

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

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JULIO CESAR PUAC,

Index No: 702770/2022

Plaintiff,

-against-

BG 37TH AVENUE REALTY LLC AND LINE VENTURE  
GROUP LLC,

Defendants.

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BG 37TH AVENUE REALTY LLC,

Third-Party Index No.:

Third-Party Plaintiff,

-against-

UNIVERSITY ORTHOPEDICS OF NEW YORK, PLLC,  
STEVEN TOULIOPOULOS, M.D., UNION SPINE SURGERY,  
P.C., ANDREW MEROLA, M.D., ALL COUNTY FOOT &  
ANKLE LLC, GIANNI PERSICH, DPM, WILLIAM L. KING,  
M.D., WILLIAM L. KING, M.D. PC, NEXUS PHYSICAL  
THERAPY P.C., MANGOOS PHYSICAL THERAPY P.C., PAIN  
PHYSICIANS NY P.C., KOLB RADIOLOGY, P.C., and  
THOMAS KOLB, M.D.,

Third-Party Defendants.

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**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE KOLB  
DEFENDANTS' MOTION TO DISMISS THE THIRD-PARTY COMPLAINT**

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**TABLE OF CONTENTS**

	<b>Page</b>
PRELIMINARY STATEMENT .....	1
ARGUMENT .....	1
I.    The Third-Party Complaint Fails to State a Fraud Claim Against the Kolb Defendants .....	1
II.   The GBL § 349 Claim Against the Kolb Defendants Should Be Dismissed.....	2
CONCLUSION .....	3

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Clayton v. Katz</i> , 2012 WL 4378035 (S.D.N.Y. Sept. 25, 2012) .....	2
<i>Gaidon v. Guardian Life Ins. Co. of Am.</i> , 94 N.Y.2d 330 (1999) .....	2
<i>N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.</i> , 102 A.D.3d 5 (2d Dep’t 2012) .....	2
 <b>Rules/Statutes</b>	
CPLR 1007 .....	3
CPLR 3016(b). ....	1
CPLR 3211(a)(3) .....	1
CPLR 3211(a)(7) .....	1

The Kolb Defendants<sup>1</sup> respectfully submit this reply memorandum of law in further support of their motion to dismiss BG37's Third-Party Complaint with prejudice pursuant to CPLR 3211(a)(3) and (a)(7) and 3016(b).

### **PRELIMINARY STATEMENT**

Failing (i) to cite to any allegation of alleged involvement of the Kolb Defendants in the purported fraud asserted in the Third-Party Complaint, (ii) to address the threshold issue of its standing to bring a GBL § 349 claim, and (iii) to confront the question whether the Kolb Defendants engaged in "consumer-oriented" conduct under the GBL claim (they did not), BG37's broad-brush opposition to the Kolb Defendants' motion to dismiss evades any engagement with the dispositive issues presented in that motion. The Third-Party Complaint should accordingly be dismissed.

### **ARGUMENT**

#### **I. The Third-Party Complaint Fails to State a Fraud Claim Against the Kolb Defendants.**

As presented in the Kolb Defendants' moving brief, the fraud claim fails to satisfy CPLR 3016(b)'s heightened pleading requirements and is otherwise insufficiently pleaded because it does not—and cannot—aver that the Kolb Defendants made a material misstatement to BG37, made such a statement or statements with intent to defraud, or that BG37 reasonably relied on any such statement. *See* Br. 4-8. In response, BG37 is silent other than to intone that "the [C]omplaint was extremely specific as to the fraud at hand." Tand Aff. (NYSCEF No. 162) ¶ 32; *see also id.* ¶ 31 (Complaint provided an "extremely specific description of the fraud at play"). In wholly declining to engage with the Kolb Defendants' argument as to the absence of a pleaded fraud allegation

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<sup>1</sup> Defined terms in this reply brief have the same meaning as in the Kolb Defendants' moving brief (NYSCEF No. 142) ("Br.").

against them, BG37 effectively concedes that the fraud claim should be dismissed for the reasons stated in the Kolb Defendants' moving brief.

## **II. The GBL § 349 Claim Against the Kolb Defendants Should Be Dismissed.**

BG37 also fails to address the argument that it lacks standing to recover damages. BG37's alleged damages are derivative of the allegedly unnecessary health care services received by Puac and his related legal claims against BG37. Indeed, BG37 characterizes its damages as the "significant resources" it has expended "investigating and defending specious claims concocted by a network of sophisticated fraudsters." Tand Aff. ¶ 38. BG37 thus confirms that its claimed loss is derivative of Puac's alleged legal claims, foreclosing its GBL § 349 claim. *See* Br. 8-10.

Even if standing were present, BG37 also fails to state a GBL § 349 claim against the Kolb Defendants. BG37 argues that it has pleaded "consumer-oriented" conduct against all of the moving Third-Party Defendants, Tand Aff. ¶ 36, and that the Third-Party Defendants "define the applicable case law much too literally in a misguided attempt to escape liability." *Id.* ¶ 39. But the cases upon which BG37 relies underscore that GBL § 349 "is limited in its application to those acts or practices [that] undermine a consumer's ability to evaluate his or her market options and to make a free and intelligent choice," such as misleading marketing or promotions directed to consumers. *N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5, 13 (2d Dep't 2012); *see Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 342-44 (1999) (cited by BG37, Tand Aff. ¶ 33) (complaint adequately alleged that defendant insurance companies' marketing of so-called "vanishing premium" life insurance policies violated GBL § 349; consumer-oriented conduct pleaded because practices at issue "involved an extensive marketing scheme that had a broader impact on consumers at large") (internal quotation marks omitted); *Clayton v. Katz*, No. 10 CIV. 5755 ALC, 2012 WL 4378035, at \*5 (S.D.N.Y. Sept. 25, 2012) (cited by BG37, Tand Aff. ¶ 34) ("promotional lecture" concerning medical device not consumer-oriented because

“directed at physicians,” not “ultimate consumer”). Here, BG37 does not allege that the Kolb Defendants engaged in any promotional acts or practices directed at consumers, much less acts or practices that caused Puac to be referred to them, or that they otherwise engaged in misleading promotions to physicians to generate referrals. The GBL § 349 claim should accordingly be dismissed. *See* Br. 10-11.

### **CONCLUSION**

For the reasons submitted herein, as well as the reasons stated in the Kolb Defendants’ moving brief, the Kolb Defendants respectfully request that the Court grant their motion to dismiss the Third-Party Complaint with prejudice.<sup>2</sup>

Dated: New York, New York  
June 27, 2025

Respectfully submitted,

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<sup>2</sup> In addition to the arguments set forth herein, the Kolb Defendants, as applicable, hereby incorporate the additional arguments for dismissal presented by co-Third-Party Defendants, including, but not limited to, the impropriety of the Third-Party Complaint under CPLR 1007.