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

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.

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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Date Completed: September 4, 2019

COURT OF APPEALS OF THE STATE OF NEW YORK

HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC. and MICHAEL McKEE,

New York County
Index No. 650932/17

Plaintiffs-Appellants,

against

MATTHEW BENDER & COMPANY, INC., A MEMBER OF LEXISNEXIS GROUP, INC.

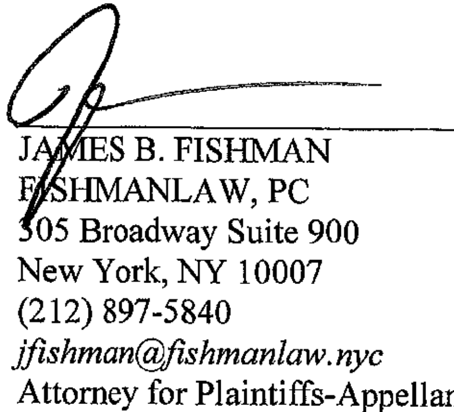
Defendant-Respondent.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS FROM THE APPELLATE DIVISION, FIRST DEPARTMENT

PLEASE TAKE NOTICE, that upon the within affirmation of James B. Fishman, attorney for the Appellants, dated September 5, 2019, and all prior papers and proceedings had herein, the Appellants will move this Court, at the Court of Appeals Hall, Albany, NY, on the 16th day of September, 2019 for an Order, pursuant to CPLR § 5602(a)(1)(i) and 22 NYCRR §500.22 granting leave to appeal to this Court from the May 2, 2019 order of the Supreme Court, Appellate Division, First Department (the "First Department") together with such other relief as may be just.

PLEASE TAKE FURTHER NOTICE, that answering papers may be served and filed as provided by 22 NYCRR §500.22(d) on or before the return date.

Dated: New York, NY
September 4, 2019



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COURT OF APPEALS OF THE STATE OF NEW YORK

HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC. and MICHAEL McKEE,

New York County
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Defendant-Respondent.

AFFIRMATION OF JAMES B. FISHMAN

JAMES B. FISHMAN, an attorney duly admitted to practice in the State of New York, affirms the truth of the following:

1. I am the managing member of Fishmanlaw, PC, attorney for the Plaintiffs-Appellants in this action.

2. This affirmation, together with the within Memorandum of Law, the Record on Appeal and Supplemental Record on Appeal and the Appellants' Main and Reply Briefs submitted to the Appellate Division, First Department, are offered in support of the Appellants' motion, pursuant to CPLR § 5602(a)(1)(i) and 22 NYCRR §500.22 for leave to appeal to this Court from the May 2, 2019 order of the Supreme Court, Appellate Division, First Department (the "First Department").

3. The Appellants seek review from this Court 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.

4. Attached hereto as Exhibit A is the decision and order of the Supreme Court, New York County, dated February 6, 2018, with Notice of Entry dated February 22, 2018.

5. Attached hereto as Exhibit B is the Appellants' Notice of Appeal from the Supreme Court, New York County order, dated March 9, 2018.

6. Attached hereto as Exhibit C is the First Department order on appeal, dated May 2, 2019.

7. Attached hereto as Exhibit D is Notice of Entry of the First Department order, e-filed with the court on May 2, 2019.

8. Attached hereto as Exhibit E is the Appellants' May 30, 2019 Notice of Motion to Reargue or for Leave to Appeal the Court of Appeals from the First Apartment order which was timely filed with that court.

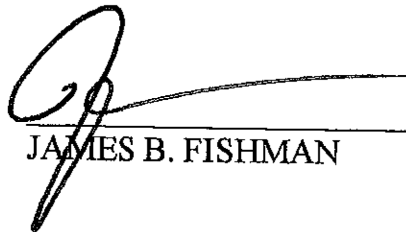
9. Attached hereto as Exhibit F is the August 6, 2019 order of the First Department denying the Appellants' Motion to Reargue or for Leave to Appeal to this Court with Notice of Entry dated August 6, 2019.

10. Attached hereto as Exhibit G is the Respondent's invoice, dated August 8, 2019, addressed to the Appellant Housing Court Answers, Inc. sent at that time with the 2019 edition of the Tanbook.

11. Attached hereto as Exhibit H is the cover page, title page and Table of Contents of the 2019 edition of the Tanbook sent to the Appellant Housing Court Answers, Inc. on or about August 8, 2019.

WHEREFORE, it is respectfully requested that the Court issue an Order granting the Appellants' motion together with such other relief as may be just.

Dated: New York, NY
September 4, 2019



JAMES B. FISHMAN

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PRELIMINARY STATEMENT

Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP, Housing Court Answers, Inc. and Michael McKee (collectively "Appellants" or "Plaintiffs") move, pursuant to CPLR § 5602(a)(1)(i) and 22 NYCRR §500.22 for leave to appeal to this Court from the May 2, 2019 order of the Supreme Court, Appellate Division, First Department (the "First Department") (Attached to the moving papers as Exhibit C) which affirmed the February 20, 2018 decision and order of the Supreme Court, New York County (Ramos, J.) which granted the pre-answer motion to dismiss the Complaint by the Defendant-Respondent Matthew Bender & Company, Inc., A Member of LexisNexis Group, Inc. ("Defendant" "Respondent" or "Bender"). (Attached to the moving papers as Exhibit A) (Record on Appeal, "R" 23-42) Notice of entry of the First Department's order was e-filed by the Respondent on May 2, 2019. (Attached to the moving papers as Exhibit D)

This motion is timely made, as required by 22 NYCRR 500.22(b)(2)(ii)(a-c), as follows: By notice of motion dated May 30, 2019 Appellants timely moved to reargue the May 2, 2019 order or, in the alternative, for leave from the First Department to appeal its order to this Court. (Attached to the moving papers as Exhibit E) That motion was denied in a one sentence order dated August 6, 2019 with Notice of Entry dated August 6, 2019, issued by e-filing only. (Attached to

the moving papers as Exhibit F) To date, Notice of Entry of the order denying the motion has not been served on the Appellants by the Respondent.

This Court has jurisdiction to adjudicate this motion and hear this appeal pursuant to CPLR § 5602(a)(1)(i) as the action arose in the Supreme Court and the order of the Appellate Division, which finally determined the action, is not appealable as of right.

As set forth below, this case presents issues of critical importance and public interest, affecting millions of New Yorkers including a significant split among the appellate divisions and this Court on the interpretation and enforcement of the New York Deceptive Practices Act, a 45 year old statute which this Court has repeatedly stated applies to "virtually all economic activity" in the State. The issues meriting review by this Court are presented here as well as in the briefs submitted to the First Department.

GROUNDS FOR COURT OF APPEALS REVIEW

22 NYCRR § 500.22(b)(4) sets forth the grounds for Court of Appeals review, which include, "that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." ***All*** of these grounds are present here. ***All*** of these claims were preserved for review by this Court.

1. **The longstanding split of authority among the Appellate Divisions and this Court involving the interpretation and applicability of the Deceptive Practices Act**

The first issue involves the First Department's longstanding misapplication of New York's Deceptive Practices Act, (GBL Art. 22-A; § 349 *et seq.*) (initially enacted in 1970) which this Court has long held applies to "virtually all economic activity in the state." *Karlin v IVF America, Inc.*, 93 NY2d 282 [1999]; *Small v Lorillard Tobacco Co.*, 94 NY2d 43 [1999]; *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46 [2001]; *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314 [2002]; *Blue Cross & Blue Shield of New Jersey, Inc. v Philip Morris USA Inc.*, 3 NY3d 200 [2004].

That misapplication was urged by Bender in its motion to dismiss the complaint and then applied by the motion court in its February 20, 2018 decision and order. (Supplemental Record on Appeal "SR" 25-27; R. 36-39; 74-75) This issue was preserved on appeal in the Appellants' Main and Reply Briefs to the First Department. (p. 52-59 and 24-26)

Since 1980, with the Legislature's enactment of § 349(h), the statute has been privately enforceable. The section of the statute enacted at that time states, in relevant part, "***any person*** who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or

practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions." (emphasis added)

In 1995, with its seminal decision in *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 85 N.Y.2d 20 (1995) this Court set forth the requirements for establishing a violation of the statute, most particularly that the alleged conduct be "consumer oriented."

Since 2000, however, the First Department (and only the First Department) has, without citing any precedential authority, grafted an additional requirement onto a § 349(h) claim not found either in the language of the statute, the legislative history of either the original 1970 statute or the 1980 private right of action amendment or in any prior decision of this Court; that it must involve a transaction for the purchase of goods or services used for "personal, family or household purposes." *Cruz v NYNEX Info. Resources*, 263 AD2d 285 [1st Dept. 2000]. Following its adoption of that newly added requirement in 2000, the First Department, and lower courts within the First Department, have consistently dismissed deceptive practice claims brought by persons or businesses who could not meet this test. That is precisely what occurred here. (See, Motion Court decision, R. 13-16).

Significantly, ***none*** of the other three departments of the Appellate Division have adopted the "personal, family or household purposes" requirement to a

§ 349(h) action and have instead routinely upheld claims under the Act brought by businesses or professionals that satisfy the other elements of the claim. And, this Court has never adopted the First Department's added requirement to a § 349(h) claim; nor has it overturned the other three department's repeated rejection of it. Thus, this case presents not only a classic, and well-defined, split among the departments of the Appellate Division, and this Court, it also presents a novel issue of first impression that this Court has never addressed. Such review is essential to establish a uniform application of state law among the various departments of the Appellate Division on this critically important statute intended to apply to "virtually all economic activity" in the state.

2. The First Department's improper extension of the "deception as injury" theory to this case, involving a class "bait and switch" claim, eviscerates the effectiveness of the Act

Relying on *Small v Lorillard Tobacco Co.,* 94 NY 2d 43, (1999) the First Department held that the "deception as injury" principle barred the Appellant's GBL § 349 claim. That reliance not only misconstrued and misapplied this Court's decision in *Small* by employing "deception as injury" to bar a classic "bait and switch" claim on such grounds, the result eviscerates the Act

3. The Defendant's undeniable failure to update its publication of New York's rent laws and regulations for 11 years resulted in a grossly inaccurate publication of those laws which affected over one million New York residential apartments and therefore raises issues of significant public importance

At oral argument before the First Department, Presiding Justice Acosta (who served as a Civil Court judge for five years where he regularly heard landlord tenant Housing Court cases) accurately described the Tanbook as "pretty much the bible in landlord tenant law."[1] Yet, even after the First Department gave Bender a free pass on its 2016 publication of an admittedly incomplete, inaccurate and defective publication of New York's rent regulation laws, Bender has failed to make the bible canonical. Just this spring, the Legislature dramatically revised virtually all of the laws governing residential landlord-tenant matters, including the rent regulation laws which are the subject of this action. The legislative enactment, known as 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

[1] Oral argument at 15:01:45

Administrative Code involving virtually every aspect of landlord-tenant law in New York which make up almost the entire Tanbook volume. [2]

But not only has Bender to date not issued an update to purchasers of the 2019 Tan Book, it continues to sell and deliver the 2019 Tan Book, at full price, and without any warning to customers that it is woefully out of date, inaccurate and incomplete as it contains no mention whatsoever of the sweeping revisions to the laws covered by the HSTPA. (See Exhibits G and H)[3] To the contrary, Bender made the outrageous, and obviously false, statement on its August 8, 2019 invoice to the Appellant Housing Court Answer, Inc. "This material updated your publication *with the latest information available*." (See Exhibit G) (emphasis added)

Months after the Legislature acted Bender's website not only blithely ignores the HSTPA in its entirety, it shockingly describes the 2019 Tanbook, falsely, 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."[4] Plainly, Bender has learned nothing from its undeniable failure to update the Tanbook between 2005 and 2016, as alleged in this action. The First

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[2] 2019 N.Y. ALS 36, 2019 N.Y. Laws 36, 2019 N.Y. Ch. 36, 2019 N.Y. SB 6458.

[3] Exhibit H is the cover page and entire Table of Contents of the 2019 Tanbook received by Appellant Housing Court Answers, Inc. in August 2019. It contains no reference whatsoever to the sweeping amendments to virtually all New York landlord-tenant laws in the HSTPA.

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

Department's free pass to Bender has obviously emboldened it to continue its deceptive and misleading business practices.

4. **The First Department's rejection of the Appellant's claim of breach of the implied obligation of good faith and fair dealing is in dramatic conflict with numerous prior decisions of this Court and this State's public policy**

The First Department improperly allowed Bender to hide behind its inconspicuous and practically hidden disclaimer of the "accuracy, reliability or currentness" of its annually published Tanbook even though it prominently described the book as an "authoritative" compilation of the laws and regulations it purported to include and even though it was not disputed that the primary reason it is purchased is for its purported accuracy, reliability and currentness with respect to New York landlord-tenant laws in general and its rent regulation laws and regulations in particular.

The First Department's allowance of a disclaimer that flatly contradicts everything any purchaser of the Tanbook has long reasonably expected from it is in direct contravention of this Court's longstanding jurisprudence on the implied covenant of good faith and fair dealing. New York has a longstanding reputation for upholding honesty and good faith in the marketplace. The First Department's decision fully undermines that.

FACTUAL STATEMENT

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, breach of the covenant of good faith and fair dealing, fraud, breach of contract and breach of express warranty against LexisNexis, one of the world's largest legal information companies, and its subsidiary Matthew Bender ("Bender") a highly regarded legal publisher for well over 100 years.

These 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) it published in the "*Tanbook-New York Landlord Tenant Law,*" (the "Tanbook") one of its annually published books, resulting in the omission or inaccurate publication of 37 key sections of those laws. In sum, for at least 12 years prior to the commencement of this action in 2017, Bender published and sold annual "new" editions of the Tanbook with significant legislative amendments completely omitted, some for as many as 12 years, leaving those who regularly purchased the book completely unaware that important changes in the law had taken place. Instead of actually publishing these critical updates Bender did little more than simply inserting a new year on the cover and labeled it "updated."

For the sake of brevity, Appellants adopt the Factual Statement set forth in their main brief to the First Department (App. Brief, pp. 1-21) which sets forth at length the underlying facts and legal errors of the Motion Court together with citations to the Record on Appeal to the First Department.

ARGUMENT

I. THE FIRST DEPARTMENT'S ADDITION OF A "PERSONAL, FAMILY OR HOUSEHOLD PURPOSE" ELEMENT TO A DECEPTIVE PRACTICES ACT CLAIM HAS CREATED A WELL-DEFINED SPLIT AMONG THE OTHER DEPARTMENTS OF THE APPELLATE DIVISION AND IS IN CONTRAVENTION TO THIS COURT'S WELL ESTABLISHED RULINGS

Bender argued in its motion to dismiss the complaint to the motion court, *inter alia,* relying extensively on *Cruz, supra* that GBL§ 349 did not apply because, it alleged, the purchase of the Tanbook is not a consumer-oriented transaction in that it is directed at professionals, not individuals using it for "personal, family or household purposes."[5]

The motion court, relying exclusively on *Cruz*, agreed with Bender and dismissed the GBL§ 349 claim finding that although the transaction met all of the

[5] The Appellants disputed that claim arguing that Michael McKee, one of the Plaintiffs, is an individual who indeed purchased the Tanbook for his personal use as a rent regulated New York City tenant. (Supp. Record, p. 47) and that the other Plaintiffs used the book in order to assist or represent residential tenants in connection with their rent regulated apartments. (id. p. 48)

other indicia of a "consumer-oriented" transaction[6], the Tanbook was intended to be used by professionals, not individual consumers. (R 38)

This issue was preserved by the Appellants in their appeal to the First Department. (App. Brief, p. 52-58)

Although the First Department expressly rejected the GBL §349 claim on other grounds (See Point II *infra*) it implicitly upheld the motion court's determination on this issue by stating, "(W)e have considered plaintiffs' remaining contentions and find them unavailing." (Appellate Division Order, p. 3)

A. This Court's genesis of the "consumer-oriented" standard

In its seminal 1995 decision in *Oswego Laborers, supra,* this Court held that the Deceptive Practices Act is directed at deterring and punishing deceptive business practices that are "consumer–oriented." (id. at 25) This Court in *Oswego Laborers*, and in later cases, further set forth the elements of a GBL §349 claim that must be met before it could proceed; a Plaintiff must allege not only that the challenged conduct is "consumer oriented" but 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.

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[6] Those indicia found by the motion court to have been met here are "(1) the goods are modest in value, (2) whether numerous parties with a disparity in economic power and sophistication are involved in the transactions and (3) whether the contract is a form contract." (R 37)

Additionally, Plaintiffs must allege and establish that the challenged deceptive conduct caused actual, although not necessarily pecuniary, harm. (*Oswego*, at 25).

Plaintiffs in GBL § 349 cases are not, however, required to either allege, or establish, that the defendant engaged in *intentional* conduct or that they justifiably relied on the misrepresentation or deception. (*id.*) Instead, in *Oswego Laborers* 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.)

B. The First Department's unilateral adoption of the "personal, family or household purposes" test

Notably, this Court in *Oswego Laborers* (nor in any subsequent GBL § 349 case) expressly declined to make an exception to its "consumer-oriented" test by excluding entities that were victimized by a deceptive business practice and instead expressly included them, recognizing that the plaintiff in *Oswego Laborers* 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 GBL §349 claim, the

First Department 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 on to the requirements for a GBL § 349 claim. In doing so, the court did not rely on any case, either from this, or any other court. Instead, it cited, by analogy, two other, unrelated sections of the General Business Law enacted after § 349(h) (§399-c involving mandatory arbitration clauses and §399-p involving telemarketing schemes), both of which define "consumer" utilizing the "personal, family or household purpose" standard, as well as sections from the General Obligations Law, the CPLR and the UCC.

In assuming that "personal, family or household purpose" must be inserted in the statute by a reviewing court, the court below 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 to restrict 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) That the Legislature did not mention "personal, family or household purpose" in §349(h) when it did so in GBL §399 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 available for use by "any person." Nor did the First Department acknowledge, or has it since acknowledged, this Court's repeated instruction that the Act applies to virtually "all economic activity" in the State. *Karlin, supra; Small, supra; Polonetsky, supra; Goshen 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, and overly restrictive, "consumer-oriented" definition 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") (*Matter of People v Northern Leasing Sys., Inc.,* 169 AD 3d 527 [1st

Dept 2019]) (rejecting the claim on behalf of numerous small "mom and pop" stores victimized by fraudulent and deceptive business practices in connection with the leasing of credit card terminals)

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

All the other departments of the Appellate Division have recognized that §349 claims can be asserted, in appropriate cases, by either businesses or professionals, and none of them have adopted the First Department's restriction in this regard.

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 Second Department 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 Dep't 2012) the Second Department similarly upheld a §349 claim asserted by a group of auto repair shops against an insurance company, saying,

> "(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] (GBL 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.")

Third Department

In *Elacqua v. Physicians' Reciprocal Insurers*, 52 AD 3d 886 (3rd Dep't 2008) the Third Department upheld a GBL §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 (hereinafter the trust), a group self-

insurance trust created in 1999 and administered by Compensation Risk Managers, LLC… pursuant to Workers' Compensation Law § 50 (3-a).]

Fourth Department

Jeffrey's Auto Body, Inc. v Allstate Ins. Co., 125 A.D.3d 1342 (4th Dep't 2015)(Court upheld a GBL §349 claim asserted by auto body repair shops against insurance company); *Crawford Furniture Mfg. Corp. v Pennsylvania Lumbermens Mut. Ins. Co.*, 244 A.D.2d 881 (4th Dep't 1997)(Court upheld a GBL§ 349 claim asserted by a furniture manufacturer against its insurer).

The First Department is the outlier among the four departments of the Appellate Division on this issue. Its jurisprudence on this issue has never been presented to, let alone recognized by, this Court making this novel issue even more appropriate for review here. As a result of this obvious and well-defined split of authority, uniformity in the enforcement of a critical state law, which is designed to provide protection from dishonesty in the marketplace is not only sorely lacking but also creates irrational anomalies. By way of example, the owners of a Bronx corner "mom and pop" grocery store who purchase a laptop computer to record their store's books, and who are victimized by deceptive business practices, have no recourse under the Act. Yet, the same type of business, victimized by the same practices, after purchasing the exact same product a few miles to the north in Yonkers, is not barred from the courthouse.

It is difficult to imagine an issue more deserving of review by this Court.

II. THE FIRST DEPARTMENT'S MISAPPLICATION AND MISCONSTRUCTION OF THIS COURT'S DECISION IN *SMALL V. LORILLARD TOBACCO CO.* RESULTS IN AN EVISCERATION OF THE DECEPTIVE PRACTICES ACT

The First Department rejected the Appellants' § 349 claim finding that it constituted "deception as injury" relying on this Court's decision in *Small, supra.* That determination fundamentally misconstrued this Court's application of the rule set forth in *Small.*

In *Small, supra* this Court held that alleged misrepresentations as to the addictive nature of cigarettes did not constitute cognizable injury under the statute where the plaintiffs alleged they would not have purchased cigarettes had the defendant not mislead them on this issue. The plaintiffs in *Small* did not, and could not, allege that the defendant promised to sell them cigarettes but instead sold them something quite different. Yet, that is precisely what the Appellants alleged; for years they were promised, and they assumed they were purchasing, a book that fully, completely and accurately contained the rent laws and regulations yet they received a publication far different than from what was represented. The First Department misapplied this Court's ruling in *Small* to deny the Appellants' §349 claim. Not surprisingly, no court has ever applied the deception as injury ruling in *Small* in this manner to deny a §349 claim.

The Appellants' deceptive practices claim of injury is based on the undeniable fact that the book sold to them by Bender over many years was not the book it had long been represented to be and was instead grossly deficient, at least with respect to its compilation of the New York City rent laws and regulations (which the Appellants allege is the primary purpose for purchasing the book)(R. 224-25; 231-32; 237). The Appellants' did not present a "deception as injury" claim; instead, they plead a classic "bait and switch" claim; which is precisely the kind of claim that the Deceptive Practices Act was designed to address. (*Goldberg v Manhattan Ford Lincoln-Mercury, Inc.*, 129 Misc. 2d 123 [Sup Ct, NY County 1985]) ("The kinds of trade practices which have been considered as deceptive in the past include false advertising… pyramid schemes… deceptive preticketing… misrepresentation of the origin, nature or quality of the product… false testimonial(s)… deceptive collection efforts against debtors…deceptive practices of insurance companies and "bait and switch" operations.") (citations omitted); *See also, People by Lefkowitz v Ludwig Baumann & Co.,* 56 Misc. 2d 153 [Sup Ct, NY County 1968]).

Depriving a purchaser of the "benefit of the bargain" through deceptive means and providing a product which is fundamentally different than the one promised constitutes a cognizable injury under GBL§ 349. *Zurakov v Register.Com, Inc.*, 304 AD2d 176 (1st Dept 2003). In *Zurakov* the First

Department expressly found that GBL §349 injury was sufficiently plead by the plaintiff because "he was deprived of the essence of his bargain." (citing *Small*). That is precisely what the Appellants alleged here; that they were promised a book containing the compete, accurate and current versions of the New York City rent laws and regulations but were sold something very different and were therefore deprived of the essence of their bargain. The book the Appellants received was significantly less valuable than the one Bender promised. That difference in value is the injury and quantification of damage suffered by the Appellants and the class they seek to represent, an injury precisely the type contemplated by this Court in *Oswego Laborers*. ("By the same token, while the statute does not require proof of justifiable reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm.") (*id* at p. 26)

A trier of fact should make the determination of the amount of damage suffered by the Appellants and the proposed class. The GBL §349 claim was properly asserted by the Appellants and it should not have been dismissed on this basis. In upholding the dismissal of the claim on this basis the First Department not only misapplied this Court's decision in *Small*, it eviscerated the Deceptive Practices Act; a result that soundly merits review by this Court.

III. THE FIRST DEPARTMENT IGNORED LONGSTANDING PRECEDENT FROM THIS COURT ESTABLISHING THE IMPORTANCE OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

This Court has long recognized the importance of the implied covenant of good faith and fair dealing 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. *Smith v General Acc. Ins.* Co.,91 N.Y.2d 648, 652-653, 674 N.Y.S.2d 267, 697 N.E.2d 168 [1998]; *Dalton v Educational Testing Services*, 87 N.Y.2d 384, 389, 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, 45, 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). This 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*, 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 v American Home Prods. Corp.,* 58 N.Y.2d 293, 304,461 N.Y.S.2d 232,448 N.E.2d 86 [1983]), ***they do encompass "any promises which a reasonable person in the position of the promisee would be justified in understanding were included"*** (*Rowe v Great Atl. & Pac. Tea Co.*,46 N.Y.2d 62,

69, 412 N.Y.S .2d 827,385 N.E.2d 566 [1978], quoting 5 Williston, Contracts g 1293, at 3682 [rev ed 1937).

511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 (2002) (emphasis added)

In rejecting the Appellants claim of breach of good faith and fair dealing the Court relied exclusively on its decision in *Friedman v. Tishman Speyer*, 107 AD3d 569 (1st Dept. 2013) (but not on any authority of this Court) which states that "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 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, completeness and currentness, the *sine qua non* of the transaction involving the sale of 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 which undermines and destroys the "basic purpose" of the Tanbook; a book aptly described as the "bible of landlord-tenant law." *supra.* The First Department

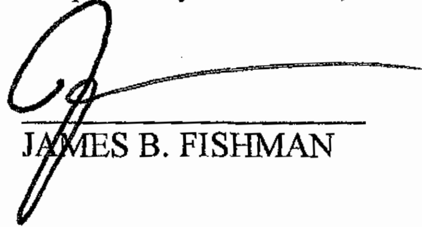
misapplied and misconstrued this Court's longstanding jurisprudence on this issue. In New York a seller cannot blithely ignore its obligation to provide a product that it has long promised to provide and where every reasonable purchaser has a right to expect it will receive. Allowing a seller to hide behind a hidden and barely noticeable disclaimer that utterly and fully contradicts 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 complete and that it therefore cannot be used to supply its promised "authoritative" content is like General Motors disclaiming that its products cannot 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.

CONCLUSION

For the reasons set forth herein, as well as in the Appellants' briefs to the First Department, this case merits review by this Court and their motion for leave to appeal should be granted.

Dated: New York, NY
September 4, 2019

Respectfully submitted,



JAMES B. FISHMAN

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

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC., and MICHAEL McKEE,

Plaintiffs,

- against -

MATTHEW BENDER & COMPANY, INC., A MEMBER OF LEXISNEXIS GROUP, INC.,

Defendant.

Index No. 650932/2017

Honorable Charles Ramos

Mot. Seq. 002

NOTICE OF ENTRY

PLEASE TAKE NOTICE that annexed hereto is a true and correct copy of the Decision and Order dated February 6, 2018, entered in the office of the Clerk of the Supreme Court, New York County, on February 20, 2018 (NYSCEF Doc. No. 71).

DATED: New York, New York
February 22, 2018

/s/ Anthony Dreyer

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1216630-NYCSR01A - MSW

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES RAMOS
Justice

PART 53

Index Number : 650932/2017
HIMMELSTEIN, MCCONNELL,
vs.
MATTHEW BENDER & COMPANY,
SEQUENCE NUMBER : 002
DISMISSAL

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______
Answering Affidavits — Exhibits ______ | No(s). ______
Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is granted in accordance with the accompanying memorandum

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Dated: 2/6/18

______, J.S.C.
CHARLES E. RAMOS

1. CHECK ONE: .... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
---x
HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC., and MICHAEL McKEE,

Plaintiffs,

-against-

Index No. 650932/2017

MATTHEW BENDER & COMPANY INC., A MEMBER OF LEXISNEXIS GROUP, INC.,

Defendant.
---x

Hon. C. E. Ramos, J.S.C.:

In motion sequence 002, defendant Matthew Bender & Company, Inc., a member of LexisNexis Group, Inc. (Matthew Bender) moves to dismiss plaintiffs' amended complaint (the Complaint) pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7).

For the reasons set forth below, the Court grants Matthew Bender's motion to dismiss the Complaint.

Background

This is a proposed class action complaint alleging omissions and inaccuracies in the "New York Tenant Law" book published by Matthew Bender (the Tanbook).

Plaintiffs Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP (HMGDJ), Housing Court Answers, Inc. (HCA), and Michael McKee (McKee; and, together with HMGDJ and HCA, Plaintiffs) are acting on behalf of themselves and a proposed class comprised of all persons residing, or doing business

within, the State of New York who purchased the Tanbook from Matthew Bender or any of its predecessors during the six-year period prior to the commencement of this action, starting in or around 2011 (the Class Period) (Complaint, ¶ 1). HMGDJ is a law firm located in New York (*Id.*, at ¶ 17). HCA is a not-for-profit corporation with an office in New York whose mission is to "promote and protect the true administration of justice in the housing courts of New York City" (*Id.*, at ¶¶ 21, 25). McKee is a New York tenant advocate and organizer who serves as a volunteer at various tenant advocacy organizations (*Id.*, at ¶¶ 29, 30).

The Tanbook is issued on an annual basis and can be bought directly on Matthew Bender's online store on www.LexisNexis.com (the Online Store) or on www.amazon.com (Amazon), or as part of a subscription service (Complaint, ¶¶ 2, 3, 4). Tanbook purchases are governed by the "Material Terms" (Material Terms) and "Additional Terms and Conditions" (Terms & Conditions, and together with the Material Terms, the Sale Contract), generated at the time that Tanbooks are ordered, and prior to shipments of hard copies (Baldwin Aff., ¶¶ 11, 12). With the subscription service, the new Tanbook edition is automatically shipped every year along with invoices (*Id.*, ¶ 13). Upon receipt, subscribers can either retain the book and pay the invoice, or return the shipment within 30 days without obligation to pay the invoice (*Id.*).

The Terms & Conditions provide that (1) the purchaser's "access" to the subscription "indicates [the purchaser's] acceptance of the terms and conditions," and (2) the Terms & Conditions constitute the "entire agreement" with the purchaser (Baldwin Aff., Exs. 2-5). Section 6 of the Terms & Conditions additionally sets forth:

> WE DISCLAIM ALL WARRANTIES WITH RESPECT TO PUBLICATIONS, EXPRESS OR IMPLIED…WE DO NOT WARRANT THE ACCURACY, RELIABILITY OR CURRENTNESS OF THE MATERIALS CONTAINED IN THE PUBLICATIONS. *Id.*

Plaintiffs estimate that Matthew Bender sold at least 100,000 Tanbooks to the proposed class members during the Class Period (Complaint, ¶ 48).

HMGDJ had a subscription with Matthew Bender since at least 2010 (Complaint, ¶ 20). During the Class Period, HCA and McKee also entered a subscription service with Matthew Bender, which included the purchase of multiple copies of the Tanbook (*Id.*, at ¶¶ 27, 31). None of the Plaintiffs purchased a Tanbook via an online store during the Class Period, and Plaintiffs do not allege that they ever visited the Online Store or the Tanbook's retail page on Amazon (Baldwin Aff., ¶¶ 10, 20, 27). Plaintiffs never chose to return their automatic shipment of the Tanbook (*Id.*, at ¶¶ 16, 22, 30). HMGDJ and McKee were sent the 2017 Tanbook in May 2017, but neither has submitted payment or returned the book to Matthew Bender (*Id.*, at ¶¶ 19, 32). HCA

cancelled its subscription in 2016, and it did not place any order for the 2017 edition (*Id.*, ¶¶ 24, 26).

Plaintiffs' Complaint alleges that Part III of the Tanbook, titled "Rent Regulation," contains inaccuracies and omissions of the New York State and New York City rent laws and regulations (Complaint, ¶¶ 6, 7). Plaintiffs maintain that Matthew Bender made several statements in the Tanbook's overview (the Overview), which appear in the hard copy book and online on Amazon and on the Online Store.

The Overview describes several Parts of the Tanbook as including "selected provisions," "selected local laws," and "various provisions," and Plaintiffs interpret this to mean that the Tanbook does not incorporate all of the relevant laws and regulations in those Parts. Meanwhile, Part III is described as "comprised of *the* laws and regulations covering rent stabilization and rent control in New York City and in applicable areas elsewhere in the state" (*Id.* at 85) (emphasis added). Plaintiffs argue the use of the word "the" indicates that Part III constitutes a complete reproduction of all of the relevant laws and regulations.

The Online Store additionally states that the Tanbook "brings together all the laws and regulations governing landlord/tenant matters in New York, providing the text of State statutes, regulations, and local laws" (Fishman Affm., Ex A). The Online Store and Amazon also represent the Tanbook as containing

"select local laws from New York City…" and "excerpts from court acts and rules", but list "rent stabilization and rent control laws and regulations" without adding qualifications such as "excerpts" or "various" (*Id.;* Fishman Affm., Ex B) (the statements on the Online Store and on Amazon together, the Online Statements).

On December 5, 2016, Matthew Chachère, an attorney at Northern Manhattan Improvement Corporation Legal Services (NMIC), sent a letter to Matthew Bender advising that he had discovered that some provisions related to rent laws and regulations had been missing from the Tanbook for years, and that several other provisions in the rent regulations section were inaccurate (Complaint, ¶ 73; Ex. B). On December 13, 2016, Chachère received a written answer from Jacqueline M. Morris (Morris Email), the legal content editor at Matthew Bender, stating:

> We sincerely apologize for these issues which occurred long ago and have only recently been brought to our attention. We are currently 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. Complaint, Ex. C.

Plaintiffs allege that this letter demonstrates that, "for a substantial period of time," Matthew Bender knew that the Tanbook's compilation of New York State and New York City rent regulation laws was incomplete and inaccurate (Complaint, ¶ 53).

Plaintiffs maintain that the same mistakes and inaccuracies affect editions of the Tanbook from at least 2010 (*Id.*, ¶ 50).

On or about May 22, 2017, Matthew Bender issued the 2017 edition of the Tanbook (Complaint, at ¶ 54). Up to and including the year 2016, the Tanbook had been issued in early January of each year (*Id.*, ¶ 78). Despite the delay, subscribers were charged the full price for the 2017 version (*Id.*, at ¶ 80).

Plaintiffs commenced this action on behalf of a proposed class of purchasers of the Tanbook, alleging breach of contract, a claim under section 349 of the New York General Business Law (GBL), fraud, and unjust enrichment. Plaintiffs allege that the 2017 edition included provisions of various rent regulation statutes that were missing in the 2016 edition (*Id.*). Plaintiffs argue that the fact that the missing provisions were added to the 2017 version demonstrates that those provisions should have been included in the 2016 Tanbook and the previous versions. Moreover, Plaintiffs allege that the Tanbook's text and promotional materials did not indicate that the rent regulation laws were incomplete. They also allege that the omissions and inaccuracies in the Tanbook resulted in at least one instance of a litigant being harmed because both his attorney and a New York State Supreme Court Justice mistakenly relied upon the Tanbook (Complaint, ¶¶ 70-72).

Discussion

1. Legal Standard

CPLR 3211(a)(1) permits the Court to dismiss a cause of action when "a defense is founded upon documentary evidence." Dismissal is warranted only if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83 [1994]).

Under CPLR 3211(a)(5), the Court can dismiss a complaint that may not be maintained because of the statute of limitations (*See Faison v Lewis*, 25 NY3d 220 [2015]).

As to CPLR 3211(a)(7), the Court is given the power to dismiss a pleading that "fails to state a cause of action." CPLR 3211(a)(7) may be used in two situations: when Plaintiff has not stated a claim cognizable at law, or when Plaintiff stated a cause of action but failed to assert a material allegation necessary to support the cause of action (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014]). The Court must accept the complaint's factual allegations as true and give the plaintiff the benefit of every possible favorable inference, and must determine only whether the facts as alleged fit within any cognizable legal theory (*Arnav Indus. v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 303 [2001]). When documentary evidence is submitted by the

defendant, the standard shifts from whether the plaintiff has stated a cause of action to whether it has one (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d at 135).

2. **Breach of Contract Claim**

Matthew Bender moves to dismiss the breach of contract claim because (i) Plaintiffs did not properly notify Matthew Bender of their claim in accordance with the New York Uniform Commercial Code (UCC), and because (ii) the Sale Contracts did not include any warranty as to the accuracy of the Tanbook, but, on the contrary, contained a disclaimer. Plaintiffs allege that the UCC is not applicable, and that even if the UCC were applicable, Plaintiffs would still have a valid claim because (a) Matthew Bender was properly notified of the inaccuracies, (b) Matthew Bender breached the express warranty of accuracy, (c) Matthew Bender could not disclaim the express warranty of accuracy because such a disclaimer strikes at the heart of the bargain and is incompatible with the express warranty of accuracy, (d) Matthew Bender breached its obligation of good faith, and (e) the parties formed an implied contract, which Matthew Bender breached.

Article 2 of the UCC applies to Plaintiffs' breach of contract claim. Article 2 applies to a transaction in goods, including "all things…which are movable at the time of identification to the contract for sale" (UCC § 2-105[1]). Books are considered goods, and thus, the UCC applies to the sale of

books (*See Simon & Schuster, Inc. v Howe Plastics & Chemicals Co.*, 105 AD2d 604, 606 [1st Dept 1984]).

Here, Plaintiffs argue that the UCC does not apply because the purchase of the annual compilation of New York rent regulatory laws was predominantly a purchase of the annual updating and compiling service. However, with the subscription service, Plaintiffs were merely buying a new edition of the Tanbook every year. The fact that the content of the book was modified does not change the fact that they were buying goods, and the updating of the books is incidental to the sale (*Richard A. Rosenblatt & Co. v Davidge Data Sys. Corp.*, 295 AD2d 168 [1st Dept 2002]) (finding that maintenance services provided for a monthly fee were incidental to the sale of computer hardware and software).

Matthew Bender alleges that Plaintiffs should be barred from pursuing their breach of contract claim because they failed to properly notify Matthew Bender of the alleged breach. Plaintiffs maintain that Matthew Bender was notified of the alleged breach because Matthew Bender must have been aware of the inaccuracies, and, if not before, was made aware of the inaccuracies thanks to the letter sent by Chachère.

According to UCC § 2-607 [3], "when a tender has been accepted…the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller

of breach or be barred from any remedy." UCC § 2-607 [3] requires the buyer to "*notify*" the seller (*emphasis added*): the use of the verb "notify" implies that the buyer has to act, and cannot just rely on the fact that the buyer may already have been aware of the issue. Moreover, according to the official comments on the UCC, the purpose of the notice requirement is to facilitate negotiations for settlement (UCC § 2-607 [3] cmt 4). Therefore, Matthew Bender's alleged awareness of the inaccuracies cannot constitute notice.

Plaintiffs fail to allege that any of them notified Matthew Bender of the alleged breach. UCC § 2-607 [3] requires that "*the buyer*…notify the seller of the breach or be barred from any remedy" (emphasis added) (*Singleton v Fifth Generation, Inc. 2016,* WL 406295 [NDNY 2016]) (citing *Schmidt v. Ford Motor Co.*, 972 FSupp2d 712, 719 [EDPa 2013], where the court held that a third party, "although possibly "a" buyer, is not "the" buyer for purposes of the UCC," and therefore proper notice was not given by complaints of third parties). Plaintiffs, as the buyers, should have notified Matthew Bender of the breach themselves (*See Paulino v Conopco*, Inc., 2015 WL 4895234 [EDNY], applying New York law, holding that the plaintiff's letter to the defendant on behalf of herself and the class members was sufficient notice). Chachère's letter to Matthew Bender does not qualify as proper notice of breach because Chachère is not a named party. Due to a

failure to meet the notice requirement of UCC § 2-607 [3], Plaintiffs are barred from pursuing their breach of contract claim.

In support of their claims, Plaintiffs also allege that the Overview Statements and the Online Statements are express warranties. Matthew Bender maintains that it did not make any statement constituting an express warranty of accuracy, and that the Sale Contracts expressly state that Matthew Bender does not warrant the accuracy of the Tanbook. Even if Plaintiffs had alleged proper notice, the breach of contract claim would fail because Matthew Bender did not warrant the accuracy of the Tanbook.

UCC § 2-213 states that there can only be an express warranty if the affirmation of facts is "part of the basis of the bargain." An action for breach of an express warranty can only be brought if the warranty was relied on (*CBS, Inc. v Ziff-Davis Pub. Co.*, 75 NY2d 496, 508 [1990]). Plaintiffs have to identify an "affirmation, description or promise by [Matthew Bender] which became part of the basis of the bargain" (*McGill v General Motors Corp.*, 647 NYS2d 209, 211 [1st Dept 1996]). Here, Plaintiffs do not allege that they relied upon, or otherwise ever saw, the Overview and Online Statements before ordering the books.

Plaintiffs also allege that Matthew Bender breached its obligation of good faith in the performance of the contract under the UCC (UCC § 1-304). Under an obligation of good faith, "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" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). Although the duty of good faith encompasses any promises that a reasonable person would understand to be included in the contract, it cannot imply obligations that are inconsistent with other terms of the contract, and it cannot overcome an explicit clause (*Id.*; *Moran v Erk*, 11 NY3d 452, 456-457 [2008]).

Here, while Plaintiffs allege that Matthew Bender breached its obligation of good faith by selling inaccurate Tanbooks, the Sale Contracts included a disclaimer wherein Matthew Bender explicitly stated that it was not warranting the accuracy or completeness of the Tanbook. In *Moran v Erk*, 11 NY3d at 456-457, the court found that the implied covenant of good faith and fair dealing could not limit the ability of an attorney to approve or disapprove of a contract where the plain contractual language made it clear that the contract was contingent on the attorney's approval, and a reasonable person could not have understood the opposite. Likewise, a reasonable person could not have understood that Matthew Bender was warranting the accuracy of the Tanbook

because the Terms & Conditions expressly stated that the accuracy was not warranted (Baldwin Aff., Exs. 2-5). Therefore, Plaintiffs failed to sufficiently plead their cause of action for breach of contract based on the duty of good faith.

Finally, Plaintiffs allege that the parties formed an implied contract for the Tanbook to be provided at the beginning of each year, and that Matthew Bender breached this implied contract by sending the 2017 Tanbook edition in May. However, a contract "cannot be implied in fact where there is an express contract covering the subject matter involved" (*Julien J. Studley, Inc. v New York News, Inc.*, 70 NY2d 628, 629 [1987]). The Sale Contracts renewed each year with the subscription system constitutes the "entire agreement" between the parties for the sale of the Tanbook (Baldwin Aff., Exs. 2-5). Concerning Plaintiffs' subscription with automatic shipments, the Material Terms provide that updated materials are shipped "on a semi annual or annual basis as the Updates become available" (Baldwin Aff., Exs. 2-5). The phrase "as the Updates become available" suggests that Matthew Bender was not bound to deliver the new Tanbook at the beginning of each year. The Sale Contracts thus covered the timing of the shipments.

3. **The GBL Claim**

Plaintiffs' claim for violation of the GBL section 349 is premised on allegations that the public at large is harmed by

Matthew Bender's alleged misrepresentations, and that the value of the Tanbook was severely diminished as a result. Section 349 (a) of the GBL prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." Section 349 (h) provides that "any person who has been injured by reason of any violation of this section may bring an action in his own name."

To assert a claim under section 349 of the GBL, a plaintiff must plead facts that allow a court to reasonably infer that: (1) the challenged act was "consumer-oriented;" (2) "misleading in a material way;" and (3) the plaintiff must have "suffered injury as a result" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). To determine if the conduct complained of is directed at consumers or affects them, the First Department looks at criteria such as whether (1) the goods are modest in value, (2) whether numerous parties with a disparity in economic power and sophistication are involved in the transactions, and (3) whether the contract is a form contract (*Cruz v NYNEX Info. Resources*, 263 AD2d at 291). The Court of Appeals has stated that a standard marketing scheme directed at consumers at large or a multi-media dissemination of information tends to show an impact on consumers at large (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 339, 344 [1999]; *Karlin v IVF Am., Inc.*, 93 NY2d 282, 289, 293 [1999]).

Plaintiffs fail to demonstrate that the conduct complained of was consumer-oriented. According to the First Department,

consumers are those "who purchase goods and services for personal, family, or household use" (*Med. Soc'y v Oxford Health Plans, Inc.*, 15 AD3d 206, 207 [1st Dept 2005]) (holding that the activities of health insurers were directed at physicians, and therefore were not consumer-oriented). The sale of goods directed at professionals is not a consumer-oriented conduct, and Plaintiffs have failed to state facts demonstrating that the sale of Tanbooks is oriented towards consumers rather than professionals (*Id.*). While the First Department recognizes that the GBL can be applied to businesses in limited situations, the GBL does not apply in circumstances where a business "purchase[s] a widely sold service that can only be used by businesses" (*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 286, 290 [1st Dept 2000]).

In *Cruz v NYNEX Info. Resources*, the First Department analyzed whether the sale of ads in the yellow book was a consumer-oriented conduct (*Id.* at 286). The threshold inquiry into whether particular conduct was consumer-oriented was met by a showing that "the acts or practices have a broader impact on consumers at large" in that they are directed at consumers, or "potentially affect similarly situated consumers" (*Id.* at 290). In his affidavit, McKee states that rent-regulated tenants are using the Tanbook to be informed of their rights as tenants, meaning that the Tanbook can be used by consumers (McKee Aff., ¶

16). The sale and marketing of the Tanbooks, however, were not directed at consumers at large using the book for "personal, family, or household use" (*Med. Soc'y v Oxford Health Plans, Inc.*, 15 AD3d at 207), and therefore they were not consumer-oriented. GBL § 349 does not apply here.

4. **The Fraud Claim**

Plaintiffs allege that Matthew Bender committed fraud by misrepresenting that the Tanbook was complete and accurate, while Matthew Bender knew it was not. In support of its motion, Matthew Bender argues that Plaintiffs failed to properly allege their fraud claim, and that the fraud claim is duplicative of the breach of contract claim. We need not reach the question of whether the fraud claim is duplicative of the breach of contract claim because the Court finds that Plaintiffs fail to sufficiently plead the elements of fraud.

In a fraud claim, the plaintiff must allege a misrepresentation or a material omission of fact known to the defendant and made for the purpose of inducing the other party to rely on it (*Mandarin Trading Ltd.* v *Wildenstein*, 16 NY3d 173, 178 [2011]). Plaintiffs must also allege that they actually relied on the misrepresentation, and were injured because of the misrepresentation (*Id.*). Those elements must be pled with particularity pursuant to CPLR 3016 (b) (*Id.*).

Plaintiffs fail to allege facts to support their allegation that Matthew Bender knew that the book contained inaccuracies before 2016 and that Matthew Bender made the representation that the Tanbook was complete and accurate in order to induce customers to buy the Tanbook. In support of their claim, Plaintiffs only cite the Morris Email to show that Matthew Bender was already aware of the inaccuracies when Morris received the Chachère letter. But the Morris Email stated in relevant part that Matthew Bender had just learned of the inaccuracies, recognized its mistakes in the Tanbook and intended to correct them (Complaint, Ex. C). If anything, this suggests that Matthew Bender took corrective action soon after learning of the inaccuracies. The Morris Email does not support Plaintiffs' claims. Plaintiffs therefore failed to meet their burden.

4. Unjust Enrichment

Plaintiffs allege that Matthew Bender was unjustly enriched at Plaintiffs' expense by selling the inaccurate Tanbook. Under New York law, a plaintiff cannot recover under an unjust enrichment theory where a contract governs the subject matter of the dispute (*Cox v NAP Constr. Co., Inc.* 10 NY3d 592, 607 [2008]). A quasi contract claim cannot be brought when the existence of the contract is not in dispute, and the scope of the contract clearly covers the dispute between the parties (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382 [1987]).

Here, the sale of the Tanbooks is covered by the Sale Contracts (Baldwin Aff., Exs. 2-5). Plaintiffs also do not dispute the existence and the scope of the contract. The unjust enrichment claim must be dismissed.

Accordingly, it is

ORDERED that the Complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

Date: February 6, 2018

Enter:

J.S.C.

CHARLES E. RAMOS

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 650932/2017

HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, Inc. and MICHAEL McKEE,

Plaintiffs,

against

MATTHEW BENDER & COMPANY, INC., A MEMBER OF LEXISNEXIS GROUP, INC.

Defendant.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Plaintiffs, HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC. and MICHAEL McKEE, hereby appeal to the Supreme Court of the State of New York, Appellate Division, First Department, from the Decision/Order and Judgment of the Supreme Court of the State of New York, County of New York, (Hon. Charles W. Ramos) and from each and every part thereof, duly entered by the Clerk of the County of New York, on February 20, 2018, which dismissed the complaint in its entirety.

[SIGNATURE PAGE TO FOLLOW]

Dated: March 9, 2018
New York, New York

James B. Fishman

JAMES B. FISHMAN
FISHMAN ROZEN, LLP
305 Broadway, Suite 900
New York, NY 10007
(212) 897-5840
Attorneys for Plaintiffs

TO: SKADDEN, ARPS, SLATE MEAGHER & FLOM LLP
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New York, New York 10036
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Attorneys for Defendant

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES RAMOS
Justice

PART 53

Index Number : 650932/2017
HIMMELSTEIN, MCCONNELL,
vs.
MATTHEW BENDER & COMPANY,
SEQUENCE NUMBER : 002
DISMISSAL

INDEX NO. ________

MOTION DATE ________

MOTION SEQ. NO. ________

The following papers, numbered 1 to ____, were read on this motion to/for ________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ________ | No(s). ____

Answering Affidavits — Exhibits ________ | No(s). ____

Replying Affidavits ________ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is granted in accordance with the accompanying memorandum

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S): ____

Dated: 2/6/18

________, J.S.C.
CHARLES E. RAMOS

1. CHECK ONE: ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC., and MICHAEL McKEE,

Plaintiffs,

-against-

MATTHEW BENDER & COMPANY INC., A MEMBER OF LEXISNEXIS GROUP, INC.,

Defendant.

Index No. 650932/2017

Hon. C. E. Ramos, J.S.C.:

In motion sequence 002, defendant Matthew Bender & Company, Inc., a member of LexisNexis Group, Inc. (Matthew Bender) moves to dismiss plaintiffs' amended complaint (the Complaint) pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7).

For the reasons set forth below, the Court grants Matthew Bender's motion to dismiss the Complaint.

Background

This is a proposed class action complaint alleging omissions and inaccuracies in the "New York-Tenant Law" book published by Matthew Bender (the Tanbook).

Plaintiffs Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP (HMGDJ), Housing Court Answers, Inc. (HCA), and Michael McKee (McKee; and, together with HMGDJ and HCA, Plaintiffs) are acting on behalf of themselves and a proposed class comprised of all persons residing, or doing business

within, the State of New York who purchased the Tanbook from Matthew Bender or any of its predecessors during the six-year period prior to the commencement of this action, starting in or around 2011 (the Class Period) (Complaint, ¶ 1). HMGDJ is a law firm located in New York (*Id.*, at ¶ 17). HCA is a not-for-profit corporation with an office in New York whose mission is to "promote and protect the true administration of justice in the housing courts of New York City" (*Id.*, at ¶¶ 21, 25). McKee is a New York tenant advocate and organizer who serves as a volunteer at various tenant advocacy organizations (*Id.*, at ¶¶ 29, 30).

The Tanbook is issued on an annual basis and can be bought directly on Matthew Bender's online store on www.LexisNexis.com (the Online Store) or on www.amazon.com (Amazon), or as part of a subscription service (Complaint, ¶¶ 2, 3, 4). Tanbook purchases are governed by the "Material Terms" (Material Terms) and "Additional Terms and Conditions" (Terms & Conditions, and together with the Material Terms, the Sale Contract), generated at the time that Tanbooks are ordered, and prior to shipments of hard copies (Baldwin Aff., ¶¶ 11, 12). With the subscription service, the new Tanbook edition is automatically shipped every year along with invoices (*Id.*, ¶ 13). Upon receipt, subscribers can either retain the book and pay the invoice, or return the shipment within 30 days without obligation to pay the invoice (*Id.*).

The Terms & Conditions provide that (1) the purchaser's "access" to the subscription "indicates [the purchaser's] acceptance of the terms and conditions," and (2) the Terms & Conditions constitute the "entire agreement" with the purchaser (Baldwin Aff., Exs. 2-5). Section 6 of the Terms & Conditions additionally sets forth:

> WE DISCLAIM ALL WARRANTIES WITH RESPECT TO PUBLICATIONS, EXPRESS OR IMPLIED…WE DO NOT WARRANT THE ACCURACY, RELIABILITY OR CURRENTNESS OF THE MATERIALS CONTAINED IN THE PUBLICATIONS. *Id.*

Plaintiffs estimate that Matthew Bender sold at least 100,000 Tanbooks to the proposed class members during the Class Period (Complaint, ¶ 48).

HMGDJ had a subscription with Matthew Bender since at least 2010 (Complaint, ¶ 20). During the Class Period, HCA and McKee also entered a subscription service with Matthew Bender, which included the purchase of multiple copies of the Tanbook (*Id.*, at ¶¶ 27, 31). None of the Plaintiffs purchased a Tanbook via an online store during the Class Period, and Plaintiffs do not allege that they ever visited the Online Store or the Tanbook's retail page on Amazon (Baldwin Aff., ¶¶ 10, 20, 27). Plaintiffs never chose to return their automatic shipment of the Tanbook (*Id.*, at ¶¶ 16, 22, 30). HMGDJ and McKee were sent the 2017 Tanbook in May 2017, but neither has submitted payment or returned the book to Matthew Bender (*Id.*, at ¶¶ 19, 32). HCA

cancelled its subscription in 2016, and it did not place any order for the 2017 edition (*Id.*, ¶¶ 24, 26).

Plaintiffs' Complaint alleges that Part III of the Tanbook, titled "Rent Regulation," contains inaccuracies and omissions of the New York State and New York City rent laws and regulations (Complaint, ¶¶ 6, 7). Plaintiffs maintain that Matthew Bender made several statements in the Tanbook's overview (the Overview), which appear in the hard copy book and online on Amazon and on the Online Store.

The Overview describes several Parts of the Tanbook as including "selected provisions," "selected local laws," and "various provisions," and Plaintiffs interpret this to mean that the Tanbook does not incorporate all of the relevant laws and regulations in those Parts. Meanwhile, Part III is described as "comprised of *the* laws and regulations covering rent stabilization and rent control in New York City and in applicable areas elsewhere in the state" (*Id.* at 85) (emphasis added). Plaintiffs argue the use of the word "the" indicates that Part III constitutes a complete reproduction of all of the relevant laws and regulations.

The Online Store additionally states that the Tanbook "brings together all the laws and regulations governing landlord/tenant matters in New York, providing the text of State statutes, regulations, and local laws" (Fishman Affm., Ex A). The Online Store and Amazon also represent the Tanbook as containing

"select local laws from New York City…" and "excerpts from court acts and rules", but list "rent stabilization and rent control laws and regulations" without adding qualifications such as "excerpts" or "various" (*Id.*; Fishman Affm., Ex B) (the statements on the Online Store and on Amazon together, the Online Statements).

On December 5, 2016, Matthew Chachère, an attorney at Northern Manhattan Improvement Corporation Legal Services (NMIC), sent a letter to Matthew Bender advising that he had discovered that some provisions related to rent laws and regulations had been missing from the Tanbook for years, and that several other provisions in the rent regulations section were inaccurate (Complaint, ¶ 73; Ex. B). On December 13, 2016, Chachère received a written answer from Jacqueline M. Morris (Morris Email), the legal content editor at Matthew Bender, stating:

> We sincerely apologize for these issues which occurred long ago and have only recently been brought to our attention. We are currently 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. Complaint, Ex. C.

Plaintiffs allege that this letter demonstrates that, "for a substantial period of time," Matthew Bender knew that the Tanbook's compilation of New York State and New York City rent regulation laws was incomplete and inaccurate (Complaint, ¶ 53).

Plaintiffs maintain that the same mistakes and inaccuracies affect editions of the Tanbook from at least 2010 (*Id.*, ¶ 50).

On or about May 22, 2017, Matthew Bender issued the 2017 edition of the Tanbook (Complaint, at ¶ 54). Up to and including the year 2016, the Tanbook had been issued in early January of each year (*Id.*, ¶ 78). Despite the delay, subscribers were charged the full price for the 2017 version (*Id.*, at ¶ 80).

Plaintiffs commenced this action on behalf of a proposed class of purchasers of the Tanbook, alleging breach of contract, a claim under section 349 of the New York General Business Law (GBL), fraud, and unjust enrichment. Plaintiffs allege that the 2017 edition included provisions of various rent regulation statutes that were missing in the 2016 edition (*Id.*). Plaintiffs argue that the fact that the missing provisions were added to the 2017 version demonstrates that those provisions should have been included in the 2016 Tanbook and the previous versions. Moreover, Plaintiffs allege that the Tanbook's text and promotional materials did not indicate that the rent regulation laws were incomplete. They also allege that the omissions and inaccuracies in the Tanbook resulted in at least one instance of a litigant being harmed because both his attorney and a New York State Supreme Court Justice mistakenly relied upon the Tanbook (Complaint, ¶¶ 70-72).

Discussion

1. Legal Standard

CPLR 3211(a)(1) permits the Court to dismiss a cause of action when "a defense is founded upon documentary evidence." Dismissal is warranted only if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83 [1994]).

Under CPLR 3211(a)(5), the Court can dismiss a complaint that may not be maintained because of the statute of limitations (*See Faison v Lewis*, 25 NY3d 220 [2015]).

As to CPLR 3211(a)(7), the Court is given the power to dismiss a pleading that "fails to state a cause of action." CPLR 3211(a)(7) may be used in two situations: when Plaintiff has not stated a claim cognizable at law, or when Plaintiff stated a cause of action but failed to assert a material allegation necessary to support the cause of action (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014]). The Court must accept the complaint's factual allegations as true and give the plaintiff the benefit of every possible favorable inference, and must determine only whether the facts as alleged fit within any cognizable legal theory (*Arnav Indus. v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 303 [2001]). When documentary evidence is submitted by the

defendant, the standard shifts from whether the plaintiff has stated a cause of action to whether it has one (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d at 135).

2. **Breach of Contract Claim**

Matthew Bender moves to dismiss the breach of contract claim because (i) Plaintiffs did not properly notify Matthew Bender of their claim in accordance with the New York Uniform Commercial Code (UCC), and because (ii) the Sale Contracts did not include any warranty as to the accuracy of the Tanbook, but, on the contrary, contained a disclaimer. Plaintiffs allege that the UCC is not applicable, and that even if the UCC were applicable, Plaintiffs would still have a valid claim because (a) Matthew Bender was properly notified of the inaccuracies, (b) Matthew Bender breached the express warranty of accuracy, (c) Matthew Bender could not disclaim the express warranty of accuracy because such a disclaimer strikes at the heart of the bargain and is incompatible with the express warranty of accuracy, (d) Matthew Bender breached its obligation of good faith, and (e) the parties formed an implied contract, which Matthew Bender breached.

Article 2 of the UCC applies to Plaintiffs' breach of contract claim. Article 2 applies to a transaction in goods, including "all things…which are movable at the time of identification to the contract for sale" (UCC § 2-105[1]). Books are considered goods, and thus, the UCC applies to the sale of

books (*See Simon & Schuster, Inc. v Howe Plastics & Chemicals Co.*, 105 AD2d 604, 606 [1st Dept 1984]).

Here, Plaintiffs argue that the UCC does not apply because the purchase of the annual compilation of New York rent regulatory laws was predominantly a purchase of the annual updating and compiling service. However, with the subscription service, Plaintiffs were merely buying a new edition of the Tanbook every year. The fact that the content of the book was modified does not change the fact that they were buying goods, and the updating of the books is incidental to the sale (*Richard A. Rosenblatt & Co. v Davidge Data Sys. Corp.*, 295 AD2d 168 [1st Dept 2002]) (finding that maintenance services provided for a monthly fee were incidental to the sale of computer hardware and software).

Matthew Bender alleges that Plaintiffs should be barred from pursuing their breach of contract claim because they failed to properly notify Matthew Bender of the alleged breach. Plaintiffs maintain that Matthew Bender was notified of the alleged breach because Matthew Bender must have been aware of the inaccuracies, and, if not before, was made aware of the inaccuracies thanks to the letter sent by Chachère.

According to UCC § 2-607 [3], "when a tender has been accepted…the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller

of breach or be barred from any remedy." UCC § 2-607 [3] requires the buyer to "*notify*" the seller (*emphasis added*): the use of the verb "notify" implies that the buyer has to act, and cannot just rely on the fact that the buyer may already have been aware of the issue. Moreover, according to the official comments on the UCC, the purpose of the notice requirement is to facilitate negotiations for settlement (UCC § 2-607 [3] cmt 4). Therefore, Matthew Bender's alleged awareness of the inaccuracies cannot constitute notice.

Plaintiffs fail to allege that any of them notified Matthew Bender of the alleged breach. UCC § 2-607 [3] requires that "*the buyer*…notify the seller of the breach or be barred from any remedy" (emphasis added) (*Singleton v Fifth Generation, Inc. 2016,* WL 406295 [NDNY 2016]) (citing *Schmidt v. Ford Motor Co.*, 972 FSupp2d 712, 719 [EDPa 2013], where the court held that a third party, "although possibly "a" buyer, is not "the" buyer for purposes of the UCC," and therefore proper notice was not given by complaints of third parties). Plaintiffs, as the buyers, should have notified Matthew Bender of the breach themselves (*See Paulino v Conopco,* Inc., 2015 WL 4895234 [EDNY], applying New York law, holding that the plaintiff's letter to the defendant on behalf of herself and the class members was sufficient notice). Chachère's letter to Matthew Bender does not qualify as proper notice of breach because Chachère is not a named party. Due to a

failure to meet the notice requirement of UCC § 2-607 [3], Plaintiffs are barred from pursuing their breach of contract claim.

In support of their claims, Plaintiffs also allege that the Overview Statements and the Online Statements are express warranties. Matthew Bender maintains that it did not make any statement constituting an express warranty of accuracy, and that the Sale Contracts expressly state that Matthew Bender does not warrant the accuracy of the Tanbook. Even if Plaintiffs had alleged proper notice, the breach of contract claim would fail because Matthew Bender did not warrant the accuracy of the Tanbook.

UCC § 2-213 states that there can only be an express warranty if the affirmation of facts is "part of the basis of the bargain." An action for breach of an express warranty can only be brought if the warranty was relied on (*CBS, Inc. v Ziff-Davis Pub. Co.*, 75 NY2d 496, 508 [1990]). Plaintiffs have to identify an "affirmation, description or promise by [Matthew Bender] which became part of the basis of the bargain" (*McGill v General Motors Corp.*, 647 NYS2d 209, 211 [1st Dept 1996]). Here, Plaintiffs do not allege that they relied upon, or otherwise ever saw, the Overview and Online Statements before ordering the books.

Plaintiffs also allege that Matthew Bender breached its obligation of good faith in the performance of the contract under the UCC (UCC § 1-304). Under an obligation of good faith, "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" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). Although the duty of good faith encompasses any promises that a reasonable person would understand to be included in the contract, it cannot imply obligations that are inconsistent with other terms of the contract, and it cannot overcome an explicit clause (*Id.*; *Moran v Erk*, 11 NY3d 452, 456-457 [2008]).

Here, while Plaintiffs allege that Matthew Bender breached its obligation of good faith by selling inaccurate Tanbooks, the Sale Contracts included a disclaimer wherein Matthew Bender explicitly stated that it was not warranting the accuracy or completeness of the Tanbook. In *Moran v Erk*, 11 NY3d at 456-457, the court found that the implied covenant of good faith and fair dealing could not limit the ability of an attorney to approve or disapprove of a contract where the plain contractual language made it clear that the contract was contingent on the attorney's approval, and a reasonable person could not have understood the opposite. Likewise, a reasonable person could not have understood that Matthew Bender was warranting the accuracy of the Tanbook

because the Terms & Conditions expressly stated that the accuracy was not warranted (Baldwin Aff., Exs. 2-5). Therefore, Plaintiffs failed to sufficiently plead their cause of action for breach of contract based on the duty of good faith.

Finally, Plaintiffs allege that the parties formed an implied contract for the Tanbook to be provided at the beginning of each year, and that Matthew Bender breached this implied contract by sending the 2017 Tanbook edition in May. However, a contract "cannot be implied in fact where there is an express contract covering the subject matter involved" (*Julien J. Studley, Inc. v New York News, Inc.*, 70 NY2d 628, 629 [1987]). The Sale Contracts renewed each year with the subscription system constitutes the "entire agreement" between the parties for the sale of the Tanbook (Baldwin Aff., Exs. 2-5). Concerning Plaintiffs' subscription with automatic shipments, the Material Terms provide that updated materials are shipped "on a semi annual or annual basis as the Updates become available" (Baldwin Aff., Exs. 2-5). The phrase "as the Updates become available" suggests that Matthew Bender was not bound to deliver the new Tanbook at the beginning of each year. The Sale Contracts thus covered the timing of the shipments.

3. **The GBL Claim**

Plaintiffs' claim for violation of the GBL section 349 is premised on allegations that the public at large is harmed by

Matthew Bender's alleged misrepresentations, and that the value of the Tanbook was severely diminished as a result. Section 349 (a) of the GBL prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." Section 349 (h) provides that "any person who has been injured by reason of any violation of this section may bring an action in his own name."

To assert a claim under section 349 of the GBL, a plaintiff must plead facts that allow a court to reasonably infer that: (1) the challenged act was "consumer-oriented;" (2) "misleading in a material way;" and (3) the plaintiff must have "suffered injury as a result" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). To determine if the conduct complained of is directed at consumers or affects them, the First Department looks at criteria such as whether (1) the goods are modest in value, (2) whether numerous parties with a disparity in economic power and sophistication are involved in the transactions, and (3) whether the contract is a form contract (*Cruz v NYNEX Info. Resources*, 263 AD2d at 291). The Court of Appeals has stated that a standard marketing scheme directed at consumers at large or a multi-media dissemination of information tends to show an impact on consumers at large (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 339, 344 [1999]; *Karlin v IVF Am., Inc.*, 93 NY2d 282, 289, 293 [1999]).

Plaintiffs fail to demonstrate that the conduct complained of was consumer-oriented. According to the First Department,

consumers are those "who purchase goods and services for personal, family, or household use" (*Med. Soc'y v Oxford Health Plans, Inc.*, 15 AD3d 206, 207 [1st Dept 2005]) (holding that the activities of health insurers were directed at physicians, and therefore were not consumer-oriented). The sale of goods directed at professionals is not a consumer-oriented conduct, and Plaintiffs have failed to state facts demonstrating that the sale of Tanbooks is oriented towards consumers rather than professionals (*Id.*). While the First Department recognizes that the GBL can be applied to businesses in limited situations, the GBL does not apply in circumstances where a business "purchase[s] a widely sold service that can only be used by businesses" (*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 286, 290 [1st Dept 2000]).

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Plaintiffs fail to allege facts to support their allegation that Matthew Bender knew that the book contained inaccuracies before 2016 and that Matthew Bender made the representation that the Tanbook was complete and accurate in order to induce customers to buy the Tanbook. In support of their claim, Plaintiffs only cite the Morris Email to show that Matthew Bender was already aware of the inaccuracies when Morris received the Chachère letter. But the Morris Email stated in relevant part that Matthew Bender had just learned of the inaccuracies, recognized its mistakes in the Tanbook and intended to correct them (Complaint, Ex. C). If anything, this suggests that Matthew Bender took corrective action soon after learning of the inaccuracies. The Morris Email does not support Plaintiffs' claims. Plaintiffs therefore failed to meet their burden.

4. Unjust Enrichment

Plaintiffs allege that Matthew Bender was unjustly enriched at Plaintiffs' expense by selling the inaccurate Tanbook. Under New York law, a plaintiff cannot recover under an unjust enrichment theory where a contract governs the subject matter of the dispute (*Cox v NAP Constr. Co., Inc.* 10 NY3d 592, 607 [2008]). A quasi contract claim cannot be brought when the existence of the contract is not in dispute, and the scope of the contract clearly covers the dispute between the parties (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382 [1987]).

Here, the sale of the Tanbooks is covered by the Sale Contracts (Baldwin Aff., Exs. 2-5). Plaintiffs also do not dispute the existence and the scope of the contract. The unjust enrichment claim must be dismissed.

Accordingly, it is

ORDERED that the Complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

Date: February 6, 2018

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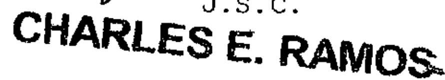


J.S.C.

CHARLES E. RAMOS

Exhibit C

Acosta, P.J., Friedman, Manzanet-Daniels, Gesmer, Singh, JJ.

9198 Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP, et al., Plaintiffs-Appellants, Index 650932/17

-against-

Matthew Bender & Company, Inc., a Member of LexisNexis Group, Inc., Defendant-Respondent.

Fishmanlaw, PC, New York (James B. Fishman of counsel), and Anderson Kill, PC, New York (Jeffrey E. Glen of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Anthony J. Dreyer of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 20, 2018, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a), unanimously affirmed, without costs.

Plaintiffs allege that defendant Matthew Bender & Company Inc.'s New York Landlord-Tenant Law, commonly known as the Tanbook, is "rife with inaccuracies and omissions," at least with respect to rent-regulated housing in New York City. The Tanbook is a compilation of statutes, regulations, and editorial contents such as summaries and commentaries, addressing New York rent regulation and landlord-tenant law. Plaintiffs allege that there have been such inaccuracies and omissions in annual editions of

the Tanbook for at least six years preceding 2017.

The breach of express warranty claim, based on the representations defendant made about the content of the Tanbook in the book's "Overview" and on websites on which the book was sold, was correctly dismissed because the Terms and Conditions pursuant to which defendant sold the Tanbook to plaintiffs contain a merger clause and a disclaimer of warranties, which states, in bold type, "We do not warrant the accuracy, reliability or currentness of the materials contained in the publications" (*see* Uniform Commercial Code [UCC] § 2-202; *Potsdam Cent. Schools v Honeywell, Inc.*, 120 AD2d 798, 800 [3d Dept 1986]). Contrary to plaintiffs' contention, this is a specific, not a general, disclaimer. In addition, the complaint fails to allege that plaintiffs relied on the statements that they contend constitute an express warranty (*see CBS Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 503 [1990]; *see also Murrin v Ford Motor Co.*, 303 AD2d 475, 477 [2d Dept 2003] [the plaintiff failed to allege that he even was aware of the advertisements he claimed formed an express warranty]). Although this defect was cured with respect to plaintiff law firm by Samuel J. Himmelstein's affidavit in opposition (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]), it was not cured with respect to the other plaintiffs.

The disclaimer of warranties also precludes the claim for breach of the implied covenant of good faith and fair dealing (*see Peter R. Friedman, Ltd. v Tishman Speyer Hudson L.P.*, 107 AD3d 569, 570 [1st Dept 2013]), which in any event is duplicative of the breach of contract claim (*Apogee Handcraft, Inc. v Verragio, Ltd.*, 155 AD3d 494, 495-496 [1st Dept 2017], *lv denied* 31 NY3d 903 [2018]; *Shilkoff, Inc. v 885 Third Ave. Corp.*, 299 AD2d 253 [1st Dept 2002]). In addition, plaintiffs identified no contractual provisions that required defendant to update the 2016 edition of the book, notify publishers of errors in it, or issue the 2017 edition sooner that it did.

The GBL § 349 claim was correctly dismissed because the only injury alleged to have resulted from defendant's allegedly deceptive business practices is the amount that plaintiffs paid for the book, which does not constitute an injury cognizable under the statute (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 56 [1999]; *Donahue v Ferolito, Vultaggio & Sons*, 13 AD3d 77, 78 [1st Dept 2004], *lv denied* 4 NY3d 706 [2005]; *Rice v Penguin Putnam*, 289 AD2d 318 [2d Dept 2001], *lv dismissed in part, denied in part* 98 NY2d 635 [2002]). In addition, the complaint fails to allege that the individual plaintiff and plaintiff Housing Court Answers, Inc. ever saw the allegedly deceptive representations that purportedly harmed them (*see Gale v International Bus.*

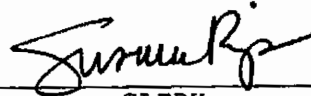
Machines Corp., 9 AD3d 446, 447 [2d Dept 2004]).

We do not reach plaintiffs' argument, raised for the first time in their appellate reply brief, that defendant's representations as to the contents of the book constitute a fraud (*see Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009]).

We have considered plaintiffs' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 2, 2019



CLERK

Exhibit D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC., and MICHAEL McKEE,	Index No. 650932/2017
Plaintiffs,	**NOTICE OF ENTRY**
- against -	
MATTHEW BENDER & COMPANY, INC., A MEMBER OF LEXISNEXIS GROUP, INC.,	
Defendant.	

PLEASE TAKE NOTICE that the attached is a true and correct copy of the Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, dated May 2, 2019 and duly entered in the office of the Clerk of the Appellate Division, First Department, on May 2, 2019.

Dated: New York, New York
May 2, 2019

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Anthony J. Dreyer
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Attorneys for Matthew Bender & Co., Inc.

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Attorneys for Plaintiffs

Acosta, P.J., Friedman, Manzanet-Daniels, Gesmer, Singh, JJ.

9198 Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP, et al., Plaintiffs-Appellants, Index 650932/17

-against-

Matthew Bender & Company, Inc., a Member of LexisNexis Group, Inc., Defendant-Respondent.

Fishmanlaw, PC, New York (James B. Fishman of counsel), and Anderson Kill, PC, New York (Jeffrey E. Glen of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Anthony J. Dreyer of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 20, 2018, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a), unanimously affirmed, without costs.

Plaintiffs allege that defendant Matthew Bender & Company Inc.'s New York Landlord-Tenant Law, commonly known as the Tanbook, is "rife with inaccuracies and omissions," at least with respect to rent-regulated housing in New York City. The Tanbook is a compilation of statutes, regulations, and editorial contents such as summaries and commentaries, addressing New York rent regulation and landlord-tenant law. Plaintiffs allege that there have been such inaccuracies and omissions in annual editions of

INDEX NO. 650932/2017
RECEIVED NYSCEF: 05/02/2019

the Tanbook for at least six years preceding 2017.

The breach of express warranty claim, based on the representations defendant made about the content of the Tanbook in the book's "Overview" and on websites on which the book was sold, was correctly dismissed because the Terms and Conditions pursuant to which defendant sold the Tanbook to plaintiffs contain a merger clause and a disclaimer of warranties, which states, in bold type, "We do not warrant the accuracy, reliability or currentness of the materials contained in the publications" (*see* Uniform Commercial Code [UCC] § 2-202; *Potsdam Cent. Schools v Honeywell, Inc.*, 120 AD2d 798, 800 [3d Dept 1986]). Contrary to plaintiffs' contention, this is a specific, not a general, disclaimer. In addition, the complaint fails to allege that plaintiffs relied on the statements that they contend constitute an express warranty (*see CBS Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 503 [1990]; *see also Murrin v Ford Motor Co.*, 303 AD2d 475, 477 [2d Dept 2003] [the plaintiff failed to allege that he even was aware of the advertisements he claimed formed an express warranty]). Although this defect was cured with respect to plaintiff law firm by Samuel J. Himmelstein's affidavit in opposition (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]), it was not cured with respect to the other plaintiffs.

The disclaimer of warranties also precludes the claim for breach of the implied covenant of good faith and fair dealing (*see Peter R. Friedman, Ltd. v Tishman Speyer Hudson L.P.*, 107 AD3d 569, 570 [1st Dept 2013]), which in any event is duplicative of the breach of contract claim (*Apogee Handcraft, Inc. v Verragio, Ltd.*, 155 AD3d 494, 495-496 [1st Dept 2017], *lv denied* 31 NY3d 903 [2018]; *Shilkoff, Inc. v 885 Third Ave. Corp.*, 299 AD2d 253 [1st Dept 2002]). In addition, plaintiffs identified no contractual provisions that required defendant to update the 2016 edition of the book, notify publishers of errors in it, or issue the 2017 edition sooner that it did.

The GBL § 349 claim was correctly dismissed because the only injury alleged to have resulted from defendant's allegedly deceptive business practices is the amount that plaintiffs paid for the book, which does not constitute an injury cognizable under the statute (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 56 [1999]; *Donahue v Ferolito, Vultaggio & Sons*, 13 AD3d 77, 78 [1st Dept 2004], *lv denied* 4 NY3d 706 [2005]; *Rice v Penguin Putnam*, 289 AD2d 318 [2d Dept 2001], *lv dismissed in part, denied in part* 98 NY2d 635 [2002]). In addition, the complaint fails to allege that the individual plaintiff and plaintiff Housing Court Answers, Inc. ever saw the allegedly deceptive representations that purportedly harmed them (*see Gale v International Bus.*

Machines Corp., 9 AD3d 446, 447 [2d Dept 2004]).

We do not reach plaintiffs' argument, raised for the first time in their appellate reply brief, that defendant's representations as to the contents of the book constitute a fraud (*see Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009]).

We have considered plaintiffs' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 2, 2019

CLERK

Exhibit E

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC., and MICHAEL MCKEE,	**Case. No. 2018-1250**
	Index No. 650932/2017
Plaintiffs-Appellants,	
v.	**NOTICE OF MOTION FOR LEAVE TO REARGUE, OR, IN THE ALTERNATIVE, FOR LEAVE TO APPEAL TO THE COURT OF APPEALS**
MATTHEW BENDER & COMPANY, INC., A MEMBER OF LEXISNEXIS GROUP, INC.,	
Defendant-Respondent.	

PLEASE TAKE NOTICE that upon the annexed affirmation of James B. Fishman dated May 30 2019 and the annexed exhibits, the Decision and Order of the Appellate Division, First Department entered in the office of the Clerk thereof on May 2, 2019, which affirmed the lower court's pre-Answer dismissal of the Complaint, and upon all the papers and proceedings had herein, a motion will be made pursuant to CPLR §§ 2221 and 5602(a) and Rule 600.14(a) or (b) of the Rules of this Court, at a Term of this Court to be held at the Courthouse located at 27 Madison Avenue, New York, New York on the 17th day of June, 2019, at 10:00am on that day, or as soon thereafter as counsel can be heard, for an order

1) granting leave to reargue the aforesaid Decision and Order of this Court on the grounds set forth herein, and, upon reargument, vacating this Court's Decision and Order, reversing the Decision and Order of the motion court, and denying defendant's motion in its entirety; or, in the alternative,

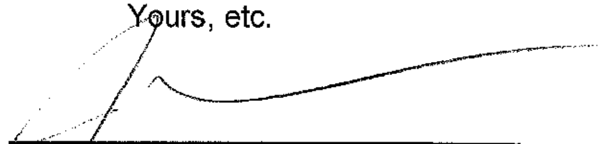
2) granting the Plaintiffs-Appellants' motion for leave to appeal the Decision and Order of this Court to the Court of Appeals; and

3) granting such other and further relief as may be just and proper.

PLEASE TAKE FURTHER NOTICE, pursuant to CPLR 2214(b), that answering papers and any notice of cross-motion, with supporting papers, if any, shall be served upon the undersigned at least seven days before this motion is noticed to be heard.

Dated: New York, New York
May 30, 2019

Yours, etc.



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Attorneys for Defendant-Respondent

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

------------------------------ x	
HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC., and MICHAEL MCKEE,	: Case. No. 2018-1250
	: Index No. 650932/2017
Plaintiffs-Appellants,	:
	: AFFIRMATION
v.	:
MATTHEW BENDER & COMPANY, INC., A MEMBER OF LEXISNEXIS GROUP, INC.,	:
Defendant-Respondent.	:
------------------------------ x	

JAMES B. FISHMAN, an attorney duly admitted to practice law before the Courts of the State of New York, affirms the following, under penalties of perjury:

1. I am the managing member of Fishmanlaw, PC, attorney for the Plaintiffs-Appellants ("Appellants") in this action. As such, I am fully familiar with the facts and circumstances of this matter.

2. I make this affirmation in support of the within motion for an order, pursuant to CPLR §§ 2221 and 5602(a) and Rule 600.14(a) or (b) of the Rules of this Court,:

(a) granting leave to reargue this Court's May 2, 2019 decision and order (the "Order") on the grounds set forth herein, and, upon reargument, vacating the Order, reversing the Decision and Order of the motion court, and denying Defendant-Respondent's ("Respondent") pre-answer motion to dismiss the First Amended Complaint in its entirety; or, in the alternative,

(b) granting the Appellants leave to appeal the Order to the Court of Appeals; and

(c) granting such other and further relief as may be just and proper.

PRELIMINARY STATEMENT

3. It is respectfully submitted that the Court overlooked and/or misapprehended significant legal and factual issues in its Order affirming the Decision and Order of the motion court which granted the Respondent's pre-answer motion to dismiss the First Amended Complaint. (Order attached as Exhibit A)

4. As a result, the Respondent, a well-known legal publisher, has been permitted to escape all liability for its undeniable and long-standing corporate misconduct. The effect of this Court's decision is that Appellants, and the class they seek to represent, have been deprived of an opportunity to present their well-documented claims to a jury and establish that the Respondent's misconduct merits a remedy.

5. The grounds relied upon by the Court in the Order misapprehend significant factual and legal claims set forth in the record. The Order also overlooks fundamental factual and legal claims, which, if they had been considered, would have resulted in a different outcome.

6. Those claims are summarized as follows:

   a. The Court incorrectly found that the contract between the parties contains an enforceable "merger clause" which applies the "Terms and Conditions of the contract to the parties. However, the cited clause

does not apply to any transaction entered between the parties and therefore has no bearing on this case. As a result, the disclaimer is not enforceable against the Appellants;

b. Even if the language of the Respondent's disclaimer is found to be otherwise enforceable the Court held, incorrectly, that the Respondent is permitted to hide behind one that excludes all express and implied warranties of "accuracy, reliability or currentness" that is concealed on the reverse side of its form purchase order where that disclaimer is directly contradicted by prominent statements in the Respondent's book that it is "designed to provide ***authoritative*** information", that it "provid(es) ***the text*** of state statutes, regulations and local laws" and that it contains "***the*** laws and regulations covering (rent regulation) while other portions of the book are described as only including "selected" or "various" "provisions" of other laws and regulations. (emphasis added)

c. In doing so, the Court overlooked recent unanimous decisional authority from this Court holding that an "insufficiently prominent" disclaimer, which directly contradicts affirmative representations by a seller, is not enforceable;

d. Next, the Court held that the complaint fails to allege that the Appellants relied on the Respondent's express warranties but then, in the next sentence, acknowledged that at least one of the named Appellants "cured" this purported pleading defect and yet refused to allow that Appellant's claims to proceed or grant the other Appellants leave to replead;

e. The Court also overlooked that the complaint does in fact allege that ***all*** of the Appellants relied upon the product and service the Respondent purported to provide to purchasers in its representations about the book;

f. The Court further overlooked significant and applicable decisional law from this Court holding that a contractual provision breaches the obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement and deprives plaintiffs of their rights to its benefits;

g. The Court also found, incorrectly, that the Respondent's contract did not require it to publish updates of the material in the Tanbook. The contracts produced by the Respondents in fact expressly establishes

the opposite and requires it to provide updates, supplements and revisions;

h. Finally, the Court incorrectly applied the principle of "deception as injury" to the facts of this case in dismissing the Appellants' GBL § 349 claim. The injury suffered by the Appellants was the diminished value of a book that was presented as being complete and authoritative with respect to the New York rent laws and regulations but was instead grossly deficient. It was therefore a classic "bait & switch," fully compensable under GBL § 349. The amount of the Appellants' injury is a fact question for a jury to determine. In applying the "deception as injury" principle the Court overlooked and disregarded unanimous authority from this Court holding that a business that deprives a purchaser of the "benefit of the bargain" and provides a product that is fundamentally different from the one it promised has suffered a cognizable injury under the Deceptive Practices Act.

STATEMENT OF FACTS

7. The Appellants presume the Court's familiarity with the facts of this action which are fully detailed in their main brief to this Court as well as in their Reply Brief.

8. The essential and undeniable fact is that for years the Respondents sold a product that it had long represented as "authoritative" and "reliable" when it was in fact rife with significant omissions and inaccuracies.

9. The Respondent conceded that at some point prior to the commencement of this action (it won't say when) the Respondent learned of the book's defects yet it continued to sell it without telling anyone it was defective and should not be relied upon. Then, months after this action filed, the Respondent, using the complaint as a roadmap, corrected all of the defects identified by the Appellants in the belatedly published 2017 edition of the book.

10. The Appellants alleged various causes of action against the Respondent. Those claims were dismissed by the motion court before the Appellants had any opportunity to conduct discovery. For the reasons set forth here, this Court should revisit the Order and, upon such review, withdraw the Order and issue an order reversing the motion court's order, or at least granting leave to replead any perceived defects in the complaint.

ARGUMENT

I. Leave to Reargue Should be Granted Because This Court Overlooked and/or Misapprehended Critical Legal and Factual Issues.

A. The merger clause relied upon by the Court is not part of the transaction between the parties and therefore is applicable here.

11. The Order states that the Appellants' express warranty claim "was correctly dismissed because the Terms and Conditions pursuant to which defendant sold the Tanbook to plaintiffs contain a merger clause and a disclaimer of warranties..." (Order, p. 2)

12. The contract however provides the opposite. The merger clause, entitled "Entire Agreement" found on the reverse side of the Respondent's "Order Form" states, in its entirety:

> The terms and conditions set forth herein and incorporated by reference constitute the entire agreement between you and...Matthew Bender®...with respect to the applicable ***Legal Research Service*** and supersedes all prior understandings and agreements, oral, written or otherwise. ***If we accept an order for a Legal Research Service on your purchase order ("PO"), the***

terms and conditions of your PO shall not apply and will not become part of this Agreement." (Record on Appeal ("R") at p. 186, 189, 192, 195 and 198) (emphasis added)

13. The Respondent undeniably accepted "purchase orders" from the Appellants for the purchase of multiple editions of the Tanbook over a period of many years. Those purchases are defined by the contract as a "Legal Research Service") ("...any subscription to a...publication...from Matthew Bender®... (each a `Legal Research Service')..."

14. Thus, by its own terms the "Terms and Conditions" relied on by the Respondent to support its disclaimer does not, and indeed cannot, apply to the Appellants and the Court's determination to the extent it is grounded on that disclaimer, must be reversed.

B. The Court overlooked or misapprehended well-established UCC jurisprudence and recent unanimous authority from this Court holding that an "insufficiently prominent" disclaimer, which directly contradicts affirmative representations by a seller, is not enforceable.

15. UCC § 2-316(2) requires that any disclaimer of an implied warranty must be "conspicuous." The Court incorrectly upheld the placement and text of the Respondent's far reaching disclaimer by simply stating, incorrectly, that it is in "bold type" in disregard of the fact that the provision is not in bold type (but in only slightly larger print than the balance of the page) on the reverse side of the contract and with no reference to it on either the front of the contract or near the signature line, rendering it completely inconspicuous. (See R 184-198)

either the front of the contract or near the signature line, rendering it completely inconspicuous. (See R 184-198)

16. Clearly, the Respondent made little or no effort to make its shocking and surprising disclaimer of "accuracy, reliability or currentness" conspicuous and instead did all it could to hide it from those who actually use the Tanbook. The disclaimer could have been placed just inside the book's cover where the Respondent already disclaimed any liability for engaging in rendering legal advice (R 175); it could have been referenced on the front page of the contract; it could have been printed in bold type (instead of just all caps only slightly larger than the rest of the print); it could have been placed near the signature line where a purchaser would more likely see it; it could have been printed in a different color ink to insure it was readily seen. The Respondents took none of these reasonable steps in an obvious effort to hide its stunning disclaimer which fully undermines the worth and usefulness of its products.

17. And, under well-established UCC jurisprudence an express warranty that goes to the heart of the bargain cannot be disclaimed where the disclaimer presents an "unexpected and unbargained" result that is inconsistent with the express warranty."

> Recognizing that the buyer is likely to consider any express warranty an important part of the contract, Section 2-316(1) protects the buyer against "unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty." In other words, having seen or heard the express

warranty, the buyer will expect that the warranty will remain part of the deal. Since, by definition, the express warranty is part of the basis of the bargain, the seller may not alter the terms of the deal through a disclaimer.1 COMMERCIAL LAW AND PRACTICE GUIDE P 5.08 (2018) Matthew Bender & Company, Inc. (citations omitted)(*See, e.g.,* Minnesota Forest Prods. v. Ligna Mach., 17 F. Supp. 2d 892 (D. Minn. 1998) (where express warranty and language of disclaimer cannot be reasonably reconciled, the express warranty must prevail). *See also* Hercules Mach. Corp. v. McElwee Bros., 2002 U.S. Dist. LEXIS 16794 (E.D. La. 2002); James River Equip. Co. v. Beadle County Equip., Inc., 2002 S.D. 61, 646 N.W.2d 265 (2002); Gable v. Boles, 718 So. 2d 68 (Ala. Civ. App. 1998).

18. A unanimous panel of this Court recently rejected a seller's disclaimer in *New York v. Orbital Publ. Group* 169 A.D.3d 564, 95 N.Y.S.3d 28 (1st Dept., 2019)[1] stating, "The disclaimer on the back of the solicitations is insufficiently prominent or clear to negate the overall misleading impression that consumers are being offered standard publisher rates...The disclaimer appears on the back of the solicitation, is not referenced on the front, and consists of two dense paragraphs of block text all in the same typeface, making it unlikely to be read by consumers. In addition, the disclaimer either does not address or directly contradicts several claims made on the front of the solicitation."

19. This Court's approval of an inconspicuous disclaimer that radically alters the purchasers' longstanding reliance on the Tanbook's reliability, accuracy and currentness simply because it was in "bold print" overlooks

[1] Two members of the Orbital panel (Friedman, J. and Gesmer, J) sat on the panel in this case.