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Court of Appeals

of the

State of New York

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

Plaintiffs-Appellants,

– against –

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

Defendant-Respondent.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Respondent Matthew Bender & Co., Inc. ("**Matthew Bender**") respectfully submits this memorandum of law in opposition to the motion of Appellants Himmelstein, McConnell, Gribben, Donaghue & Joseph, LLP ("**Himmelstein**"), Housing Court Answers, Inc. ("**HCA**"), and Michael McKee ("**McKee**") (collectively, "**Appellants**") for leave to appeal the unanimous May 2, 2019 Decision and Order of the Appellate Division, First Department, which affirmed the dismissal with prejudice of all of Appellants' twice-pled causes of action.

PRELIMINARY STATEMENT

Six justices of the Supreme Court, including all five justices on the panel of the Appellate Division, have agreed that the Amended Complaint in this case failed to state any claim against Matthew Bender arising out of alleged "errors" and "omissions" in Part III of the 2016 Tanbook. These justices applied longstanding precedent, and unequivocally concluded that Appellants' various causes of action—for breach of express warranty, breach of the implied covenant of good faith and fair dealing, violation of New York General Business Law § 349 ("**GBL 349**"), fraud, and unjust enrichment—each had multiple deficiencies and failed for numerous, independent reasons. When Appellants requested that the First Department grant them leave to appeal to this Court, the panel quickly denied that request. In short, this was not a close case in any respect, and the lower courts' dismissal and affirmance were entirely routine and uncontroversial.

As a last-ditch effort to keep this litigation alive, Appellants now seek to revive just two of their claims—breach of the implied covenant and violation of GBL 349—by arguing that there are four "grounds" for *certiorari*. (Appellants' Motion for Leave to Appeal to the Court of Appeals ("**Mot.**") at 2-8.) The first ground pertains to the implied covenant claim; the second and third pertain to the GBL 349 claim; and the fourth is a general, vague, and bald contention that the litigation "affects" a broad swath of New Yorkers.

None of these "grounds" comes remotely close to satisfying the exacting criteria for this Court to exercise its discretionary review power. The legal questions presented by Appellants are not "novel or of public importance." N.Y. Comp. Codes R. & Regs. ("**NYCRR**") tit. 22, § 500.22(b)(4). Nor do the lower courts' resolution of those questions "conflict with prior decisions of this Court, or involve a conflict among departments of the Appellate Division." *Id.* And even if any legal question could satisfy those criteria, the Court still could not consider them because Appellants' arguments are (1) unpreserved because they were never raised in the lower courts, and/or (2) wholly academic and would require this Court to issue an improper advisory opinion because there are independent, unappealed grounds for affirmance of the dismissals of both the implied covenant and GBL 349 claims.

SUMMARY OF ARGUMENT

Ground #1 – The Implied Covenant Claim: Appellants challenge the dismissal of the implied covenant claim on the sole ground that the lower courts should not have relied on the express disclaimer of the Tanbook's "ACCURACY, RELIABILITY, OR CURRENTNESS" in the contracts that undisputedly governed Appellants' purchases of that publication. (Mot. at 21-23.) But review of this issue would be inappropriate for at least three independent reasons:

- *First*, there is no question that the issue was not preserved in the courts below; in fact, Appellants do not even attempt to satisfy the requirement that they "identify the particular portions of the record" where the issue was raised. 22 NYCRR § 500.22(b)(4).

- *Second*, the issue is academic because the implied covenant claim was dismissed for the independent reason that it was duplicative of Appellants' breach of warranty claim—an issue that Appellants have never disputed throughout this litigation, and have not even mentioned in the current motion.

- *Third*, Appellants fail to support their conclusory statement that the lower courts' decisions conflict with this Court's precedent. Instead, they rely on a self-serving and circular argument that the express disclaimer of Tanbook content should simply be ignored because it would be contrary to the supposed "*sine qua non* of the transaction." (Mot. at 22.)

Grounds #2 and #3 – The GBL 349 Claim: The Commercial Division and First Department collectively have found that Appellants have failed to satisfy *any* of the three required elements of a GBL 349 claim. Appellants challenge the lower courts' conclusions with respect to only two of those three elements. Those two challenges cannot possibly support a review by this Court:

- Appellants' rhetoric that the First Department's application of this Court's well-settled holding in *Small v. Lorillard* "eviscerates" GBL 349 is not only unpreserved and unsupported, but also manifestly wrong. To the contrary, the application of *Small* to the allegations in this case could not be any more straightforward: Appellants have repeatedly claimed that they "would not have purchased" the Tanbook had they not been deceived about its contents—*precisely* the theory of injury that this Court unequivocally held is not legally cognizable under GBL 349.

- Appellants contend that the First Department's standard for determining whether alleged misconduct is "consumer-oriented" under GBL 349 is inconsistent with the other departments of the Appellate Division. Even putting aside that Appellants mischaracterize the First Department's and Matthew Bender's positions, any alleged departmental "split" is entirely academic because dismissal of the GBL 349 claim is still necessitated by, *inter alia*, the failure to demonstrate a cognizable injury.

Ground #4 – The Alleged "Millions" of New Yorkers "Affected" By Part III of the 2016 Tanbook: Appellants' suggestion that this case "raises issues of significant public importance" because alleged problems with the 2016 Tanbook "affected over one million New York apartments" is pure speculation. (Mot. at 6-8.) In fact, despite two-and-a-half years of litigation, Appellants have never even been able to identify any injury that Appellants *themselves* suffered due to the purported "errors" or "omissions" in Part III of the publication. But even if Appellants could support their claim, this new argument is not only unpreserved, but also irrelevant. Appellants purported to bring this litigation on behalf of a class of Tanbook *purchasers*, and the only relief they sought was recoupment of the book's purchase price. The "over one million" New Yorkers to which Appellants refer cannot possibly receive any tangible benefit from review by this Court.

FACTUAL AND PROCEDURAL BACKGROUND

This memorandum sets forth only the background most pertinent to the current motion and the specific legal questions for which Appellants seek review. To the extent the Court would like a more detailed history, Matthew Bender respectfully refers to the Statement of the Case on pages 5-16 of Matthew Bender's merits brief submitted to the First Department ("**MB App. Br.**").[1]

A. Appellants and Their Annual Purchases of the Tanbook

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

Each of the three Appellants in this case—a real estate law firm, a non-profit housing advocacy group, and a self-described "tenant advocate"—alleged that they purchased Tanbooks in connection with their work or advocacy concerning New York landlord-tenant law. (*See, e.g.*, R51-53.) All three Appellants purchased Tanbooks the same way: Tanbooks were automatically shipped each year along with printed invoices, and upon receipt, Appellants could either (1) retain the

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[1] Matthew Bender relies on Appellants' counsel's email representation that, in accordance with the applicable rules, he filed not only the Record and Supplemental Record on Appeal (cited as "**R**" and "**SR**," respectively), but also Matthew Bender's briefs before the Appellate Division. (*See* Affirmation of Jordan A. Feirman Ex. 1.).

books and pay the invoices, or (2) return the shipment within 30 days without paying. (R48 ¶ 3; R167 ¶¶ 13-14; R168-69 ¶ 21; R170 ¶ 29.) In every pertinent instance in which Appellants received Tanbooks, they expressly and separately opted to pay for the books. (R167 ¶ 16; R169 ¶ 22; R170 ¶ 30.)

B. Terms and Conditions Governing Tanbook Sales to Appellants

Appellants' Tanbook purchases are subject to "Material Terms" and "Additional Terms and Conditions" (collectively, the "**T&C**") set forth in "Agreement and Order Forms" that accompanied the shipments of the Tanbooks. (R166-67 ¶ 11.) Critically, Appellants have never disputed that the T&C—which was introduced as documentary evidence before the Commercial Division—constituted a binding and valid contract governing all of their Tanbook acquisitions.

The T&C provides that it constitutes the "entire agreement" with the purchaser that "supersedes all prior understandings and agreements." (*See, e.g.*, R185-86; R188-89; R191-92; R194-95; R198.) The T&C further sets forth, in all capital letters, that:

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

(*Id.* (emphasis added).)

C. Procedural History

1. The Operative Pleading and Motion to Dismiss

On June 6, 2017, in response to Matthew Bender's motion to dismiss a complaint by Himmelstein, Appellants filed an Amended Complaint, adding HCA and McKee as plaintiffs. (R47-136.) The Amended Complaint largely reiterated the allegations in the initial pleading, asserting claims on behalf of a putative class of Tanbook purchasers for breach of express warranty, violation of GBL 349, fraud, and unjust enrichment, all premised on a theory that Matthew Bender absolutely guaranteed that Part III of the 2016 Tanbook——the section addressing rent stabilization and control—would be complete and without error. (*See, e.g.*, R49 ¶ 7.) The pleading repeatedly alleged that Appellants would not have purchased the Tanbook had they not been deceived by purported misrepresentations concerning the book's completeness. (*See, e.g.*, R48-49 ¶¶ 6, 8; R74 ¶ 92; R78 ¶ 112; R81 ¶ 133.)

In its motion to dismiss the Amended Complaint, Matthew Bender reiterated and explained in detail that Appellants' claims failed for numerous, independent reasons. (SR3-35.) Appellants' opposition filings did not address several of those reasons, but raised for the first time an argument that "The UCC Imposes an Obligation of Good Faith on Merchants." (SR54-55.) Rather than expressly asserting a new claim for breach of an implied covenant, Appellants argued that

this obligation was an "additional safeguard," and generally contended that "Matthew Bender failed to deliver the annual compilation, in its entirety." (*Id.*)

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

On February 6, 2018, Justice Charles E. Ramos of the Commercial Division dismissed the Amended Complaint, concluding that Appellants' claims failed on multiple grounds. (R23-41.) With respect to the two claims for which Appellants now seek review from this Court, Justice Ramos concluded that: (1) the implied covenant claim failed because the alleged implied guarantees of Tanbook completeness and accuracy would impose an obligation on Matthew Bender that is inconsistent with the T&C; and (2) the GBL 349 claim failed because Appellants did not plead facts that would allow a court to infer that sales of the Tanbook were "consumer-oriented," as required by the statute. (R35-39.)

Justice Ramos did not expressly rule on all of the grounds for dismissal raised by Matthew Bender. With respect to GBL 349, Matthew Bender demonstrated that Appellants did not—and could not—plead the other two required elements of that claim: (1) Appellants could not show an injury cognizable under GBL 349, because they alleged only that they would not have purchased the Tanbook had they not been deceived—a theory that is barred by this Court's decision in *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 56 (1999); and (2) Appellants could not plead causation of the alleged injury, because Appellants

never claimed to have even seen the allegedly deceptive "misrepresentations" regarding Tanbook content.

3. *The Appellate Division's Unanimous Affirmance of Dismissal and Denial of Leave to Appeal*

On May 2, 2019, five justices of the Appellate Division, First Department unanimously affirmed the dismissal of all claims. (*See* Affirmation of James B. Fishman ("**Fishman Aff.**") Ex. C.) Most pertinent to the current motion, the panel found the implied covenant and GBL 349 claims each fatally deficient for multiple reasons.

With respect to the implied covenant, the panel agreed with Justice Ramos that the clear disclaimer of Tanbook content in the T&C precluded any claim. (*Id.* at 16.) But the panel also affirmed on the independent ground argued by Matthew Bender that the claim was impermissibly "duplicative of the breach of contract claim." (*Id.*) With respect to GBL 349, the panel affirmed dismissal on the two aforementioned grounds that were argued by Matthew Bender: (1) the alleged injury was not cognizable in light of *Small v. Lorillard*; and (2) causation was lacking for at least those Appellants that never alleged to have even seen the supposed "deceptive representations" concerning the Tanbook. (*Id.* at 16-17.) The panel did *not* refer to Appellants' argument that Tanbook sales are "consumer-oriented" under the statute, or the Commercial Division's holding on that issue.

On May 30, 2019, Appellants moved for reargument or, in the alternative, for leave to appeal to this Court. (Fishman Aff. Ex. E.) As Matthew Bender explained in its opposition, Appellants improperly sought to re-litigate issues that were fully considered by the panel, and present new arguments that were never previously raised. On August 6, 2019, the panel denied Appellants' motion.[2]

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

A. Appellants' Burden to Demonstrate the *Certiorari* Factors

The grounds for leave to appeal to the Court of Appeals are constitutionally limited to where such an appeal is "required in the interest of substantial justice." N.Y. Const. art. 6, § 3(b)(6); *see also Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 298 (1929). In requesting permission to appeal, a movant must demonstrate "why the questions presented merit review by this Court, such as 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." 22 NYCRR § 500.22(b)(4). This *certiorari* standard is strictly applied; because "[t]he primary function of the Court of Appeals is to decide legal issues of State-wide significance," simply "[a]rguing error below is not enough." N.Y.

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[2] Appellants incorrectly state that they were not served with a Notice of Entry of the order denying that motion. (Mot. at 2.) In fact, counsel for Matthew Bender served that notice on August 6, 2019, and it is attached as Exhibit F to the Affirmation submitted to this Court by Appellants' counsel. (*See* Fishman Aff. Ex. F.)

Court of Appeals, *The New York Court of Appeals Civil Jurisdiction and Practice Outline* (“***CoA Outline***”) § II(E)(5);[3] *see id.* § II(B) (counsel must “convince the Court that their case is worthy of the Court’s time and scarce judicial resources”).

B. Appellants Must Demonstrate That All Legal Questions for Which They Seek Review Have Been Preserved Below

Appellants are required to “identify the particular portions of the record where the questions sought to be reviewed are raised and preserved.” 22 NYCRR § 500.22(b)(4); *see also CoA Outline* § V(C)(1)(a) (“Counsel bears the responsibility for showing the Court where each issue raised has been preserved in the record.”). That is because “[t]his Court has no power to review . . . unpreserved error.” *Elezaj v. P.J. Carlin Constr. Co.*, 89 N.Y.2d 992, 994-95 (1997); *see also Bingham v. N.Y.C. Transit Auth.*, 99 N.Y.2d 355, 359 (2003) (“Unlike the Appellate Division, we lack jurisdiction to review unpreserved issues in the interest of justice.”). Accordingly, this Court does not consider issues and arguments unless they were first raised before the trial court. *See, e.g.*, *Gaines v. City of New York*, 29 N.Y.3d 1003, 1005 (2017) (argument was “unpreserved for our review” because party “did not argue [it] before [the] Supreme Court”); *Branch v. County of Sullivan*, 25 N.Y.3d 1079, 1082 (2015) (finding theories “not advanced in Supreme Court . . . unpreserved for our review”); *JF Capital Advisors,*

[3] *Available at* http://www.nycourts.gov/ctapps/forms/civiloutline.pdf (last visited September 12, 2019).

LLC v. Lightstone Grp., LLC, 25 N.Y.3d 759, 767 (2015) (refusing to consider issue "raised for the first time . . . at the Appellate Division").

C. Mere "Academic" Legal Questions That Could Not Alter the Outcome of a Lower Court's Rulings Do Not Warrant Review

It is well-established that this Court is "prohibited from giving advisory opinions or ruling on 'academic, hypothetical, moot, or otherwise abstract questions.'" *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 810-11 (2003) (quoting *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980)). The Court has therefore repeatedly recognized that it is "bound, of course, by principles of judicial restraint not to decide questions unnecessary to the disposition of the appeal." *People v. Carvajal*, 6 N.Y.3d 305, 316 (2005); *see also Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 252 (1999) (explaining that "courts cannot go beyond the issues necessary to decide the case at hand"); *N.Y. Pub. Interest Research Grp., Inc. v. Carey*, 42 N.Y.2d 527, 530 (1977) (noting that the court "should not resolve disputed legal questions unless this would have an immediate practical effect on the conduct of the parties").

II. NONE OF THE LEGAL QUESTIONS PRESENTED BY APPELLANTS IS APPROPRIATE FOR REVIEW BY THIS COURT

Construing their motion as liberally as possible, Appellants present the Court with only ***three*** legal questions that they claim merit review, which Appellants refer to as their "Grounds for Court of Appeals Review." (Mot. at 2.) One of

those legal questions concerns dismissal of the implied covenant claim, and the other two concern dismissal of the GBL 349 claim:[4]

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

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

3) whether the trial court properly applied GBL 349 when it adhered to First Department precedent in determining that Tanbook sales were not "consumer-oriented" (*id.* at 3-5).

None of these questions merits this Court's resources. To the contrary, they reflect routine applications of settled law and, even if they did not, the issues are unpreserved and academic. Nor does Appellants' fourth "ground" for review—their speculation concerning the impact of Tanbook errors on "New York residential apartments"—provide any basis for this Court to permit an appeal; indeed, it doesn't present any "legal question" for the Court to review at all.

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[4] Even if this Court were to grant the current motion—and for the reasons set forth herein, it should not—any appeal would be limited to the three issues to which Appellants have limited their request, and should not extend, for example, to Appellants' breach of express warranty and fraud claims that were dismissed on multiple grounds. *See Quain v. Buzzetta Constr. Corp.*, 69 N.Y.2d 376, 379-80 (1987) (striking portions of appeal that were not within the scope of the issues appellant stated it was raising in its motion for leave to appeal).

A. Appellants' Argument That the T&C's Disclaimer of Tanbook Content Does Not Preclude Their Implied Covenant Claim Is Unpreserved, Academic, and Meritless

Appellants' lone proposed ground for appeal of the dismissal of the implied covenant claim is their contention that the Commercial Division and the First Department should have disregarded the T&C's express disclaimer that Matthew Bender "DO[ES] NOT WARRANT THE ACCURACY, RELIABILITY OR CURRENTNESS" of the Tanbook. (*See* Mot. at 21-23.) That argument, however, should not be reviewed by this Court for at least three reasons.

First, Appellants do not even attempt to satisfy the requirement that they "identify the particular portions of the record" where this issue was "raised and preserved." 22 NYCRR § 500.22(b)(4). And with good reason: Appellants never suggested to the Commercial Division or in their merits briefs on appeal that "[e]nforcing the disclaimer" somehow violated the implied covenant, as they now contend. (Mot. at 22.) In fact, Appellants never mentioned the disclaimer *at all* in the context of defending their implied covenant claim, even when faced with Matthew Bender's direct argument on this exact point. (*See* MB App. Br. at 35-37.) Accordingly, it is beyond question that Appellants have failed to preserve the argument that they now (improperly) request leave to present.

Second, even if the issue had been preserved, review by this Court would still be inappropriate because the application of the disclaimer to the implied

covenant claim is academic, and could not reverse the dismissal of the claim. This is because, contrary to Appellants' assertion, the First Department's rejection of an implied covenant did *not* "rel[y] exclusively" on its conclusion that the claim was precluded by the T&C. (Mot. at 22.) Rather, the First Department also affirmed for the separate reason that the implied covenant claim was "duplicative of the breach of contract claim." (Fishman Aff. Ex. C at 16; MB. App. Br. at 37-38.) As Appellants have never argued otherwise, the issue is undisputed, and any new argument that Appellants may now seek to make on this point would be waived. Accordingly, any review of the implied covenant claim by this Court on the grounds requested by Appellants would be purely advisory.

Third, Appellants fail to support their contention that the lower courts' determination "ignored longstanding precedent from this Court." (Mot. at 21.) Appellants recognize, as they must, that the implied covenant cannot encompass any "obligations 'inconsistent with other terms of the contractual relationship.'" (Mot. at 21 (quoting *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 304 (1983)).) Since Appellants did not dispute—and cannot now dispute—that the T&C governed their purchases, and that the plain text of the T&C expressly disclaims the "ACCURACY, RELIABILITY OR CURRENTNESS" of the Tanbook, the alleged implied guarantee regarding the Tanbook's content is plainly

inconsistent with the parties' governing contracts.[5] Appellants do not cite a single decision from this Court that compels a contrary holding; instead, they rely solely on a self-serving and circular argument that the disclaimer simply cannot apply because it purportedly "destroys the 'basic purpose' of the Tanbook." (Mot. at 22.)

B. Neither of the Proposed Legal Questions Pertaining to Dismissal of the GBL 349 Claim Merits Review

The crux of Appellants' GBL 349 claim was that Matthew Bender deceived them by purportedly misrepresenting that Part III of the 2016 Tanbook was a "complete" and "authoritative source of rent regulation laws and regulations." (R73 ¶ 87.) Appellants were required to plead facts that would have allowed the Commercial Division to infer that: (1) Tanbook sales were "consumer-oriented;" (2) Tanbook sales were "misleading in a material way;" and (3) Appellants suffered a cognizable injury as a result of alleged deception. *See Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000). Between Justice Ramos and the five justices on the First Department panel, all three of these required elements were found to be deficiently pled.

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[5] *See, e.g.*, *Moran v. Erk*, 11 N.Y.3d 452, 457 (2008) (rejecting implied covenant claim where "the plain language of the contract in this case makes clear" that an alleged implied promise did not exist); *Roberts v. Weight Watchers Int'l, Inc.*, 712 F. App'x 57, 60-61 (2d Cir. 2017) (rejecting implied covenant claim under New York law where subscription agreement "expressly provided that Weight Watchers did not warrant that its services would be 'uninterrupted or error-free'").

Appellants only address *two* of those elements, and neither of them provides a legitimate basis for further appeal.

1. Appellants' Argument That the Application of This Court's Well-Settled Holding in Small v. Lorillard *"Eviscerates" GBL 349 Is Unpreserved and Meritless*

Appellants contend that this Court's holding in *Small v. Lorillard* does not preclude their GBL 349 claim. As with their attempt to revive the implied covenant claim, however, Appellants fail to identify where in the record this argument was preserved for appeal. And once again, this is because Appellants never made the argument in the Commercial Division, and thus it has been waived. Indeed, as Matthew Bender pointed out in its reply brief for its Motion to Dismiss (*see* SR72), Appellants' opposition filing "ignore[d] the issue entirely" and did not even mention *Small*—much less dispute Matthew Bender's detailed explanation in its moving brief as to why that holding barred the GBL 349 claim. This failure to preserve the question that Appellants now ask this Court to consider is alone sufficient to bar review by this Court.

At all events, Appellants' argument that the First Department's application of *Small* in this case risks "evisceration of the Deceptive Practices Act" (Mot. at 18) is wholly unsupported, if not frivolous. In *Small*, this Court expressly and unequivocally rejected the contention "that consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices,

have suffered an injury under § 349." *Small*, 94 N.Y.2d at 56. As the First Department correctly concluded, that is *precisely* the theory of injury that Appellants have advanced all along in this case; even applying the most charitable reading of the Amended Complaint, the sole alleged "injury" is that Appellants would not have purchased the Tanbook had they not been purportedly deceived regarding its contents. In that regard, Appellants repeatedly alleged in both their initial and amended pleadings that the Tanbook had "no value" and that they sought monetary damages in the amount of the full purchase price. (*See, e.g.*, R48-49 ¶¶ 6, 8; R74 ¶ 92; R78 ¶ 112; R81 ¶ 133). Moreover, when confronted with these allegations in Matthew Bender's Motion to Dismiss (*see* SR28-30), Appellants not only refused to disavow their theory, but actually doubled and tripled down on the alleged injury in their opposition and subsequent appeal filings.[6] In light of the foregoing, it is difficult to conceive of a more straightforward application of precedent.

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[6] *See, e.g.*, SR44-45 (arguing that the "actual harm" is that Appellants "received a deficient product they would never have bought had they know[n] of those deficiencies"); R226 ¶ 14 & R235 ¶ 22 (asserting in Appellants' sworn affidavits that they "would never have purchased" the Tanbook "[h]ad [they] known that [it was] so deficient"); Opening Brief for Plaintiffs-Appellants to the Appellate Division, at 19-21 (in section titled "The Harm to Appellants, the Class, and Rent Regulated Tenants Generally," claiming that purchasers "received a grossly deficient product they would never have bought had they know[n] of those deficiencies").

Certainly nothing in the current motion should give the Court any pause; if anything, the submission reflects the flimsiness of Appellants' newly minted positions. Appellants principally rely on general, uncontroversial statements about GBL 349 in decisions by *trial courts* that *predate Small by decades*. (*See* Mot. at 19.) They baldly contend that "no court has ever applied . . . *Small* in this manner," conveniently ignoring the numerous contrary authorities cited in the First Department's opinion (Fishman Aff. Ex. C at 16), and in Matthew Bender's prior briefs (SR28-30; MB App. Br. at 43-45)—including a directly on-point decision in which the Second Department, relying on *Small*, dismissed a GBL 349 claim alleging that a class of purchasers "would not have purchased" a novel had they not been allegedly deceived concerning "the true facts about its authorship." *Rice v. Penguin Putnam, Inc.*, 289 A.D.2d 318, 318-19 (2d Dep't 2001). Finally, Appellants' new suggestion that their injury is something other than the purchase price of the book is squarely contradicted by their own pleading and prior litigation statements, and cannot be credited at this stage of the litigation.

2. *The Alleged Department Split Concerning "Consumers" Under GBL 349 Is Academic*

Eager to shoehorn the lower courts' routine and unanimous dismissal of their claims into the enumerated *certiorari* factors, Appellants devote the majority of their motion to presenting an alleged departmental conflict concerning the First Department's longstanding precedent that "consumers" under GBL 349 are "those

who purchase goods and services for personal, family, or household use." *Sheth v. N.Y. Life Ins. Co.*, 273 A.D.2d 72, 73 (1st Dep't 2000). The problem for Appellants, however, is that resolving any alleged split on that question will have no impact on the outcome of *this* case. In fact, as Appellants are forced to acknowledge, *the First Department panel in this case did not rely at all on this ground when rejecting the claim*, or even discuss the "consumer-oriented" requirement of GBL 349 at all. (Fishman Aff. Ex. C at 16-17.) And even if the Court were inclined to conclude that Tanbook sales were "consumer-oriented," as detailed above, Appellants cannot succeed on any argument that they suffered a legally cognizable injury (or show the other required element of causation), thus dooming the GBL 349 claim regardless of this Court's advisory opinion.

Appellants also attempt to create a false sense of importance concerning an alleged departmental "split" by mischaracterizing Matthew Bender's arguments below and First Department precedent. As in prior briefing, Appellants incorrectly suggest that the First Department standard imposes a "restriction" whereby GBL 349 claims categorically cannot be "asserted" by "businesses or professionals." (Mot. at 15.) Appellants even pose a dramatic hypothetical where "the owners of a Bronx corner 'mom and pop' grocery store who purchase a laptop computer" are "victimized by deceptive business practices" but "have no recourse under the Act."

(*Id.* at 17). But Appellants' colorful rhetoric aside, the First Department standard would not compel such a result, nor has Matthew Bender ever suggested as much.

Rather, the relevant analysis is whether *Matthew Bender's practices are targeted* at consumers at large, not whether every single person that might encounter or be impacted by those practices is a "consumer." (*See* MB App. Br. at 41-42.) Even in *Cruz v. NYNEX Information Resources*—the decision so maligned by Appellants that first elaborated the "consumer" standard at issue—the First Department explained that GBL 349's "consumer orientation" limits but "does not preclude its application to disputes between businesses per se." 263 A.D.2d 285, 290 (1st Dep't 2000); *see, e.g.*, *In re Opioid Litig.*, No. 400000/2017, 2018 N.Y. Slip Op. 31228(U), at *21 (Sup. Ct. Suffolk County June 18, 2018) (noting that, "though 'consumers' has been construed to mean those who purchase goods and services for personal, family or household use, courts have recognized the standing of business entities and business-like entities" to invoke the statute). Properly understood, there is nothing inconsistent between the First Department's approach and the general purposes of GBL 349. Not surprisingly, then, Appellants cannot point to any instance in which the First Department standard led to any injustice.[7]

[7] This Court has declined to take appeals of decisions in which the *Cruz* "consumer" standard was expressly addressed and applied by the First and Third Departments to reject GBL 349 claims. *See Benetech, Inc. v. Omni Fin. Grp., Inc.*, 116 A.D.3d 1190 (3d Dep't), *leave to appeal denied*, 23 N.Y.3d 909 (2014); *Sheth v. N.Y. Life Ins. Co.*, 272 A.D.2d 72 (1st Dep't 2000), *leave to appeal denied*, 1 N.Y.3d 505 (2003).

C. Appellants' Suggestion That an Alleged "Failure to Update" the Tanbook Has Affected "Millions" of New Yorkers Is Utterly Speculative, Unpreserved, and Irrelevant to the Proposed Appeal

As a final attempt to persuade the Court that this mundane litigation is worthy of this Court's "scarce resources," Appellants assert that the purported inaccuracies in Part III of the 2016 Tanbook have "affected over one million New York residential apartments" and "therefore raise[ ] issues of significant public importance." (Mot. at 6.) This statement, however, is nothing more than rank speculation; indeed, Appellants do not provide a shred of support for that claim or even explain what it means for an apartment to have been "affected" by the Tanbook. Moreover, to the extent that Appellants now suggest that myriad New Yorkers have somehow been harmed by a "defective publication" (*id.*), that claim is especially dubious given that to this day Appellants themselves—self-professed frequent users of the Tanbook—still have never been able to identify any injury that *they* suffered due to purported inaccuracies or omissions in the publication.[8]

Even if Appellants somehow located evidence of a large number of New Yorkers being "affected" by alleged problems in the Tanbook, that evidence never has been suggested or submitted at any prior stage of the litigation. Consequently, like many of Appellants' other arguments raised for the first time in the current

[8] Indeed, at least two of the Appellants can hardly claim to have been aggrieved at all, given that they chose to pay full price for the 2017 edition of Tanbook after filing this lawsuit. (R228 ¶¶ 24-26; R235 ¶¶ 23-24.)

motion, Appellants' contentions regarding the supposed wide impact of Matthew Bender's conduct are unpreserved and cannot be countenanced.[9]

At all events, whether the alleged inaccuracies in the Tanbook "affected over one million New York residential apartments" is a red herring; it is simply irrelevant to this Court's exercise of discretionary review for at least two reasons.

First, the relevant *certiorari* factor provides that Appellants must show that the "questions presented for review"—that is, the *legal issues*—"are novel or of public importance," not simply that an otherwise straightforward application of settled law may impact a substantial number of people. 22 NYCRR § 500.22(b)(4); *see CoA Outline*§ II(E)(5) ("The primary function of the Court of Appeals is to decide *legal issues* of State-wide significance" (emphasis added)); *id.* § III(A) (explaining that the "*[q]uestion of law* should be 'novel or of public importance . . .'" (emphasis added)); *cf. Anonymous v. N.Y. City Health & Hosps. Corp.*, 70 N.Y.2d 972, 974 (1988) (noting that "the narrow jurisdictional context of this case presents no novel, constitutional or substantial legal question for this court's review").

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[9] Equally unpreserved are Appellants' contentions concerning the *2019* Tanbook, which is not a subject of this lawsuit and was issued long after dismissal of the pleading. Appellants' new allegations also have zero substantive value; Appellants take issue with Matthew Bender's issuance of the 2019 edition prior to the enactment of new laws later in the year, but ignore the First Department's unchallenged holding that Appellants cannot identify any requirement that Matthew Bender issue updates of the Tanbook at any particular time. (Fishman Aff. Ex. C at 16.)

Second, Appellants' attempt to co-opt the purported injury of "over one million" apartments "affected" by the Tanbook is disingenuous because that suggests a population that is exponentially larger than the number of people that could possibly be directly impacted by this Court's review. Appellants purported to bring their action on behalf of a putative class composed only of *purchasers* of the Tanbook, and the relief that they sought in the Amended Complaint was limited to their recoupment of the *purchase price* of the publication. (*See, e.g.*, R48-49 ¶¶ 6, 8; R74 ¶ 92; R78 ¶ 112; R81 ¶ 133.) Even in the current motion, Appellants only claim that they received a book that was "significantly less valuable than the one Bender promised." (Mot. at 20.) Appellants have never suggested that hypothetical New York tenants somehow impacted by "omissions" in Part III of the 2016 Tanbook would share in any compensation recovered in this litigation. Combined with Appellants' failure to point to any injury that even they suffered due to those "omissions," it strains credulity for Appellants to now tell this Court that its review of narrow legal questions regarding the implied covenant of good faith and fair dealing and GBL 349 are of paramount importance to the State of New York.

CONCLUSION

For the reasons set forth above, the arguments made by Appellants in the current motion are both too little and too late. After two-and-a-half years of addressing Appellants' meritless claims, it is time for this litigation to conclude.

Matthew Bender therefore respectfully submits that this Court should deny Appellants' motion for leave to appeal to this Court in its entirety.

Dated: New York, New York
September 13, 2019

Respectfully submitted,

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Attorneys for Defendant-Respondent
Matthew Bender & Co., Inc.

CORPORATE DISCLOSURE STATEMENT

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

(1) The following are Matthew Bender's corporate parents:

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

(2) The following are Matthew Bender's affiliates:

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

(3) Matthew Bender has no subsidiaries.

COURT OF APPEALS
STATE OF NEW YORK

HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC., and MICHAEL McKEE,	:	A.D. Case No. 2018-1250
Plaintiffs-Appellants,	:	N.Y. Cty. Index No. 650932/2017
- against -	:	
MATTHEW BENDER & COMPANY, INC., A MEMBER OF LEXISNEXIS GROUP, INC.,	:	
Defendant-Respondent.	:	

AFFIRMATION OF JORDAN A. FEIRMAN

Jordan A. Feirman, an attorney duly admitted to practice law in the State of New York, hereby affirms under penalty of perjury pursuant to CPLR 2106 as follows:

1. I am a member of the bar of the State of New York and an attorney at Skadden, Arps, Slate, Meagher & Flom, LLP, counsel for Defendant-Respondent Matthew Bender & Company, Inc. ("Matthew Bender"). I submit this affirmation in support of Matthew Bender's Opposition to Appellants' Motion for Leave to Appeal to the New York State Court of Appeals.

2. Attached hereto as Exhibit 1 is a true and correct copy of email correspondence between me and Appellants' outside counsel, James B. Fishman, on September 6, 2019.

I affirm under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
September 13, 2019

Jordan A. Feirman

EXHIBIT 1

From: James Fishman <jfishman@fishmanlaw.nyc>
Sent: Friday, September 06, 2019 5:45 PM
To: Feirman, Jordan (NYC)
Cc: Dreyer, Anthony J (NYC); Gimelstein, Shelli (NYC)
Subject: [Ext] Re: Himmelstein v. Matthew Bender - Motion for Leave to Appeal

Yes. As I stated previously.

Sent from my iPhone

On Sep 6, 2019, at 4:08 PM, Feirman, Jordan <Jordan.Feirman@skadden.com> wrote:

> James,
> We are operating in good faith to determine what has been submitted to the Court of Appeals, as that obviously impacts our response. So as to avoid any ambiguity, are you confirming that you filed (1) a complete copy of the record/supplementary record before the First Department, and (2) copies of *Matthew Bender's* briefs filed below? If not, please explain how those are not required in light of Rule 550.22(c).
> **Jordan Feirman**
> **Skadden, Arps, Slate, Meagher & Flom LLP**
> **Four Times Square | New York | 10036-6522**
> **T: 212.735.3067 | F: 917.777.3067**
> **jordan.feirman@skadden.com**
>
> ---
>
> **From:** James Fishman [mailto:jfishman@fishmanlaw.nyc]
> **Sent:** Friday, September 06, 2019 4:02 PM
> **To:** Feirman, Jordan (NYC)
> **Cc:** Dreyer, Anthony J (NYC); Gimelstein, Shelli (NYC)
> **Subject:** [Ext] Re: Himmelstein v. Matthew Bender - Motion for Leave to Appeal
>
> We filed everything required by the Court's rules
>
> Sent from my iPhone
>
> On Sep 6, 2019, at 1:47 PM, Feirman, Jordan <Jordan.Feirman@skadden.com> wrote:
>
> > James,
> > Rule 500.22(c) requires the movant to file with the Court of Appeals both a copy of the record below and a copy of the briefs filed below by each of the parties. Can you confirm that you've done so? I see a reference in Paragraph 2 of your Affirmation to submission of the record and only *Appellants'* main and reply briefs to the First Department—not Matthew Bender's. And one of the Exhibits to your affirmation is Appellants' motion for reargument, but there is no reference to Matthew Bender's response thereto.
> > Thank you,
> > **Jordan Feirman**
> > **Skadden, Arps, Slate, Meagher & Flom LLP**
> > **Four Times Square | New York | 10036-6522**
> > **T: 212.735.3067 | F: 917.777.3067**
> > **jordan.feirman@skadden.com**

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Further information about the firm, a list of the Partners and their professional qualifications will be provided upon request.

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Further information about the firm, a list of the Partners and their professional qualifications will be provided upon request.

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COURT OF APPEALS
STATE OF NEW YORK

HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC., and MICHAEL McKEE,	A.D. Case No. 2018-1250
Plaintiffs-Appellants,	N.Y. Cty. Index No. 650932/2017
- against -	
MATTHEW BENDER & COMPANY, INC., A MEMBER OF LEXISNEXIS GROUP, INC.,	
Defendant-Respondent.	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Jordan Feirman, being duly sworn, deposes and says:

1. I am not a party to the action, am over 18 years of age and reside in New York, New York.

2. On September 13, 2019, I served two true copies of Defendant-Respondent's ***Opposition to Motion for Leave to Appeal to the Court of Appeals*** by Federal Express, overnight delivery upon:

James Bart Fishman
FishmanLaw, PC
305 Broadway, Suite 900
New York, NY 10007

Jeffrey Elias Glen
Anderson Kill
1251 Avenue of the Americas
New York, NY 10020

Sworn to before me this
13th day of September 2019

Notary Public

MAXIMILIAN M RIEF
Notary Public, State of New York
No. 01RI6345728
Qualified in New York County
Commission Expires 08/01/2020