CASE NO.
A24A1281
(Related Case No. A24A1282)

IN THE COURT OF APPEALS
STATE OF GEORGIA

STERLING PLANET, INC.
Appellant

v.

GRP HOLDCO, LLC; GRP MADISON, LLC and GRP FRANKLIN, LLC
Appellees

APPELLANT'S BRIEF

Kevin T. Moore - 520036
KEVIN T. MOORE, P.C.
2500 Northwinds Parkway, Suite 330
Alpharetta, GA 30009
(770) 396-3622
ktm@ktmtriallaw.com

John Monroe, Jr. – 516190
Frederick L. Warren – 738350
FORD HARRISON, LLP
271 17th Street, NW, Suite 1900
Atlanta, GA 30363
(404) 888-3800
jmonroe@fordharrison.con
rwarren@fordharrison.com

Tammi M. Cody – 053850
CODY LAW, P.C.
659 Auburn Ave., NE, Suite 210
Atlanta, GA 30312
(802) 734-1697
tcody@codylaw.net

ATTORNEYS FOR APPELLANT STERLING PLANET, INC.

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INTRODUCTION

This case arose from a business relationship conducted in a complex, largely unregulated marketplace focused on environmental sustainability practices and marketing claims related thereto. Consumer demand for companies to adopt low carbon business practices has outpaced regulatory actions in many cases. Thus, a voluntary, sustainability-focused marketplace has emerged and has shifted rapidly from mere glossy statements about corporate environmental practices to emerging regulatory frameworks aimed at assuring that sustainability claims are evidence-based. In short, verification of the "renewable-ness" of purchased renewable energy is crucial for consumer protection. Current voluntary verification processes involve environmental attribute tracking systems and certification methodologies to guarantee the authenticity of renewable energy purchases and to help guard against misleading claims about positive environmental impacts.

Within this context, this appeal seeks review of an Order on Pending Motions entered by the Georgia State-wide Business Court on February 28, 2024 ("Order"), which, as relevant to this appeal, (1) erroneously dismissed on summary judgment Counterclaim Count II – Promissory Estoppel filed by Appellant Sterling Planet, Inc. ("Sterling") against of Appellees, GRP Holdco, LLC; GRP Madison, LLC and GRP Franklin, LLC ("GRP"), (2) erroneously disregarded portions of the affidavit of Sterling's Chairman and CEO, and (3) erroneously held, as a matter of first

impression, that "environmental attributes" and "renewable energy certificates (RECs)" are "property" under Georgia law. This appeal followed.

As precision in terminology is vital to this appeal, we address the key terms at the outset, while noting that one of the challenges inherent in this case is that there are no binding definitions to guide the parties and the courts. Based on the law review article relied upon by the trial court, an "environmental attribute" generated by a renewable energy facility is commonly understood to mean "any 'aspect, claim, characteristic or benefit associated with the generation of a quantity of electricity . . . other than the electric energy produced.'" Katrina M. Wyman & Adalene Minelli, *Propertizing Environmental Attributes*, 39 YALE J. ON REG. 1391, 1397 n.18 (2022) [hereinafter "*Propertizing Environmental Attributes*"].[1] One example might be, as here, that electricity was produced via renewable, or "green," means.

A Renewable Energy Certificate, or REC, is a distinct concept. A REC is "a certificate, credit, allowance, green tag, or other transferable indicia, howsoever entitled, created by an Applicable Program or Certification Authority indicating generation of a particular quantity of energy."[2] In essence, the REC is a transferable certificate that allows a company or other entity to take credit for using renewable

[1] Citing RENEWABLE ENERGY RES. COMM. & SPECIAL COMM. ON ENERGY & ENV'T FIN., Master Renewable Energy Certificate Purchase and Sale Agreement, A.B.A. SECTION OF ENV'T, ENERGY & RES. 5 (2016), https://www.ipa-energyrfp.com/?wpfb_dl=845 [https://perma.cc/XY4N-5D58].

[2] *See id.*

energy. RECs are necessary to track the usage of renewable energy, given that a kilowatt of electricity does not show up as renewable or "green" when used.

While the renewable marketplace is complicated, the promise to be enforced is not. In Enumeration of Error 1, Sterling contends questions of material fact exist upon which a jury could conclude GRP should be estopped from denying that there was an enforceable promise between the parties that Sterling would market GRP's RECs[3] and be paid for doing so. Relatedly, in Enumeration of Error 2, Sterling contends that the trial court erred by disregarding competent, material evidence in the affidavit of its Chairman and CEO, Therrell "Sonny" Murphy, Jr. regarding the enforceable promise between the parties.

Finally, in Enumeration of Error 3, Sterling contends that the trial court erred by concluding that "environment attributes" and "RECs" are "property" in Georgia, allowing GRP's property-based claims to survive summary judgment. Whether "environmental attributes" or "RECs" constitute "property" is a question of first impression in Georgia, and GRP's property claims in this case hinge on this question of law. The trial court erred in its analysis of this issue by broadly declaring that both environmental attributes and RECs are property, without reference to binding authority and without distinguishing between these distinct concepts.

[3] In this brief, Sterling at times uses the term "GRP RECs" or "GRP's RECs" as a shorthand to refer to the MWh of renewable energy originating at the GRP Plants. This terminology is not meant as an admission or concession that GRP "owned" the RECs.

For the reasons set forth in this brief, the Order below should be reversed as requested herein.

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to OCGA § 9-11-56(h), which authorizes a direct appeal of an order granting a motion for summary judgment, and OCGA § 5-6-34(d), which provides that, when a direct appeal from an order granting a motion for summary judgment is taken, "all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court, without regard to the appealability of the judgment, ruling, or order standing alone and without regard to whether the judgment, ruling, or order appealed from was final or was appealable by some other express provision of law contained in this Code section, or elsewhere." The issues raised herein do not fall within the exclusive jurisdiction of the Supreme Court of Georgia. *See* Ga. Const. Art. 6, Sec. 6, Pars. 2-3.

II. ENUMERATION OF ERRORS

1. The trial court erred by granting GRP's motion for summary judgment as to Sterling's promissory estoppel claim.

2. The trial court erred by disregarding portions of the affidavit of Therrell "Sonny" Murphy, Jr.

3. The trial court erred by concluding that "environmental attributes" and "RECs" are "property" under Georgia law, thereby allowing GRP's property-based claims to survive summary judgment.

These errors are preserved in Sterling's Motion for Partial Summary Judgment (V4 – 2342-2413), Sterling's Response to GRP's Motion for Partial Summary Judgment (V9 – 6102-6147), Sterling's Brief in Opposition to GRP's Motion to Strike (V9 – 6480-6498), and Sterling's Motion for Partial Summary Judgment (V6 – 4636-4675). Sterling timely filed its notice of appeal of the trial court's Order dated February 28, 2024, on March 20, 2024. (V2 – 1-8; V10 – 6833).

III. STATEMENT OF THE CASE

A. Statement of Proceedings Below

On October 31, 2022, GRP filed its Complaint for Declaratory Judgment, Injunctive Relief and Damages in the instant action alleging the following claims: First Cause of Action (Declaratory Judgment — Quantum Meruit); Second Cause of Action (Conversion-Injunction/Damages); Third Cause of Action (Money Had and Received); Fourth Cause of Action (Intentional Interference with Business Relations); and Fifth Cause of Action (Intentional Interference with Property Rights). (V2 – 9-89).

On February 27, 2023, Sterling filed its Second Amended Verified Answer and Counterclaim to Plaintiffs' Verified Complaint for Declaratory Judgment,

Injunctive Relief and Damages, in which it asserted, among other claims, a claim for promissory estoppel. (V2 – 912-1046).

On September 5, 2023, GRP filed its Motion for Partial Summary judgment seeking, among other things, dismissal of Sterling's promissory estoppel claim. (V4 – 2342-2413). That same day, Sterling filed its Motion for Partial Summary Judgment, arguing in relevant part that GRP's claims for conversion and intentional interference with property rights should be dismissed because GRP could not, as a matter of law, establish an ownership interest in the RECs at issue. (V6 – 4636-4675).

The trial court granted GRP's summary-judgment motion as to Sterling's promissory estoppel claim. (V10 – 6833, 6879-6882). In addition, the trial court struck portions of the affidavit of Therrell "Sonny" Murphy, Jr. propounded by Sterling. (V10 – 6852-6859). Finally, as related to this appeal, the trial court denied Sterling's motion as to GRP's property claims on the basis that the "environmental attributes" and "RECs" upon which GRP based its claims are "property" under Georgia law, explaining:

> ["Sterling's] arguments largely hinge on a distinction between "RECs" and "environmental attributes": Sterling claims an "REC is owned by a party if and only if it is retired in that party's name," and that "GRP merely owns the right to transfer environmental attributes [that are] attributable to the production of renewable energy." Sterling thus argues that because "Sterling did not hold 'GRP's RECs' as claimed by GRP," and instead held "environmental attributes," Sterling could not have converted GRP's RECs. Sterling also contends that

> "GRP cannot establish damages because the 'value' of the environmental attributes cannot be determined when . . . sitting in an inchoate form," such that GRP's Conversion Claim must fail as a matter of law. The Court disagrees on both counts.
>
> Whether Sterling converted the "RECs" or the "environmental attributes" associated with the renewable energy produced at the GRP Plants may present a dispute over terminology, but it is not determinative of GRP's Property Claims. Regardless of what one labels the environmental attributes associated with each MWh of renewable energy generated by the GRP Plants that were uploaded to the NAR Registry, such attributes are proper objects of property with concomitant rights.

(V10 – 6862-6863).

B. Statement of Relevant Material Facts

1. The parties' background in the renewable-energy market.

This litigation centers on a business arrangement between Sterling and GRP regarding the sale of RECs connected to energy production at two Georgia biomass power plants owned by GRP. (V2 – 955 at ¶ 4). GRP owns and operates two renewable biomass power plants located in Madison County, Georgia and Franklin County, Georgia (the "GRP Plants"), which produce renewable energy and generate RECs. (V4 – 2417 at ¶¶ 1-3). Sterling, a Georgia corporation, is a marketer that specializes in the sale of RECs across the country. (V2 – 955 at ¶¶ 1–3).

The RECs at issue in this action are tracked on the North American Renewables Registry ("NAR Registry"), an electronic tracking system that

facilitates the sale and transfer of RECs. (V4 – 2425 at ¶ 35 & ex. 16).[4] The NAR Registry Operating Procedures define a "Renewable Energy Certificate (REC)" as representing "all of the Environmental Attributes from one MWh of electricity generation from an Asset." (V4 – 2427 at ¶ 46). The NAR Registry "will create one REC per MWh of generation that occurs from a Generating Unit or Contract Project" associated with an NAR Registry account. *Id.* However, the NAR Registry Operating Procedures note that "[i]ndividual states and provinces may create different definitions of renewable certificates." *Id.*

2. GRP makes, and breaks, its promise that Sterling will market GRP RECs.

In 2015, GRP and Sterling formed an agreement that provided for Sterling to be the exclusive marketer for RECs produced by the GRP Plants for a term of six years once the plants were placed in service, with Sterling to receive 20% of the RECs' sales price as compensation. (V2 – 969-971 at ¶¶ 4–6, ¶¶ 12–13; 984-1025). Consistent with that agreement, Sterling set up the platform and infrastructure allowing for the sale of GRP's RECs. Specifically, in 2021, the parties agreed that Sterling would seek to obtain "Green-e certification" for GRP's RECs. (V4 – 2423 at ¶ 27; 2424 at ¶¶ 30, 32). To facilitate Sterling's Green-e certification efforts, the

[4] Exhibit 16 to Plaintiffs' Statement of Undisputed Material Facts, the NAR Registry Operating Procedures, is filed under seal in Record Volume 5. The NAR Registry Operating Procedures are also available at: https://apx.com/wp-content/uploads/2018/03/NAR-Operating-Procedures-_March-2018.pdf.

parties designated Sterling as the "Responsible Party" for the GRP Plants on the NAR Registry. (V4 – 2425 at ¶ 37, 2426 at ¶ 40 & ex. 18).[5] This Responsible Party designation gave Sterling sole managerial authority over the transaction and activities related to the GRP Plants within the NAR Registry.[6] (V4 – 2427 at ¶ 47). In accordance with the parties' arrangement, Sterling marketed and sold RECs produced by the GRP Plants on five separate occasions in 2022 for a total sales price of $1,886.921.79, 80% of which was remitted to and accepted by GRP pursuant to the parties' agreement. (V2 – 964-965 at ¶¶ 33–37).

GRP and Sterling's business relationship began to deteriorate around February of 2022, after non-party Fairlead Advisors, LLC ("Fairlead") took over control of the Madison and Franklin Plants. (V2 – 961 at ¶ 24). On February 11, 2022, Charles Abbott ("Abbott"), a Fairlead partner, informed Sterling that it would no longer be considered a marketer of GRP's RECs but rather a broker, and Abbott sought to "renegotiate" the parties' business arrangement for RECs produced at the GRP Plants. (V2 – 960 at ¶¶ 21–22). When Sterling attempted to reduce the parties' agreement to writing, GRP reneged, with GRP rejecting Sterling's draft agreements

[5] Exhibit 18 to Plaintiffs' Statement of Undisputed Material Facts is filed under seal in Record Volume 5.

[6] The NAR Registry credits the account of the "Account Holder" with whom the GRP Plants (referred to as "Assets" in NAR parlance) are registered—here, Sterling as the "Responsible Party"— with one REC for each MWh of renewable energy generation by the GRP Plants. (V4 – 2427 at ¶¶ 45–47).

memorializing the longstanding 20% commission rate, and Sterling rejecting GRP's attempts to substitute a $150,000 fixed fee and a 4% commission rate. (V4 – 2430-2435 at ¶¶ 57–78). This litigation followed, with Sterling asserting (among other claims) a cause of action for promissory estoppel, and GRP asserting (among other claims) causes of action for conversion and intentional interference with property rights. Relevant to this appeal, the trial court's Order granted GRP's summary judgment motion as to Sterling's promissory estoppel claim and denied Sterling's summary judgment motion as to GRP's property claims. (V10 – 6833-6896).

IV. ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[.]" OCGA § 9-11-56(c).

Summary judgment enjoys no presumption of correctness on appeal, and an appellate court must satisfy itself de novo that the requirements of OCGA § 9-11-56(c) have been met. *Essien v. CitiMortgage, Inc.*, 335 Ga. App. 727, 781 S.E.2d 599 (2016). In the de novo review of the grant or denial of a motion for summary judgment, the appellate court must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant. *Id.*

B. The trial court erred by granting GRP's motion for summary judgment as to Sterling's promissory estoppel claim.

The trial court erred by granting summary judgment on Sterling's promissory estoppel claim. In Georgia, the doctrine of promissory estoppel is codified at OCGA § 13–3–44. The essential elements of promissory estoppel are: (1) the defendant made a promise or promises; (2) the defendant should have reasonably expected the plaintiff to rely on such promise; (3) the plaintiff relied on such promise to its detriment; and (4) an injustice can only be avoided by the enforcement of the promise, because as a result of the reliance, plaintiff changed its position to its detriment by surrendering, forgoing, or rendering a valuable right. *Reynolds v. CB&T*, 342 Ga. App. 866, 872, 805 S.E.2d 472, 478 (2017).

The principle of promissory estoppel "relates to the sufficiency of consideration to enforce a promise; it merely provides that in certain circumstances, the reliance by the promissee or third party upon the promise of another is sufficient consideration ... to render the executory promise enforceable against the promissor." *Mooney v. Mooney*, 245 Ga. App. 780, 782–83, 538 S.E.2d 864, 867 (2000) (explaining that "the key difference between a promise supported by consideration and a promise supported by a promissory estoppel is that in the former case the detriment is bargained for in exchange for the promise; in the latter, there is no bargain").

1. GRP did not meet its burden on summary judgment to pierce Sterling's pleadings.

To prevail on summary judgment, GRP must "pierce" Sterling's pleadings "only by affirmatively disproving [Sterling's] claim with [its] own evidence establishing the absence of any genuine issue of material fact or by showing from the affidavits, depositions and other documents in the record that there was an absence of evidence to support at least one essential element of [Sterling's] claim." *Solomon v. Barnett*, 281 Ga. 130, 131, 636 S.E.2d 541, 542 (2006); *see Bone v. The Children's Place, Inc.*, 297 Ga. App. 367, 677 S,E.2d 404 (2009) ("[o]nly after the moving party makes a showing of entitlement to a judgment as a matter of law does the burden shift to the respondent to come forward with rebuttal evidence") (quoting *Smith v. Atl. Mut. Companies*, 283 Ga. App. 349, 351, 641 S.E.2d 586, 588 (2007) ("It is incumbent upon a plaintiff to prove its case and, until it does, a defendant is under no obligation to disprove it")). GRP has failed to meet its burden.

In its motion, GRP makes three arguments as to why it is entitled to summary judgment on Sterling's promissory estoppel claim. First, GRP contends that "the record is clear that GRP never made a promise to Sterling that Sterling would be permitted to sell GRP's Green-e RECs nor that GRP would compensate Sterling for 'building the platform, infrastructure and certifying the RECs' as alleged by Sterling. (SUMF ¶ 81; Answer & Counterclaims, Counterclaims, Count II ¶ 35.)." (V4 –

2387). GRP, however, points to no evidence in the record to support its conclusory statement that "the record is clear" as to any of its assertions.

These unsupported statements are accordingly inadequate to "pierce" Sterling's verified pleadings showing that GRP promised that Sterling could sell GRP's RECs and be compensated accordingly. In its Second Amended Counterclaim, Sterling provided detailed, verified allegations regarding the parties' agreement as follows:

> 3.
>
> Since 2015, Sterling negotiated with GRP to obtain its produced RECs for resale and the parties agreed that Sterling would market the RECs produced from both GRP's Georgia Biomass Plants. (Murphy Aff'd, 7)
>
> 4.
>
> It was agreed that Sterling would set up the necessary trading platforms and obtain the necessary certifications including Green-e. It was agreed that Sterling would put necessary business systems in place to facilitate the GRP and Sterling marketing endeavor. (Shaffer Aff'd, 6, 7, 8, 9)
>
> 5.
>
> It was agreed that Sterling's compensation for setting up the platform, obtaining the certifications and marketing the RECs would be 20% of the sales receipts with 80% being retained with GRP. (Shaffer Aff'd 1 9) (Murphy Aff'd, 8)
>
> . . . .
>
> 32.
>
> Plaintiff asserts a breach of the parties' agreement to provide monthly RECs to be uploaded to Plaintiffs' NAR account, now and in the future.

33.

Defendant promised the term of the agreement would be for six years and Plaintiff Sterling would be paid 20% of the net sales price for the sale of the RECs.

34.

The Defendant GRP promised the Plaintiff that all RECs produced by the two biomass plants would be uploaded to Plaintiffs NAR account for resale on a monthly basis and has intentionally failed to do so.

(V2 – 968-69, 977-78). These verified allegations at the very least create a fact issue as to whether GRP made a promise to Sterling regarding the sale of, and compensation for, GRP's RECs.[7] *See Rolland v. Martin*, 281 Ga. 190, 191, 637 S.E.2d 23, 24 (2006) ("A verified pleading may serve as the functional equivalent of an affidavit and suffice to create an issue of fact.") (citation omitted).

GRP presumably relies on the fact that the trial court dismissed Sterling's breach-of-contract claims as the basis for its rank conclusion that "the record is clear that GRP never made a promise to Sterling" regarding sale of RECs and compensation therefor. However, the fact that there was not a contract does not prove that there was not an enforceable *promise*. To the contrary, "[e]ven when a promise is unenforceable as a contract, a promisee may recover under a theory of promissory estoppel[.]" *Cheeley Investments, L.P. v. Zambetti*, 332 Ga. App. 115, 119–20, 770

[7] To the extent GRP argues these or similar allegations should be stricken or disregarded, such arguments are addressed in Section C regarding the affidavit of Therrell "Sonny" Murphy, Jr.

S.E.2d 350, 355–56 (2015) (citing OCGA § 13–3–44(a)); *see Kamat v. Allatoona Fed. Sav. Bank*, 231 Ga. App. 259, 263, 498 S.E.2d 152, 155 (1998) ("where a purported contract was not enforceable, such did not preclude a claim predicated on a theory of promissory estoppel") (citing *20/20 Vision Ctr., Inc. v. Hudgens*, 256 Ga. 129, 135, 345 S.E.2d 330, 335 (1986)).

GRP next argues, "Second, even if general promises were made, promissory estoppel does not apply to 'vague or indefinite promises, or promises of uncertain duration.'" (V4 – 2387). Once again, GRP abjectly fails to cite evidence or otherwise meet its burden to demonstrate the absence of a genuine issue of material fact. *See Allen & Bean, Inc. of Georgia v. Am. Bankers Ins. Co. of Florida*, 153 Ga. App. 617, 618, 266 S.E.2d 295, 297 (1980) ("It is well established that the burden of showing the absence of a genuine issue of any material fact rests on the party moving for summary judgment; the burden does not shift until the pleadings are pierced."). Moreover, Sterling's pleadings provide the requisite level of detail, explaining that "the term of the agreement would be for six years and Plaintiff Sterling would be paid 20% of the net sales price for the sale of the RECs." (V2 – 977 at ¶ 33). *See Cheeley Investments, L.P.*, 332 Ga. App. at 119–20 ("promise to pay . . . attorney fees and legal expenses in responding to . . . declaratory judgment action was sufficiently definite to be enforced"); *Jones v. White*, 311 Ga. App. 822, 830, 717 S.E.2d 322, 330 (2011) (promise to pay consultant 10 percent of net developer's fee

if bid was successful sufficiently specific to be enforceable); *Hardnett v. Ogundele*, 291 Ga. App. 241, 242–43, 661 S.E.2d 627 (2008) (promise to pay 1/3 of any settlement or recovery was enforceable); *Phillips & Co. v. Hudson*, 9 Ga. App. 779, 780–781, 72 S.E. 178 (1911) (promise to pay a percentage of company's net earnings was definite and enforceable).[8]

Lastly, GRP argues:

> Finally, Sterling's reliance on any qualifying promise must have been "reasonable," meaning that it "relied exclusively on such promise and not on [its] own preconceived intent or knowledge; that [Sterling] exercised due diligence, so as to justify such reliance as a matter of equity; and that there was nothing under the circumstances which would prevent [Sterling] from relying to [its] detriment." *Blau v. Blau*, 890 S.E.2d 50, 56 (Ga. 2023) (quotation omitted) (emphasis added). Accordingly, Sterling's promissory estoppel claim must be dismissed.

(V4 – 2387). Again, GRP's argument fails due to a dearth of evidence. As above, GRP simply cites to a legal standard without making any effort to connect the

[8] The cases relied upon by the trial court to reach a different conclusion are inapposite. *Mariner Healthcare, Inc. v. Foster*, a case about nursing-home leases, centered on vague allegations that "the conditions of the leases would continue in force so long as the parties continued to negotiate." 280 Ga. App. 406, 409, 634 S.E.2d 162 (2006). No such vague terms as "continue to negotiate" are present here. Likewise, two other cases cited by the trial court concerned "subjective beliefs" that did not support promissory estoppel. *See Woodstone Townhouses, LLC v. S. Fiber Worx, LLC*, 358 Ga. App. 516, 855 S.E. 2d 719 (2021) (subjective belief that claim for trespass had been released); *Ga. Investment Intl. v. Branch Banking and Trust Co.*, 305 Ga. App. 673, 675-76, 700 S.E. 2d 662 (2010) (subjective belief of borrower that bank had promised to refinance note). The instant case, however, does not concern subjective beliefs, but rather deals with competent evidence of a specific promise, with actions on both sides consistent with that promise. *See Brannon v. Brannon*, 261 Ga. 565, 565, 407 S.E.2d 748, 749 (1991) (promise coupled with action consistent with that promise is enforceable); *see also Wright v. Newman*, 266 Ga. 519, 520, 467 S.E.2d 533, 535 (1996) (nonparent's voluntary assumption of responsibilities of fatherhood coupled with actions consistent with that promise over yearslong span enforceable under theory of promissory estoppel).

caselaw to any facts or evidence at issue here, and specifically fails to explain how or why Sterling's reliance on GRP's promises was "unreasonable" so as to meet its burden on summary judgment. *See Tselios v. Sarsour*, 341 Ga. App. 471, 474, 800 S.E.2d 636, 639 (2017) ("if the plaintiff fails to point to any competent evidence [on summary judgment], the burden does not shift to the defendant, and the grant of summary judgment in favor of the plaintiff is inappropriate"); *see also League v. Citibank (S. Dakota)*, 291 Ga. App. 866, 867, 663 S.E.2d 266, 268 (2008) ("Legal argument presented to the trial court as to whether the material already on file authorizes the grant of summary judgment is not evidence."). And nothing about the facts pleaded by Sterling—that GRP made a promise that, for a six-year period, Sterling would sell GRP's RECs and be paid 20% of the sales price—suggests, never mind conclusively establishes, that Sterling's reliance on GRP's promises was unreasonable. (V2 – 968-69, 977-78). Moreover, "[q]uestions of reasonable reliance are usually for the jury to resolve." *Ambrose v. Sheppard*, 241 Ga. App. 835, 837, 528 S.E.2d 282 (2000).

Accordingly, the trial court erred by granting summary judgment on Sterling's promissory estoppel claim because GRP failed to meet its burden to show that no genuine issues of material fact remain as to this claim, and the evidence in the record definitely shows otherwise.

2. The trial court further erred by adding additional elements of proof and placing the summary judgment burden on Sterling, the nonmovant.

In addition, the trial court's analysis of Sterling promissory estoppel claim contains further errors. In support of its reasoning, the trial court explained that "Sterling fails to show *who* made the promise, *when* it was made, *where* it was made, or any other relevant factual circumstances." (V10 – 6880-6881) (emphasis in original). As a threshold matter, this mischaracterizes the record, as Sterling provides "relevant factual circumstances" regarding the transaction in its pleadings quoted above. (V2 – 968-969, 977-978, 988-998).

More egregiously, the trial court's analysis both improperly shifted the burden of proof to Sterling while at the same time grafting new and unprecedented factors onto a claim for promissory estoppel. The trial court cites to no case, nor is Sterling aware of any, holding that promissory estoppel requires proof of "*who* made the promise, *when* it was made, *where* it was made," or any other extraneous factors. (V10 – 6880-6881). Such language is certainly not found in the statutory codification of promissory estoppel, which simply requires proof of "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." OCGA § 13-3-44.

Moreover, trial court's analysis impermissibly placed the summary-judgment burden on Sterling, the non-movant, to prove these new and unprecedented elements. Despite the summary-judgment burden resting with GRP, the trial court concluded that summary judgment was appropriate because "Sterling has failed to show" evidence of the court's newly created elements. *See* OCGA § 9-11-56(c) (placing burden in the moving party to show entitlement to judgment as a matter of law).

For these reasons, the portion of the Order below should be reversed as to summary judgment on Sterling's promissory estoppel claim.

3. Additional record evidence demonstrates a fact issue as to Sterling's promissory estoppel claim.

Moreover, additional record evidence creates a fact issue on promissory estoppel and requires that the trial court's Order be reversed. Specifically, questions of material fact exist upon which a jury could conclude GRP should be estopped from denying a oral contract existed which entitled Sterling to compensation for its work performed in quantifying and arranging certification processes, and selling environmental attributes associated with the January 2021 through February 2022 production vintages ("Tracked Vintages") of biomass energy generated from the GRP Plants. (V9 – 6433 at ¶ 9). Specifically, the record reflects that GRP requested that Sterling create and sell authenticated RECs resulting from the quantification of the Tracked Vintages via the digitized tracking process established by NAR

Registry. All RECs held in Sterling's NAR Account are deemed beneficially owned by Sterling by virtue of the NAR Registry Operating Procedures.[9]

GRP had notice and knowledge that Sterling is in the business of selling RECs in accordance with the NAR Registry Operating Procedures. GRP voluntarily disclosed its business records to Sterling confirming MWh production from the Biomass Plants and did so for the express purpose of permitting Sterling to quantify the Tracked Vintages in Sterling's NAR Account.

The record in this case, when viewed in the light most favorable to Sterling (the non-moving party), shows GRP clearly promised Sterling would be entitled to market the RECs resulting from the Tracked Vintages, at a 20% commission on sales. Sterling's contractual relationships with a third party (NAR Registry) increase the marketability of the Tracked Vintages generated from the Biomass Plants, and Sterling agreed to its detriment to market the Tracked Vintages; therefore, an injustice would result if the GRP were permitted to break its promises.

Moreover, the admissions in GRP's own pleadings likewise support Sterling's arguments. GRP's own verified allegation should "estop" it from claiming that there was no enforceable promise between the parties. GRP's Verified Complaint

[9] *See supra* n.4 at NAR Operating Procedures 4 (regarding the type of account at issue here, "**Account Holders cannot hold Certificates on behalf of any other party.** An Account Holder must have full legal title of and all Beneficial Ownership Rights in the Certificates held in its Accounts.") (emphasis in original).

acknowledges Sterling and GRP had a mutual understanding about the role Sterling would play in transacting RECs in Sterling's NAR Registry Account. Paragraph 26 states: "There is increasing demand for electricity to be generated from wind, solar, and other renewable to achieve reductions in pollution. RECs provide an accounting of renewable-energy production that can be transacted to meet this demand . . . ." (V2 – 15-16 at ¶ 26). Paragraph 29 states "The [GRP] RECs were sold by Sterling using the NAR Registry, which is an electronic tracking system that enables the sale and transfer of RECs." (V2 – 16 at ¶ 29). Footnote 1 to Paragraph 29, states: "NAR's system tracks and enables trading of RECs by assigning a unique serial number to each megawatt-hour of qualifying renewable energy or energy savings from projects registered with NAR." (V2 – 16 at ¶ 29, FN 1).

GRP acknowledges in its Complaint the NAR Registry was a necessary vehicle for REC trading. *See id.* By virtue of the NAR Operating Procedures Sterling created the RECs arising from the Tracked Vintages of GRP RECs. Thus, GRP knew or should have known Sterling was the beneficial owner of the RECs under the NAR Operating Procedures. Therefore, GRP should be estopped from claiming no promise was made to sell the RECs. Why else would GRP ask Sterling to create the RECs in Sterling's NAR account if it did not want, and expect, Sterling to sell the RECs?

For these additional reasons, summary judgment as to Sterling's promissory estoppel claim was improper and must be reversed.

C. The trial court erred by disregarding portions of the affidavit of Therrell "Sonny" Murphy, Jr.

As part of its summary-judgment order, the trial court addressed GRP's motion to strike portions of the affidavit of Therrell "Sonny" Murphy, Jr., Chairman and CEO of Sterling. (V8 – 5974-5988). In its ruling, the trial court determined it would "disregard" portions of the affidavit. (V10 – 6852-6857). Particularly relevant to this appeal, the trial court disregarded paragraphs 6, 7, and 29, which state:

> 6.
>
> Sterling Planet, Inc. entered into a contract to market and resell Renewable Energy Certificates, i.e. RECs with GRP. I have known Dave Shaffer since approximately 2013, and he helped negotiate the sale of Plant Carl from Sterling Planet to GRP.
>
> 7.
>
> In 2015, Sterling Planet, Inc. negotiated and entered into a contract to be the exclusive marketer for biomass generated RECs. This agreement was negotiated with David Shaffer (President and CEO of GRP) and Dennis Carroll in which Sterling Planet, Inc. would be the exclusive marketer for 6 years upon the plants being placed into service. Dave Shaffer was aware of the contract percentage on the sale of the RECs.
>
> . . . .
>
> 29.
>
> GRP and Sterling had an agreement that Sterling had exclusive marketing rights to all the RECs which were to be produced by GRP uploading their monthly information including MWHs to Sterling's NAR account.

(V8 – 5975, 5982).

The trial court apparently chose to "disregard" these paragraphs on the grounds that they are "unsupported conclusions or are otherwise demonstrably opposed by business record evidence." (V10 – 6856). This analysis is incorrect. These paragraphs do not consist of "unsupported conclusions"; rather, they detail negotiations regarding an agreement with GRP to market its RECs, with details regarding who engaged in the negotiations (Murphy, GRP President and CEO David Shaffer, and Dennis Carroll, agent for GRP), when the negotiations took place (2015), and certain terms of the agreements. (V8 – 5975, 5982). These are not legal conclusions at all but rather specific facts to which Murphy attested based on his personal knowledge, which is sufficient at the summary judgment stage. *See United States v. Stein*, 881 F.3d 853, 858 (11th Cir. 2018) (while fact-finder can disregard litigant's self-serving testimony *at trial*, "[t]hat proposition has no place at summary judgment, where 'the [court's] function is not . . . to weigh the evidence'") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

Moreover, the trial court's conclusion that statements in these paragraphs are "demonstrably opposed by business record evidence" is both factually and legally incorrect. The trial court seemed to base this analysis on the fact that draft agreements attached to Sterling's counterclaim were "presented in support of the claim were unsigned, unenforceable, or expired." (V10 – 6856-6857). Even if true, this holding provides no basis to disregard portions of Murphy's affidavit discussing

the promises between Sterling and GRP. As discussed above, the mere fact that a written agreement is unenforceable does "not preclude a claim predicated on a theory of promissory estoppel." *See Kamat*, 231 Ga. App. at 263 (citing *20/20 Vision Ctr.*, 256 Ga. at 135); *Hendon Properties, LLC v. Cinema Dev., LLC*, 275 Ga. App. 434, 439, 620 S.E.2d 644, 649–50 (2005) ("[T]he decision of the Supreme Court of Georgia in *20/20 Vision Center v. Hudgens* stands as authority for the proposition that a claim predicated on a theory of promissory estoppel may lie even though the promise was made in a contract that is not legally enforceable.").

Accordingly, Murphy's testimony is competent evidence of an enforceable promise, and must not be disregarded simply because of a purported "conflict" between such testimony and the enforceability of the written instruments in question, as any such conflict would go to the weight, not the admissibility, of the evidence. *See Peach Blossom Dev. v. Lowe Elec. Supply*, 300 Ga. App. 268, 271, 684 S.E.2d 398 (2009) ("[b]ut on summary judgment, neither we nor the lower court may consider the credibility of witnesses, which is a matter for the jury to resolve") (quoting *Green v. Eastland Homes, Inc.*, 284 Ga. App. 643, 647, 644 S.E.2d 479, 482 (2007)); *Bearden v. Bearden*, 231 Ga. App. 182, 184, 499 S.E.2d 359, 361 (1998) ("affidavit testimony must speak for itself" and "[o]n summary judgment it is inappropriate for this Court to weigh evidence or determine its credibility").

These same arguments apply to the remaining paragraphs disregarded by the trial court, all of which are made on the basis of personal knowledge, not speculation. (V8 – 5974-5988, ¶¶ 10, 12, 14, 16, 24, 35, 41-42). For the foregoing reasons, the trial court erred by disregarding portions of Murphy's affidavit in its summary-judgment analysis.

D. The trial court erred by concluding that "environmental attributes" and "RECs" are "property" under Georgia law, thereby allowing GRP's property-based claims to survive summary judgment.

In Sterling's Motion for Partial Summary Judgment, it argued in relevant part that GRP's claims for conversion and intentional interference with property rights should be dismissed because GRP could not, as a matter of law, establish an ownership interest in the RECs at issue. (V6 – 4660-4661). The trial court denied Sterling's motion as to GRP's Property Claims, explaining:

> ["Sterling's] arguments largely hinge on a distinction between "RECs" and "environmental attributes": Sterling claims an "REC is owned by a party if and only if it is retired in that party's name," and that "GRP merely owns the right to transfer environmental attributes [that are] attributable to the production of renewable energy." Sterling thus argues that because "Sterling did not hold 'GRP's RECs' as claimed by GRP," and instead held "environmental attributes," Sterling could not have converted GRP's RECs. Sterling also contends that "GRP cannot establish damages because the 'value' of the environmental attributes cannot be determined when . . . sitting in an inchoate form," such that GRP's Conversion Claim must fail as a matter of law. The Court disagrees on both counts.
>
> Whether Sterling converted the "RECs" or the "environmental attributes" associated with the renewable energy produced at the GRP

> Plants may present a dispute over terminology, but it is not determinative of GRP's Property Claims. Regardless of what one labels the environmental attributes associated with each MWh of renewable energy generated by the GRP Plants that were uploaded to the NAR Registry, such attributes are proper objects of property with concomitant rights.

(V10 – 6862-6863 (citations omitted)).

There are numerous problems with this analysis. First, a blanket statement that "environmental attributes" and "RECs" are "property" under Georgia law ignores the nuances and realities of the renewable-energy market, and places Georgia courts at the forefront of regulating the voluntary market for renewable energy in Georgia. Second, by failing to distinguish between "environmental attributes" and "RECs," the trial court ignored recognized issues of "double counting" environmental attributes, thereby threatening to throw its judge-regulated market into chaos.

1. The trial court erred by concluding that "environmental attributes" and "RECs" are "property" under Georgia law.

To Sterling's knowledge, the Order is the first of its kind in Georgia to address whether either environmental attributes or RECs are property under Georgia law—or, for that matter, to address environmental attributes or RECs at all. The trial court ultimately determined that both RECs and environmental attributes are "property" as follows:

> Whether Sterling converted the "RECs" or the "environmental attributes" associated with the renewable energy produced at the GRP Plants may present a dispute over terminology, but it is not determinative of GRP's Property Claims. Regardless of what one labels

> the environmental attributes associated with each MWh of renewable energy generated by the GRP Plants that were uploaded to the NAR Registry, such attributes are proper objects of property with concomitant rights.

(V10 – 6863). In deciding these issues of first impression, the trial court unsurprisingly cited no caselaw, as there appears to be no binding or persuasive caselaw on this issue in Georgia. Rather, the trial court cited two secondary sources—Black's Law Dictionary for its definition of property, and a Yale Law Review article. *See id.*; *see also Propertizing Environmental Attributes*, 39 Yale J. on Reg. at 1401.

Accordingly, the trial court came to its sweeping conclusions about "environmental attributes" and "RECs" nearly in a vacuum, and with reference to precious little authority. The trial court did not have the benefit of Georgia caselaw on the issue. Perhaps more importantly, the trial court did not have the benefit of a statutory framework defining "environmental attributes" and "RECs," as other states have but which Georgia does not.

Tellingly, even in states that regulate RECs by statute, issues of property and ownership are complex and varied. As analyzed by the Second Circuit, "RECs are inventions of state property law whereby the renewable energy attributes are 'unbundled' from the energy itself and sold separately." *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (per curiam). Accordingly, "***different states define RECs differently***, focusing on various

attributes which they deem to be especially relevant." *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 93 (2d Cir. 2017) (emphasis added). Therefore, even in states where RECs are regulated, their status as "property" is far from uniform or settled. Indeed, as summarized in the law review article relied on by the trial court, of the more than 30 states and territories that have statutory frameworks for regulating RECs and other similar concepts, only a handful have explicitly recognized RECs as "property." *See Propertizing Environmental Attributes*, 39 YALE J. ON REG. at 1396 n.13, 1402 n.44.

Given the complexity of property issues involving RECs even when such issues are regulated by statutes, in a voluntary, unregulated market such as Georgia's, ownership is best left to the agreement of the parties. According to leading commentary in the field, "***In voluntary transactions, most agree that the question of REC ownership can and should be negotiated privately between the buyer and the seller***, and should be clearly established by contract." (emphasis added).[10]

In other words, instead of creating new and poorly-defined property rights in environmental attributes and RECs, the trial court should have concluded that

[10] E. Holt, R. Wiser & M. Bolinger, *Who Owns Renewable Energy Certificates? An Exploration of Policy Options and Practice* (Ernest Orlando Lawrence Berkeley National Laboratory Report No. LBNL–59965, April, 2006), *available at* https://www.osti.gov/servlets/purl/922809. This source has been cited by multiple courts grappling with REC ownership. *See Wheelabrator Lisbon, Inc. v. Dep't of Pub. Util. Control*, 283 Conn. 672, 694, 931 A.2d 159, 174 (2007); *In re Ownership of Renewable Energy Certificates ("RECs")*, 389 N.J. Super. 481, 485, 913 A.2d 825, 828 (App. Div. 2007).

whatever "property" rights derive from RECs in a voluntary, unregulated market (such as Georgia's) are a creature of the agreement between the parties. Such a system makes good sense, given the various considerations weighing on when and how ownership rights accrue regarding environmental attributes and RECs.

By contrast, under the trial court's analysis, such considerations would become the province of the courts to regulate in the absence of legislative guidance. Instead of simply evaluating what the parties have agreed as to ownership of RECs, the courts would be responsible for determining the metes and bounds of the trial court's new, judge-made property "right" in environmental attributes and RECs. This would include determining whether (as suggested by the trial court) property rights attach separately to environmental attributes and RECs, when such differential property rights arise, whether such new rights are dependent on REC certification (which allows RECs to be traded), and how to allocate the competing claims for ownership at different stages of the REC certification process.[11]

[11] The struggles of court regulation of digital property rights has been addressed in the context of social media:

> Courts adjudicate disputes arising from the ownership and control of social media accounts under both federal and state law; this litigation landscape is littered with legal theories of recovery that obscure essential questions about the nature of the property embedded in these lawsuits and what legal rights should attach to those property interests. What is clear from an analysis of the caselaw is that courts provide idiosyncratic interpretations of whether and how a legal theory of recovery applies to a dispute over social media account control.

Kathleen McGarvey Hidy, *Let Them Eat Cake: Social Media Accounts, Property Rights, and the Digital Rights Revolution*, 71 DePaul L. Rev. 47, 56 (2021).

A far more prudential course would be to simply leave such issues to the parties' agreement, as recommended by the leading literature.[12] This, in turn, demonstrates the necessary linkage between Sterling's promissory estoppel claim, which as above seeks to delineate the agreement between the parties as to the ownership and sale of RECs, and GRP's property claims. As argued herein, the matter of "ownership" of the RECs at issue should be determined by reference to the parties' agreement, not by the creation of a vague and expansive property right under Georgia law. In other words, if the trial court is correct in its promissory estoppel ruling that no agreement existed between the parties regarding the ownership of the environmental attributes and RECs at issue, then GRP's property claim must also fail, given that ownership of environmental attributes and RECs in a voluntary, unregulated market is a creature of contract, not judge-made property law.

Ultimately, the trial court erred by broadly determining that environmental attributes and RECs are "property" under Georgia law.

2. The trial court erred by failing to distinguish "environmental attributes" and "RECs."

The trial court's sweeping statement that both RECs and environmental attributes are property, and indeed that the only distinction between them is semantic, is likewise erroneous. The trial court oversimplified complex industry-

[12] *See* Holt, et al. *supra* n.10.

based definitions in concluding "[r]egardless of what one labels the environmental attributes [as opposed to RECs] associated with each MWh of renewable energy generated by the GRP Plants that were uploaded to NAR Registry, such attributes are proper objects of property with concomitant rights." (V10 – 6833). The Order's imprecise use of industry terms of art—using "environmental attributes" and "RECs" as synonymous—will impact not only the future trial of this case but subsequent litigation in this arena.

Specifically, the implication in the trial court's Order that either RECs or environmental attributes may constitute property leads to potential confusion and double-counting of purported "ownership" rights. As referenced in the Yale Law Review article, to help establish more precise and standard usage of the terms "environmental attributes" and "RECs," the American Bar Association created a Master REC transfer agreement, which defined such terms (specific to renewable energy production only) as follows:

> "Environmental Attribute" means an aspect, claim, characteristic or benefit associated with the generation of a quantity of electricity by a Renewable Energy Facility, other than the electric energy produced, and that is capable of being measured, verified or calculated . . . .
>
> "Renewable Energy Certificate" or "REC" means a certificate, credit, allowance, green tag, or other transferable indicia, howsoever entitled, created by an Applicable Program or Certification Authority indicating generation of a particular quantity of energy, or Product associated with the generation of a specified quantity of energy from a Renewable Energy Source by a Renewable Energy Facility. . . .

See supra n.1; *see also Propertizing Environmental Attributes*, 39 YALE J. ON REG. at 1396 n.18.

These definitions clearly show that "environmental attributes" and "RECs" are distinct concepts. By conflating these ideas, the plain language of the trial court's order indicates that *either* an environmental attribute, which is the "characteristic" itself, *or* a REC, which is a separate instrument for transferring the characteristic, may constitute property. This formulation potentially creates two property rights from a single characteristic and would throw the renewable energy market into chaos, with Georgia being the focal point for an entirely new class of judge-made property rights in the state.

The above "model" definitions illustrate that it has been generally understood that environmental attributes are separate from RECs, and accordingly *must be* quantified and verified through certification processes prior to being considered a tradable Renewable Energy Certificate. The trial court's formulation upends these distinctions, confusing the issue of when and how property rights might arise with respect to environmental attributes and RECs and leading to *each* being considered a tradable commodity. This, in turn, would throw the judge-made market for RECs in Georgia into disarray. Indeed, the Federal Trade Commission has addressed the foundational problems caused by double-counting RECs:

> [T]he operation of the renewable energy market relies heavily on the expectation of all market participants that these certificates have not

> been counted or claimed twice (i.e., double counted). Such double-counting can occur, for instance, through […] renewable energy claims made by a company that already sold the RECs for its renewable generation. […] ***Such double counting, in turn, not only risks deceiving consumers but also threatens the integrity of the entire REC market***. By selling RECs, a company has transferred its right to characterize its electricity as renewable.[13]

(emphasis added). Accordingly, the trial court's determination that the only difference between "environmental attributes" and "RECs" is "semantic" is erroneous and must be reversed.

Ultimately, the trial court erred in its broad yet vague conclusion that property rights attach ***as a matter of law*** to ill-defined categories of environmental attributes and RECs. The determination is not supported by the caselaw or the record and must be reversed.

V. CONCLUSION

For the foregoing reasons, Sterling respectfully requests that: (1) the portion of the Order below granting GRP's motion for summary judgment as to Sterling's promissory estoppel claim be reversed; (2) the portion of the Order below disregarding portions of the Murphy affidavit be reversed; (3) the portion of the Order holding that "environmental attributes" and "RECs" are "property" under Georgia law be reversed, with judgment rendered that GRP take nothing by its

[13] Letter from James A. Kohm, Assoc. Dir., Div. of Enf't, Bureau of Consumer Prot. to R. Jeffrey Behm, Esq., Sheehey, Furlong & Behm, P.C. (FTC Feb. 5, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/624571/150205gmpletter.pdf.

claims for conversion and intentional interference with property rights; and (4) Sterling be granted all further relief to which it has shown itself entitled.

This submission does not exceed the word count imposed by Rule 24.

Respectfully submitted this 9th day of May, 2024.

/s/ John L. Monroe, Jr.

Kevin T. Moore, P.C.
Georgia Bar No. 520036
ktm@ktmtriallaw.com
KEVIN T. MOORE, P.C.
2500 Northwinds Parkway
Suite 330
Alpharetta, GA 30009
Telephone: (770) 396-3622

Tammi M. Cody
Georgia Bar No. 053850
tcody@codlaw.net
CODY LAW, P.C.
659 Auburn Ave. NE
Suite 210
Atlanta, GA 30312
Telephone: (802) 734-1697

John L. Monroe, Jr.
Georgia Bar No. 516190
jmonroe@fordharrison.com
Frederick L. Warren
Georgia Bar No. 738350
rwarren@fordharrison.com
FORDHARRISON LLP
271 17th Street, NW
Suite 1900
Atlanta, GA 30363
Telephone: (404) 888-3800
Facsimile: (404) 888-3863

Attorneys for Appellant

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served a true and correct copy of the foregoing Appellant Sterling Planet Inc.'s Appellant's Brief upon counsel of record by electronic service pursuant to agreement of counsel as follows: I certify that there is a prior agreement Sweetnam, Schuster & Schwartz, LLC to allow documents in a PDF format sent via email to suffice for service.

Ed Schwartz eschwartz@sweetnamlaw.com Jared Siegel jsiegel@sweetnamlaw.com Sweetnam, Schuster & Schwartz, LLC 1050 Crown Pointe Parkway Suite 500 Atlanta, GA 30338 Tel: (470) 395-7842	Daniel Fleming dfleming@sweetnamlaw.com Sweetnam, Schuster & Schwartz 200 Vesey Street Brookfield Place 24th Floor New York, NY 10281 Tel: (646) 952-8600

This 9th day of May, 2024.

/s/ John L. Monroe, Jr.
John L. Monroe, Jr.
Georgia Bar No. 516190
jmonroe@fordharrison.com

Attorney for Appellant