medical partnership, against an insurance company*). See also, Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.,* 168 AD 3d 1162, 1165-1166 (3d Dept. 2019) ["plaintiffs are former members of the Healthcare Industry Trust of New York… a group self-insurance trust created in 1999 and administered by Compensation Risk Managers, LLC… pursuant to Workers' Compensation Law § 50 (3-a)]."

3. Fourth Department

*Jeffrey's Auto Body, Inc. v Allstate Ins. Co.,*125 A.D.3d 1342 (4th Dept. 2015) (§349 claim asserted by auto body repair shops against insurance company); *Crawford Furniture Mfg. Corp. v Pennsylvania Lumbermen's Mut. Ins. Co*., 244 A.D.2d 881 (4th Dept. 1997)(§349 claim asserted by a furniture manufacturer against its insurer).

The First Department is plainly the outlier among the departments of the Appellate Division on this issue, which has never been presented to, let alone approved by, this Court. This well-defined split of authority prevents uniformity in the enforcement of a critical state law, designed to provide protection from dishonesty in the marketplace and creates irrational anomalies. For example, the owners of a Bronx "mom and pop" grocery store who purchase a laptop to record their store's books and are victimized by the seller's deceptive business practices,

have no recourse under the Act. Yet, the same type of business, a few miles to the north in Yonkers, victimized by the same practices, after purchasing the same product, is not barred from the courthouse. This Court must eliminate this nonsensical anomaly and reject the First Department's erroneous departure from well-established judicial and legislative authority.

In the face of the broad mandate by this Court, itself based on the broad mandate of the Legislature, Bender claimed, erroneously, that the Act must be read narrowly. Bender would have this Court exclude the mass sale of a $120.00 book by a large national data company, using form contracts, to the general public where numerous provisions of the Rent Regulation laws were omitted, even though they had long been represented as produced in their entirety. Bender's attempt to narrow the application of §349 well beyond this Court's holdings must be rejected.

F. The Appellate Division incorrectly applied the "deception as injury" limitation to this case.

In affirming the Motion Court's dismissal of the §349 claim, the Appellate Division wrote,

> The GBL § 349 claim was correctly dismissed because the only injury alleged to have resulted from defendant's allegedly deceptive business practice is the amount that plaintiffs paid for the book, which does not constitute an injury cognizable under the statute.

The court thus purported to apply the "deception as injury" limitation on §349 claims first articulated by this Court in *Small, supra.* and which has

occasionally been used to close the doors of the courts to claims that because of a deceptive misrepresentation or omission, a prospective plaintiff bought a product or service that she otherwise would not have purchased.

In *Small* this Court reiterated its earlier decision in *Oswego, supra,* that a plaintiff must allege that the defendant has engaged "in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof". What a §349 plaintiff must allege under *Oswego* is that "a material deceptive act or practice caused actual, although not necessarily pecuniary, harm." *id.*

Without citing to a single decision, and as far as counsel can ascertain, uniquely in the United States, this Court wrote in *Small* that "consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices" has not suffered an injury under §349. "(Plaintiffs) theory contains no manifestation of either pecuniary or 'actual' harm; plaintiffs do not allege that the cost of cigarettes was affected by the alleged misrepresentation, nor do they seek recovery for injury to their health as a result of their ensuing addiction." *Id.*

Why being induced by a deceptive representation to buy something that one otherwise would eschew is not an actual injury is never explained in *Small.* But *Small* need not be abandoned in order for the dismissal of the Appellants'

§349 claim to be reversed. For in *Small*, plaintiffs claimed not that the cigarettes they bought were not the cigarettes they bargained for, but solely that they wouldn't have bought cigarettes at all had they not been deceived into believing they were benign. They bought cigarettes, presumably smoked them, and got exactly what they bargained for. Had they gotten ill or become addicted, their remedy, if any, would have been under products liability law. But they didn't lose the benefit of their bargain because of the defendant's deception.

Contrast the instant case. What the Appellants sought to buy was a book that included selected provisions of state and local landlord-tenant laws, collated in Parts I, II, and V of the Tanbook, and "*the* laws and regulations covering rent stabilization and rent control in New York City and in applicable areas elsewhere in the state", constituting part III of the Tanbook. (emphasis added) That's not, however, what the Appellants received. Instead, they received Bender's admittedly defective publication of the Rent Regulation laws which either omitted, or misstated, at least 37 significant sections of those laws and regulations. It's as if the *Small* plaintiffs had received not the cigarettes they thought they had bought, but ones with the filter tips missing.

This is not "deception as injury"; this is classic "bait and switch". And bait and switch caused by material deception states a §349 claim, *See, Zurakov v. Register.com, Inc.,* 304 AD 2d 176 (1st Dept. 2003) (§349 injury was sufficiently

pleaded because plaintiff "was deprived of the essence of his bargain); *Orlander v. Staples, Inc.,* 802 F.3d 289, 302 (2nd Cir. 2015) ("a plaintiff must allege that, on account of a materially misleading practice, she purchased a product and did not receive the full value of her purchase.") both citing *Small. See also, Ghee v. Apple-Metro, Inc.,* 2018 WL 575326, (SDNY 2018), explicitly holding that overcharging for a product or service intended to be obtained states a §349 claim under *Small.*

While "bait and switch" states a claim under the Act, this case presents an opportunity for this Court to clarify the doctrine and join virtually every other state in holding that "(A)n ascertainable loss requirement is satisfied if the consumer has purchased an item that is different from or inferior to that for which the consumer bargained." *Unfair and Deceptive Acts and Practices*, 9th ed. (2016), National Consumer Law Center, at section 11.4.2.8.4, citing to decisions from several dozen jurisdictions.

It is significant that, unlike in *Small*, here the value of the product delivered and the value of the product hawked are totally different. The nicotine in a cigarette does not vary whether or not it is addictive, and thus plaintiffs in *Small* could not compare the value, or even the cost, of what they bought to the non-existent, non-addictive, cigarettes they thought they bought. But Bender's publication of the Rent Regulation laws was simply worthless to the class

plaintiffs; they could not rely on what Bender included as accurately encompassing those laws and regulations. Put another way, the cost to a class plaintiff of the presumably accurate sections of the Tanbook, which is nothing more than sections of the RPAPL and various court acts, is the cost of copying sections out of McKinneys. It's precisely the congeries of administrative regulations, scattered throughout often uncompiled agency releases, that a practitioner or *pro se* landlord or tenant needs in a reliable format that she can take to an agency hearing officer or a Housing Court judge and know that what she claims the law to be is what the law actually reads.

It is worth noting that cases purporting to apply *Small* are generally ones in which the alleged deception was that the purchaser did not obtain additional benefits supposedly promised from the use of the product or service, such as better health from drinking a particular beverage, *Donahue v. Ferolito, Vultaggio & Sons*, 13 AD3d 77 (1st Dept. 2004), *lv. denied* 4 NY3d 706 (2005), or was unable to get a one dollar reduction on a putative purchase when a coupon triggering the deduction was never provided by the defendant, *Amalfitano v. NBTY, Inc.*, 128 AD3d 743, 745 (2d Dept. 2015). In other cases, where there was no viable claim that the product sold was overpriced compared to what the product actually cost or was worth, such as *Small* itself and *Rice v. Penguin Putnam Inc*., 289 AD2d 318 (2nd Dept. 2001), there was no injury from the deception because the value

delivered was not provably different from the value had the promise been carried out. The issue in such cases is not that there has been no injury from the deception, but rather that proof of the injury is too remote or speculative; see the compendium of cases gathered in *Harris v. Dutchess County Bd. of Co-op Education,* 50 Misc3d 750,771 (Sup. Ct. Dutchess Co. 2015); *Gomez-Jimenez v New York Law School*, 103 AD3d 13 (1st Dept., 2012). Where, as here, the value of the product delivered was miniscule compared to the value of the product sought to be purchased, *Small* simply does not apply.

POINT II

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

A. Summary

The Appellate Division agreed that the FAC alleges breach of an express warranty but dismissed the claim for two reasons. First, it held that Bender had included a specific disclaimer of warranty which was sufficiently prominent to constitute an effective disclaimer. Second, it held that while one named plaintiff, the Himmelstein law firm, adequately alleged reliance on the warranty, that pleading "defect" did not cure the lack of alleged reliance by the class.

The errors of the Appellate Division here are multiple. Appellants will show the broad extent of the express warranty, the limited extent of Bender's purported

disclaimer, the inadequacy of the disclaimer because of its obscurity, the lack of any reliance pleading requirement under New York's "basis of the bargain" approach to breach of warranty claims, and the applicability of the doctrine, enshrined in the jurisprudence of this Court since 1968, that a seller cannot disclaim a warranty that nullifies the heart of the bargain.

B. The statements made in the Tanbook itself and on Bender's online store are express warranties.

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

Were there any ambiguity, the promotional material that Bender supplies on its website, and on Amazon's website, explains that while the Tanbook contains "selected provisions" of a set of named statutes, "selected local laws" and "various provisions" of court acts, it contains "*the* laws and regulations covering rent stabilization and rent control in New York City."(R207-09, 214)(emphasis added).

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

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

Bender argued below that the statements in the Overview and on its website were "immaterial puffery," citing to *Gillis v QRX Pharma Ltd.*, 197 F.Supp.3d 557, 593 (SDNY 2016). The more relevant analogy is to the express warranties in *Imperia v. Marvin Windows of N.Y., Inc.*, 297 A.D.2d 621 (2nd Dept. 2002) ["An

express warranty can arise from the literature published about a product"]. See also *Weiss v. Herman*, 193 A.D.2d 383 (1st Dep't 1993).

Defendant in *Imperia*, a manufacturer of a product called "flexacron prefinish" represented that its product "`lasts four to five times as long as paint' and that products treated with [its prefinish] were 'maintenance-free' and would resist 'cracking, blistering or peeling even under the toughest conditions."(*supra* at 622) These statements, like Bender's, are both express representations of fact, and used to describe a product for sale. And, like Bender's statements, they constitute express warranties.

Virtually every word of U.C.C. §2-313, regarding express warranties, is meant to ensure that such warranties are easy to create.[23] It states:

(1) Express warranties by the seller are created as follows:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty

[23] While it is unclear whether Bender's sale of books that are annually updated is predominantly sale of a service, and thus explicitly covered by Article 2 of the Uniform Commercial Code, or of books, and thus subject to the common law of contract, the creation and enforcement of an express warranty is governed by the same criteria. *Milau Associates v. North Ave. Development Corp*., 42 NY2d 482, 487 (1977). See, equating the "basis of the bargain" approaches of New York common law and the UCC, *Price v. L'Oreal USA, Inc.*, 2018 U.S.Dist LEXIS 138473, *17-18 (SDNY), and *LaSalle Bank Nat'l Assn. v. CAPCO Am. Securitization Corp.*, 2005 U.S.Dist. LEXIS 27781, *15 (SDNY)

> that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he (sic) have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

The product that Bender sold to the Plaintiff class is itself a compendium of text. A textual description of a product is the usual venue for an examination of whether performance has been warranted: when the product is itself a document, the documentary description is of the essence of the bargain. The Tanbook holds itself out as including the text of New York's Rent Regulation laws.

It just isn't that, and therefore what Bender sold is just not what it said it sold.

C. The "disclaimer" upon which the Appellate Division relied did not disclaim the warranty of completeness.

The Motion Court wrote that Bender's "Sales Contracts included a disclaimer wherein Matthew Bender explicitly stated that it was not warranting the accuracy or completeness of the Tanbook."(R16) The Appellate Division appears to have concurred; while not repeating the error that there was an explicit disclaimer of "completeness", it wrote that Bender's disclaimer was "specific", not "general", and thus was effective to disclaim that which Bender had listed as disclaimed. These courts were compelled to characterize the disclaimer as specific to avoid the well-established doctrine that a general disclaimer does not supersede an express warranty that arises from the language describing the product; *Jesmer v. Retail Magic, Inc.,* 55 AD3d 171, 184 (2nd Dept. 2008), compiling the cases.

Both courts were in error, for the specific disclaimer in Bender's own language does not include the critical representation of "completeness." The disclaimer contained in the terms and conditions that appear on the reverse side of its contract provides, in capital, albeit small font, letters, that Bender does not "WARRANT THE ACCURACY, RELIABILILTY OR CURRENTNESS OF THE MATERIALS" contained in the Tanbook. (R186)(emphasis original). As demonstrated in Section B, *supra,* the critical warranty to prospective purchasers was the warranty of completeness; that if one wished to have in a single volume "the laws and regulations covering rent stabilization and rent control in New

York", together with what Bender selected from other statutes and court rules, one would obtain the entirety of those laws and regulations by purchasing the Tanbook. Bender never disclaimed a warranty of completeness. Failing to include numerous amendments to those laws and regulations, and continuing to include provisions long repealed, made the Tanbook utterly incomplete.

D. The hidden disclaimer was ineffective

Bender hid its disclaimer on the reverse side of an order form sent separately from the Tanbook itself. (R195) Compare the limited disclaimer provided by Bender's competitor Westlaw, in its online statutory service, FindLaw Codes, where prominently at the bottom of each page of text, appears the following:

> "FindLaw Codes may not reflect the most recent version of the law in your jurisdiction. Please verify the status of the code you are researching with the state legislature or via Westlaw before relying on it for your legal needs."

New York requires that an exclusion or disclaimer of a warranty must be "conspicuous", UCC § 2-316(b), defined as "a term or clause…so written that a reasonable person against whom it is to operate ought to have noticed it." UCC 1-201(10). *See, e.g., Deven Lithographers v. Eastman Kodak Co.,* 199 AD2d 0 (1st Dept. 1993) (disclaimer affixed to packaging of a product inadequate). Where the disclaimer is separate from the warranty, and printed in smaller type than the body of the contract, it is inconspicuous and thus unenforceable *vel non.* Compare *Warren W. Fane, Inc. v. Tri-State Diesel, Inc.,* 2014 WL 1806773, *8-10 (NDNY

2014), where the disclaimer was in the warranty itself, labeled, in bold capital letters, "**WARRANTY DISCLAIMER AND LIMITATIONS OF LIABILITY."** As the court wrote in that case, "A reasonable person reading the warranty could not help but notice the disclaimer." In the instant case, where the disclaimer wasn't even in the Tanbook itself, the only thing that was conspicuous was the warranty – not the disclaimer.

E. The FAC adequately pled reliance.

The Appellate Division held that "the complaint fails to allege that plaintiffs relied on the statements that they contend constitute an express warranty", (R453), citing *CBS, Inc. v. Ziff-Davis Pub. Co.,* 75 NY2d 496, 503 (1990). The majority in *Ziff-Davis* held that in order to receive an award of damages, a plaintiff's proof must be "shown to have been relied on…". That is a proof requirement, not a pleading requirement, as Judge Bellacosa lamented in his dissent: "The [majority] holding discards reliance as a necessary element to maintain a cause of action for breach of an express warranty." *id.,* at 508.

Even if reliance had to be pled in an action for breach of express warranty, as the Appellate Division held, such reliance was concededly adequately pled by way of an affidavit from Samuel Himmelstein on behalf of his law firm. (R223-29; 453) But the Appellate Division wrote that this affidavit did not cure the omission of "the other plaintiffs." It seems to have forgotten that this is a class action, and in

discovery Bender can explore whether the myriad of other lawyer purchasers, let alone non-lawyer purchasers, relied upon the promise that the Tanbook contained the laws and regulations regarding rent regulation in New York . After all, it is Bender, not the class representatives, which knows who bought the Tanbook. If it eventuates that there are some purchasers, perhaps practitioners in rural counties where rent regulation does not exist, bought the book solely for its selection of generally applicable landlord-tenant statutes and regulations, the size and definition of the class might be affected; not the validity of the class pleading. *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 AD 3d 63, 72 (2nd Dept. 2006).

Concededly, there are decisions which can be read to require that an allegation of *Ziff-Davis* reliance must be in the pleading, and not merely the proof. See, e.g., *Goldenberg v. Johnson & Johnson Consumer Cos.,* 8 F.Supp.3d 467,482 (SDNY 2014). But this is by no means the majority position. *See, e.g., Factory Assocs. & Exporters, Inc. v. Lehigh Safety Shoes Co., LLC, 382* Fed. Appdx. 110, 111-112 (2d Cir. 2010) ("[t]o *prevail* on a claim of breach of express warranty, a Plaintiff must show…that the warranty was relied upon."(emphasis added).

A recent opinion by Judge Rakoff in *Manier v. L'Oreal U.S.A., Inc.,* 2017 U.S.Dist. LEXIS 116139, 29-30 (July 18, 2017, SDNY) is particularly instructive here.

> "The motion to dismiss the pleading was denied:
> Defendants also argue that Plaintiffs' express warranty claims

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

F. Bender did not, and could not, expressly disclaim its warranty because it pertains to the very purpose of the product.

The volume and breadth of Bender's inaccuracies and omissions, specified in the FAC, are so extreme that they effectively made the Tanbook useless to the class of purchasers. For those purchasers who bought the Tanbook to have the Rent Regulation laws in one convenient place, the *completeness* of the publication was the *sine qua non* of the transaction; something *all* of the named plaintiffs expressly alleged. (R224, 231, 238)

Because the class would not have bought the Tanbook absent the promise of completeness and accuracy regarding rent regulation, Bender's purported

disclaimer is unenforceable. For a seller cannot disclaim a warranty if the disclaimer nullifies the heart of the bargain. As this Court has held:

> "[S]ection 2-719 (subd. [2]) of the UCC provides 'the general remedy provisions of the code apply when 'circumstances cause an exclusive or limited remedy to fail of its essential purpose'. As explained by the official comments to this section: 'where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must' give way to the general remedy provisions of this Article.' (UCC §2-719, official comment 1.)" *Wilson Trading Corp. v. David Ferguson, Ltd,* 23 N.Y.2d 398,404 (1968)

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

York Landlord-Tenant Law" book is the fundamental basis for its publication, and the fundamental reason for its purchase.

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

The Appellate Division attempted to avoid this case law by holding that Bender's disclaimer was "specific." However, as shown in Section C *supra*, Bender never specifically disclaimed completeness, and thus the Appellate Division's implication that the disclaimer was enforceable against Appellants who seek damages for having bought an incomplete book fails. If the disclaimer was "general" enough to disclaim a breach of warranty claim based on incompleteness, then it fails because general disclaimers do not defeat claims of buyers induced by the very substance of the warranty.

POINT III

BENDER'S FAILURE TO PROMPTLY NOTIFY ITS CUSTOMERS WHO HAD PURCHASED THE 2016 TANBOOK THAT IT HAD OMITTED, OR INCORRECTLY PUBLISHED, NUMEROUS SIGNIFICANT PORTIONS OF NEW YORK'S RENT REGULATIONS CONSTITUTED A BREACH OF CONTRACT AND AN ONGOING FRAUDULENT MISREPRESENTATION

At the very latest, Bender learned of material omissions and errors in the Tanbook from Mr. Chachere's December 5, 2016 letter(R134-35) although it admitted it knew of the book's problems before that(R136).[24] It was undeniably on notice that the 2016 Tanbook could not be relied upon to fully and correctly provide the Rent Regulation laws.

Yet, Bender did nothing to inform its customers who had purchased, and were presumably still using, the 2016 Tanbook, of those errors and omissions, even though it readily could determine their name and address from its own records. Despite having been shown by Mr. Chachere an example of a decided case in which counsel and the court, relying on the accuracy and completeness of the Tanbook, had misinterpreted the law, Bender allowed its customers to continue under the misapprehension that the Tanbook was both accurate and complete for at least another six months, until it finally issued the 2017 edition in May 2017.

[24] Only through discovery will Appellants be able to establish precisely how long before December 2016 Bender learned of the Tanbook's deficiencies.

The "Material Terms" of the Bender Agreement and Order Form promise "supplementation" and "revisions…made available during the annual subscription period." (R191) What could call for a "supplementation" or "revision" more than actual knowledge that the Tanbook was incomplete, and in places simply wrong. Yet, Bender admittedly did nothing.[25]

The Appellate Division erroneously dismissed the breach of contract claim because "plaintiffs identified no contractual provisions that required defendant to update the 2016 edition of the book." However, Bender was in fact contractually required to supplement and revise and it did neither even though it had actual notice that the book was inaccurate and incomplete and, at least as regards the errors identified by Mr. Chachere, wrong as to the triggering elements of a type of rent reduction order. Had Bender not purported to sell a subscription service, arguably it would not have breached its contract by doing nothing once the 2016 Tanbook had been published. But it promised more and delivered nothing.

The Appellate Division was equally wrong in dismissing plaintiffs' fraudulent inducement claim. By purporting to sell a subscription service that it would supplement and revise between annual book releases, Bender fraudulently induced class members to buy the Tanbook on a promise that the book would

[25] Bender even allowed Amazon to continue to sell the 2016 Tanbook at least until August 2017, months after the 2017 edition was eventually published. (R214-15)

maintain its utility for the entire year. Analogous to the breach of contract claim, had Bender wished to sell a book purported to be complete and accurate on the date of publication, it ought not to have promised more. And, in the absence of an express provision that a purchaser is not relying on the updating and supplementation aspects of the subscription service, the plaintiff class states a claim for fraudulent inducement. The Appellate Division's dictum that the updating provisions were not contractually required, whether or not accurate, simply do not dispose of the fraudulent inducement allegation. *Taormina v. Hibsher,* 215 AD2d 549, 560 (2nd Dept 1995); *Union Ave. Estateas, LLC v. Garsan Realty Inc.*, 170 AD3d 498 (1st Dept. 2019) ("The disclaimer provisions in the contract of sale and the rider are not sufficiently specific to preclude the claim that defendants fraudulently induced plaintiff to purchase the property by misrepresenting the status of the commercial tenants' leases.")

Perhaps more egregiously, Bender continued, after receiving the Chachere letter in December 2016, to accept orders for the 2017 Tanbook on an "annual subscription period" basis knowing that it could not deliver the 2017 Tanbook until it had corrected its mistakes and cured its omissions. That apparently did not take place until late May 2017. So, the new subscribers not only were deprived of the use of the 2017 Tanbook for 5/12s of the subscription period, for which they were

charged the full 12-month price, but were left assuming, in the interim, that the 2016 Tanbook remained reliable, accurate and complete.

Selling the 2017 Tanbook, knowing that it would not be timely delivered, and necessarily aware that its annual purchasers would continue to use the discredited 2016 edition, was an ongoing fraudulent inducement. Selling an annual subscription to the 2017 Tanbook, then not delivering it until late May, and letting the purchasers of the 2017 annual subscription remain in ignorance of the inaccuracy and incompleteness of that year's publication, is like selling a 2017 calendar in May 2017, and only after that five month delay telling purchasers that the earlier calendar they were using was on the Julian year system, not the Gregorian.

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

POINT IV

THE APPELLATE DIVISION INCORRECTLY DISREGARDED BENDER'S BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. Longstanding precedent from this Court establishes the importance of the implied covenant of good faith and fair dealing.

This Court has long recognized the implied covenant of good faith and fair dealing and its importance in New York contractual relations. In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance (see e.g., *Rowe v Great Atl. & Pac. Tea Co.*,46 N.Y.2d 62, 412 N.Y.S 2d 827, 385 N.E.2d 566 (1978); *Smith v General Acc. lns.* Co., 91 N.Y.2d 648, 674 N.Y.S.2d 267, 697 N.E.2d 168 (1998); *Dalton v Educational Testing Services*, 87 N.Y.2d 384, 639 N.Y.S.2d 977, 663 N.E.2d 289 (1995); *Van Valkenburgh, Nooger & Neville v Hayden Publ. Co.,* 30 N.Y.2d 34, 330 N.Y.S. 2d 329, 281 N.E.2d 142, *rearg denied* 30 N.Y.2d 880, cert denied 409 U.S. 875[1972).

The covenant embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton*, *supra,* 87 N.Y.2d at 389, quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87,188 N.E. 163 [1933]). While the duties of good faith and fair dealing do not imply obligations `inconsistent with other terms of the contractual relationship' (*Murphy, supra,* 58 N.Y.2d at 304) they do encompass `any promises which a reasonable person in the position of the

promisee would be justified in understanding were included' (*Rowe, supra,* 46 N.Y.2d at 69 quoting 5 Williston, Contracts §1293, at 3682 [rev ed 1937)." *511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 153, 773 N.E.2d 496, 746 N.Y.S.2d 131(2002) (emphasis added)

B. The Appellate Division ignored this Court's longstanding jurisprudence and instead relied solely on its own, inapposite, authority.

ln rejecting Appellants' claim of breach of good faith and fair dealing, the Appellate Division ignored all of this Court's precedents and instead relied exclusively on its decision in *Friedman v. Tishman Speyer*, 107 AD3d 569 (1st Dept. 2013) There, the court stated "the implied covenant...cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights." (*id.* at 570). The court further stated in *Friedman* that the covenant did not apply because the plaintiff failed to show that the contractual provision "would deprive the other party of the right to receive the benefits under their agreement." (id.) Yet, that is precisely what occurred here. Enforcing the disclaimer of accuracy, reliability and currentness, the *sine qua non* of a transaction involving the sale of a supposedly annually updated publication, deprived the Appellants of the right to the benefits of their purchase of the Tanbook. Those characteristics are precisely why the Appellants, and indeed all purchasers, buy a new Tanbook every year.

Bender chose to hide behind an overbroad, and wholly unexpected, disclaimer, hidden on the reverse side of its order form, which undermines and destroys the "basic purpose" of the Tanbook; a book aptly described as the "bible of landlord-tenant law."[26]

Longstanding authority from this Court establishes that a seller cannot blithely ignore its obligation to provide a product or service that it has long promised to provide and where every reasonable purchaser has a right to expect it will receive. Allowing a seller to hide behind a hidden and barely noticeable disclaimer that utterly, and fully, eviscerates the very purpose of the product violates this state's longstanding prohibition of such conduct. Bender's disclaimer that its annually sold Tanbook is not current, accurate or reliable and that its promised "authoritative" content is not that at all is like General Motors disclaiming that its automobiles can be used as a means of transportation. No reasonable purchaser would believe the product they are buying cannot be used for its obvious and fundamental purpose, yet that is precisely what the First Department allowed here.

[26] At oral argument (at 15:01:45) Presiding Justice Acosta (who served as a Civil Court judge for five years where he regularly heard landlord-tenant and Housing Court cases) accurately described the Tanbook as "pretty much the bible in landlord tenant law."

CONCLUSION

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

Dated: New York, NY
May 18, 2020

Respectfully submitted,

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CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. § 500.13(c)(1)

I certify pursuant to 22 N.Y.C.R.R. § 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the corporate disclosure statement, the table of contents, the table of cases and authorities, and the statement of questions presented required by 22 N.Y.C.R.R. § 500.13(a) of this section is 14,491 words. Such certification is based upon the statistics contained within the Microsoft Word Document.

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Dated: May 18, 2020