

<b>Matter of Greensky, Inc. Sec. Litig.</b>
2020 NY Slip Op 31545(U)
April 22, 2020
Supreme Court, New York County
Docket Number: 655626/2018
Judge: Jennifer G. Schechter
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. JENNIFER G. SCHECTER **PART** **IAS MOTION 54EFM**

*Justice*

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IN RE GREENSKY, INC. SECURITIES LITIGATION

**INDEX NO.** 655626/2018

**MOTION DATE** \_\_\_\_\_

**SEQ. NOS.** 005 006

**DECISION & ORDER ON  
MOTIONS**

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 64, 65, 66, 89 were read on this motion to \_\_\_\_\_ **DISMISS** \_\_\_\_\_.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 82, 83, 84, 88, 90, 94, 95 were read on this motion to \_\_\_\_\_ **DISMISS** \_\_\_\_\_.

Motion sequence numbers 005 and 006 are consolidated for disposition.

Defendants GreenSky, Inc. (GreenSky or the Company), David Zalik, Robert Partlow, Joel Babbit, Gerald Benjamin, John Flynn, Gregg Freishtat, Nigel Morris, Robert Sheft, Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, Morgan Stanley & Co. LLC, Citigroup Global Markets Inc., Credit Suisse Securities (USA) LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, SunTrust Robinson Humphrey, Inc., Raymond James & Associates, Inc., Sandler O'Neill & Partners, L.P., Fifth Third Securities, Inc., and Guggenheim Securities, LLC move to dismiss the consolidated class action complaint (Dkt. 37 [the Complaint]). The putative class representatives—Damian Langere, Robert Lowinger, Rafal Dobek, William Coombs, James Zhang, and Diane Korth—oppose the motions. The motions are granted.

## Background

The facts drawn from the Complaint are assumed true for purposes of this motion to dismiss.

“GreenSky is a financial technology company that facilitates the provision of consumer loans by matching consumers with banks that provide financing” (Complaint ¶ 2). It “derives its revenue from two sources: (1) upfront transaction fees paid by participating merchants; and (2) incentive and servicing fees paid by the Company’s banking partners over the loan term” – the former accounting for “the majority of its total revenue” (¶ 3).

In May 2018, GreenSky conducted an initial public offering (the IPO). Plaintiffs allegedly purchased GreenSky’s shares in the IPO. In this action, they claim that GreenSky violated the Securities Act of 1933 (the 1933 Act) by making material misstatements and omissions in its final pre-IPO registration statement (Dkt. 69 [the Registration Statement]). Specifically, plaintiffs allege that “the Registration Statement failed to disclose that GreenSky was suffering from **a lower transaction fee rate** at the time of the IPO as the Company’s business mix had shifted **from more profitable solar panel merchants** to merchants in other, less profitable industries” (Complaint ¶ 2 [emphasis added]). While its business with solar merchants was “highly profitable,” GreenSky’s consumer satisfaction concerns impelled it to pivot to other types of merchants (¶ 64). Because the transaction fee rate for those other types of merchants was lower than for solar merchants, GreenSky’s revenue and stock price declined.

Plaintiffs claim that the Registration Statement failed to adequately disclose GreenSky's shift away from solar merchants and the resulting impact on transaction-fee rates and revenue, allegedly altering the total mix of available information to IPO investors. After multiple putative class actions were filed and consolidated (*see* Dkt. 13), plaintiffs filed the Complaint in March 2019. They assert claims for primary liability under sections 11 and 12(a)(2) of the 1933 Act and for control-person liability under section 15.

Defendants move to dismiss. They argue that the Registration Statement sufficiently discloses GreenSky's shift away from solar merchants and that the alleged omissions would not have significantly altered the total mix of available information. Specifically, they point out that the Registration Statement states that solar panel merchants were excluded from certain calculations because GreenSky "actively reduced . . . transaction volume with such merchants in 2017" (*see* Dkt. 69 at 17). They further rely on the Registration Statement's disclosures about GreenSky's revenue model, which set forth:

We have a strong recurring revenue model built upon repeat and growing usage by merchants. **We derive most of our revenue and profitability from upfront transaction fees** that merchants pay us every time they facilitate a transaction using our platform. Thus, **our profitability is strongly correlated with merchant transaction volume. The transaction fee rate depends on the terms of financing selected by a consumer** (*id.* at 12 [emphasis added]).

The Registration Statement provided further detail regarding GreenSky's "existing markets" (*see id.* at 13-14) and identified growth opportunities (*see id.* at 19). In the "Risk Factors Summary," GreenSky disclosed that its growth depends on its ability to retain and attract new merchants (*see id.* at 20). According to defendants, these disclosures, read together and in context, sufficiently inform reasonable investors that GreenSky was not

expecting to rely on solar panel merchants as significant future drivers of revenue and that there was uncertainty as the Company expanded into new verticals.

Plaintiffs recognize this but contend that the Registration Statement should have nonetheless disclosed that the transaction fee rate for the merchant types that the Company did expect to attract would be lower and that this would negatively affect revenue (*see* Dkt. 82 at 11 [“The Company’s transaction-fee revenue is the product of its average transaction-fee rate (expressed as a percentage) multiplied by the transaction-fee volume, which equals the total dollar amount of the transaction fees collected at the front-end of the loans”])). They take issue with the way in which transaction fees and transaction volume are discussed in the Registration Statement and the context in which they are presented. Plaintiffs complain that merely disclosing the interplay between volume and fees and the prior disclosure about a shift away from solar merchants is materially misleading without a disclosure of the allegedly foreseeable effects on revenue given the higher solar merchant fee rates. Plaintiffs also allege that the Company was aware of this issue before the IPO, relying on transcripts of post-IPO calls in which defendants admitted the outsized impact of the loss of its solar merchants (*see* Complaint ¶¶ 61-66), and they cite more recent SEC disclosures specifically identifying the relationship between merchant type and transaction fee rate (*see* Dkt. 84 at 55).

### Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from them (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court cannot assess the merits of the

complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). If dismissal is sought based on documentary evidence, the motion will succeed only if that “evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

“Section 11 of the (1933 Act) imposes liability on issuers and other signatories of a registration statement that, upon becoming effective, contains an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading” (*Litwin v Blackstone Group, L.P.*, 634 F3d 706, 715 [2d Cir 2011]; *see* 15 USC § 77k[a]). An omission is material if there is “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available” (*Basic Inc. v Levinson*, 485 US 224, 231-32 [1988]). “Alleged misrepresentations in a stock offering are immaterial as a matter of law (if) it cannot be said that any reasonable investor could consider them important in light of adequate cautionary language set out in the same offering” (*Halperin v eBanker USA.com, Inc.*, 295 F3d 352, 357 [2d Cir 2002] [bespeaks-caution doctrine establishes that “when cautionary language is present, we analyze the allegedly fraudulent materials in their entirety to determine whether a reasonable investor would have been misled” and “touchstone of the

inquiry is not whether isolated statements within a document were true, but whether defendants' representations or omissions, considered together and in context, would affect the total mix of information and thereby mislead a reasonable investor regarding the nature of the securities offered").

Plaintiffs argue that defendants made material omissions because "the Registration Statement did not present GreenSky's lower transaction-fee rate as a risk nor did it disclose that this lowered rate was a function of GreenSky's deliberate business decision to move away from its historic concentration in the solar industry" (Dkt. 82 at 20). They aver that

the lowered transaction-fee rate was portrayed as ordinary variance and accompanied by the following misleading statement: "[t]ransaction fee rates vary based on the financing terms selected by consumers at the point of sale and, in general, loans with higher annual percentage yields carry lower transaction fee rates." This statement would lead a reasonable investor to believe that the Company's lower transaction-fee rate was due to ordinary variations in business operations (such as consumers' financing choices) rather than the impact of GreenSky's restructuring of its business mix; thus, the transaction-fee rate purportedly could go up following the IPO just as easily as it could go down. In truth, however, Defendants knew but did not disclose to investors that the lowered transaction-fee rates would persist following the IPO thereby imperiling the long-term health of the Company. The Registration Statement's failure to address the causal connection between the change in its business composition and the reduction of its transaction-fee rate left investors unable to appreciate the financial risk posed to the Company's earnings and growth prospects. As a result, Defendants understood the actual risk to GreenSky "as significantly greater or more certain than those portrayed" in the Registration Statement (*id.* at 20-21).

In other words, plaintiffs argue that when a company discloses that different types of clients generate different amounts of revenue and the company expects to do less business with a certain type of client in the future, those disclosures are insufficient when the company

knows that the clients with which it actually expects to do business will be less profitable on a per-client basis.

The Registration Statement here, however, provides:

Total revenue increased \$20.0 million, or 31%, in the first three months of 2018 compared to the same period in 2017. The increase was primarily due to the net effect of a 29% increase in transaction fees, from \$54.9 million in the first three months of 2017 to \$70.9 million in the first three months of 2018. **The increase in transaction fees was driven by a 47% increase in transaction volume. The impact of higher transaction volume was offset by a decrease in transaction fees earned per dollar originated from 7.79% in the first three months of 2017 to 6.87% in the same period in 2018.** Transaction fee rates vary based on the financing terms selected by consumers at the point of sale and, in general, loans with higher annual percentage yields carry lower transaction fee rates. **In the first three months of 2018, relative to the same period in 2017, we facilitated a larger volume of loans with higher annual percentage yields, resulting in the decrease in transaction fees earned per dollar originated.** The impact of higher transaction volume was further offset by promotional pricing we offered to certain merchants during the first three months of 2018, which reduced transaction fees by \$2.4 million (Dkt. 69 at 102 [emphasis added]).

In other words, the offering materials revealed that increased volume was projected to offset lower per-client profitability.

Plaintiffs do not allege facts suggesting that the projected increased volume and its ability to offset lower fee rates was unreasonable. Rather, plaintiffs rely on post-IPO performance and retrospective statements suggesting GreenSky eventually realized that its declining performance was directly attributable to lower merchant rates after the shift away from solar merchants and that the increased volume ultimately did not mitigate that loss. Such hindsight does not support a claim under section 11 (*see Lighthouse Fin. Group v Royal Bank of Scotland Grp., PLC*, 902 F Supp 2d 329, 345 [SDNY 2012] [“With the benefit of hindsight, Plaintiffs cannot establish falsity by simply pointing to the credit crisis

and making conclusory allegations that because RBS ultimately was forced to take \$11 billion in credit market write-downs, its earlier statements about portfolio risk were necessarily false”], *affd* 783 F3d 383 [2d Cir 2015]; *In re Deutsche Bank AG Sec. Litig.*, 2016 WL 4083429, at \*28 [SDNY July 25, 2016]; *Panther Partners, Inc. v Ikanos Communications, Inc.*, 538 F Supp 2d 662, 668 [SDNY 2008] [“In assessing whether a misrepresentation or omission was material, courts may not employ 20/20 hindsight; instead, they must consider whether the misrepresentation or omission was material on the date the prospectus or registration statement was issued”]; *see also Ong v Chipotle Mexican Grill, Inc.*, 294 F Supp 3d 199, 234 [SDNY 2018] [a reasonable shareholder “having suffered losses as a result of the outbreaks and having learned the intricacies of investigating such an outbreak—might now consider the issue material, but the Court cannot find, *ex ante*, that Chipotle’s ability to nose to the source of a contaminated piece of produce would weigh significantly on an investor’s mind”]; *In re TVIX Sec. Litig.*, 25 F Supp 3d 444, 452 [SDNY 2014] [failure to predict future market performance is not a material omission], *affd sub nom. Elite Aviation LLC v Credit Suisse AG*, 588 F Appx 37 [2d Cir 2014]).

To be sure, while the Registration Statement does not expressly identify the fees paid by solar merchants or those paid by the types of merchants with which GreenSky expected to do business, a reasonable investor would draw the obvious inference that the new merchants who would replace the solar merchants would pay lower fees consistent with the trend that GreenSky had disclosed (*see In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F3d 347, 360 [2d Cir 2010] [materiality requires that “representations, taken together

and in context, would have misled a reasonable investor”]; *see also In re TVIX Sec. Litig.*, 25 F Supp 3d at 455 [“Offering materials must be read as a whole and the challenged statements must be put in the context of any surrounding cautionary language”], *affd sub nom. Elite Aviation*, 588 F Appx at 38 [“No reasonable investor could have read these materials without realizing the risk”]). Thus, GreenSky’s failure to make more specific disclosures about the fees paid by solar merchants was not material (*In re ProShares Trust Secs. Litig.*, 728 F3d 96, 102 [2d Cir 2013] [there must be “a *substantial* likelihood that the disclosure of the omitted material would have been viewed by the *reasonable* investor as having *significantly* altered the total mix of information already made available”).

Likewise, defendants did not violate their obligations to disclose material trend changes under Items 105 and 303 of Regulation S-K (*see Barilli v Sky Solar Holdings, Ltd.*, 389 F Supp 3d 232, 257 [SDNY 2019] [“Item 303 requires a registrant to ‘describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable effect on net sales or revenues or income from continuing operations,’ and disclose ‘events that will cause a material change in the relationship between costs and revenues.’ ... Similarly, Item 503 (now 105) of SEC Regulation S–K creates a duty to disclose ‘the most significant factors that make the offering speculative or risky’”]). The trend of shifting away from solar merchants to lower fee merchants was disclosed (*see id.* at 257-58).

The section 12(a)(2) claim based on alleged misrepresentations in the prospectus is dismissed for plaintiffs’ failure to identify a material misstatement or omission as well (*see* 15 USC § 771[a][2]).

Finally, plaintiffs’ section 15 control-person-liability claims necessarily fail due to the lack of a viable predicate claim (*Hutchison v Deutsche Bank Sec. Inc.*, 647 F3d 479, 490 [2d Cir 2011]).<sup>1</sup>

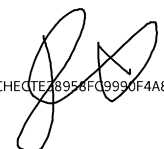
Accordingly, it is ORDERED that defendants’ motions to dismiss the Complaint are granted and the Clerk is directed to enter judgment accordingly with costs and disbursements as taxed by the Clerk.

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4/22/2020  
DATE

CHECK ONE:

X	CASE DISPOSED				NON-FINAL DISPOSITION		
X	GRANTED		DENIED		GRANTED IN PART		OTHER




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**JENNIFER G. SCHECTER, J.S.C.**

<sup>1</sup> Plaintiffs’ request to amend the Complaint, made at the end of the end of their opposition brief (*see* Dkt. 82 at 35), is denied because plaintiffs did not submit a proposed pleading or identify any specific facts that would avoid dismissal (*see Fletcher v Boies, Schiller & Flexner, LLP*, 75 AD3d 469, 470 [1st Dept 2010]).