To Be Argued By:
JAMES B. FISHMAN
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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.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

JAMES B. FISHMAN
FISHMANLAW, PLLC
400 Madison Avenue, 19th Floor
New York, New York 10017
Telephone: (212) 897-5840
Facsimile: (212) 983-4356

JEFFREY E. GLEN
ANDERSON KILL P.C.
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 278-1000
Facsimile: (212) 278 1733

Attorneys for Plaintiffs-Appellants

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

PRELIMINARY STATEMENT

This brief is respectfully offered by the Plaintiffs-Appellants, Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP, Housing Court Answers, Inc. and Michael McKee (collectively, "Appellants" or "Plaintiffs") in reply to the brief ("Resp. brief") of the Defendant-Respondent Matthew Bender & Company ("Respondent," "Defendant" or "Bender") and in further support of the Appellants' 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") (R 5-22).

For the reasons set forth in the Appellant's main brief, ("Main brief") as well as herein, this Court should reverse the First Department's Order and reinstate the complaint.[1]

[1] The Court's word limit rule prevents Appellants from separately addressing each and every one of the claims in Bender's brief and instead address its most significant misstatements and inaccuracies. The Appellants rely on their Main brief for any argument asserted by Bender not specifically referenced herein, without intending to concede or abandon any such arguments.

INTRODUCTION

Bender's arrogance remains monumental. When told in December 2016 of "numerous" omissions and lack of updated material in its compendium of "the" New York rent laws and regulations, (the "Rent Laws") it did nothing, even though it admitted at the time that the problem had "occurred long ago." (R134-5;136) It continued to sell its materially deficient text for at least six full months, at full price, without a hint to its known customers of its errors. No supplement with the three dozen omissions it had been told of; not even a letter or email to its customers warning them that there were known omissions and that the book could no longer be relied on; No apology, no offer of a refund. Then, in May 2017, when the 2017 edition was belatedly issued, it failed to make mention of the prior errors and omissions; not a word of what had been changed and added, and no change in the price although the year was half over. Throughout this litigation Bender has responded to the longstanding "issues" with the Tanbook with a shrug and a "stuff happens" approach.

And now, in its brief to this Court, Bender has the temerity to argue that because some putative class members bought the 2017 edition, that purchase means they suffered no compensable loss when they bought the 2016 defective product. It's as if a buyer of a Ford Pinto with an exploding gas tank who bought a new one, after the defect was corrected, by that very act gave Ford a free pass. To

continue the analogy, the very purpose of the rule that correction of a product defect is inadmissible as proof of knowledge of the defect is to encourage correction of defective or misleading products. But the defect correction doctrine doesn't absolve the producer of a defective product of liability; it merely requires proof of liability by means other than a claimed admission through redesign. No such liability deficiency exists here.

Even worse, Bender continues to take the view that it can sell "the rent regulations" as if they were complete when the legislature made a wholesale revision in those very statutes. The very purpose of the Tanbook, to enable its users, including practitioners and adjudicators, to have in one convenient volume the statutes and regulations that govern landlord-tenant relations in New York City and numerous other centers in the state, was negated in June 2019 when the Legislature enacted a wholesale revision of those statutes, many with immediate effect. ("Housing Stability and Tenant Protection Act of 2019") ("HSTPA").[2] Yet Bender kept mum, as it had from December 2016 until May 2017.[3] It continued to hawk the 2019 edition for months after the HSTPA was enacted making the

[2] Bender touts 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." (R 205)

[3] The Appellants also pointed out below, in response to Bender's motion to dismiss the FAC at the motion court, that it even continued to offer the 2016 Kindle edition for sale on the Amazon website at least until August 2017, nine months after conceding the book's "issues." (R 136; 214-15; 450.61).

astonishingly incredible claim that it included "the latest information available." (See, Main brief at 17-18) [4]

The putative class plaintiffs here charge Bender directly and explicitly of maintaining a deceptive sales practice from the moment it actually learned that the Tanbook was incomplete.[5] What Bender purports to sell is the rent laws and regulations. It is one thing to disclaim liability if it just makes a mistake; it is something completely different to continue to sell the Tanbook after its publisher knows that it is inaccurate, unreliable and incomplete. The representation that the Tanbook contains the rent laws and regulations goes to the heart of the bargain which induced the class to buy the Tanbook; it was more than a warranty, it was the statement of the very nature of the Tanbook.

REPLY STATEMENT OF FACTS

Appellants rely upon their Statement of Facts in their initial brief. They add only this; in their Motion for Review to this Court, which this Court granted without any limitation on what may be briefed and argued to it, Appellants sought review of "the issues set forth in their within Memorandum of Law as well as those issues set forth in their briefs submitted to the First Department." (September 4,

[4] Bender doesn't even attempt to defend against these allegations. It did manage, however, to complain that the Appellant's brief contained 491 too many words. (Resp. brief, p. 20, ftn. 6)
[5] While Bender concedes, self-servingly, that in December 2016 it had only "recently" learned of the book's "issues" discovery will be necessary to show exactly how long before then it had actual knowledge of the book's many defects. (R 136)

2019 affirmation of James B. Fishman in support of Appellants motion for leave to appeal to this Court, para. 3). Of course, Appellants emphasized the four points which they believed most called for this Court's review.

For Bender to claim, (Resp. brief, at 19-20) that issues not specifically articulated in the motion for leave are abandoned, is to insult the integrity of Appellants' counsel, who, as all experienced appellate attorneys know, emphasized a number of points which they believed might induce this Court to grant the Motion. And they were correct.

REPLY ARGUMENT

POINT I

ALL OF APPELLANTS' CLAIMS ARE PRESERVED FOR REVIEW BY THIS COURT

Bender's carping about unpreserved arguments is irrelevant because it is factually inaccurate. The preservation cases in this Court make it clear that the issue is whether an argument was presented to the trial court so it could be ruled on, not whether it was in fact ruled on or whether it was adjudicated on appeal. An issue or claim must be "raised" at the trial court level, *Clement v. Durban,* 32 NY3d 337, 344, n.1 (2018), and the "argument" must be made to that court, *Gaines v. City of New York,* 29 NY3d 1003, 1005 (2017). As long as the argument is made while the case remains in the trial court, it is preserved. See, e.g., *Eujoy Realty Corp. v. Van Wagner Communications, LLC*., 22 N.Y.3d 413, 422

(2013). There is just no rule that an argument has to be articulated in a pleading; the question is whether the argument was articulated at the trial level.

The specific issue or argument alleged by Bender to be unpreserved for review is the inapplicability of the "deception as injury" formulation of the actual injury element of a GBL section 349 claim, articulated by this Court in *Small v. Lorillard Tobacco Co.,* 94 NY2d 43 (1999) (Resp. brief at 28). Bender had argued in briefing in support of its motion to dismiss that whether or not it had engaged in deceptive acts and omissions, the plaintiff class could not receive damages because its alleged injuries were the cost of purchasing the Tanbook. (R 450.28-30). At oral argument, plaintiffs noted the inapplicability of *Small* to Justice Ramos, who replied that he was well aware of the point since *Small* had been his decision. (R 413). Plaintiffs argued extensively that *Small* does not apply where the product delivered was merely misdescribed, not something completely different from what the purchaser had paid for. (R 425). Bender's counsel argued to the contrary; Justice Ramos did not write on the issue in his dismissal of the complaint.

Because the applicability of *Small* was presented to the motion court, the preservation requirement was met. Significantly, the First Department actually opined that *Small* provided a ground additional to those on which Justice Ramos

had written to dismiss the complaint; were the issue unpreserved it would not have been an appropriate analysis for the intermediate appellate court.

Bender also make a passing reference to preservation in regard to plaintiffs' claims arising out of breach of warranty. (Resp. brief 40-41). Bender admitted, at the argument before Justice Ramos that plaintiffs had presented in their opposition to Bender's motion to dismiss breach of warranty theories. (R 416). When plaintiffs began to address warranty issues at argument, Justice Ramos invited plaintiffs to replead to include specifically articulated allegations of breach of warranty, and terminated argument on the point. (R 441). While the Justice ultimately dismissed the complaint without permitting further repleading, presumably because he held that the action could not survive on other grounds, the warranty issues were undeniably raised. And, as with the damages issue, the First Department not only entertained the appeal of the dismissal of the warranty claims but explicitly ruled on them.

It is evident from the record that every argument presented by Appellants here was presented to the trial court. Some of those arguments were ruled on, some were not. But plaintiffs cannot control whether a judge elects to write on a particular argument; all plaintiffs can do, as they did here, is make their arguments to the trial judge. If, as here, he gets it wrong, this Court has the power, nay, the duty, to set it right.

POINT II

BENDER'S ATTEMPT TO DEFEAT APPELLANTS' GBL 349 CLAIM FAILS

1. Appellants Sufficiently Allege That The Sale Of The Tanbook Is "Consumer Oriented"

A. Bender's About-Face on the "Consumer Oriented Conduct" Requirement Of GBL 349

Bender won at the motion court by insisting it adopt the First Department's limitation of GBL 349 that "consumer oriented" is limited to those who buy for "a personal, family, or household purpose." Bender's very first sentence of its memorandum of law presented to the motion court on this claim states, "(A)s a threshold matter, Plaintiffs must demonstrate that the challenged practices were oriented toward `consumers' which the First Department has defined as `those who purchase goods and services, personal family or household use.'" (citations omitted) (R 450.25) . Bender's attorney emphasized this point to the motion court at oral argument. ("The 1st Department has construed that element as requiring the product to be used for personal use, home use, and for family use…(the Tanbook) is (C)learly for professional use." (R 414) . Bender even snidely belittled Appellant Michael McKee's claim that he purchased the book for "his personal use" saying "no one is buying a voluminous statutory compendium for a leisurely poolside read." (R 450.27).

The motion court agreed with Bender's claim that First Department authority mandated a "personal, family or household use" as a threshold matter for GBL 349 analysis.[6] ("The sale of goods directed at professionals is not a consumer oriented conduct, (sic) and Plaintiffs have failed to state facts demonstrating that the sale of Tanbooks is oriented toward consumers rather than professionals." (R 19).

Now, presented with overwhelming caselaw establishing that the First Department is an outlier on this issue (Resp. brief at 32-38) Bender attempts to sidestep it, calling it a "red herring." (Resp. brief at 40). Although the First Department upheld dismissal of the GBL 349 claim on other grounds, it expressly wrote that "(W)e have considered plaintiffs' remaining contentions and find them unavailing" (R 455) thereby adhering to, and declining to correct, the motion court's reliance on its "personal, family or household use" requirement.

B. Bender Continues to Affirmatively Misrepresent its Sales Practices

Bender's claim that its book is only targeted to, and purchased by, "professionals" for "professional" use is also objectively false. When one seeks to

[6] Bender also distorted Appellants' legal argument, claiming that they assert that "the First Department's analysis precludes `entities, businesses, or professionals' from bringing GBL 349 claims." (Resp. brief at 37-38). In reality, Appellants focused on the First Department's "personal, family or household use" requirement; one which has *never* been adopted by any other department, or this Court. (Main brief at 35-38). Given the chance, Bender has not been able to cite a *single* case from outside the First Department that applies this standard.

purchase the Tanbook on Bender's online store[7] they are first required to create an account and provide certain identifying information about themself. The website then requires purchasers to identify an "organization type" and a "role" before allowing the creation of an account. The "organization type" drop down box lists various types of businesses and professions and also includes "*individual consumer*" as a choice. The "role" drop down box lists various professions, and also includes "*personal use*" as a choice. Plainly, throughout this litigation Bender has misrepresented the sale of the Tanbook as limited to "professionals," when it has known all along that "individual consumers" purchase it for "personal use."

Appellants have demonstrated that the First Department's unique limitation on GBL 349 claims frustrates the clear intent of the Legislature, as consistently recognized by this Court in *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995) and its progeny. Time and again the First Department has denied claims which would help end deception in the sale of goods and services in the State. Even Bender has walked away from the First Department's narrowing, and has just completely misrepresented its own sales practices in an attempt –thus far successful – to get a free pass for its duplicity. It is time to stop it.

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

2. The Appellate Division Misapplied this Court's "Deception as Injury" Rule

As demonstrated at Point I(F) of Appellants' Main brief, the First Department's invocation of the "deception as injury" concept in *Small, supra* was error because the Tanbook, as delivered, was simply not worth what it would have been had it in fact reproduced "the laws and regulations covering rent stabilization and rent control in New York City," as promised. Unlike the *Small, supra* plaintiffs, who alleged that they would not have bought cigarettes at all absent the promise that they were non-addictive, the plaintiffs here intended to purchase a book with all the rent laws. Whether some class members would have purchased a Tanbook which promised selected rent law provisions, analogous to the selection of various state and local laws relating to landlord-tenant relations, for presumably a lower price, is a matter for exploration in discovery. A "price premium" claim, made by plaintiffs in this case (see, Main brief at 40-42) sufficiently alleges actual injury under *Small, supra*. *Orlander v. Staples, Inc.* 802 F.3d 289, 301 (2d Cir. 2015).[8] and see *Daniel v. Mondelez International, Inc.*, 257 F.Supp.3d 177, 195-198 (EDNY 2018)(collecting cases).

But further, *Small* does not require dismissal of a GBL 349 claim where the only injury was the payment induced by the deception. Just a year after *Small*, in

[8] The dismissal of the complaint in *Stutman, supra* was affirmed on the ground that plaintiff had failed to prove that the attorney's fee assessed was a "prepayment charge", and thus there was no deceptive act.

Stutman v. Chemical Bank, 95 N.Y.2d 24, 29-30 (2000), this Court dealt with a claim that an alleged deception caused nothing more than a payment that otherwise would not have been made. Plaintiff borrowed to finance the purchase of a cooperative apartment. The note claimed no "prepayment charge" but when plaintiff sought to prepay he was charged an attorney's fee of $275. The remedy sought, as in this case, was the return of the payment. As the Court of Appeals for the Second Circuit recently wrote in *Orlander*, *supra,* regarding *Stutman supra,* "[The New York Court of Appeals] explained that the allegation that a deceptive practice caused plaintiff to pay a $275 fee sufficiently pled an actual injury under Section 349." 802 F. 3d at 301.

And shortly before its decision in *Stutman*, this Court, citing *Small, supra* reversed a dismissal of a GBL 349 claim where "Plaintiffs have alleged, in essence, that defendants had lured them into purchasing [insurance] policies by using illustrations that created unrealistic expectations as to the prospects of premium disappearance upon a strategically chosen 'variable date'." *Gaidon v.Guardian Life Ins Co. of America,* 94 NY2d 330, 344 (1999). The only alleged injury in *Gaidon* was the purchase cost of the policy.

This Court has not revisited the contours of the actual injury requirement of GBL 349 since *Stutman*, and the listing of lower state court and Federal District Court cases that opine that loss of the purchase price, standing alone, does not

constitute an actual injury under GBL 349, engrafts onto *Small* a limitation that this Court explicitly rejected in *Stutman* and *Gaidon*. This Court should take this opportunity to clarify that purchase of a good or service that is not what was intended to be bought is an actual injury, and is actionable under GBL 349 if the other 349 pre-requisites are adequately pled. The plaintiff class here intended to buy a Tanbook containing all the rent laws of New York, and the Tanbook as delivered did not do so. That is enough to sustain the pleading.[9]

In any event, the bevy of New York cases cited by Bender at pages 29-34 of its brief would not require dismissal, for they share the critical fact of *Small, supra*; plaintiff's bought the product they paid for, but the product didn't match up to the representations made about it. The *Small* plaintiffs bought cigarettes, and received cigarettes; they were misled by defendants' false claims that smoking was not injurious to health. The plaintiff in *Baron v. Pfizer, Inc.,* 42 AD3d 627 (3rd Dept.

[9] The suggestion in Bender's brief, at 35, that taking a further look at how *Small, supra* has been interpreted and applied over the two decades since this Court has grappled with "actual injury" would violate the principle of *stare decisis*, is just not reflective of this Court's relevant practice. In *Samiento v. World Yacht, Inc.*, 10 NY3d 70, 77 (2008), plaintiffs, wait staff on a floating restaurant, pled claims under Labor Law sec.196(d) and GBL 349. Plaintiffs argued that imposing a mandatory service charge assessed against customers but then not distributing the revenues to the wait staff violated the Labor Law, despite this Court's earlier contrary holding in *Weinberg v. D-M Rest. Corp*., 53 NY2d 499, 507 (1981). Plaintiffs had also alleged that the mandatory service charge was a deceptive practice *vis a vis* the customers; that claim was dismissed because, as the Court wrote, there was no actual injury to customers who arguably paid less for their meals than they would have had they not been misinformed that tips were included, and therefore did not add a tip to the bill. Had there been a claim that the deception had induced customers into ordering a product, and not the contrary, this Court might well have elected to deal with two different precedents and, if appropriate, overturn both.

2007) bought a drug for an off-label use and used it for that very purpose. The plaintiffs in *Donahue v. Ferolito, Vultaggio & Sons,* 13 AD3d 77 (1st Dept. 2004), bought beverages and drank them, but claimed that promised health benefits from consumption didn't follow. The plaintiff in *Sokoloff v. Town Sports Int'l,* 6 AD3d 185 (1st Dept. 2004) bought a health club membership and "does not claim that defendant failed to deliver the services called for in the contract." The plaintiff in *Rice v. Penguin Putnam Inc.,* 289 AD2d 318 (2nd Dept. 2001), a case that has been emphasized by Bender at every stage of this litigation, bought a novel that contained every word intended, but some of those words were actually written by a person other than the advertised author after he died. The evidence on the motion to dismiss established that the completion of the book by another author had no effect on the pricing of the novel, and thus plaintiff's cross-motion to amend to add a price premium claim was properly denied. The value delivered by the text as published was not provably different from the value had the advertised author written every word, and thus the GBL 349 claim was too remote. (See, Main brief at 43).

3. Bender's Claim That The Appellants Did Not "See" Any Of Its Deceptive Representations Is Both Inaccurate And Irrelevant

Bender repeatedly fixates on the contention that the Appellants do not state a GBL 349 claim because they allegedly never saw any of the deceptive

representations.[10] Bender is wrong, and, even if it was correct, its point is a *non sequitur* with respect to the Tanbook's significant material omissions.

A. Bender Has Not Cited A Single Case That Applies To An Annually Published, And Purportedly Updated, Book.

All of the cases cited by Bender, both to this Court, the Appellate Division and the motion court, for the proposition that a GBL 349 plaintiff must have seen the deceptive representation prior to making a purchase, involve *single* purchases of a product or service. Significantly, none of those cases involve repeated annual purchases of a purportedly updated product like the Tanbook. Indeed, Bender established at the motion court that each of the appellants made multiple purchases of the Tanbook as far back as 2010.[11]

Each Appellant expressly stated below that they purchased a new edition of the Tanbook each year because they reasonably relied on the fact that it had been updated to reflect the changes in the law occurring during the previous year. For example, Samuel Himmelstein, of the Appellant Himmelstein firm, stated,

> (M)y belief (that the Tanbook is current, complete and up-to-date) is … also based on the fact that omitting random sections of the rent regulations would serve no legitimate or useful purpose, particularly since the book is issued on an annual basis with the accompanying representation that each year's book consists of all of the previous year's content ***plus*** any changes that occurred in those laws during the previous year; otherwise there would

[10] Bender's brief makes this claim not less than 8 times.
[11] According to Tracy Baldwin, Bender's parent's "Operations Director", the Tanbook has been sold "on an annual basis" since 1990. (R 165). Ms. Baldwin confirmed that each of the Appellants has purchased Tanbooks "since at least 2010" or "2012") (R 166, 168, 170).

be no reason to purchase the new editions each year. (R 225)(emphasis original)[12].

Given the nature of the Tanbook's annual issuance and yearly sales, it would be absurd to require a GBL 349 plaintiff to allege that they expressly saw the deceptive representation *each year* before deciding to buy the next year's edition. Yet that is what Bender would have this Court rule. Instead, Bender's prominent placement on the cover of the book, "**2016 EDITION**" (R 172, 216) is the only deceptive representation necessary here. Plainly, the term "**2016 EDITION**" is, in and of itself, deceptive and misleading as the book was admittedly out of date, inaccurate and incomplete when published. Prominently representing an annually issued book with a new year each time, is the obvious inducement to buy it each year. To suggest that Appellants must show that they read the deceptive representations in the 2015 edition before deciding to buy the 2016 edition, after buying all previous editions for many years, creates a ridiculous hurdle for a GBL 349 plaintiff and Bender has not cited a single case requiring it.

B. The Appellants Saw Bender's Deceptive Representations.

Continuing the deceptive presentation to this Court that Bender made below, it falsely claims that the Appellants "have never alleged that they ever saw-let

[12] Both Appellants HCA and McKee made the same claim. (R 231-2; 235).

alone were deceived by- any of the allegedly deceptive statements on which the GBL 349 claim is based." (Resp. brief at 1-2).

In reality, the Appellants all alleged that based on their repeated purchase, and use, of the Tanbook, over the course of many years, they became aware of, and were deceived by, Bender's claim that it was complete, updated and current. For example, Mr. Himmelstein stated,

> It has been my longstanding understanding, and reasonable belief, that the Tanbook purports to produce the Rent Regulation Laws each year ***in their entirety***. This understanding and belief is based on the fact that the Tanbook itself represents, and has long represented, that it includes only "selected" provisions of ***other*** state and federal statutes, while no such selectivity descripton has ever been similarly applied to the Rent Regulation Laws. (R 225) (emphasis original).

It is difficult to imagine a more specific allegation that a deceptive representation was seen by a GBL 349 plaintiff.

C. A GBL 349 Plaintiff Is Not Required To Have Seen, And Indeed Could Not Have Seen, Material Omissions

Just as a purchaser can sue for breach of a warranty that is contained on the product itself, and thus could not have been seen before the product is purchased, the plaintiff class here could not know of the omissions before using the Tanbook and relying, erroneously, on its completeness. (See Point IIIB *infra*).

While Bender accuses the Appellants of failing to allege that they saw any deceptive representations, it fails completely to acknowledge that they did not see, and indeed could not have seen, the Tanbook's significant omissions. This is

particularly true where Bender had actual knowledge that the book was inaccurate, incomplete and out-of-date yet said nothing to its previous or future purchasers.[13]

The FAC alleges that the 2016 Tanbook has not less than 37 separate and distinct *omissions* of material sections of the Rent Laws. (R 58-59). Those omitted sections, discovered after plaintiffs conducted an exhaustive review, were attached as an exhibit to the FAC. (R 86-133). Each section of the those Rent Laws that appeared inaccurately in the Tanbook is a separate and distinct representation by Bender that such section was complete, current and up-to-date when, in reality, significant portions of those sections were undeniably omitted. Of course a GBL 349 plaintiff could not possibly be required to have seen a deceptive omission; that is the very essence of an omission. The courts have repeatedly recognized this and permitted GBL 349 claims based on omissions of material information. *Szymczak v. Nissan N. Am., Inc.,* 2011 US Dist LEXIS 153011 (SDNY Dec. 16, 2011); *Doll v. Ford Motor Co.,* 814 F Supp 2d 526, 549-550 (D Md 2011)(applying New York law).

In *Szymczak,* the court stated,

> Plaintiffs… can also maintain a cause of action under Section 349 for defendants' failure to disclose a defect when such failure was likely to mislead a reasonable consumer. (See, *Oswego Laborers' Local 214 Pension*

[13] Even taking at face value Bender's self-serving December 13, 2013 claim that "these issues…have only recently been brought to our attention" (R 136) it undeniably continued to blithely sell the 2016 Tanbook to unsuspecting purchasers for months without breathing a word of its numerous defects.

> *Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995). An omission-based claim is actionable under Section 349 when "the business alone possesses material information that is relevant to the consumer and fails to provide this information." Id., 85 N.Y.2d at 26. Plaintiffs' allegations meet this standard, and their claim under Section 349 based on a failure to disclose is not dismissed. 2011 US Dist LEXIS 153011 at 46.

For all of the foregoing reasons, the Appellants have properly asserted all of the necessary elements required by this Court of a GBL 349 claim. The First Department's dismissal of this claim was incorrect and must be reversed.

POINT III

APPELLANTS SHOULD BE ALLOWED TO PURSUE THEIR BREACH OF WARRANTY CLAIMS

A. Bender's Futile Attempt To Concoct A Disclaimer Of The Warranty Of Completeness

There is no dispute that Bender's publication of the Rent Laws in the 2016 Tanbook (as well as for many years before that) was woefully incomplete. There's simply no other way to describe a book that failed to include legislation enacted by various bodies for at least 11 years. Bender attempts to avoid liability for this gross incompleteness by suggesting, without any authority, that the disclaimer of "accuracy, reliability or currentness" on the reverse side of its purchase invoice, by necessity, incorporates a disclaimer of "completeness." Bender's effort is fallacious, for a variety of reasons.

Bender also claims that "this argument was never raised in the lower courts, and is thus unpreserved." (Resp. brief at 47) Once again, Bender is flatly wrong.

Initially, Bender attempts, bizarrely, to support its claim that the incompleteness of the Tanbook was not raised below by citing five allegations in the FAC that expressly allege the book was incomplete. (*id* at 48).

And, Bender flatly misrepresented its disclaimer to Justice Ramos at the motion court when its attorney falsely stated, at oral argument, that Bender "expressly disclaim(ed) any representations or warranties about the *completeness* of the book." (R 416) (emphasis added). The motion court then repeated that canard, stating in its order, "the Sales Contracts included a disclaimer wherein Matthew Bender explicitly stated that it was not warranting the accuracy or *completeness* of the Tanbook." (R 35)(emphasis added).

In its brief to this Court, Bender, now conceding that no such disclaimer exists, attempts to suggest, without citing any authority, that "completeness" is synonymous with "accuracy". ("there is no difference between `completeness' and `accuracy, reliability, or currentness.'")(Resp. at 48). Bender is, simply put, incorrect. For reasons known only to Bender, it chose not to include "completeness" when drafting its disclaimer. It's reasonable to assume that Bender, a large book publisher, owned by Lexis, an enormous data company, knows how to draft a warranty disclaimer that includes all of the specific things its customers cannot rely on when using its products. Indeed, businesses and government entities engaged in the publication of information have long known

that completeness and accuracy are not synonymous and are instead very different terms because *both* are routinely included as separate express provisions in their disclaimers; and the cases, in both state and federal court are legion on this point. See, e.g., *Suez Equity Investors, L.P. v. Toronto-Dominion Bank* 250 F.3d 87 (2nd Cir. 2001) (disclaimer of accuracy or completeness of information); *First Equity Corp. v. Standard & Poor's Corp.* 869 F.2d 175 (2d Cir. 1989) (no guaranty of accuracy or completeness of published data); *Lanier v. BATS Exch., Inc.* 105 F. Supp. 3d 353 (SDNY 2015)(disclaimer of timeliness, sequence, accuracy or completeness of information provided); *Raquer v. Café Buon Gusto Corp.* 2012 U.S. Dist. LEXIS 141975 (SDNY 2012) (New York State website expressly disclaims its completeness or accuracy); *In re Parmalat Sec. Litig.* 684 F. Supp. 2d 453 (SDNY 2010)(disclaimer of completeness or accuracy of information provided); *McGraw-Hill Cos. v. Vanguard Index Trust* 139 F. Supp. 2d 544 (SDNY 2001) (disclaiming liability for the completeness and accuracy of data); *Dimon Inc. v. Folium, Inc.*, 48 F Supp 2d 359 (SDNY 1999) (disclaimer of accuracy or completeness of information provided); *Quaker Oats Co. v. Borden, Inc.*1996 U.S. Dist. LEXIS 6525 (SDNY 1996)(no express or implied warranty or representation as to the accuracy or completeness of information in an offering); *Costanza Constr. Corp. v. Rochester,* 147 A.D.2d 929 (4th Dept. 1989)(disclaimer of completeness or accuracy); *People v. Thompson,* 2016 N.Y. Misc. LEXIS 1811

(Sup. Ct. NY Co., 2016)(disclaimer of completeness or accuracy of information published in a newsletter); *Allstate Ins. Co. v. Merrill Lynch & Co.* 2013 N.Y. Misc. LEXIS 3536 (Sup. Ct., NY Co., 2013)(same).

Bender prominently touted the Tanbook as "(C)ontain(ing) all the laws and regulations governing landlord/tenant matters in New York, providing the text of state statutes, regulations and local laws." (R 205). Yet it woefully failed to deliver a product that actually provided this.

The absence of a disclaimer of completeness, coupled with Bender's repeated representations, in the Tanbook and on its website, that the Rent Laws were published in their entirety, permits the Appellants to pursue their breach of warranty claim.

B. Appellants Do Not Have To Show Reliance To Pursue Their Breach Of Warranty Claim

Bender's contention that the complaint fails to meet the *Oswego Laborers', supra* requirement that a deceptive practice or description caused injury, [Resp. brief at Point II(A)] fails for the same reason that its opposition to the express warranty claim fails.

It is simply not the law that in order for a purchaser to sue a seller for breach of a promise that the purchaser must be aware of the misrepresentation at the time of sale. A purchaser can sue for breach of warranty as long as the "seller's affirmations go to the basis of the bargain." *Manier v. L'Oreal U.S.A. Inc.,* 2017

U.S.Dist. LEXIS 116139 (July 18, 2017) (discussed extensively in Appellants' Main brief at 50–52). The operative dynamic for awareness is identical whether the question is knowledge at the time of purchase for warranty purposes or for GBL 349 purposes. If one can sue for breach of warranty without having known the terms of the warranty at time of purchase, it follows that one can sue for breach of the deceptive practices statute in the same state of ignorance. See, for example, *Randy Knitwear, Inc. v. American Cyanamid Co.,*, 11 N.Y.2d 5, 10 (1962)(warranty contained on the label sewn into an article of clothing), *Imperia v. Marvin Windows of N.Y., Inc.,* 297 A.D.2d 621, 623-24 (2d Dept. 2002)(warranty language in brochure delivered with the product); for a recent example see *Mohoney v. Endo Health Services Solutions, Inc.,* 2016 U.S. Dist. LEXIS 94732, *5-6 (July 20, 2016, S.D.N.Y.).

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

> we believe that while the warranty was technically handed over *after* plaintiffs paid the purchase price, the fact that it was given to plaintiffs at the time they took delivery of the motor home renders it sufficiently proximate in time so as to fairly be said to be part of the basis of the bargain *(compare,* UCC 2-313, official comment 7; 1 White and Summers, Uniform Commercial Code, § 9-5, at 448-455 [3d ed]; *cf., Marine Midland Bank v. Carroll*, 98 AD2d 516). To accept the manufacturer's argument that in order to be part of the basis of the bargain the warranty must actually be handed over during the negotiation process so as to be said to be an actual procuring cause of the contract, is

> to ignore the practical realities of consumer transactions wherein the warranty card generally comes with the goods, packed in the box of boxed items or handed over after purchase of larger, non-boxed goods and, accordingly, not available to be read by the consumer until after the item is actually purchased and brought home. Indeed, such interpretation would, in effect, render almost all consumer warranties an absolute nullity. *Murphy v. Mallard Coach Co.,* 179 A.D.2d 187, 193 (3rd Dept. 1992).

If reliance on the basis of the bargain, namely that the Tanbook contained a specific representation of completeness of what was printed therein, was, and remains, extensively advertised, and was explicitly known to the purchasers as the Himmelstein and other affidavits establish, is sufficient to sustain a breach of warranty claim, where reliance is part of the cause of action, it definitionally is sufficient to sustain a GBL 349 claim, where reliance is not required. The knowledge is identical, and the effect on the deceptive seller should be no less.

Finally on this point, Bender argues that its disclaimer language forecloses any claim that a reasonable consumer could be deceived, and thus for this reason as well such a consumer cannot maintain a GBL 349 claim. (Resp. brief at 27). That argument compels reversal, for in every case Bender cites, what is disclosed is precisely what was delivered, and thus accepting the product or service means there is no deception. The instant case is the precise opposite; what was promised was "the laws and regulations covering rent stabilization and rent control in New York City …", and what was delivered was an inaccurate and incomplete *selection* of those laws and regulations. The deal that every class member accepted by

purchase was for what was described. None of them got what was described. Whether or not the reliance prong of warranty law is applicable, or is vitiated by its obscured disclaimer, Bender should be held liable for its deception.

CONCLUSION

For the reasons set forth herein, as well as in the Appellants' Main brief, 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: August 17, 2020

Respectfully submitted,

James B. Fishman

JAMES B. FISHMAN
Attorney for Appellants

On the Brief: James B. Fishman
Jeffrey E. Glen

CERTIFICATION PURSUANT TO 22 NYCRR §500.13(c)(1)

I hereby certify that the foregoing reply brief was prepared on a computer using Microsoft Word.

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Dated: August 17, 2020

James B. Fishman

JAMES B. FISHMAN
Attorney for Appellants