UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

Natalya A. Napoleon,

Plaintiff,

-against-

5665 Sunrise Highway Corporation, d/b/a 112 Auto Sales; and North Shore Equities, Inc.,

Defendants.

----------X

5665 Sunrise Highway Corporation, d/b/a 112 Auto Sales; and North Shore Equities, Inc.,

Counter-Claimants,

-against-

Natalya A. Napoleon,

Counter-Defendant.*

----------X

MEMORANDUM & ORDER
18-CV-05703 (DG) (SIL)

DIANE GUJARATI, United States District Judge:

This case arises from Plaintiff Natalya A. Napoleon's purchase and financing of a used car from Defendant 5665 Sunrise Highway Corporation, doing business as 112 Auto Sales ("112 Auto"), and by Defendant North Shore Equities, Inc. ("North Shore"), respectively, in March 2016 and the City of New York's seizure of the car in February 2017 based on Napoleon's unpaid parking fines.

On October 11, 2018, Napoleon commenced this action against 112 Auto, North Shore, and Trans Union LLC ("Trans Union"), alleging: (1) deceptive acts and practices by North Shore in violation of New York General Business Law § 349; (2) conversion by North Shore; (3) fraud

* The Clerk of Court is directed to amend the caption as set forth above.

by North Shore; (4) violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, by North Shore and Trans Union; (5) violations of the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. § 2301 *et seq.*, by North Shore and 112 Auto; and (6) intentional infliction of emotional distress by all three defendants. *See* Complaint ("Compl.") ¶¶ 37-123, ECF No. 1. In February 2019, Trans Union was dismissed from this action after Napoleon settled her two claims against Trans Union. *See* ECF Nos. 27-28; *see also* Settlement Agreement, ECF No. 60-1. On October 14, 2019, 112 Auto and North Shore (together, "Defendants") countersued Napoleon for breach of the vehicle financing agreement. *See* ECF No. 41.

Following discovery, Napoleon moved for summary judgment on her FCRA claim against North Shore, ECF No. 54, and Defendants cross-moved for summary judgment on all of Napoleon's claims, on Defendants' counterclaim, and for damages on the counterclaim, ECF No. 58. On June 28, 2021, the Court held oral argument on the motions and, following argument, Napoleon stipulated to dismissal of her conversion and fraud claims. *See* ECF No. 63.

For the reasons set forth below, Napoleon's motion for summary judgment is denied, and Defendants' cross-motion for summary judgment is granted as to Napoleon's remaining claims, as to Defendants' counterclaim, and as to damages in the amount of $11,001.20. Because Napoleon stipulated to dismissal of her conversion and fraud claims, Defendants' cross-motion for summary judgment as to those claims is denied as moot.

BACKGROUND

I. Factual Background

A. The Purchase, Financing, Repairs, and Seizure of the Car

Because Defendants seek summary judgment on their counterclaim and on all of Napoleon's claims, the following facts are either undisputed or described in the light most favorable to Napoleon, unless otherwise indicated.

On March 31, 2016, Napoleon purchased a used 2006 Toyota Corolla from 112 Auto. *See* Plaintiff's Counter-Statement of Undisputed Facts Pursuant to Local Civil Rule 56.1 ("Pl. Counter 56.1") ¶ 1, ECF No. 56-17; ECF No. 58-4.[1] Napoleon financed her purchase through a retail instalment contract (the "Contract") that was signed by Napoleon and 112 Auto, and then assigned by 112 Auto to North Shore. Pl. Counter 56.1 ¶ 5; *see also* Contract at 5, ECF No. 54-1.

Under the terms of the Contract, North Shore credited Napoleon $10,567.60 – *i.e.*, the unpaid balance due on the car – at an annual percentage rate of 24.99% and, in turn, North Shore took a security interest in the vehicle.[2] *See* Contract at 1. The Contract required Napoleon to make 78 biweekly payments of $193.00 beginning on April 14, 2016. Pl. Counter 56.1 ¶ 6. In addition, Napoleon entered into a limited warranty agreement with a $200.00 deductible,

[1] Any citation to the parties' Local Rule 56.1 statements incorporates by reference the documents cited therein.

[2] The retail instalment contract lists both 24.92% and 24.99% as the applicable annual percentage rate. *See* Contract at 1. The Court need not resolve this discrepancy in order to resolve the instant motions.

whereby 112 Auto agreed to service the vehicle repairs. *See* Pl. Counter 56.1 ¶ 16; *see also* Limited Warranty Application, ECF No. 56-13.[3]

After Napoleon purchased the car, she experienced issues with its battery and starter. Pl. Counter 56.1 ¶ 13. The day after Napoleon purchased the car, it would not start without a jump. *See* Transcript of Napoleon Deposition ("Napoleon Tr.") at 38, ECF No. 58-10. Approximately one week after the car purchase, 112 Auto replaced the car battery at no cost to Napoleon. Pl. Counter 56.1 ¶ 14; *see also* Napoleon Tr. at 39. Napoleon experienced no issues with the battery thereafter. Napoleon Tr. at 40. Approximately one month after the battery issue, Napoleon experienced issues with her starter. *Id.* at 40-43. She contacted 112 Auto, which offered to fix the starter, *see* Pl. Counter 56.1 ¶ 15, if she brought the car into one of 112 Auto's repair shops, *see* Napoleon Tr. at 43, 46. Because she could not afford a tow truck and 112 Auto could not send one at the time, Napoleon had a local mechanic fix the starter, Napoleon Tr. at 44-48, 59, who charged her $120.00, Pl. Counter 56.1 ¶ 15. Napoleon did not experience any other mechanical issues with the car thereafter. Napoleon Tr. at 49.

On February 7, 2017, approximately ten months after the car purchase, the City of New York seized the car as a result of unpaid fines for outstanding parking violations. Pl. Counter 56.1 ¶¶ 2-3; *see also* ECF No. 58-9 at 3-22. Napoleon contacted both the local police precinct and North Shore, *see* Napoleon Tr. at 145-46, 160, but "[n]obody [at North Shore] knew anything," *id.* at 160, and, according to Napoleon, the local precinct indicated that there was no record of her car being towed, *id.* at 78, 137-38, 145-46.

[3] Although this document is styled as a limited warranty "application," the parties do not dispute that Napoleon and 112 Auto entered into a limited warranty agreement with these terms. *See* Pl. Counter 56.1 ¶ 16 (referencing "warranty contract").

On February 10, 2017, the City mailed a notice of the seizure to Napoleon's former address, which she never received, *id.* at 147-50, and thereafter mailed a notice dated February 10, 2017 to North Shore as the lienholder, ECF No. 58-9 at 36-38.[4] Despite knowledge of the vehicle's location and despite Napoleon's inquiries, North Shore never informed Napoleon of the location of her vehicle. *See* Pl. Counter 56.1 ¶ 4.[5] Without notice, Napoleon ultimately was unable to locate and redeem the car and, as a result, the City sold the car at a public auction on March 22, 2017. *See* Pl. Counter 56.1 ¶ 4.

B. The Credit Report

Napoleon was current with her loan payments through January 29, 2017 – prior to the car's seizure. Pl. Counter 56.1 ¶¶ 7-9; *see also* Payment History at 1-2, ECF No. 58-6. After the City seized the car, Napoleon stopped making her biweekly payments to North Shore. Pl. Counter 56.1 ¶¶ 8-9; *see also* Payment History at 2. Prior to ceasing payment, Napoleon paid North Shore a total of $4,052.80. Pl. Counter 56.1 ¶ 10. Under the terms of the Contract, she was required to make 78 installment payments totaling $15,054.00. Pl. Counter 56.1 ¶ 11; *see also* Contract at 1. Accordingly, under the terms of the Contract, there was an unpaid balance of $11,001.20, *see* Contract at 1; Payment History at 1-2, notwithstanding Napoleon's denial of this fact, *see* Pl. Counter 56.1 ¶ 12.

---

[4] The City's lienholder notice to North Shore, although indicating that the City seized the car at issue here, was captioned "N.Y.C. Department of Finance (Parking Violations) v. Stjuste Gesner," not Napoleon. *See* ECF No. 58-9 at 36-38; *see also* Napoleon Tr. at 149.

[5] City records indicate that the City notified a North Shore employee of the seizure by telephone on February 16, 2017 and, on March 21, 2017, notified the same employee by email of the City's intent to auction the car on March 22, 2017. *See* ECF No. 58-9 at 23; *see also, e.g.*, Transcript of Ted Pawelec Deposition ("Pawelec Tr.") at 95-96, ECF No. 59-2 (discussing notice from the City). North Shore also installed a GPS system in the vehicle, which, *inter alia*, permitted North Shore to locate the vehicle. *See* GPS Installation Agreement, ECF No. 56-1; *see also, e.g.*, Pawelec Tr. at 20, 25 (discussing the car's GPS system).

In March 2017, Napoleon received one or two emails from North Shore regarding her vehicle financing agreement. *See* Pl. Counter 56.1 ¶¶ 17-18. One email stated: "We have tried to on several occasions to get in contact with you about your past due balance on your auto loan. If we don't hear from you today your account will go out for a repossession." Pl. Counter 56.1 ¶ 18. Throughout the following months, Napoleon remained unaware of the location of her car. Napoleon Tr. at 80. Around January 2018, Napoleon reviewed her credit history through Credit Karma, which reflected that her vehicle was "repossessed." *Id.* Around April 2018, Napoleon requested and received a copy of her payment history from Ted Pawelec, North Shore's general manager. *Id.* at 72-73, 79; Pawelec Tr. at 6.

By letter to Trans Union dated June 27, 2018, Napoleon demanded that Trans Union verify or remove the North Shore account reflected on her credit report. *See* June 27, 2018 Letter, ECF No. 55-1. In relevant part, Napoleon stated:

> According to the Fair Credit Reporting Act . . . , you are required by federal law to verify – through the physical verification of the original signed consumer contract – any and all accounts you post on a credit report. . . . I demand to see Verifiable Proof (an original Consumer Contract with my Signature on it) you have on file of the [North Shore] accounts. Your failure to positively verify these accounts has hurt my ability to obtain credit. . . . I demand the [North Shore] accounts be verified or removed immediately.

Id. at 1 (emphasis omitted).

Napoleon's letter triggered an investigation by Trans Union, *see* Defendants' Counter-Statement of Undisputed Facts Pursuant to Local Civil Rule 56.1 ("Defs. Counter 56.1") ¶ 2, ECF No. 59-1, after which Trans Union sent a letter to Napoleon dated July 27, 2018 stating that Trans Union "investigated the information you disputed and the disputed information was verified as accurate," *see* July 27, 2018 Investigation Results Letter, ECF No. 55-2 (emphasis omitted). The letter further indicated that Napoleon's credit report reflected: (1) that she was thirty days delinquent on her car payments in June 2016, July 2016, and August 2016; (2) that

she was sixty days delinquent on her payments in September 2016; (3) that she was ninety days delinquent on her payments in October 2016, November 2016, and December 2016; and (4) that her car was in repossession status from January 2017 through March 2018. *See* July 27, 2018 Investigation Results Letter (illustration of "how [the North Shore account] appears on your credit report following our investigation"). In response to the July 27, 2018 Investigation Results Letter, Napoleon sent a second letter to Trans Union in August 2018, which triggered a second investigation by Trans Union. Defs. Counter 56.1 ¶ 3.[6] Trans Union sent its investigation results dated September 1, 2018 to Napoleon and again stated that Trans Union "investigated the information you disputed and the disputed information was verified as accurate." *See* Sept. 1, 2018 Investigation Results Letter, ECF No. 55-5 (emphasis omitted).

It is undisputed that, as part of Trans Union's investigation, it contacted North Shore. *See* Aug. 20, 2018 Investigation Record (the "Investigation Record"), ECF No. 55-10 (Trans Union record noting contact with North Shore). The parties do dispute, however, what information North Shore relayed to Trans Union: North Shore represents, through a declaration by its president, Thomas Campbell, that it "sends raw credit data (i.e., payment history) to the credit reporting agencies" and, in this case, that it "sent Napoleon's payment history to Trans Union." Pl. Counter 56.1 ¶¶ 21-22[7]; *see also* Campbell Decl. ¶¶ 9-10, ECF No. 58-2. Napoleon, by

---

[6] The parties dispute whether Napoleon re-sent the same letter dated June 27, 2018 or sent a different letter dated August 7, 2018 with her payment history attached. Napoleon alleges that she sent a different letter dated August 7, 2018, stating that her North Shore account was "[i]naccurately showing late payments and a repossession" and that, as a result, she was "unable to get a car or an apartment because of this inaccurate reporting of late payments and a repossession on my credit report." *See* Aug. 7, 2018 Letter, ECF No. 55-3; *see also* Defs. Counter 56.1 ¶ 3. Defendants, by contrast, argue that Napoleon testified at her deposition that she sent the same letter dated June 27, 2018 twice and never mentioned a letter dated August 7, 2018. *See* Defs. Counter 56.1 ¶ 3; *see also* Napoleon Tr. at 99-100.

[7] In her counter-statement of facts, Napoleon does not dispute this but instead states that she "is not able to evaluate [Campbell's] claim that Defendants only send raw credit data to the credit

contrast, represents that North Shore "repeatedly verif[ied] the accuracy of the information regarding Plaintiff's North Shore Equities, Inc. account being reported *on her credit report*," despite its knowledge of her payment history. *See* Defs. Counter 56.1 ¶ 12 (emphasis added). In support of this fact, Napoleon has submitted an internal document of Trans Union, dated August 20, 2018, which notes that Napoleon disputed "inaccurate information" relating to her North Shore account and requested that Trans Union confirm the account identity and "verify all Account Information." *See* Aug. 20, 2018 Investigation Record. Although the Investigation Record does not indicate what information Trans Union provided to North Shore about Napoleon's dispute, the Investigation Record states: "Data Furnisher Response: Account information accurate as of Date Reported." *Id.* The Investigation Record does not specify what "account information" North Shore indicated was "accurate." *See id.*

II. Procedural History

On October 11, 2018, Napoleon commenced this action against 112 Auto, North Shore, and Trans Union. *See* Compl. at 1. Trans Union answered the Complaint on November 8, 2018, ECF No. 10, and both 112 Auto and North Shore answered on January 8, 2019, ECF No. 22. Shortly thereafter, on February 1, 2019, Napoleon stipulated to the dismissal of Trans Union after agreeing to settlement terms, ECF No. 27, whereby Trans Union paid to Napoleon $17,000.00 and deleted the North Shore account from Napoleon's credit report, Pl. Counter 56.1 ¶ 23; *see also* Settlement Agreement at 1-13. On October 14, 2019, Defendants filed an amended answer and brought a counterclaim against Napoleon for breach of the parties' Contract, ECF No. 41, which Napoleon answered on October 29, 2019, ECF No. 44.

---

reporting agencies," and states that the deposition testimony of Ted Pawelec "says nothing about North Shore Equities having sent Plaintiff's payment history to Trans Union." Pl. Counter 56.1 ¶¶ 21-22.

Following discovery, the parties cross-moved for summary judgment on November 20 and 21, 2019. ECF Nos. 46-50. On September 28, 2020, the Court adopted Magistrate Judge Steven I. Locke's report and recommendation to deny the cross-motions without prejudice to renewal because the parties failed to submit Local Rule 56.1 statements. ECF Nos. 51-52. This action was reassigned to the undersigned on December 23, 2020. On February 26 and 27, 2021, the parties refiled the instant cross-motions for summary judgment. *See* Plaintiff's Memorandum in Support of Summary Judgment ("Pl.'s Mem."), ECF No. 54; Defendants' Memorandum in Opposition ("Defs.' Opp'n"), ECF No. 59; Plaintiff's Reply in Support ("Pl.'s Reply"), ECF No. 57; Defendants' Memorandum in Support of Summary Judgment ("Defs.' Mem."), ECF No. 58-1; Plaintiff's Memorandum in Opposition ("Pl.'s Opp'n"), ECF No. 56; Defendants' Reply in Support, ECF No. 60.

Oral argument on the cross-motions for summary judgment was held on June 28, 2021. ECF No. 62. On the same date, Napoleon stipulated to dismissal of her conversion and fraud claims against Defendants. *See* ECF No. 63.

STANDARD OF REVIEW

Rule 56(a) of the Federal Rules of Civil Procedure provides that a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material' for these purposes when it 'might affect the outcome of the suit under the governing law.'" *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 104 (2d Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)), *cert denied*, 565 U.S. 1260 (2012). No genuine issue of material fact exists "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable,

or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted). "Summary judgment allows the court to dispose of meritless claims before becoming entrenched in a frivolous and costly trial." *Tavares v. City of New York*, No. 17-CV-05221, 2020 WL 2563189, at *2 (E.D.N.Y. Apr. 6, 2020) (citing *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986)).

The moving party bears the initial burden of establishing the absence of any genuine issue of material fact. *See Liberty Lobby*, 477 U.S. at 256; *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008). This showing can be accomplished by citation to "materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." *See* Fed. R. Civ. P. 56(c). The moving party may show *prima facie* entitlement to summary judgment by either: (1) pointing to evidence that negates an opponent's claims; or (2) by identifying portions of an opponent's evidence that demonstrate the absence of a genuine issue of material fact. *Salahuddin v. Goord*, 467 F.3d 263, 272-73 (2d Cir. 2006) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986) and *Farid v. Smith*, 850 F.2d 917, 924 (2d Cir. 1988)). "Where the non-movant bears the burden of proof at trial, the movant's initial burden at summary judgment can be met by pointing to a lack of evidence supporting the non-movant's claim." *Tardif v. City of New York*, 991 F.3d 394, 403 (2d Cir. 2021) (citing *Celotex Corp.*, 477 U.S. at 325). To determine whether the moving party has carried its burden, the Court "construe[s] the evidence in the light most favorable to the nonmoving party and draw[s] all inferences and resolv[es] all ambiguities in favor of the nonmoving party." *Doro v. Sheet Metal Workers' Int'l Ass'n*, 498 F.3d 152, 155 (2d Cir. 2007); *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 75 (2d Cir. 2005). The

Court "accept[s] as true the facts that [are] sworn to or undisputed." *Green v. Town of East Haven*, 952 F.3d 394, 407 (2d Cir. 2020).

Where the movant shows a *prima facie* entitlement to summary judgment, "the burden shifts to the nonmovant to point to record evidence creating a genuine issue of material fact." *Salahuddin*, 467 F.3d at 273; *accord Miller v. Nassau Health Care Corp.*, No. 09-CV-05128, 2012 WL 2847565, at *3 (E.D.N.Y. July 11, 2012). "[T]he nonmovant cannot rest on allegations in the pleadings" but, rather, "must point to specific evidence in the record to carry its burden on summary judgment," *Salahuddin*, 467 F.3d at 273, offering "concrete evidence from which a reasonable juror could return a verdict in its favor," *Dister v. Cont'l Grp.*, 859 F.2d 1108, 1114 (2d Cir. 1988) (quoting *Liberty Lobby*, 477 U.S. at 256). *See also McPherson v. N.Y.C. Dep't of Educ.*, 457 F.3d 211, 215 n.4 (2d Cir. 2006) ("[S]peculation alone is insufficient to defeat a motion for summary judgment."); *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 101 (2d Cir. 2001) ("Even where facts are disputed, in order to defeat summary judgment, the nonmoving party must offer enough evidence to enable a reasonable jury to return a verdict in its favor."). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In resolving a summary judgment motion, the Court must not "weigh evidence or assess the credibility of witnesses." *Tavares*, 2020 WL 2563189, at *3 (citing *United States v. Rem*, 38 F.3d 634, 644 (2d Cir. 1994)).

DISCUSSION

I. The Intentional Infliction of Emotional Distress Claim

An intentional infliction of emotional distress ("IIED") claim "may be invoked only as a last resort, to provide relief in those circumstances where traditional theories of recovery do not." *Salmon v. Blesser*, 802 F.3d 249, 256 (2d Cir. 2015) (citations and quotation marks omitted). To succeed on an IIED claim in New York, a plaintiff must establish four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Rich v. Fox News Network, LLC*, 939 F.3d 112, 122 (2d Cir. 2019) (quoting *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121 (1993)). "The standard of outrageous conduct is 'strict,' 'rigorous' and 'difficult to satisfy.'" *Scollar v. City of New York*, 160 A.D.3d 140, 146 (1st Dep't 2018) (quoting *Howell*, 81 N.Y.2d at 122). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Stuto v. Fleishman*, 164 F.3d 820, 827 (2d Cir. 1999) (quoting *Howell*, 81 N.Y.2d at 122). The first element is "the one most susceptible to determination as a matter of law," *Rich*, 939 F.3d at 122 (quoting *Howell*, 81 N.Y.2d at 121), and "serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine," *Howell*, 81 N.Y.2d at 121.

In response to Defendants' argument that there is no evidence to support each element of Napoleon's IIED claim and that not even the Complaint alleges sufficient facts to support an IIED claim, *see* Defs.' Mem. at 8, Napoleon argues that her claim should survive summary judgment because Defendants knew that the City seized her vehicle but did not inform Napoleon

about its location, causing a "rift" between Napoleon and her daughter, who Napoleon blamed for the car's disappearance, Pl.'s Opp'n at 5-6. But, even assuming these facts to be true,[8] Defendants' failure to tell Napoleon that the City seized her car does not rise to the level of conduct that is "utterly intolerable in a civilized community." *See Howell*, 81 N.Y.2d at 122 (quotation marks omitted). In any event, Napoleon proffers no evidence from which a reasonable jury could conclude that Defendants intended to cause – or disregarded a substantial probability of causing – severe emotional distress. Moreover, a mother/daughter "rift" over the location of a car, without more, is insufficient to establish the requisite "*severe* emotional distress." *See id.* at 121 (emphasis added).

Defendants' motion for summary judgment as to Napoleon's IIED claim is granted.

II. The Deceptive Acts and Practices Claim

Section 349 of New York General Business Law prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]," N.Y. Gen. Bus. Law § 349(a), and provides a private right of action for damages and injunctive relief, *see id.* § 349(h). To establish a claim under Section 349, a plaintiff must prove that "a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *See Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015) (quoting *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (2012)). Regarding the first requirement, a plaintiff must demonstrate that the acts or practices – whether reoccurring or isolated – "have a broader impact on consumers at large," rather than only involve a "[p]rivate contract dispute[] unique to the

[8] Napoleon has failed to properly support this factual assertion as required by Federal Rule of Civil Procedure 56(c), and there is no record support for the alleged "rift."

parties." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995). As to the second requirement, "[w]hether a representation or an omission, the deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances." *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 124 (2d Cir. 2017) (quoting *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000)); *see also Oswego*, 85 N.Y.2d at 26 ("Such a test . . . may be determined as a matter of law or fact (as individual cases require) . . . ."). "In the case of omissions, in particular," the statute proscribes withholding information "where the business alone possesses material information that is relevant to the consumer." *Oswego*, 85 N.Y.2d at 26. "A deceptive practice, however, need not reach the level of common-law fraud to be actionable . . . ." *Stutman*, 95 N.Y.2d at 29.

Napoleon alleged in her Complaint that North Shore violated Section 349 by providing Napoleon with "bogus phone numbers in February and May 2017" when she was trying to retrieve her seized vehicle from the City, by "charg[ing] her an exorbitant fee . . . to recover her own vehicle," and by "reporting a wrongful repossession on her credit report since January 2017." Compl. ¶ 62. Napoleon now argues for the first time – in her opposition brief – that both 112 Auto *and* North Shore violated Section 349 by failing to provide Napoleon a copy of an inspection report and by failing to disclose that Thomas Campbell owns 112 Auto, North Shore, and Sunwave Auto Repair, causing her to be injured by purchasing "a defective vehicle." Pl.'s Opp'n at 8-9. Because Napoleon seeks to allege a new claim in her opposition papers and appears to have abandoned the original claim alleged in the Complaint, the Court need not address either claim. In any event, the record does not contain evidence sufficient to meet each element of Section 349 – with respect to either the original or newly-advanced claims.

III. The Magnuson-Moss Warranty Act Claim

"After many years of study, and partially in response to 'a rising tide of complaints . . . from irate owners of motor vehicles complaining that automobile manufacturers and dealers were not performing in accordance with the warranties on their automobiles,' Congress passed the Magnuson-Moss Warranty Act . . . in 1975." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams*, 899 F.2d 1315, 1317 (2d Cir. 1990) (first alteration in original) (quoting H.R. Rep. No. 93-1107 (1974)). Congress enacted the MMWA to, *inter alia*, "restrict the ability of sellers to disclaim the warranties implied under state law." *Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 247 (2d Cir. 1986). Accordingly, the MMWA grants relief to "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation . . . under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1); *see also Wilbur v. Toyota Motor Sales, U.S.A., Inc.*, 86 F.3d 23, 26 (2d Cir. 1996).

To succeed on a claim under the MMWA, a plaintiff must establish a "breach of written or implied warranty under state law." *Garcia v. Chrysler Grp. LLC*, 127 F. Supp. 3d 212, 232 (S.D.N.Y. 2015). "[C]laims under the [MMWA] stand or fall with the express and implied warranty claims under state law." *Cali v. Chrysler Grp. LLC*, No. 10-CV-07606, 2011 WL 383952, at *4 (S.D.N.Y. Jan. 18, 2011) (quotation marks omitted), *aff'd*, 426 F. App'x 38 (2d Cir. 2011); *see Platt v. Winnebago Indus., Inc.*, 960 F.3d 1264, 1269 (10th Cir. 2020) ("Where Magnuson-Moss claims are brought for breach of a limited warranty, as here, we look to state law to determine the causes of action and the remedies available."); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 & n.3 (9th Cir. 2008) ("[C]laims under the Magnuson-Moss Act stand or fall with [a plaintiff's] express and implied warranty claims under state law. Therefore, this court's disposition of the state law warranty claims determines the disposition of the

Magnuson-Moss Act claims."); *Schimmer v. Jaguar Cars, Inc.*, 384 F.3d 402, 405 (7th Cir. 2004) ("In [actions seeking to enforce written and implied warranties under state law via the Magnuson-Moss Act], we then look to state law to determine the remedies available . . . ."); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1012 (D.C. Cir. 1986) ("[E]xcept in the specific instances in which Magnuson-Moss expressly prescribes a regulating rule, the Act calls for the application of state written and implied warranty law, not the creation of additional federal law.").

Napoleon argues that, because the parties entered into a limited warranty agreement, Defendants should have "provide[d] Plaintiff with a written report of the inspection done to the subject vehicle" and "should have fixed [the battery and starter] issues with the subject vehicle." Pl.'s Opp'n at 9-10. Under the terms of the agreement, 112 Auto agreed to service Napoleon's vehicle for the shorter of 18 months or 18,000 miles, with a $200.00 minimum deductible "per occurrence." ECF No. 56-7 at 3 (retail instalment contract noting "powertrain warranty"); ECF No. 56-13 (limited warranty application).

Napoleon submits no evidence indicating that she was entitled to an inspection report under the terms of the limited warranty agreement. Nor does she direct the Court to any authority establishing a duty to produce such a report under New York law. In fact, Napoleon cites no case law at all with respect to her MMWA claim. *See* Pl.'s Opp'n at 9-10; *see also* Transcript of June 28, 2021 Oral Argument ("June 28, 2021 Tr.") at 8, ECF No. 64. Moreover, although Napoleon experienced issues with the car battery and starter within the first month of purchase, it is undisputed that 112 Auto replaced the battery at no cost to Napoleon, Pl. Counter 56.1 ¶ 14, explaining to Napoleon that the battery could have died "because the car was sitting for a while," Napoleon Tr. at 41, and that 112 Auto offered to fix the starter, although Napoleon

ultimately hired someone else to fix it, *see* Pl. Counter 56.1 ¶ 15. Even if 112 Auto's ultimate failure to repair the starter, despite its offer, could somehow qualify as a breach of the limited warranty agreement, Napoleon could not demonstrate damages as she still paid less for the repair ($120.00) than the $200.00 deductible required under the warranty. *See* Pl. Counter 56.1 ¶ 15-16. And, there is no evidence that Napoleon would have paid less than $120.00 had 112 Auto conducted the repair.

Defendants' summary judgment motion as to Napoleon's MMWA claim is granted.

IV. The Breach of Contract Counterclaim

Napoleon concedes that she entered into a contract with 112 Auto that was then assigned to North Shore and that, following seizure of her car, she ceased making her biweekly payments. *See* Pl. Counter 56.1 ¶¶ 5, 8-9. Under the terms of the Contract, Napoleon agreed to make 78 biweekly payments of $193.00 at 24.99% per annum, which, over the life of the Contract, entitled North Shore to $15,054.00. *See* Pl. Counter 56.1 ¶ 6; *see also* Contract at 1. Napoleon argues, however, that the Contract is void because the interest rate provided for in the Contract exceeds New York's civil usury rate of 16%. Pl.'s Opp'n at 4-5.[9]

New York statutes prohibit both civil and criminal usury. New York's civil usury statute proscribes loans at rates exceeding 16% per annum. N.Y. Gen. Oblig. Law § 5-501; N.Y. Banking Law § 14-a(1). The criminal usury statute forbids loans at rates exceeding 25% per annum. N.Y. Penal Law § 190.40. Such usury caps apply only to a "loan or forbearance." N.Y. Gen. Oblig. Law § 5-501; N.Y. Banking Law § 14-a(2); *see also* N.Y. Gen. Oblig. Law § 5-511(1); *Seidel v. 18 E. 17th St. Owners, Inc.*, 79 N.Y.2d 735, 744 (1992) ("Usury laws apply

[9] Napoleon further argues that 112 Auto "virtually violated New York's criminal usury limit of 25%." *See* Pl.'s Opp'n at 4 (citing N.Y. Penal Law § 190.40).

only to loans or forbearances . . . . If the transaction is not a loan, there can be no usury, however unconscionable the contract may be." (citation and quotation marks omitted)); *see also LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664, 122 (2d Dep't 2020). New York's usury laws do not apply to "retail instalment contracts." *See Garcia v. Chrysler Cap. LLC*, No. 15-CV-05949, 2016 WL 5719792, at *1-2 (S.D.N.Y. Sept. 30, 2016). A retail instalment contract is "an agreement, entered into in [New York], pursuant to which the title to, the property or a security interest in or a lien upon a motor vehicle, which is the subject matter of a retail instalment sale, is retained or taken by a retail seller from a retail buyer as security, in whole or in part, for the buyer's obligation." N.Y. Pers. Prop. Law § 301(5). "A retail seller may contract for in a retail instalment contract and charge, receive and collect the credit service charge authorized by [the Motor Vehicle Retail Instalment Sales Act] at the rate or rates agreed to by the retail seller and the buyer." *Id.* § 303(1); *see also Kwon v. Masterz Auto. Int'l Inc.*, 57 N.Y.S.3d 675 (N.Y. App. Term 2017).

Because the contract entered into by Napoleon and 112 Auto meets all of the statutory requirements of a retail instalment contract, *see* N.Y. Pers. Prop. Law § 302 (listing requirements), the parties' agreement to a 24.99% interest rate does not run afoul of New York's usury laws. *See, e.g.*, *Kwon*, 57 N.Y.S.3d at 675 (concluding that usury laws do not apply to retail instalment contracts involving motor vehicles); *Garcia*, 2016 WL 5719792, at *8 ("Consequently the 26.32% credit charge that [p]laintiff agreed to is not subject to New York usury laws.").[10]

[10] Napoleon also argues – for the first time in her reply brief – that North Shore should be equitably estopped from enforcing the terms of the Contract. Pl.'s Reply at 9-10. It is well established, however, that "issues raised for the first time in a reply brief are generally deemed waived." *Tardif*, 991 F.3d at 404 n.7 (brackets and quotation marks omitted). In any event, the argument is unavailing.

Defendants' motion for summary judgment on their counterclaim for breach of contract by Napoleon is granted.

V. The Fair Credit Reporting Act Claim

The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, "regulates credit reporting procedures to ensure the confidentiality, accuracy, relevancy, and proper utilization of consumers' information." *Longman v. Wachovia Bank, N.A.*, 702 F.3d 148, 150 (2d Cir. 2012) (per curiam) (citing 15 U.S.C. § 1681(b)). "Accordingly, to ensure credit reports are accurate, the FCRA imposes certain duties on [consumer reporting agencies ("CRAs")], users of consumer reports, and furnishers of information to CRAs," like North Shore. *See Sprague v. Salisbury Bank & Tr. Co.*, 969 F.3d 95, 98 (2d Cir. 2020) (per curiam). The FCRA requires furnishers to refrain from reporting information to a CRA where the furnisher "knows or has reason to believe that the information is inaccurate," 15 U.S.C. § 1681s-2(a)(1), and to correct any information discovered to be incomplete or inaccurate, 15 U.S.C. § 1681s-2(a)(2). The FCRA does not provide a private cause of action for violations of § 1681s-2(a) by furnishers. *See* 15 U.S.C. § 1682s-2(d); *see also Sprague*, 969 F.3d at 98 ("The statute plainly restricts enforcement of 15 U.S.C. § 1681s-2(a) to federal and state authorities." (alterations adopted) (quoting *Longman*, 702 F.3d at 151)). However, the FCRA does afford consumers the right to dispute with a CRA any information reported. *See* 15 U.S.C. § 1681g(c)(1)(B)(iii); *see also* 15 U.S.C. § 1681i(a)(1)(A).

If a dispute is raised with the CRA, both the CRA and the furnisher of the relevant information have a duty to investigate and verify that the information is accurate. *See* 15 U.S.C. §§ 1681i(a)(1)(A), 1681s-2(b); *see also Longman*, 702 F.3d at 151. Specifically, within five business days of notification of the consumer's dispute, the CRA must "provide notification of

the dispute to [the furnisher] who provided any item of information in dispute," which notification "shall include all relevant information regarding the dispute that the [CRA] has received from the consumer." 15 U.S.C. § 1681i(a)(2). After receiving such notice from the CRA, the furnisher must, *inter alia*, "conduct an investigation with respect to the disputed information," "review all relevant information provided by the [CRA]," "report the results of the investigation to the [CRA]," and "if an item of information disputed by a consumer is found to be inaccurate or incomplete . . . promptly" "modify," "delete," or "permanently block the reporting of that item of information." 15 U.S.C. § 1681s-2(b)(1).

Although the United States Court of Appeals for the Second Circuit has not yet defined the specific contours of a furnisher's investigatory responsibility under the FCRA, courts both within and outside this Circuit have applied a reasonableness standard for determining the adequacy of the required investigation. *Jenkins v. Cap. One, N.A.*, No. 14-CV-05683, 2017 WL 1323812, at *6 (E.D.N.Y. Feb. 28, 2017) (collecting cases); *see Hinkle v. Midland Credit Mgmt., Inc.*, 827 F.3d 1295, 1302 (11th Cir. 2016); *Maiteki v. Marten Transp. Ltd.*, 828 F.3d 1272, 1275 (10th Cir. 2016); *Seamans v. Temple Univ.*, 744 F.3d 853, 865 (3d Cir. 2014); *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 616 (6th Cir. 2012); *Anderson v. EMC Mortg. Corp.*, 631 F.3d 905, 908 (8th Cir. 2011); *Chiang v. Verizon New England Inc.*, 595 F.3d 26, 38-41 (1st Cir. 2010); *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1155 (9th Cir. 2009); *Westra v. Credit Control of Pinellas*, 409 F.3d 825, 827 (7th Cir. 2005); *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 431 (4th Cir. 2004). "The reasonableness of a furnisher's investigation depends upon the nature and scope of the consumer's dispute to the CRA." *Jenkins*, 2017 WL 1323812, at *6. When assessing a consumer's claim under § 1681s-2(b), courts look to "whether the furnisher's procedures were reasonable in light of what is learned about the nature of the dispute

from the description in the CRA's notice of dispute." *Id.* (quoting *Chiang*, 595 F.3d at 27); *see also Severini v. Penn. Higher Educ. Assistance Agency*, No. 18-CV-02775, 2020 WL 1467396, at *5 (S.D.N.Y. Mar. 25, 2020). For example, "where a given notice contains only scant or vague allegations of inaccuracy, a more limited investigation may be warranted." *Seamans*, 744 F.3d at 865; *see also Boggio*, 696 F.3d at 616-17; *Chiang*, 595 F.3d at 38-41; *Gorman*, 584 F.3d at 1157-61; *Westra*, 409 F.3d at 827.

Napoleon alleges both negligent and willful violation of the FCRA by North Shore. *See* Compl. ¶¶ 103, 105; *see also* Pl.'s Mem. at 1, 14. Neither claim can survive summary judgment.

As an initial matter, Napoleon has failed to proffer evidence from which a reasonable jury could find that North Shore willfully – *i.e.*, "know[ingly]" or with "reckless disregard of statutory duty," *see Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56-57 (2007) – violated the FCRA. Under the FCRA, North Shore had a statutory duty to, as relevant here, "review all relevant information provided by [Trans Union]" and "conduct an investigation with respect to the disputed information." 15 U.S.C. § 1681s-2(b)(1)(A)-(B). In her summary judgment briefing, Napoleon proffers no *evidence* indicating what information, if any, Trans Union provided to North Shore. This evidentiary gap is significant. Without evidence establishing the scope of North Shore's statutory duty, no reasonable jury could conclude on the facts here that North Shore willfully – that is, knowingly or recklessly – disregarded its investigatory duty under the FCRA. *See, e.g.*, *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995). Although Napoleon relies heavily on the deposition testimony of Ted Pawelec in connect with her FCRA claim, that testimony, viewed in the light most favorable to Napoleon, does not plug the evidentiary gap.

As to Napoleon's negligence claim, even assuming *arguendo* that North Shore negligently violated the FCRA, Napoleon's claim cannot survive because Napoleon has proffered no evidence from which a reasonable jury could conclude that she sustained actual damages. A successful claim for negligent violation of an FCRA provision entitles the consumer plaintiff to recover "any actual damages sustained . . . as a result of the failure." 15 U.S.C. § 1681*o*(a); *Shimon v. Equifax Info. Servs. LLC*, 994 F.3d 88, 92 (2d Cir. 2021). "A plaintiff 'bears the burden of proving actual damages sustained as a result of [the furnisher's] activities,' and, in the absence of such proof, the plaintiff's FCRA claim cannot survive summary judgment." *Shimon*, 994 F.3d at 92 (quoting *Casella*, 56 F.3d at 473-74).[11]

In her Complaint, Napoleon alleges that as a result of the FCRA violation, she "has suffered, and continues to suffer, actual damages, including economic loss, lost opportunity to receive credit, damage to reputation, interference with [Napoleon's] normal and usual activities, emotional distress, anger, frustration, humiliation, anxiety, fear, worry, and related health problems." Compl. ¶ 106. In her FCRA damages briefing on summary judgment, Napoleon simply argues that "her credit score has been negatively affected." *See* Pl.'s Mem. at 4. Such an argument is not sufficient to demonstrate "actual damages." *See* 15 U.S.C. § 1681*o*(a). Napoleon has "presented no evidence that any[one] even received h[er] credit report," let alone that her credit report caused her to lose out on an opportunity. *See Casella*, 56 F.3d at 475-76; *see also, e.g.*, *Selvam v. Experian Info. Sols., Inc.*, 651 F. App'x 29, 32 (2d Cir. 2016) (affirming grant of summary judgment where plaintiff did not offer any evidence "that he applied for or

[11] For willful violations of the FCRA, a defendant may be liable for punitive damages even where there are no actual damages. *See Casella*, 56 F.2d at 476. However, as noted above, Napoleon's willfulness claim cannot survive summary judgment and, in any event, she does not seek punitive damages. *See* Pl.'s Mem. at 1 (describing relief sought).

forwent applying for *any* credit after the date on which [the CRA] was informed to delete [a challenged] account . . . and before [challenged] accounts were deleted").[12] The evidence does not, for example, reflect that Napoleon "made an offer to purchase property" or "applied for a home mortgage," but was rejected on account of her credit score. *See Casella*, 56 F.3d at 475. Indeed, Napoleon does not even argue as much.[13] In addition, absent evidence that, during the period in which Trans Union reported the inaccurate North Shore account, Trans Union provided the credit report to any third party, no rational trier of fact could conclude that Napoleon suffered actual pain and suffering. *See id.* at 474-75 (declining to hold that a plaintiff is "entitled to damages for pain and suffering simply because he *knew* of an inaccurate and potentially damaging item in his credit report"); *Wenning v. On-Site Manager, Inc.*, No. 14-CV-09693, 2016 WL 3538379, at *20 (S.D.N.Y. June 22, 2016) (collecting cases). And again, Napoleon does not even argue as much. The record evidence would not permit a jury finding of actual damages.

Defendants' motion for summary judgment as to Napoleon's FCRA claim against North Shore is granted.[14]

---

[12] Napoleon's conclusory statement of harm in her (unsworn) August 7, 2018 letter to Trans Union ("I am unable to get a car or an apartment because of this inaccurate reporting. . .") is not specific enough to permit a finding of actual damages and, tellingly, Napoleon does not rely on that statement in her damages briefing on summary judgment.

[13] In her deposition testimony, Napoleon discusses having explored rent-to-own property, *see* Napoleon Tr. at 89-91, but does not indicate that she suffered any actual damages in connection with this endeavor. Napoleon does not reference this testimony in her damages briefing on summary judgment. Further, at oral argument, counsel for Napoleon noted, "I don't think that we have enough to say that [Napoleon] was indeed denied credit or the opportunity for credit, but I believe that she may have been . . . . We don't have any document indicating that she had been denied credit or lost credit opportunities . . . ." June 28, 2021 Tr. at 12.

[14] In light of Trans Union's settlement with Napoleon, whereby Trans Union, *inter alia*, deleted the North Shore account from Napoleon's credit report, *see* Pl. Counter 56.1 ¶ 23; *see also* Settlement Agreement at 1-13, Napoleon's request for injunctive relief – namely, that North Shore "furnish a complete and accurate report to Defendant Trans Union," Compl. at 21-22; *see also* Pl.'s Mem. at 1 – is denied as moot.

VI. Damages

"[C]ourts . . . routinely award damages that are readily calculable based on the undisputed facts on summary judgment." *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 740 (2d Cir. 2010); *see Hart v. Rick's Cabaret Int'l, Inc.*, 60 F. Supp. 3d 447, 474 (S.D.N.Y. 2014) ("District courts may grant summary judgment as to damages for which there exist no disputed issues of material fact."); *GCCFC 2006-GG7 Westheimer Mall, LLC v. Okun*, No. 07-CV-10394, 2008 WL 3891257, at *3 (S.D.N.Y. Aug. 21, 2008) ("Summary judgment may be granted on damages where there is no fact dispute as to the amount of damages.").

Here, there is no dispute that, under the terms of the Contract, Napoleon was required to make 78 installment payments totaling $15,054.00. Pl. Counter 56.1 ¶ 11; *see also* Contract at 1. Moreover, it is also undisputed that, prior to ceasing payment, Napoleon paid to North Shore a total of $4,052.80. Pl. Counter 56.1 ¶ 10. Accordingly, under the terms of the Contract, there was an unpaid balance of $11,001.20. *See* Contract at 1; Payment History at 1-2. Although Napoleon denies that the record evidence supports that she owes $11,001.20 under the Contract, *see* Pl. Counter 56.1 ¶ 12, because she admitted the total amount due under the Contract ($15,054.00) and the amount she has already paid ($4,052.80), it cannot be disputed that Defendants are entitled to $11,001.20 in damages.

Accordingly, the Court grants Defendants summary judgment as to damages, in the amount of $11,001.20.

CONCLUSION

For the foregoing reasons, Napoleon's motion for summary judgment is DENIED; Defendants' cross-motion for summary judgment as to Napoleon's conversion and fraud claims

is DENIED as moot; and Defendants' cross-motion for summary judgment is GRANTED as to all of Napoleon's remaining claims, as to Defendants' counterclaim for breach of contract, and as to damages in the amount of $11,001.20 on Defendants' counterclaim for breach of contract.

The Clerk of Court is directed to enter judgment accordingly and close the case.

SO ORDERED.

/s/ Diane Gujarati
DIANE GUJARATI
United States District Judge

Dated: July 7, 2021
Brooklyn, New York