UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT TOMASSINI, ***on behalf of himself and all others similarly situated,***

Plaintiff,

vs. **3:14–cv–1226 (MAD/DEP)**

FCA US LLC, *formerly known as Chrysler Group LLC***,**

Defendant.

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Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff commenced this putative class action on September 8, 2014. *See* Dkt. No. 1-1 at 2-32 ("Complaint"). After Defendant's motion to dismiss, the surviving cause of action is for violating New York General Business Law § 349 ("§ 349" or "Section 349") under a theory of failure to disclose a defect of the metal alloy valve stems within the tire pressure monitoring system ("TPMS") on certain minivans. *See id.* Presently before the Court is Defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See* Dkt. No. 84. Defendant, in a separate motion, seeks to exclude the owners of vehicles that have not had corrosion of the tire valve stems from the putative class. *See* Dkt. No. 85.

II. BACKGROUND

In January 2012, Plaintiff purchased a used model-year 2010 Town and Country minivan ("the Minivan") from JJT, a wholesale vehicle business owned by a friend. *See* Dkt. No. 146 at 2. At the time Plaintiff purchased the Minivan, it had been driven for 36,631 miles, and Plaintiff understood that the manufacturer's basic limited warranty had expired. *See id.* The Minivan was equipped with a Tire Pressure Monitoring Systems ("TPMS"), which measures the air pressure in

the tires and reports low pressure to the driver. *See id.* at 10. Since Plaintiff has owned the Minivan, Plaintiff has experienced two instances of valve stem failure, which he attributes to corrosion on the valve stems. *See id.* at 10. The first leak occurred in August 2013 when the Minivan had been driven for 47,000-plus miles. *See id.* at 11. On that occasion, the TPMS unit illuminated alerting Plaintiff to low tire pressure, and Plaintiff attempted to put air in the tire, but the "valve stem connector" snapped off. *See id.* at 11-12. The tire maintained air pressure so Plaintiff was able to drive the Minivan to a repair shop where the TPMS unit was replaced at a cost of $120.35 to Plaintiff. *See* Dkt. No. 116-13 at 131. The valve stem and the TPMS unit that were removed from the Minivan were not preserved. *See id.* at 129, 131.

On or before June 9, 2014, Plaintiff noticed that the right rear tire of the Minivan was soft while it was parked in his home garage. *See* Dkt. No. 117 at 13. When Plaintiff removed the valve stem cap he noticed that the valve was "corroded." *See id.* Plaintiff did not attempt to put air into the tire because he was concerned that the stem might snap off. *See id.* at 13; Dkt. No. 116-13 at 139. He brought the Minivan to an auto repair shop and decided to replace the Chrysler TPMS unit with a simple, rubber valve stem at a cost of $13.50, which does not function with the TPMS. *See* Dkt. No. 116-13 at 144, 146, 149, 215. Plaintiff called two Chrysler service centers, Binghamton Chrysler and Royal Chrysler. *See id.* at 145. Plaintiff inquired of both if there was a replacement TPMS unit for the Minivan, but both responded that the TPMS unit had been redesigned and improved for some vehicles but not Plaintiff's vehicle. *See id.* at 145. After the TPMS unit was removed from Plaintiff's vehicle, he sent it to his attorney for analysis. *See id.* at 147. At the time of Plaintiff's deposition, he was awaiting Defendant's inspection of the Minivan related to this litigation and then he planned to replace the TPMS valve units. *See id.* at 210-11.

In June 2009, Plaintiff searched the internet for information on corrosion of the valve stems and TPMS units on Defendant's vehicles, and he found that other consumers were making similar complaints about corrosion and valve stem failure. *See* Dkt. No. 117 at 14. On June 9, 2014, Plaintiff called Defendant to report that he had a valve stem leak and he was looking for an explanation for that failure. *See id.* at 143, 155. Plaintiff was advised that the cracked valve stem was the result of living in a high salt areas. *See* Dkt. No. 116-11. Defendant advised Plaintiff on June 24, 2014 that, according to available information, there were no recalls or technical service bulletins regarding his concern. *See id.* Defendant also advised Plaintiff that the Minivan was designed, engineered, and built in this way and any additional information was either unavailable or considered proprietary. *See id.*

The 2010 Chrysler Town and Country vehicle had valve and nut components on the TPMS unit made of aluminum alloy. *See* Dkt. No. 116-2. In an undated report, two different series of aluminum alloy, AL 2011 (the "2000 series") and AL 6061 (the "6000 series") were tested and compared. *See id.*; Dkt. No. 116-1. It was found that the corrosion resistance of the 2000 series is inferior to the corrosion resistance of the 6000 series, and it states that "[t]his resistance is most likely linked to the amount of copper found in the alloy." *See id.* (documenting that the percentage of copper content in the 2000 series is greater than in the 6000 series). The environmental corrosion test demonstrated that the 6000 series aluminum has a better resistance to "salt fog" than the 2000 series. *See id.* (finding that the resistence to corrosion of the 6000 series is more than double). The environmental corrosion test utilized the wheel units with and without valve stem caps. *See id.*

Defendant's documents outline a proposed change from the aluminum 2000 series to the 6000 series for the valve stem and nut on the TPMS units. *See* Dkt. No. 116-2. These documents

are dated March through May 2010. *See id.* Defendant notes in these documents that a change of aluminum series is recommended even though the 2000 series aluminum was meeting the current corrosion requirements from Chrysler. *See id.* The switch to the 6000 series of aluminum alloy in the nut and valve stem was planned for within one year but notes that there is an additional cost. *See id.*

A materials engineering lab report completed on April 21, 2010 documented a fracture analysis on several tire pressure parts, which states that "[s]everal field issues have been re[p]orted from fleets related to the TPS." *See* Dkt. No. 116-5. The report posed two possible causes to the valve stem fractures – intergranular corrosion or stress corrosion cracking – but concludes based upon the analysis that the valve stem fractures submitted were caused by stress corrosion cracking. *See id.* In a second materials engineering lab report dated April 1, 2011, the tire pressure monitor/valve stem submitted is noted to have failed, and the analysis was requested by the safety office. *See* Dkt. No. 116-6. This analysis also concluded that the fracture was most likely caused by stress corrosion cracking due to the presence of chlorine, which was verified as present in the corrosion products found on the valve body. *See id.* The report posited that the chlorine could be from calcium chloride, a known road de-icer. *See id.*

An e-mail from within Chrysler, dated April 29, 2010, explains that "Stress Corrosion Cracking is the unexpected sudden failure of normally ductile metals subjected to a tensile stress in a corrosive environment, especially at elevated temperature in the case of metals." *Id.* According to the e-mail, "metal parts with severe SCC can appear bright and shiny, while being filled with microscopic cracks" which "makes it common for SCC to go undetected prior to failure." *Id.* Further, the e-mail states that SCC "often progresses rapidly," produces "catastrophic cracking," and leads to "devastating and unexpected failure." *Id.* In this 2010 e-

mail correspondence, the issue of communication with the fleet customer and the regular retail customer is specifically contemplated. *See id.* The Chrysler author of the e-mail contemplates a disclosure to customers to "keep the original valve stems caps firmly in place and keep the valve stems clean and free from corrosive elements." *Id.* Also, the Chrysler author indicates that, under certain conditions, "some additional unknown action by the customer might be required to reduce the likelihood of future breakage." *See id.*

On September 8, 2014, Plaintiff commenced this action in New York Supreme Court, Broome County, by the filing of a summons and class action complaint with the Broome County Clerk. *See* Dkt. No. 1-1 at 1-2. Defendant removed the instant case to this Court on October 8, 2014, pursuant to the Class Action Fairness Act codified at 28 U.S.C. § 1332(d)(2). *See* Dkt. No. 1-2. After a Rule 12(b)(6) motion, Plaintiff's remaining cause of action is for unfair and deceptive trade practice in violation of New York General Business Law § 349. *See id.* at ¶¶ 55-81. Plaintiff claims that Defendant has concealed or failed to notify the public of the existence and nature of the TPMS defect or of the possible safety issues presented by the defect. *See* Dkt. No. 1-1 at ¶ 7. Plaintiff seeks damages and "a declaratory judgment requiring [Defendant] to warn all purchasers and potential purchasers of Chrysler Minivans about the defective TPMS valve stems." *Id.* at ¶¶ 64-65, 81, 85. Plaintiff defined the class, which he seeks to represent, as "[a]ll residents of the State of New York who purchased and/or leased the following Chrysler Minivans: (a) the 2008-2011 Chrysler Town & Country; and (b) the 2008-2011 Dodge Grand Caravan, which were first sold or leased as new vehicles on or after June 10, 2009." *Id.* at ¶ 45.

Presently before the Court is Defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Rule 56"). *See* Dkt. No. 84.

III. DISCUSSION

A. Legal Standards

"'[S]ummary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law.'" *Salahuddin v. Goord*, 467 F.3d 263, 272 (2d Cir. 2006) (quoting *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). When analyzing a summary judgment motion, it is not the court's function "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,'which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

> Where, as here, the nonmovant bears the burden of proof at trial, the movant may show prima facie entitlement to summary judgment in one of two ways: (1) the movant may point to evidence that negates its opponent's claims or (2) the movant may identify those portions of its opponent's evidence that demonstrate the absence of a genuine issue of material fact, a tactic that requires identifying evidentiary insufficiency and not simply denying the opponent's pleadings.

Salahuddin, 467 F.3d a t 272-73.

If "a properly supported motion for summary judgment is made," then the burden of production shifts to the non-movant to "set forth specific facts showing that there is a genuine issue" of material fact. *Anderson*, 477 U.S. at 250 (internal quotation marks and citation omitted). In assessing the record to determine whether a genuine issue of material fact exists, the court is required to resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving

party. *See Shapiro v. Berkshire Life Ins. Co.*, 212 F.3d 121, 124 (2d Cir. 2000). A party opposing a motion for summary judgment may not simply rely on the assertions in its pleading, but the party can oppose by any evidentiary materials such as "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials. FED. R. CIV. P. 56(c), (e)*; see also Celotex*, 477 U.S. at 324.

B. Unfair and Deceptive Trade Practice

Plaintiff alleges that Defendant violated New York General Business Law § 349 by intentionally failing to disclose material information. *See* Dkt. No. 1-1. Specifically, Plaintiff claims that failing to disclose the "known defects in the TPMS valve stem[s] and the known risks associated therewith" to consumers at the time of sale of Defendant's minivans and post-sale. *See* Dkt. No. 1-1 at ¶ 60(a)-(b). General Business Law § 349 provides protection to consumers from "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. G.B.L. § 349(a). "The law is a broad, remedial statute designed to address 'the numerous, ever-changing types of false and deceptive business practices which plague consumers in [New York] State.'" *Braynina v. TJX Cos.*, No. 15 Civ. 5897, 2016 WL 5374134, *4 (S.D.N.Y. Sept. 26, 2016) (quoting *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 291 (1999)); *see also Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 (2002) ("The statute seeks to secure an honest market place where trust, and not deception, prevails." (citations and quotations omitted)).

There are three elements to a General Business Law § 349 cause of action: "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000); *see also Goshen*, 98 N.Y.2d at 324.

1. Consumer-Oriented Conduct

Consumer-oriented conduct encompasses acts or practices that "have a broad impact on consumers at large; '[p]rivate contract disputes unique to the parties . . . would not fall within the ambit of the statute.'" *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 320 (1995) (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995)). Conduct that is sufficiently consumer oriented includes practices that constitute "a standard or routine practice that was 'consumer-oriented in the sense that [it] potentially affect[ed] similarly situated consumers.'" *N. State Autobahn, Inc. v. Progressive Ins. Group Co.*, 102 A.D.3d 5, 12 (2d Dept. 2012) (internal citations omitted). On this motion, Defendant does not dispute that the act was consumer-oriented. *See* Dkt. No. 84.

2. Materially Misleading Act or Practice

With regard to the second element, the New York Court of Appeals has adopted "an objective definition of deceptive acts and practices." *Oswego*, 85 N.Y.2d at 26. The test is whether the misrepresentation or omission is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Id.* at 26. It should be noted that this test can be determined as a matter of law or fact depending on the case. *See id.*

In the case of omissions, which is the case here, the General Business Law "does not require businesses to ascertain consumers' individual needs and guarantee that each consumer has all relevant information specific to its situation. The scenario is quite different, however, where the business alone possesses material information that is relevant to the consumer and fails to provide this information." *Id.* A business's failure "to disclose to consumers material, relevant information the business alone possesses is actionable under [GBL] § 349 without reference to any special relationship between the consumer and the business." *Chiarelli v. Nissan N. Am.*,

Inc., No. 14–CV–4327, 2015 WL 5686507, *12 (E.D.N.Y. Sept. 25, 2015) (internal citations and quotation marks omitted). Said another way, "whether there is a legal duty is not the operative focus under the GBL." *Id.*

Defendant argues that Plaintiff was not subjected to a deceptive act or practice because Plaintiff knew the terms of the bargain. *See* Dkt. No. 84-4 at 10-12. In particular, Plaintiff was aware that the vehicle could degrade or corrode, requiring repairs that Plaintiff would be responsible for paying. *See id.* at 10-12. Defendant argues that, under the facts in this case, no reasonable consumer would expect that the purchased vehicle would be free of defects or that it would not require repairs at the owner's expense. *See id.* In Defendant's view, there was no deceptive practice as a matter of law because the terms of the bargain were fully disclosed. *See id.* Defendant likens this case to *Lebowitz v. Dow Jones and Co.*, 508 Fed. Appx. 83 (2d Cir. 2013).

At issue in *Lebowitz* was a subscriber agreement that included an online subscription to another publication under the terms of the agreement, but the subscriber agreement also reserved the right to discontinue the services available at any time. *See id.* at 84. The plaintiff, there, argued that the defendant should have advised the consumers that it was considering spinning off the other publication into its own subscription. *See id.* at 85 The Second Circuit concluded that there was not a violation of GBL § 349 because the "terms of the bargain" were fully disclosed to the plaintiff. *Id.*

In its motion, Defendant frames the alleged deceptive practice in broad terms, i.e. the corrosion of the vehicle. *See* Dkt. No. 84-4. Defendant claims that Plaintiff was aware that corrosion could occur on the Minivan and, therefore, knew the terms of the bargain. *See id.* However, Plaintiff alleges a specific deceptive omission, which is the failure to disclose a latent

defect in the materials used in the valve stem on the TPMS unit, and Defendant knew of this defect in the material at the time Plaintiff purchased the vehicle. *See* Dkt. No. 1-1 at ¶¶ 55-65.

Because, in this Court's view, Defendant has improperly framed the allegations, it has not met its initial burden of identifying the basis for its motion. Moreover, the evidence in the record does not established that the terms of the bargain were fully disclosed, such was the case in *Lebowitz*. Plaintiff has submitted evidence documenting that as early as March 2010 Defendant was aware of a recommendation to change the aluminum alloy series. *See* Dkt. No. 116-2. Plaintiff also submitted an April 2010, materials engineering lab report prepared by Defendant documenting an analysis on the valve stem fractures and concluding that the fractures were caused by stress corrosion cracking, also referred to as "SCC." *See* Dkt. No. 116-2. In another report dated April 2011, Defendant analyzed a failed TPMS unit and valve stem, and Defendant concluded that the failure was most likely caused by stress corrosion cracking due to the aluminum alloy's interaction with calcium chloride, a known road de-icer. *See* Dkt. No. 116-6. In an e-mail from Defendant, dated April 2010, it is explained that it is common for stress corrosion cracking to go undetected prior to devastating and unexpected failure because the metal appears shiny but contains microscopic cracks. *See* Dkt. No. 116-6. This e-mail also documents that Defendant contemplated communication of these findings to the consumers, noting that "some additional unknown action by the customer might be required to reduce the likelihood of future breakage." *Id.*

The Court finds that Plaintiff's knowledge that corrosion could occur on his vehicle does not preclude his Section 349 claim for Defendant's failure to disclose that it manufactured vehicles with inferior material causing undetectable cracks that have lead to devastating and unexpected failure. Considering the evidence submitted, the Court finds that Defendants have not

demonstrated a basis for its contention that the terms of the bargain were fully disclosed, precluding a Section 349 claim. Moreover, the evidence submitted by Plaintiff raised a genuine question of material fact, precluding summary judgment.

Defendant also contends that a Section 349 claim of omission cannot be established in the circumstances of this case. Specifically, Defendant argues that it is not a Section 349 omission when a Plaintiff is not told that his tire valve stems might corrode. *See* Dkt. No. 84-4 at 13. The Court finds that Defendant has again improperly defined the alleged omission. The ommission is not Defendant's failure to disclose that valve stem corrosion could occur. It was the non-disclosure of a known defect in the materials used in the TPMS unit, i.e. the use of a metal determined to be failing due to stress corrosion cracking, that Plaintiff is alleging as the omission. Whether a reasonable consumer acting reasonably would be misled by Defendant's omission that the aluminum alloy used was failing due to stress corrosion cracking is a genuine question of material fact for a jury and not for the Court's resolution. It is not dispositive as a matter of law that Plaintiff knew the Minivan will generally corrode because the non-disclosure was the alleged known defect and not the corrosion.

Defendant also argues that the knowledge of potential degradation of the TPMS units including the valve stems, was available to the public and, thus, not within Defendant's exclusive knowledge. *See* Dkt. No. 84-4 at 14-16. Defendant claims that the availability of this information was in consumer complaints, the Transport Canada investigation, and the owners manual to the Minivan. *See id.* It is Defendant's position that the availability of this information removes this case from the liability of a deceptive omission under Section 349. *See id.*; *Lebowitz,* 508 Fed. Appx. at 85 ("Where a claim alleges an omission, a Section 349(a) claim stands only 'where business alone possesses material information that is relevant to the consumer and fails to

provide this information.'" (quoting *Oswego*, 85 N.Y.2d at 26 (1995))). It may be true that these sources were available to the public and not within the exclusive knowledge of Defendant, *see* Dkt. No. 1-1 at 33-88, but their accessibility to the public does not insulate Defendant from liability under Section 349 under the facts in this case.

Defendant attempts to limit the material information to just the "potential degradation of the TPMS units and their valve stems." *See* Dkt. No. 84-4 at 15. According to Defendant, the availability of the customer complaints to the public demonstrates as a matter of law that Defendant was not in exclusive possession of the knowledge that tire valve stems were breaking, requiring replacement of the TPMS units in certain vehicles manufactured by Defendant. *See id.* However, as discussed in this decision, the material information is not limited to the breakage of valve stems due to corrosion; the material information included that Defendant identified and knew of the defect in its product – the inferior aluminum alloy found to be vulnerable to stress corrosion cracking. Although knowledge of reported broken valve stems was knowable by the public, the alleged defect was not public knowledge. Defendant advised Plaintiff on June 24, 2014, that there were no recalls or technical service bulletins regarding Plaintiff's concern. *See* Dkt. No. 116-11. Documents from Defendant contemplate communicating their knowledge of the inferior alloy to its consumers, both the fleet customer and the regular retail customer in April 2010. *See* Dkt. No. 116-4. Accordingly, the Court finds that this contention also fails because there is evidence that material information was within Defendant's exclusive knowledge, which raises a question of material fact.

Next, Defendant claims that judgment should be granted in its favor because the information allegedly withheld was not material to Plaintiff. *See* Dkt. No. 84-4 at 16-18. Defendant cites that Plaintiff did not look into the history of the Minivan prior to purchase, and he

bought it without knowing the details of its maintenance, among other things. *See id.* Plaintiff argues that this evidence demonstrates as a matter of law that the TPMS and valve stems on the Minivan were "***completely immaterial*** to Plaintiff's purchasing decision." *See id.* at 16. This argument is fatally flawed because Defendant relies upon Plaintiff's subjective decision, which is not dispositive.

"The New York Court of Appeals has established an objective standard for determining whether acts or practices are materially deceptive or misleading 'to a reasonable consumer acting reasonably under the circumstances.'" *Goldemberg v. Johnson & Johnson Consumer Cos.*, 8 F. Supp. 3d 467, 478 (S.D.N.Y. 2014) (quoting *Oswego*, 85 N.Y.2d at 26); *see also Paulino v. Conopco, Inc.*, No. 14–CV–5145, 2015 WL 4895234, *4 (E.D.N.Y. Aug. 17, 2015) ("Courts apply an objective standard in determining whether acts or practices are materially deceptive or misleading to a reasonable consumer acting reasonably under the circumstances." (internal quotation marks and citations omitted)); *Dash v. Seagate Tech. Holdings, Inc.*, 27 F. Supp. 3d 357, 360 (E.D.N.Y. 2014).

General Business Law § 349 does not define the term material, but the statute is modeled after Sections 5 and 12 of the Federal Trade Commission, which also requires a materially misleading statement. *See Bildstein v. Matercard Int'l Inc.*, 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004); *Oswego*, 85 N.Y.2d at 26 (establishing an objective test to determine a materially misleading act to complement the definition applied by the Federal Trade Commission to its antifraud provision). The term material, as it has been used in Section 5 of the Federal Trade Commission Act ("FTCA"), has been interpreted by the courts, and that interpretation has been applied to General Business Law § 349 claims. *See, e.g.*, *Novartis Corp. v. F.T.C.*, 223 F.3d, 783, 785-86 (D.C. Cir. 2000); *Bildstein*, 329 F. Supp. 2d at 414. This Court will also evaluate the

materiality prong of General Business Law § 349 by examining the case law interpreting Section 5 of the FTCA. *See Bildstein*, 329 F. Supp. 2d at 414.

"[A] material claim is one that 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'" *Bildstein*, 329 F. Supp. 2d at 414 (quoting *Novartis Corp. v. F.T.C.*, 223 F.3d 783, 785-86 (D.C. Cir. 2000)). Although materiality can be presumed under the FTCA, there is not a presumption in New York law. *See Novartis*, 223 F.3d at 786; *Bildstein*, 329 F. Supp. 2d at 414 (noting that the burden is on the plaintiff to show materially deceptive conduct). Nonetheless, the Court notes that the categories of claims involving safety, cost, durability, performance, or quality would be presumed material under the FTCA. *See Novartis*, 223 F.3d at 786. In this case, Defendant has failed to establish that its alleged non-disclosure of a known defect was not *materially* deceptive under the General Business Law. Moreover, Plaintiff has submitted evidence that the alleged defect was a matter of safety, quality, durability, and performance, and, accordingly, there is a genuine question of material fact raised on whether Defendant's practice was materially deceptive.

3. Injury

Defendant argues that, even if it engaged in a materially deceptive practice, Plaintiff is unable to prove that he was injured as a result of its practices. *See* Dkt. No. 84-4 at 18-21. "[A] plaintiff must prove 'actual' injury to recover under [§ 349], though not necessarily pecuniary harm." *Stutman*, 95 N.Y.2d at 29 (citations omitted). Of course, a "plaintiff . . . must show that the defendant's 'material deceptive act' caused the injury." *Stutman*, 95 N.Y.2d at 29 (quoting *Oswego*, 85 N.Y.2d at 26). The basis for Defendant's motion is that Plaintiff is not aware of the history of his Minivan. *See* Dkt. No. 84-4 at 18-22. Specifically, Defendant claims that (1) Plaintiff does not know if the TPMS units and tire valve stems were original parts at the time of

purchase and (2) Plaintiff does not know if the TPMS units were subjected to abuse that could have caused the need for repairs. *See id.* Defendants unilaterally limit Plaintiff's injury to the cost of replacing the TPMS unit and valve stems on his vehicle.[1] *See id.* at 18. This argument as to causation is unsuccessful.[2]

Plaintiff has pleaded two actual injuries: (1) purchasing the Minivan or paying more for it than he would have had he known of the defect and (2) expending money to replace the defective valve stems. *See* Dkt. No. 1-1. It is well-settled that a plaintiff cannot establish a Section 349 claim by claiming that he would not have purchased the product absent the deceptive practice. *See Goldemberg v. Johnson & Johnson Consumer Cos.*, 8 F. Supp.3d 467, 480-81 (S.D.N.Y. 2014); *Preira v. Bancorp Bank*, 885 F. Supp. 2d 672, 676-77 (S.D.N.Y. 2012) (citing *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55-56 (1999) and *Baron v. Pfizer, Inc.*, 42 A.D.3d 627, 629 (N.Y. 3d Dept. 2007)). However, allegations that a plaintiff purchased a product at an inflated price as a result of the defendant's deception is a sustainable injury under Section 349. *See Goldemberg*, 8 F. Supp. 3d at 481 (citing *Baron*, 42 A.d.3d at 629). Plaintiff submitted evidence that Defendant knew of the defect as early as March 2010, which is prior to Plaintiff's purchase of the Minivan in January 2012. *See* Dkt. No. 116-2; Dkt. No. 146 at 2. Plaintiff's alleged injuries include paying a price for a vehicle whose value was inflated due to Defendant's deceptive acts. *See* Dkt. No. 116-17. Accordingly, the fact that Plaintiff does not know if the original valve stems were on the vehicle at the time of his purchase, or if the TPMS unit was subject to abuse prior to his ownership, is not legally dispositive of causation on an inflated price injury.

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[1] Plaintiff's injuries have not been interpreted so narrowly by this Court. *See Tomassini v. FCA U.S. LLC*, No. 3:14–cv-1226, 2015 WL 3868343, *9 (N.D.N.Y. June 23, 2015).

[2] The Court notes that Defendant does not cite to any law that supports this injury argument.

With regard to Plaintiff's alleged injury of the cost of replacement of the defective TPMS unit, Defendants argue that Plaintiff is unable to show that Defendant manufactured the TPMS unit that was replaced in August 2013. *See* Dkt. No. 84-4 at 18-22. This alleged injury is sufficiently causally related to Defendant's alleged post-sale omissions to satisfy the causation element of Plaintiff's Section 349 claim based on post-sale failure to disclose. *See Doll*, 814 F. Supp. 2d at 550 (finding that the plaintiffs satisfied the actual injury element of their § 349 claim by pleading high repair and replacement costs caused by the defendant's withholding of information regarding a defective torque converter).[3]

In this case, Defendant relies on Plaintiff's testimony that he did not take any photographs of the valve stem or TPMS unit that was replaced in August 2013, and he does not know "if the TPMS unit removed from his vehicle was an original equipment component." *See* Dkt. No. 146 at 12. Therefore, causation to that injury is cut off as a matter of law, according to Defendant, because Plaintiff is unable to prove that Defendant manufactured the defective TPMS unit. *See id.*

"'Although the product [at issue] itself is the best and most conclusive proof,' . . . where the product is missing or no longer exists, the manufacturer's identity may be shown by circumstantial evidence." *Paniagua v. Walter Kidde Portable Equip., Inc.*, No. 15 Civ. 1858, 2016 WL 1718254, *9 (S.D.N.Y. Apr. 27, 2016) (quoting *Healey v. Firestone Tire & Rubber Co.*, 87 N.Y.2d 596, 601 (1996)). The circumstantial evidence must establish that it is reasonably probably – not merely possible or evenly balanced – that the defendant was the manufacturer of

[3] Section 349 also provides for statutory damages of fifty dollars for an injured plaintiff that fails to prove actual damages exceeding fifty dollars. *See* N.Y. Gen. Bus. Law § 349(h).

the defective product. *See Healey*, 87 N.Y.2d at 601-02 Evidence cannot be speculative or conjectural. *See id.* at 602.

In this case, the Minivan was originally purchased in 2010 by a rental company, and it was driven 19,852 miles per year. *See* Dkt. No. 116-18 at 2. After one year and ten months, the Minivan was sold at auction and purchased by Plaintiff in January 2012. *See id.* at 4; Dkt. No. 146 at 2. It is not disputed that the Minivan was manufactured by Defendant and it is not disputed that the vehicle was originally sold with four TPMS units. The evidence submitted indicates that the Minivan had not sustained any structural damage or any accident damage, and the Minivan did not have any airbag deployments. *See* Dkt. No. 116-18 at 3. Plaintiff testified that he was aware that all four tires needed to be replaced when he purchased the Minivan, and he replaced them in July 2012. *See* Dkt. No. 146 at 4. Although Plaintiff did not know whether the TPMS unit removed from the Minivan in August 2013 was an *original* equipment component, Plaintiff testified in July 2012 that he had four Chrysler TPMS modules on the Minivan. *See* 116-13 at 210. Viewing the facts in the light most favorable to Plaintiff, the Court finds that there is sufficient circumstantial evidence to render it reasonably probable that Defendant manufactured the valve stem and TPMS unit that had to be replaced. For the same reasons, the Court also finds that there is sufficient circumstantial evidence that the second TMPS unit that failed on the Minivan was also manufactured by Defendant.

C. Putative Class

Defendant has separately move to exclude "owners and lessees of vehicles on which tire valve stems have never corroded." Dkt. No. 85-1 at 3. Defendant argues that "[u]nder clear New York law those owners/lessees whose vehicles have not experienced any valve stem corrosion cannot be included in the class." *See id.* According to Defendant, the Court should dismiss the

class definition which includes individuals who could not possibly prove their claims. *See id.* at 5.

Here, Defendant contends that those vehicle owners and lessees who do not have corroded valve stems cannot prove that they have sustained an injury under Section 349.[4] However, in order to support its contention, Defendant improperly narrows Plaintiff's injuries to just the cost to repair or replace the defective valve stems. *See id.* As already stated by this Court, allegations that a plaintiff purchased a product at an inflated price as a result of the defendant's deception is a sustainable injury under Section 349. *See Goldemberg*, 8 F. Supp. 3d at 471 (citing *Baron*, 42 A.D.3d at 629). Those cases, cited by Defendant to support its argument that a Section 349 action requires proof of malfunction in a defective products case, did not involve an inflated purchase price injury. *See, e.g., Statler v. Dell, Inc.*, 775 F. Supp. 2d 474 (E.D.N.Y. 2011); *In re Canon Cameras*, 237 F.R.D. 357 (S.D.N.Y. 2006); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 (N.Y. 1st Dept. 2002).

Further, the Court notes the District Court for the Southern District of New York issued its decision in *Canon* (237 F.R.D. 357) a year before the appellate court in New York found that an inflated purchase price is an injury under Section 349 in *Baron* (42 A.D.3d 627). That district court later acknowledged that an inflated purchase price due to deceptive practices is an injury under Section 349. *See Goldemberg*, 8 F. Supp. 3d 467. Also, the District Court for the Eastern District of New York after *Statler* (775 F. Supp. 2d 474), held that, under Section 349, a plaintiff can suffer a premium price injury. *See Belfiore v. Proctor & Gamble Co.*, 311 F.R.D. 29, 62-63

[4] Defendants do not address how to exclude any putative class members based upon identifying corrosion where its discovery documents state that "metal parts with severe [stress corrosion cracking] can appear bright and shiny, while being filled with microscopic cracks" which "makes it common for SCC to go undetected prior to failure." See Dkt. No. 116-6.

(E.D.N.Y. 2015) (citing *Ebin v. Kangadis Food Inc.*, No. 13–CV–2311, 2013 WL 6504547, *5 (S.D.N.Y. Dec. 11, 2013)). A premium price injury occurs when a plaintiff paid more for a good than he or she would have paid but for the deceptive practice of the defendant. *See id.* at 62. There, the court clarified that it is irrelevant whether some consumers may be satisfied with the product. *See id.* at 62. Accordingly, the Court denies Defendant's motion to exclude members of the putative class who do not have corrosion on their valve stems.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant's motion for summary judgment is **DENIED**; and the Court further

ORDERS that Defendant's motion to exclude putative class members is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: November 23, 2016
Albany, New York

Mae A. D'Agostino
U.S. District Judge