IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

GREENSKY, LLC, Plaintiff, v. WELLNESS PROGRAM SERVICES, LLC d/b/a TRUSII, and JEFFREY TARADAY, Defendants.	CIVIL ACTION NO. 2019CV323886 Bus. Case Div. 4

ORDER ON PLAINTIFF GREENSKY LLC'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF GREENSKY LLC'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS

This matter comes before the Court on Plaintiff GreenSky, LLC's Motion for Summary Judgment and its Motion for Summary Judgment on Defendant's Counterclaim, both filed May 24, 2021.[1] Having reviewed the record, considered the submissions of counsel, and heard argument during a November 2, 2021 hearing, the Court enters the following order.

I. INTRODUCTION

Plaintiff GreenSky, LLC ("GreenSky") is a third party loan service provider. (Pl. SUMF, ¶ 1; Defs. SUMF, ¶ 1.)[2] It acts as an intermediary between merchants, their customers, and GreenSky's partner banks who offer financing to facilitate a customer's purchase of a merchant's

[1] On August 26, 2021, Plaintiff also filed a Motion for Summary Judgment on Defendant's Amended Counterclaim. As outlined below, that particular motion will be addressed separately.

[2] This order addresses two separate motions for summary judgment with two separate Rule 6.5 statements. However, the numbered paragraphs found in both of Plaintiff's Rule 6.5 statements, filed May 24, 2021 appear substantially similar. Defendants' Response to Plaintiffs' Rule 6.5 Statements, filed August 27, 2021 offers a consolidated reply. For ease of reference, the Court will offer this single citation to Plaintiff's first two Rule 6.5 statements.

services or wares. This dispute concerns a purported agreement between GreenSky and a merchant as well as one of the merchant's owners. GreenSky contends a legally enforceable agreement was established electronically with the pair which the merchant and the subject owner dispute.

II. FACTS

A. The GreenSky Program.

1. GreenSky's Merchant Relationships.

Through a specific program, GreenSky administers loans on behalf of its bank partners which a merchant's customers may use to facilitate their purchases (the "GreenSky Program.) (Primeaux Aff. (May 2021), ¶ 1.)[3] Merchants must apply to participate in the GreenSky Program, and GreenSky enters into contractual relationships with merchants whose participation is approved. (Id.) During the period in question, GreenSky's merchant contract was placed on GreenSky's website and accessible to merchant applicants. ("Program Agreement"). (Id., ¶ 1, Ex. 1.) Merchants desiring to participate would electronically submit an application also found on GreenSky's website ("Merchant Application"). (Primeaux Dep., p. 20.)[4] In addition to some information about the merchant, the individual preparing the Merchant Application had to list all owners with 10% or greater ownership interest in the merchant such that "[t]he combined ownership" of the listed owners would constitute a majority interest. (Id., p. 23.)[5] The individual preparing the Merchant Application also had to list certain personal information about each owner so listed, including their email, mobile phone number, birthdate, social security number, and residential address. (Id., pp. 23-24.) At the end of the Merchant Application, the party preparing

[3] Joshua Primeaux has submitted various affidavits during the course of this action. The Affidavit of Joshua Primeaux (May 2021) is Exhibit 7 to Plaintiff's motions for summary judgment and is cited by the Court with this reference.

[4] The deposition of GreenSky's 30(b)(6) witness, Joshua Primeaux, is Exhibit 4 offered in support of Defendants' response to Plaintiff's motions for summary judgment.

[5] The Merchant Application is discussed in the deposition of GreenSky's 30(b)(6) witness, Joshua Primeaux which appears to reference Exhibit 1 offered in support of Defendants' response to Plaintiff's motions for summary judgment.

it had to click on a check box ("click box") which followed below this affirmation:

> By clicking the box below and submitting this application, you are certifying that you have read and agree to the Disclosures [with a web address] and Program Agreement [with a web address].

(Id., p. 24.) Additionally, directly adjacent to the click box was the statement,

> I certify that the information submitted is true, accurate, and complete. By submitting this [Merchant] Application, I certify that I have read and agree to the Disclosures and Program Agreement.

(Def. Ex. 1.) It was not possible for a Merchant Application to be electronically submitted unless this click box was indeed checked. (Primeaux Aff. (Nov. 2019), ¶ 8.)[6] By so submitting the Merchant Application containing the checked, click box, GreenSky considered an applicant was willing be bound by the Program Agreement should its Merchant Application be approved. Id.

One of the key disputes in this matter concerns of the Program Agreement's definition of a "merchant" which, for most purposes, was the vendor identified in the Merchant Application. However, § 42(q) of the Program Agreement extended the definition of a merchant to include the owners of the vendor solely for purposes of GreenSky's indemnification should it incur losses as a result of the merchant's breach of the Program Agreement. This extended definition (which applied to merchants who were not publicly-traded companies), provided that should GreenSky seek indemnification under § 25(a) of the Program Agreement the term merchant,

> shall expressly include all persons who, directly or indirectly, have an ownership interest in the Merchant (and, by participating in the GreenSky Program, Merchant represents and warrants that all authorizations and approvals of any such persons necessary for them to be included in the definition of Merchant for such purpose have been obtained).

(Id., ¶ 1, Ex. 1, § 42(q).) In its briefing, GreenSky admits this definition essentially makes the

[6] The Second Affidavit of Joshua Primeaux, executed on November 25, 2019, is Exhibit 6 to Plaintiff's motions for summary judgment, and is referred to by the Court with this reference.

subject owners personal guarantors of the primary merchant's debt. (Pl. Resp. ISO its Mot. for Summ. J., pp. 6-7.)

2. GreenSky Connections with Merchant's Customers

GreenSky processes loan applications from customers interested in purchasing a product or service from a merchant participating in the GreenSky Program. (Kaliban Aff., ¶¶ 5-6.)[7] GreenSky connects with customers seeking financing primarily through a mobile application or website. (Id., ¶¶ 3, 5.) If the underwriting criteria of GreenSky's partner bank are satisfied, the loan application is approved, and GreenSky notifies the customer that it can then use the available funds to purchase items from the participating merchant. (Id., ¶ 6.) When such a purchase is made, the bank partner of GreenSky that approved the customer's loan application sends payment, via GreenSky, to the merchant, and GreenSky then acts as a loan servicer for the bank partner, receiving and processing the customer's loan payments. (Id., ¶ 7; Primeaux Aff. (May 2021), ¶ 2.)

B. Trusii Participates in GreenSky Program.

Defendant Wellness Program Services, LLC d/b/a Trusii ("Trusii") is a Florida limited liability company, and, in April of 2018, Defendant Jeffrey Taraday was an owner and the managing member of Trusii. (Pl. SUMF, ¶ 2; Defs. SUMF, ¶ 2.) During the pertinent time frame, Trusii sold two types of "hydrogen water generator" machines on its website, the ProElite and the EliteX (collectively referred to as "systems," "machines" or "products"). (Pl. SUMF, ¶ 4; Defs. SUMF, ¶ 4.) The two types of machines sold for approximately $6,700 and $9,970, respectively. (Taraday Dep., pp. 115-117.)[8] On or about April 17, 2018, Michael Pino electronically submitted a Merchant Application for Trusii to participate in the GreenSky Program. (Pl. SUMF, ¶ 5; Defs.

[7] The Affidavit of Timothy D. Kaliban is Exhibit 1 to Plaintiff's motions for summary judgment.
[8] The Deposition of Jeffrey Taraday is Exhibit 5 to Plaintiff's motions for summary judgment.

SUMF, ¶ 5; Primeaux Aff. (Nov. 2019), ¶ 5.) In doing so, Pino checked the online click box affirming that the Program Agreement had been reviewed. (Primeaux Aff. (Nov. 2019), ¶ 8.) Pino would have been unable to submit the Merchant Application unless this box had been checked. (Id.) Because Pino completed the Merchant Application for Trusii and was listed as it primary contact, GreenSky sent him an email, directed to an address with a Trusii domain, confirming the Merchant Application had been received and was being reviewed. (Id., ¶¶ 9-10; Ex. B.) That email included an electronic link to a copy of the Program Agreement, stating, "[c]lick here to review the GreenSky Program Agreement for your records." (Id.)

Defendants have formally described Pino as an independent contractor working for Trusii. (Defs. SUMF, ¶ 5.) Mariano Piompino, an individual closely associated with Trusii's operations, repeatedly describes Pino as an intern. (Piompino Aff., pp. 35-36, 109, 147-148.)[9] Taraday describes him as a "do it all office clerk." (Taraday Dep., p. 36.) Taraday testified that he understood Pino was assisting with Trusii business at its South Florida office while Taraday was based in Los Angelos. (Taraday Dep., p. 37) He further testified that Pino may have been on some company conference calls, but he "never met or interacted with Michael Pino." (Id., pp. 36-37.)

Taraday became aware of the submission when he received a telephone call from a GreenSky agent seeking to verify Trusii had submitted the Merchant Application. The record contains a transcript as well as an audio file of that conversation. (Primeaux Aff. (May 2021), ¶ 3, Ex. 2.) The telephone call to Taraday was placed to the phone number listed for Taraday on Trusii's Merchant Application. (Id.; Taraday Dep., p. 176.) During the relatively short conversation, Taraday provided the GreenSky agent with the requested verification as follows:

> GreenSky: I was umm actually just calling to go over an application we received that was submitted for your business.

[9] The deposition of Mariano Piompino is Exhibit 10 to Plaintiff's motions for summary judgment.

Taraday: Okay . . .

GreenSky: . . . we always reach out when we receive applications like in their starting stages just to confirm that you are aware of the application and you submitted it so that's our main concern just making sure that no one is trying to defraud you or put in the application without your knowledge.

Taraday: Yea, you know, I, I, I'll need to verify that. I'm checking right now with my partners because I know that they were submitting a few applications.

GreenSky: Okay.

Taraday: Umm so let me just put you on hold for one minute and double check on that, that'd be great.

GreenSky: Okay I'll be here.

Taraday: Okay hold on, okay.

[Pause lasting approximately five minutes]

Taraday: Hi, I'm back.

GreenSky: Hey sir.

Taraday: Hey so yea everything's all good, my partner submitted an application for us.

GreenSky: Alright.

Taraday: We're moving very fast and sometimes I don't know about certain things.

(Primeaux Aff. (May 2021), ¶ 3, Ex. 2.)

Before the call concluded, Taraday told the GreenSky agent that he had learned during the hold in the telephone conversation that the email address listed for him on the Merchant Application was inaccurate which he then orally corrected for the GreenSky agent. (Id.)

GreenSky subsequently approved Trusii's Merchant Application, and Trusii began to inform its customers they had the option to finance their purchases of Trusii's water systems through the GreenSky Program. (Pl. SUMF, ¶ 8; Defs. SUMF, ¶ 8.) Customers who elected to

finance their purchases through the GreenSky Program, executed installment loan agreements with GreenSky and its bank partners. (Pl. SUMF, ¶ 9; Defs. SUMF, ¶ 9.) Between April 2018 and March 2019, 527 Trusii customers financed the purchase of over $4.5 million worth of Trusii's products through the GreenSky Program. (Pl. SUMF, ¶ 10; Defs. SUMF, ¶ 10.)

C. Trusii Case Study Program.

Trusii conducted an information and marketing program with some of its machine owners who applied and who Trusii approved to participate (the "Case Study Program"). (Taraday Dep., pp. 64-65.) In exchange for certain activities – making posts on social media, providing testimonials, answering survey questions – Trusii promised these owner participants in the Case Study Program monthly compensation. (Id., pp. 102-108; Piompino Dep., pp. 42-45; Kennedy Dep., pp. 145-148.)[10]

D. Customer Complaints De-Rail Trusii's Participation in the GreenSky Program.

In March of 2019, relations between GreenSky and Trusii became strained. GreenSky produced a "routine monitoring report" that reflected "Trusii's transaction volume was higher than anticipated" prompting it to ask Trusii for its 2018 financial statements. (Primeaux Aff. (Nov. 2019), ¶ 15; Lekawa Aff., ¶ 4.)[11] On March 6, 2019, GreenSky sent an email requesting Trusii to submit certain financial information the following day, including a copy of its balance sheet and its profit and loss statement for 2018. (Lekawa Aff., ¶ 5, Ex. A.) In subsequent telephone calls on March 8 and March 9, 2019, GreenSky repeated its requests but Trusii never provided GreenSky with the information it had solicited. (Id., ¶¶ 6-7.)

During this same timeframe, GreenSky noticed a "material increase" in the number of customers complaining about Trusii. (Primeaux Dep., pp. 37-38.) GreenSky's analysis indicates

[10] The deposition of Christopher Kennedy is Exhibit 11 to Plaintiff's motions for summary judgment.
[11] The Affidavit of Matthew Lekawa is Exhibit 13 to Plaintiff's motions for summary judgment.

it received between zero and two complaints each month from Trusii customers beginning in June of 2018 and continuing through February of 2019. (Singh Aff., ¶ 17, Ex. A, Tab 3.)[12] As described by GreenSky's 30(b)(6) witness, Trusii customer complaints "quickly went into double digits" during March of 2019. (Id., p. 38.) This led GreenSky to start contacting Trusii's customers to learn more about their dealings with Trusii. (Primeaux Aff. (Nov. 2019), ¶ 16; Primeaux Aff. (May 2021), ¶ 5.) Specifically, on March 11, 2019, GreenSky began a "customer satisfaction calling campaign of Trusii's customers" and shortly thereafter "conducted an additional email based customer satisfaction survey." (Primeaux Aff. (Nov. 2019), ¶¶ 16-17.) Considered in a light most favorable to Defendants, the language found in the email customer satisfaction survey could be interpreted as suggesting there might be something disreputable about Trusii. (Id., ¶ 17.)[13] After making this suggestion, the email informed certain customers they could potentially receive a refund, invited them to call GreenSky "to discuss your options" and also solicited their additional feedback. (Id.)

GreenSky contends through the preliminary results of its surveys, it learned "Trusii's customers had serious complaints about its business conduct." (Primeaux Aff., (Nov. 2019), ¶ 18.)

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[12] The Affidavit of Amit Singh is Exhibit 8 to Plaintiff's motions for summary judgment.

[13] Joshua Primeaux averred,

> The following questions were asked of Trusii's customers as part of the email survey:
>
> (1) Has Trusii provided you with all the product(s) you purchased using your GreenSky loan?
> (2) Did you know or have you been told when your product(s) are expected to arrive?
> (3) Did you sign up for the case study reimbursement offer?
> (4) What is the monthly amount of the case study reimbursement that Trusii committed to you?
> (5) What is the monthly amount of the case study reimbursement that you have actually received from Trusii?
> (6) Are you aware that you have a personal loan through the GreenSky Program to pay for your Trusii purchase?
> (7) If you have not received your product(s) from Trusii, you may be entitled to a refund. Would you like us to contact you to discuss your options? You can also call us at 855-849-0088.
> (8) Please provide us any additional feedback.

(Primeaux Aff. (Nov. 2019), ¶ 17.)

Some customers complained they had never received the system they had purchased or that the system they did receive did not work properly. (Id.) Other customers "complained they had enrolled in [the Case Study Program], but that Trusii had failed to pay them for their participation, despite its promise to do so." (Id.) As indicated above, during March of 2019, the number of complaints GreenSky received about Trusii began to increase from single digits to double digits. (Primeaux Dep., p. 38.) However, after Trusii began its customer satisfaction survey, the number of customer complaints it reported receiving began to dramatically rise, reaching a peak of 103 complaints in June of 2019.[14]

GreenSky contends it informed Trusii of these complaints and did not receive responses that it considered "acceptable." (Pl. Mot. for Summ. J., p. 11.) In support of its contention, GreenSky cites to a composite exhibit solely of emails that it sent to Trusii informing it of customer complaints. (Pl. SUMF, § 12, Ex. 12.)[15] GreenSky's briefing offers little insight into the timing or nature of Trusii's responses or what led it to deem them unacceptable.[16] However, GreenSky's 30(b)(6) witness testified that initially Trusii did send "a couple" of emails responsive to GreenSky's notice of customer complaints, but it "did not respond to the overall majority, and

[14] GreenSky's analysis reflects the following numbers of complaints once it initiated its customer satisfaction survey in March of 2019 and continuing through the end of that year:

Mar.	17
April	23
May	37
June	103
July	45
Aug.	75
Sept.	68
Oct.	47
Nov.	27
Dec.	14

(Singh Aff., ¶ 17, Ex. A, Tab 3.)

[15] GreenSky contends and Defendants do not appear to dispute that the emails in this composite Exhibit 12 were received from Trusii during discovery. (Pl. SUMF, n. 2.)

[16] In its briefing, GreenSky claims it is not required to explain as it is the "sole decisionmaker" on whether Trusii offered an acceptable response to its notices of customer complaints. (Pl. Reply ISO its Mot. for Summ. J., p. 10.)

[Trusii] certainly stopped responding completely at some point." (Primeaux Dep., pp. 115-16.)

Based upon its newfound concerns about Trusii, GreenSky suspended the company from the GreenSky Program on March 11, 2019 before altogether terminating its participation two days later on March 13, 2019. (Kaliban Aff., ¶ 18.)

Subsequently, GreenSky determined that every one of the sales that involved a customer complaint "may have been subject to claims of cancellation, rescission, avoidance, or offset by the customers." (Primeaux Aff. (May 2021), ¶ 6.) According to § 12(a)(1) of the Program Agreement, this determination led GreenSky to issue refunds to all of the complaining customers for their loan payments and to forgive their loan balances and then to reimburse GreenSky's bank partners for the forgiven loans. (Id.) Defendants do not dispute that at the time of this motion filing, GreenSky had remitted a total of $3,053,331.44 towards the loans of 428 complaining customers. (Pl. SUMF, ¶ 24; Defs. SUMF, ¶ 24.)

E. Discovery Reveals Trusii's Loosely Structured Business.

As discovery in this case revealed, Trusii was a thinly capitalized corporation that had an extremely loose, almost non-existent business structure. Taraday is listed on the company's organizational documents as a 51% owner. (Pl. SUMF ¶ 2; Defs. SUMF ¶ 2; Pl. Ex. 3.) His affiliation with Trusii was his first experience with a limited liability company. (Taraday Dep., p. 52.) He initially contributed between $80,000 and $100,000 to the company but had little knowledge of its finances or business dealings. (Id., pp. 28-33, 35.) Taraday testified the company had no operating agreement, board of directors, chief financial officer, or controller. (Pl. SUMF, ¶ 16; Defs. SUMF, ¶ 16.) No one who worked in the company had a formal title, and there was no business hierarchy. (Taraday Dep., p. 51; Piompino Dep., pp. 136-137, 146.) By all accounts,

the company was never profitable and money was "incredibly tight" throughout its existence. (Taraday Dep., p. 32; Piompino Dep., p. 126.)

Taraday made it clear to Trusii's key personnel that he would not personally guarantee any company debts. (Taraday Dep., pp. 44-45; Piompino Dep., pp. 127-128; Kennedy Dep., pp. 167-169.) Pino was informed that Taraday's personal information and name were never to be used to guaranty any company debts. (Kennedy Dep., p. 167.)

III. PROCEDURAL HISTORY

On July 12, 2019, GreenSky filed the above-styled petition seeking declaratory relief. In its most recent pleading amendment, GreenSky added claims for breach of contract and attorney's fees. (2nd Am. Pet. for Decl. Judg. and Compl., filed March 4, 2020.) On August 15, 2019, Trusii and Taraday filed separate answers. This matter was transferred to the Metro Atlanta Business Case Division on October 16, 2019. On October 29, 2019, Trusii amended its responsive pleadings to include counterclaims for tortious interference, product disparagement, injunctive relief (barring GreenSky from contacting Trusii's customers), and attorney's fees.

The case proceeded through a lengthy discovery period that included judicially-imposed, pandemic-related stays. Additionally, numerous discovery extensions were granted, most based on the joint motion of the parties.[17] On May 24, 2021, Plaintiff filed two separate motions for summary judgment currently before the Court, one involving its own claims and the other addressing Trusii's counterclaims. Plaintiff filed a third motion for summary judgment on August 26, 2021 focusing on recent amendments made to Trusii's counterclaim, lodged after these summary judgment motions had been filed. As addressed in the Court's Order Establishing Briefing Deadlines and Setting Hearing, entered November 16, 2021, this order will address the

[17] See Joint Motions to Extend Case Management Order Deadlines filed on March 3, 2020, November 5, 2020, November 24, 2020, February 19, 2021, and May 24, 2021.

Plaintiff's first two motions for summary judgment, and GreenSky's third such motion will be addressed separately.

IV. STANDARD OF REVIEW ON MOTIONS FOR SUMMARY JUDGMENT

In Fulton County v. Ward-Poag, 310 Ga. 289, 292 (2020), the Georgia Supreme Court recently reiterated the "well-established principles" guiding a trial court's review of a motion for summary judgment. "A trial court can grant summary judgment to a moving party only if there are no genuine issues of material fact and the undisputed evidence warrants judgment as a matter of law. See O.C.G.A. § 9-11-56(c). In reviewing the evidence, a court must construe all facts and draw all inferences in favor of the non-movant." Ward-Poag expressly relied on Messex v. Lynch, 255 Ga. 208, 210 (1985) which further provides, "[t]he party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists, and the trial court must give that party the benefit of all favorable inferences that may be drawn from the evidence."

V. GREENSKY'S EVIDENTIARY OBJECTIONS

In relation to the two motions for summary judgment currently before the Court, Plaintiff lodged Evidentiary Objections to Documents Submitted by Defendants in Opposition to GreenSky's Motions for Summary Judgment, filed September 10, 2021.

As general matter, GreenSky objects to Defendants' response and all of their opposing evidence because their response was filed at 12:31 a.m. on August 27, 2021, just after the August 26, 2021 deadline. (Pl. Evid. Object., p. 1.) A trial court has discretion whether to consider untimely responsive materials offered in opposition to a motion for summary judgment. Fowler v. Smith, 237 Ga. App. 841, 843 (1999). Case law has upheld the exercise of discretion in a variety of circumstances and outcomes. For example, in Gerben v. Beneficial Georgia, Inc., 283 Ga. App.

740 (2007), the case cited by GreenSky, a party responded to a motion for summary judgment one day after the deadline and presented affidavits in opposition to the motion three days after the deadline. The appellate court found the trial court did not abuse its discretion in declining to consider the late responding party's affidavits. Id. at 742. By contrast, in Arbor Stations Homeowners Services, Inc. v. Dorman, 255 Ga. App. 866, 867 (2002), the appellate court upheld the trial court's determination to consider a response that was almost two weeks late based purely on the trial court's conclusion that "the interests of justice" would be served "so that the case could be decided on its merits." Here, based on the extremely short time after the deadline in which the Defendants' response and evidence were presented, the fact that Plaintiff was able to consider the response and evidence when preparing its reply brief and appearing during the motions hearing and also considering the extensive discovery that has occurred in this matter as well as the significant damages at issue, the Court determines that the late-filed responsive materials should be considered so that this case may be "decided on its merits." Id.

Plaintiff also lodged sixteen specific objections to the Defendants' evidence, not including subparts. The Court has reviewed and considered all of these objections and determined that none of the challenged evidence, even if considered admissible, would materially impact its analysis on these motions for summary judgment, as detailed below.

VI. ANALYSIS

A. GreenSky's Motion for Summary Judgment.

1. *Did Trusii Enter into a Binding, Enforceable Contract with GreenSky*

Defendants offer a litany of arguments as to why they did not enter a binding and/or enforceable contract with GreenSky. (Defs. Resp., pp. 4-8.) The Court will first consider those arguments in relation to Trusii.

Essentially, Trusii attacks the online nature of the Merchant Application's submission and the "click box" acceptance of the Program Agreement. It contends there are disputed issues of fact regarding Trusii's assent to the Program Agreement and its intent to be bound thereby. (Defs. Resp. to Pls. Mots. for Summ. J., pp. 4-5.) See O.C.G.A. § 13-3-1 (assent of the parties is an essential element of a valid contract).

The Program Agreement expressly states that it will be governed by Georgia law. (Primeaux Aff. (May 2021), ¶ 1, Ex. 1, § 29.) Regarding the formation of electronic agreements, Georgia law is in its infancy. See generally Thornton v. Uber Technologies, Inc., 359 Ga. App. 790 (2021) *certiorari denied* October 5, 2021. Thornton addressed, as a matter of first impression, whether certain terms and conditions of use, employed in a smartphone application were binding on the user. The facts were distinct as Thornton concerned a "browsewrap agreement" which "does not require the user to manifest assent to the terms and conditions expressly" as opposed to agreements like the present one which use a click box as a means of evidencing assent. Id. at n. 1. However, Thornton does illustrate the unique issues that these types of electronic agreements can pose when evaluating assent based on electronic screen presentations – the size and color of the font, the level of contrast between writing and the background screen, the conspicuous styling of a hyperlink leading to the terms and conditions as well as visual obstructions occurring on the screen that may have prevented the user from fully observing or electronically linking to the terms and conditions. Notably, Thornton considered these novel issues of contract formation by reference to Georgia's long-standing objective theory of intent for evaluating whether parties assented to a contract.

> In determining whether there was a mutual assent, courts apply an objective theory of intent whereby one party's intention is deemed to be that meaning a reasonable man in the position of the other contracting party would ascribe to the first party's manifestations of assent, or that meaning which the other contracting party knew the first party ascribed to his

> manifestations of assent. Further, in cases such as this one, the circumstances surrounding the making of the contract, such as correspondence and discussions, are relevant in deciding if there was a mutual assent to an agreement.

Id. at (1).

Trusii asserts it only "manifested the intent to be able to refer customers to GreenSky for accessible financing." (Defs. Resp., p. 6.) The Court disagrees. Trusii's agent electronically submitted the Merchant Application to be a part of the GreenSky program through the GreenSky portal and electronically affirmed, via checking the click box, that Trusii had read and agreed to be bound by the Program Agreement. (Primeaux Aff. (Nov. 2019), ¶¶ 4-8, Ex. A.) Trusii could not have electronically submitted the Merchant Application without checking this click box and making this affirmation. (Id., ¶ 8.) GreenSky then sent Trusii's agent an email confirming the Merchant Application had been received and providing him with another link to the Program Agreement. (Id., ¶¶ 9-10, Ex. B.) During the follow up telephone call placed by a GreenSky representative, Taraday affirmed that the submission of the Merchant Application had been authorized. (Primeaux Aff. (May 2021), ¶ 3, Ex. 2.) Applying the "objective theory of intent" to all of this undisputed evidence, the Court finds GreenSky reasonably assumed Trusii intended to accept the Program Agreement.[18] The one case Trusii cites as recognizing a disputed questions of fact may arise concerning the parties' intent to contract, Turner Broadcasting System v. McDavid, 303 Ga. App. 593, 596-597 (2010), is easily distinguished. (Defs. Resp. to Pl. Mots. for Summ. J., p. 5.) That case concerned an oral contract where the evidence regarding its formation was "highly controverted." Id. at 596. Nothing about it is similar to the facts at issue here.

Trusii also argues there was no mutual assent because key terms of the Program Agreement

[18] Additionally, the Court has reviewed the copy of the electronic Merchant Agreement form that Trusii itself has presented in response to these motions. (Defs. Ex. 1.) This screen presentation reflects the click box and the corresponding affirmations are both clear and conspicuous.

were concealed from it. (Defs. Resp. to Pl. Mots. for Summ. J., pp. 5-6.) However, the Program Agreement was posted on GreenSky's website and accessible for Trusii to view when it applied for the GreenSky Program and during the entire time Trusii was a participant. (Primeaux Aff. (May 2021), ¶ 1.) Again, the record reflects that upon its receipt of the Merchant Application, GreenSky responded to the Trusii agent who submitted Trusii's Merchant Application with an email that also provided a clear link to the Program Agreement. (Primeaux Aff. (Nov. 2019), ¶¶ 9-10, Ex. B.) Trusii's arguments about concealment are simply not borne out by the undisputed evidence.

Without any authority or evidence, Trusii argues that the submission of the Merchant Application was, at most, an offer to form an agreement. However, Trusii's assertion completely ignores all of the undisputed evidence discussed above. It also ignores the millions of dollars Trusii received as a result of the financing GreenSky helped facilitate pursuant to the Program Agreement. (Def. Resp. to Pl. Mots. for Summ. J., pp. 6-8.) As recognized in Thornton, even absent a valid signature, assent sufficient to form a contract may be indicated by a party's continued acceptance of services after receiving notice of a contract's terms. Id. at (2) citing Comvest, L.L.C. v. Corp. Sec. Group, Inc., 234 Ga. App. 277, 280-81 (3) (1998) ("Parties may become bound by the terms of a contract, even though they do not sign it, where their assent is otherwise indicated, such as by the acceptance of benefits under the contract, or the acceptance by one by the performance of the other.")(citation and punctuation omitted).

Trusii further contends there was a unilateral mistake because GreenSky knew or should have known after its telephone call that Taraday had not personally reviewed the Program Agreement and could not have possibly have read and understood it during the short span of the telephone call. (Defs. Resp. to Pl. Mots. for Summ. J., pp. 9-10.) Trusii's purported lack of

knowledge about the terms of the Program Agreement does not fall within the realm of a legal mistake sufficient to justify relief. "As a general rule, equity does not operate to rescind a contract based upon a unilateral mistake where the party claiming mistake, by exercising reasonable diligence, could have discovered the truth (punctuation omitted)." Decision One Mortg. Co., LLC v. Victor Warren Prop., Inc., 304 Ga. App. 423, 425–26 (2010); see also O.C.G.A. § 23–2–29 ("If a party, by reasonable diligence, could have had knowledge of the truth, equity shall not grant relief; nor shall the ignorance of a fact known to the opposite party justify an interference if there has been no misplaced confidence, misrepresentation, or other fraudulent act.") For its own protection, GreenSky telephoned Taraday simply to confirm that Trusii had submitted the Merchant Application and wanted to be considered for participation in the GreenSky Program. It was not incumbent upon GreenSky to canvas Trusii's complete understanding of the Merchant Application process or the terms of Program Agreement to which Trusii had agreed. Wright v. Safari Club International, 322 Ga. App. 486, 493 (2013) ("[P]arties to a contract are presumed to have read their provisions and to have understood the contents.")

Trusii also contends the contract contains unconscionable terms without specifying which terms it is attacking. (Defs. Resp., p. 10.) However, nothing in the record suggests the Program Agreement would meet Georgia's high legal standard of unconscionability.

> An unconscionable contract is abhorrent to good morals and conscience and is an agreement in which one of the parties takes a fraudulent advantage of another. But an agreement is *not* unconscionable merely because it appears to favor one party over another or may lead to hardship. Indeed, we have repeatedly emphasized that parties should be entitled to contract on their own terms without the courts saving one side or another from the effects of a bad bargain (punctuation and citations omitted; emphasis found in original).

Smith v. Adventure Air Sports Kennesaw, LLC, 357 Ga. App. 1, 6 (2020), cert. denied (May 3, 2021)

In light of the foregoing, the Court finds the Program Agreement was a binding and

enforceable contract between GreenSky and Trusii.

2. Is Taraday Individually Liable to GreenSky under the Program Agreement?

Taraday's liability is based on § 42(q) of the Program Agreement which defines merchant in such a way that any Trusii owner would be considered one solely for purposes of indemnifying GreenSky for any losses it might incur should Trusii breach the Program Agreement. In its briefing, GreenSky casually asserts, "Taraday provided his agent with actual and apparent authority to submit the application on **his** behalf (emphasis supplied)." (Pl. Reply ISO Mot. for Summ. J., p. 7.) This claim merits closer inspection. "The relation of principal and agent arises wherever one person, expressly or by implication authorizes another to act for him or subsequently ratifies the acts of another on his behalf." O.C.G.A. § 10-6-1. In the recent case of Lynn v. Lowndes County Health Servs., LLC, 354 Ga. App. 242 (2020) cert. denied Sept. 8, 2020, the Georgia Court of Appeals offered a detailed review of the three different ways in which an agent may bind his principal – actual authority, apparent authority, and ratification.

In the absence of a legal document, such as a power of attorney, conferring an agent with authority and outlining its scope, a high evidentiary bar exists to establish that an agent had actual authority to bind a principal:

> we have been clear that although a principal or an agent may testify as a fact of their status as a principal or an agent of the other, such testimony must have some evidentiary support and is only conclusive on the question of an agency relationship when *both* the principal and agent testify of their status as to one another (cits. omitted; emphasis in original).

Id. at 246. Here, Taraday has disclaimed Pino's status as his agent capable of personally binding Taraday for Trusii's debts. (Taraday Dep., pp. 44-45; see also Piompino Dep., pp. 127-128; Kennedy Dep., p. 167.) Indeed, Taraday claims he barely knew Pino. (Taraday Dep., p. 36-37.) No evidence has been offered from Pino.

Lynn also offers a detailed recitation of the law governing the apparent authority of an agent to bind a principal that requires examination of *both* the principal's conduct and the reasonable/innocent reliance of the third party attempting to establish the agency:

> the doctrine of apparent agency is predicated on principles of estoppel, and its applicability, therefore, is determined by examining both the conduct of the alleged *principal* and the detrimental reliance on that conduct by the third party asserting the doctrine. Apparent authority creates an estoppel allowing third parties to bind a principal to the agent's acts on account of the principal's conduct, reasonably construed by third parties acting in innocent reliance thereon. (Punctuation omitted; emphasis in original).

Id. at 247-248. As concerns Taraday's conduct, GreenSky correctly notes that agency may be demonstrated through circumstantial evidence, citing Atlanta Truck Parts, Inc. v. Zenon & Zenon Contractors, Inc., 345 Ga. App. 507, 508 (2018). However, this case upheld the trial court's finding of apparent authority based on evidence presented during a bench trial. Thus, the evidence supporting the trial court's decision received a far more lenient standard of review, thus limiting use of this authority in a summary judgment context.[19] Moreover, the circumstantial evidence of the agent's apparent authority in Atlanta Truck Parts reflected a significant history of past dealings and conduct that is not found in this record. Id. at 509.

Here, there is some evidence of the agent's apparent authority to bind Taraday because he had access to Taraday's personal information – his social security number, mobile phone number, residential address, etc. However, the primary evidence of Taraday's conduct is the telephone conversation commenced by GreenSky, and it does not suggest that Taraday offered any indication that the Trusii agent who submitted the Merchant Application had the authority to personally bind him. That conversation begins began with a GreenSky representative telling Taraday, "I am calling to go over an application . . . that was submitted for your business" and Taraday's response that

[19] "Upon a review of the evidence, we cannot conclude that the trial court [judgment that included an implicit] finding of apparent authority was wholly unsupported or clearly erroneous." Atlanta Truck Parts. at 509.

"my partner submitted an application for us . . . We're moving very fast and sometimes I don't know about certain things." (Primeaux Aff. (May 2021), ¶ 3, Ex. 2.) During this conversation, the potential for Taraday to become personally liable for Trusii's business dealings with GreenSky was never mentioned. (Id.)

As concerns the second factor outlined in Lynn, the record raises questions about GreenSky's "innocent" reliance on Taraday's conduct. GreenSky's briefing acknowledges that the Program Agreement's definition of merchant created a guarantor relationship with Trusii's owners, yet, notably, neither the Merchant Application nor the Program Agreement uses the term guaranty or guarantor. (Pl. Reply ISO of its Mot. for Summ. J., p. 7.) Similarly, during the telephone conversation, the GreenSky representative expressly stated that the call was about an application submitted by Taraday's "business" and was entirely silent about Taraday's potential liability for Trusii's dealings. (Primeaux Aff. (May 2021), ¶ 3; Ex. 2.) Finally, the Merchant Application electronic submittal process used by GreenSky did not allow for all potentially liable parties to manifest their assent to be bound by the Program Agreement. (Primeaux Dep., pp. 20-24; Defs. Ex. 1.) Rather, GreenSky relied on a process where the one individual submitting the Merchant Application could potentially bind not only the vendor merchant but also its owners without clearly establishing the individual's authority to do so. The Court finds a question of fact exists as to whether GreenSky reasonably and innocently relied on Pino's apparent authority to bind Taraday.

Finally, Lynn addresses the third method by which an agent's acts may bind a principal, ratification.[20] In order for a principal to ratify an agent's acts, "he must have full knowledge of all material facts." Id. at 249. As outlined above, the transcript of the call suggests Taraday may not

[20] It does not appear that GreenSky is asserting a ratification argument. (Pl. Reply ISO Mot. for Summ. J., p. 7.)

have had full knowledge of all the material facts regarding his personal liability under the Program Agreement.

For the reasons outlined above, the Court finds the issue of Taraday's liability under the Merchant Agreement is not susceptible to summary judgment.

3. Did Trusii Breach the Program Agreement?

GreenSky asserts Trusii breached the Program Agreement in a number of ways. (Pl. Mot. for Summ. J., pp. 11-12.)

a. Section 11(a)(iii)(B).

Section 11(a)(iii)(B) requires all Trusii products purchased and financed through the GreenSky Program should be "fit and merchantable for their intended purpose" and shall be "delivered into the customer's possession." GreenSky has submitted some large, composite exhibits with recordings of telephone calls and emails from Trusii customers making a number of complaints – products that had not arrived and machines that did not work properly. (Primeaux Aff. (May 2021), Ex. 4-5.) In their response brief, Trusii does not specifically address this claim of breach. While Defendants have attempted to offer some isolated evidence that certain customers' complaints were either baseless or had been addressed, Defendants have failed to refute the bulk of Plaintiff's evidence.[21] (Am. Taraday Aff., ¶ 10.)

b. Section 2 (v) and (ix).

Section 2 of the Program Agreement requires the Merchant to respond to GreenSky's requests for information in the event of a customer complaint. Specifically, Section 2(v) required the Merchant to "cooperat[e] with [GreenSky] in investigating and remediating escalations,

[21] Trusii appears to acknowledge significant shipping delays for some Trusii products. Taraday's affidavit suggests that on September 12, 2019, six months after its termination, Trusii still had products awaiting shipment to customers who financed their purchase through the GreenSky Program. (Am. Taraday Aff., ¶ 6, Def. Ex. 2; but see Ev. Objec., No. 16.)

complaints and disputes about Merchant and respond[] within five Business Days, or such shorter time as required by this Agreement, to any request for information, audit or review related to Merchant's participation in the GreenSky Program." Section 2(ix) outlined an identical deadline for Merchant to respond "to any inquiry from [GreenSky], and fully cooperate[e] with [GreenSky] in connection with the resolution of any dispute involving a Borrower or prospective Borrower."

In support of its motion for summary judgment, Plaintiff submitted a composite exhibit of numerous emails it sent providing Trusii with notice of customer complaints beginning with emails dated in July of 2018 and ending with emails dated in June of 2019. (Pl. SUMF, ¶ 12, Ex. 12.) The bulk of these complaints occurred after Trusii's March 13, 2019 termination from the GreenSky Program. (Id.) As for Trusii's obligation to cooperate with GreenSky in addressing customer complaints post-termination, Section 18(a) of the Program Agreement provides, "the termination of this Agreement shall not affect the rights of either party to recover for breaches occurring . . . prior thereto or with respect to provisions of this Agreement that by the nature of their terms continue after termination . . ." Section 18(c) further provides that, "[n]otwithstanding termination of this Agreement, the provisions of this Agreement will continue in full force and effect as to all [transactions approved through the GreenSky Program] prior to termination. . . ." Therefore, the obligation of Trusii to respond to GreenSky's requests for assistance in dealing with customer complaints continued as to those customers who had used the GreenSky Program to fund their purchases of Trusii products prior to Trusii's termination.

As for Trusii's failure to respond to these customer complaints, GreenSky very generally states, "GreenSky informed Defendants about these complaints, but did not receive acceptable responses . . . ." (Pl. Mot. for Summ. J., p. 11.) GreenSky's corporate representative testified that, during the early phases of this dispute, Trusii provided some responses to GreenSky's requests for

assistance in resolving customer disputes but that it failed to respond to the majority of such requests before it stopped responding altogether which evidence Trusii has not refuted. (Primeaux Dep., pp. 115-116.) Thus, the record presents clear and uncontroverted evidence that Trusii failed to timely respond to GreenSky's requests for assistance in remedying customer complaints.

c. Section 14(c)

In § 14(c) of the Program Agreement,

> Merchant also agrees that, upon request, Merchant shall provide a copy of Merchant's most recent financial statements, including Merchant's balance sheets, statements of income and retained earnings, cash flows and any accompanying notes, in reasonable detail and prepared in accordance with generally accepted accounting principles.

GreenSky has clearly evidenced such a request for Trusii to supply its general 2018 financial information as well as Trusii's corresponding failure to comply. (Lekawa Aff., ¶¶ 5-6, Ex. A.) This evidence is unrefuted.

In light of the foregoing, the Court finds summary judgment is merited as to Trusii's liability for breach of the Program Agreement.[22]

4. GreenSky's Entitlement to all Refunded Sums in Damages.

Section 12(a) of the Program Agreement provides,

> Merchant agrees that it will refund on demand . . . the amount of any Loan affected, plus any finance or other charges related to the Loan under the [customer's loan agreement], in

[22] GreenSky also argued that § 17 of the Program Agreement was breached. Section 17 of the Program Agreement imposes an independent obligation upon the Merchant to provide GreenSky with notice of customer complaints. It states, "[w]ithin five Business Days of receipt, Merchant shall provide [GreenSky] . . . with a copy of any written complaint or a report of any verbal complaint received from any borrower . . . ."

GreenSky claims that during discovery, it learned of various customer complaints that Trusii had received but not shared. (Pl. SUMF, ¶ 11, Ex. 9.) However, the evidence cited by GreenSky regarding Trusii's failure to share the complaints is weak. (Id.) It only cites excerpts from the deposition testimony of some key Trusii personnel, Taraday, Piompino, and Kennedy. (Id.) Taraday testified he had "nothing to do with . . . any communications back and forth to GreenSky . . ." (Taraday Dep., p. 126.) Kennedy similar testified he played no role in forwarding customer complaints to GreenSky. (Kennedy Dep., p. 94-95.) Piompino testified he "personally" did not work with GreenSky to resolve customer complaints as that was Pino's job. (Piompino Dep., p. 67.) However, the evidence that none of these three individuals shared the information with GreenSky does not prove Trusii's failure to share the information, particularly in light of Piompino's testimony that Pino was responsible for this task. Thus, as the movant who bears the burden of proof, GreenSky's evidence is lacking as to this particular breach claim.

each of the following events:

> (i) [GreenSky] determines that (A) Merchant has breached or failed to fulfill any of its obligations under this Agreement . . . or has breached any of its representations or warranties under this Agreement, or (B) the [transaction with a customer] is fraudulent or is subject to any claim of illegality, cancellation, rescission, avoidance or offset, including negligence, fraud, misrepresentation or dishonesty on the part of . . . Merchant . . . .

Based on this authority, GreenSky determined that it would refund all loans involving every one of Trusii's complaining customers. It now seeks indemnity from Trusii for this refund amount, which exceeds $3 million, based on §§ 25(a) and 37 of the Program Agreement. When challenged about its decision to broadly grant refunds, GreenSky's 30(b)(6) witness explained it was due, in large part, to Trusii's failure to cooperate in resolving the complaints. (Primeaux Dep., pp. 40, 56, 67, 100-101, 110, 119-120.)

While Trusii's failure to cooperate with GreenSky in investigating customer complaints makes this a difficult issue, the Court finds that this decision to grant a refund to any party who complained about a Trusii product raises questions of fact about the amount of Trusii should be required to indemnify GreenSky for its breaches. On its face, §12(a) contemplates the refund decision will be made on a case-by-case basis, focusing on each individual loan transaction. Taraday has averred some of the refunds were given to customers who had baseless complaints – including customers who had received functioning products and some who had products that Trusii had fixed, including some that Taraday himself had personally repaired. (Am. Taraday Aff., ¶ 10.) Also, considering the evidence in the light most favorable to the Defendants, the timing of the GreenSky customer surveys and the corresponding drastic increase in the number of customer complaints suggest a question of fact as to whether GreenSky's customer communications simply revealed the extent of Trusii's problems or whether these communications, together with GreenSky's refund policy, may have spurred bogus refund requests. (Singh Aff., ¶ 17, Ex. A, Tab

3.)

5. GreenSky's Entitlement to Declaratory Relief

Initially, GreenSky petitioned the Court solely for declaratory relief addressing its right to demand and Trusii's obligation to provide information about customer complaints and its ability to recover from Trusii the money GreenSky refunded to Trusii's customers. (Pl. Mot. For Summ. J., p. 12.) However, GreenSky subsequently amended its complaint and added a claim for breach of contract.

> The Declaratory Judgment Act is designed to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, see OCGA § 9-4-1, and the object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated. The proper scope of declaratory judgment is to adjudge those rights among parties upon which their future conduct depends. Such relief is authorized when there are circumstances showing a necessity for a determination of the dispute to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct, which is properly incident to his alleged rights and which if taken without direction might reasonably jeopardize his interest.

Love v. Fulton Cty. Bd. of Tax Assessors, 311 Ga. 682, 3(c) (2021).

As the case currently stands, GreenSky has already terminated Trusii from the GreenSky Program, issued over $3 million in refunds to Trusii's complaining customers, and now seeks to recover from Defendants for breach of contract and indemnification. It has not pointed to what future conduct requires direction from the Court. Accordingly, the Court finds GreenSky is facing no actual controversy requiring this Court's guidance, and its motion for summary judgment on its declaratory relief claim is without merit.

B. GreenSky's Motion for Summary Judgment on Defendant's Counterclaims and GreenSky's Motion for Summary Judgment on Defendant's Amended Counterclaims.

1. Counterclaim for Tortious Interference

Trusii accuses GreenSky of tortious interference "with its existing contracts between customers, interference with prospective contractual relations, and interference with business relationships." (Defs. Second Am. Countercl., ¶ 11.) This counterclaim was included in both Trusii's initial and amended counterclaim, and appears to be substantially similar, if not identical, in both pleadings. Specifically, Trusii claims GreenSky reached out "to Trusii's customers and encourage[d] them to cancel orders, modify orders, file complaints and seek refunds." (Id., ¶ 6.)

GreenSky claims it cannot be held liable for tortious interference because it was not a stranger to the contracts or business relationships at issue. (Pl. Mot. for Summ. J. on Def. Countercl., pp. 10-11.) In a landmark opinion, Atlanta Market Ctr. Mgmt. Co. v. McLane, 269 Ga. 604, 609 (1998), the Georgia Supreme Court drastically reduced the reach of tortious interference liability, formally adopting the stranger doctrine.

> We endorse the Court of Appeals' line of cases which, in effect, reduce the number of entities against which a claim of tortious interference with contract may be maintained. We reiterate that, in order to be liable for tortious interference, one must be a stranger to both the contract at issue and the business relationship giving rise to and underpinning the contract. (Cit.) In other words, all partys [sic] to an interwoven contractual arrangement are not liable for tortious interference with any of the contracts or business relationships. (Cits.)

Here, the undisputed evidence reflects that many of the customers at issue financed the purchase of Trusii's products through the GreenSky Program. (Pl. SUMF, ¶ 10; Defs. SUMF, ¶ 10.) Trusii's efforts to portray GreenSky as a stranger to the relationship between Trusii and those customers is unpersuasive.

As to other Trusii customers or prospective Trusii customers who were not affiliated with the GreenSky Program, the elements of a tortious interference claim are:

> (1) improper action or wrongful conduct by the defendant without privilege;
> (2) the defendant acted purposely and with malice with the intent to injure;
> (3) the defendant induced a breach of a contractual obligation or caused a party or third party to discontinue or fail to enter into an anticipated business relationship with the

plaintiff; and
(4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Rowell v. Phoebe Putney Mem'l. Hosp., Inc., 338 Ga. App 603, 604 (2016). GreenSky has noted Trusii has failed to produce any evidence necessary to support some of these essential elements, e.g. failing to identify the customers at issue, failing to specify just how GreenSky caused those customers to discontinue or fail to enter into a relationship with Trusii, or failing to demonstrate that GreenSky's actions proximately caused Trusii damages. (Pl. Mot. for Summ J. on Def. Countercl., p. 12.) As the defendant in counterclaim, who will not bear the burden of proof at trial, GreenSky may demonstrate that it is entitled to summary judgment by pointing to an absence of evidence in the record by which Trusii might carry its burden. Morris v. Real Estate Expert Advisors, LLC, 355 Ga. App. 286, 291-292 (2020). "When this done, [Trusii] cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue." Id. at 292. Here, as to any tortious interference claim involving customers who did not participate in the GreenSky Program, Trusii has failed to identify the evidence supporting essential elements of its tortious interference claim.

2. Other Trusii Counterclaim Issues

In their August 27, 2021 response, Trusii formally declared its counterclaims for product disparagement and injunctive relief to be moot. (Defs. Resp. to Pl. Mots. for Summ. J., p. 4.) Accordingly, the Court finds these counterclaims have been withdrawn.

Trusii has asserted new counterclaims by amendment since GreenSky filed the instant motion. Because of those new claims, the Court finds the portion of GreenSky's motion seeking summary judgment on Trusii's claim for attorney's fees has been rendered premature. See D. Rose, Inc. v. City of Atlanta, 359 Ga. App. 533 (2) (2021) (claims for attorney's fees under

O.C.G.A. § 13-6-11 are derivative).

VII. CONCLUSION

It is hereby ORDERED that Plaintiff GreenSky, LLC's Motion for Summary Judgment is GRANTED IN PART solely as to Defendant Trusii's liability for breach of contract and DENIED as to the remainder.

It is further ORDERED that Plaintiff's Motion for Summary Judgment on Defendant's Counterclaim is GRANTED IN PART as to Defendant Trusii's counterclaim for tortious interference, MOOTED as to Defendant Trusii's counterclaims for product disparagement and injunctive relief as these claims have been withdrawn, and RESERVED as to Trusii's counterclaim for attorney's fees.

So ordered this 29th day of November, 2021.

/s/ John J. Goger
JOHN J. GOGER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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