CASE NO.
A24A1282

IN THE COURT OF APPEALS STATE OF GEORGIA

GRP HOLDCO, LLC, GRP MADISON, LLC, and GRP FRANKLIN, LLC
Cross-Appellants

v.
STERLING PLANET, INC.
Cross-Appellee

BRIEF OF CROSS-APPELLANTS

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COME NOW, Cross-Appellants GRP HoldCo, LLC ("GRP HoldCo"), GRP Madison, LLC ("GRP Madison"), and GRP Franklin, LLC ("GRP Franklin;" and collectively, "GRP," or "Cross-Appellants") respectfully submit this opening cross-appeal brief and enumeration of errors. GRP contends that the Georgia State-wide Business Court (the "Trial Court") erred in its February 28, 2024 Order on Pending Motions (the "Order") in denying GRP's motion for summary judgment against Cross-Appellees Sterling Planet, Inc. ("Sterling" or "Cross-Appellee" and collectively with GRP, the "Parties") regarding the third and fourth elements of GRP's Second Cause of Action, Conversion. GRP further contends that the Trial Court erred in its Order by denying GRP's motion, pursuant to O.C.G.A § 9-15-14 for attorneys' fees and expenses of litigation against Sterling and Sterling's counsel in *GRP HoldCo, LLC, GRP Madison, LLC, GRP Franklin, LLC v. Sterling Planet, Inc.*, File no. 22-GSBC-0019 (the "Action").[1]

[1] Record citations to the records in A24A1281, which is Sterling's appeal from the Order are referred to herein as "R1." Record citations to the records in this appeal, A24A1282, are referred to herein as "R2."

INTRODUCTION

GRP commenced this Action to reclaim control of its property – the GRP RECs and Assets – wrongfully held by Sterling. Sterling had held GRP's property hostage until after GRP made an Emergency Motion for an Interlocutory Injunction requesting an order compelling Sterling to return its RECs and Assets.

Even after Sterling finally returned GRP's property, Sterling has persisted in asserting specious breach of contract and equitable claims, primarily alleging that Sterling had exclusive rights to transact GRP's property for a multi-year period and at a 20% commission rate, a proposition explicitly rejected by GRP. Most of those claims have now been dismissed following GRP's motions to dismiss and for summary judgment.

On summary judgment, the Trial Court held that GRP established three of the four elements of its conversion claim. However, the Trial Court erred in not holding that GRP satisfied the fourth conversion element, that Sterling refused to return GRP's property. Furthermore, the Trial Court erred by not holding that GRP demanded that Sterling return its property in July 2022. Because GRP established all four elements of its conversion claim, the Trial Court erred in not granting summary judgment to GRP.

Additionally, the Trial Court erred by not imposing mandatory O.C.G.A. § 9-15-14(a) sanctions against Sterling despite Sterling's assertion of claims,

defenses, and positions lacking any justiciable law or fact. *See* O.C.G.A. § 9-15-14(a). The Trial Court denied sanctions, reasoning that certain arguments made by Sterling were cognizable. (*See* R2 V2-61–63.) However, finding that certain claims are cognizable does not absolve Sterling of liability for Sterling's other spurious claims, defenses and positions that are independently sanctionable under O.C.G.A. § 9-15-14(a). Taken to its logical conclusion, the Trial Court's decision produces an antithetical result – that making a cognizable legal argument provides a safe harbor to otherwise sanctionable conduct.

PART THREE

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this cross appeal under O.C.G.A. § 5-6-38. This cross appeal does not involve a matter over which the Georgia Supreme Court has exclusive jurisdiction under Article VI, Section VI, Paragraphs II and III of the Georgia Constitution and involves the correction of errors of law. GRP timely filed the Notice of Cross Appeal on March 26, 2024, which is within 30 days of the date after entry of the Order.

PART FOUR

ENUMERATION OF ERRORS

1. The Trial Court erred in denying GRP's motion for summary judgment on the third element of conversion by July 21, 2022 because GRP made

an unequivocal demand for the return of the Assets and RECs by that date. (R2 V2-40–41.)

2. The Trial Court erred in denying GRP's motion for summary judgment on the fourth element of conversion because Sterling refused to return GRP's property to GRP multiple times after GRP unequivocally demanded the return of that property. (R2 V2-42–43.)

3. The Trial Court erred as a matter of law in denying GRP's motion for sanctions pursuant to O.C.G.A. § 9-15-14 and by not applying the review standard required by that statute. (R2 V2-61–63.)

PART FIVE

STATEMENT OF THE CASE[2]

A. The Parties and Renewable Energy Certificates ("RECs")

This Action centers on GRP and Sterling's business relationship in connection with the sale of renewable energy certificates or credits ("RECs") generated by two renewable biomass power plants that are owned by GRP and located in Georgia (the "GRP Facilities"). (*See* R2 V2-9–11.)

[2] The facts relevant to this cross-appeal are summarized below and discussed in greater detail in the GRP's Statement of Theories of Recovery and Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment. (R1 V4-484–553.)

The GRP Facilities generate RECs that are intangible assets. (R1 V5-361–62, at 39:5–40:5; R2 V2-10–11.) These RECs are GRP's property and can be sold to others as a commodity on a retail or wholesale basis. (*See id.*; R1 V5-1196–97.). A REC corresponds to the environmental characteristics of generating one megawatt-hour ("MWh") of the renewable energy generated by the GRP Facilities. (*See* R1 V5-1196–97; R2 V2-10, at n.8.)

The RECs at issue here are tracked on the North American Renewables Registry ("NAR Registry"), which is an electronic tracking system managed by APX, Inc. ("APX"). (R1 V5-332, at 10:18–20; V5-1199–1200; R2 V2-10, at n.8.) GRP designated Sterling as the "Responsible Party" for the GRP Facilities on the NAR Registry (known as "Assets" for purposes of the NAR Registry), which provided Sterling with authority over the transaction and activities related to the Assets and the RECs generated by the GRP Facilities on the NAR Registry. (R1 V5-497; R2 V2-12.) There is no change in the legal ownership of Assets or RECs because GRP designated Sterling as the Responsible Party. (R1 V5-344, at 22:23–25.)

As Responsible Party, Sterling had possession and control over GRP's Assets and RECs on the NAR Registry. (R1 V5-497.) However, despite multiple demands for return, Sterling refused to return that property to GRP, ultimately

compelling GRP to commence this Action. (*See* R1 V5-1704; V5-1707–10; V5-1718.)

In pursuit of the return of their Assets and RECs, GRP commenced this action on October 31, 2022, and made an Emergency Motion for an Interlocutory Injunction (the "Emergency Motion"). (R1 V5-1826–1845; R2 V2-16–17.) The Emergency Motion sought an order compelling Sterling to return GRP's Assets and RECs. (R1 V5-1845.) GRP's Verified Complaint for Declaratory Judgment, Injunctive Relief, and Damages, dated October 31, 2022 alleges: (i) that Sterling made unfounded claims regarding the existence of an enforceable agreement between the Parties concerning REC sales; and (ii) conversion and other intentional torts against Sterling due to Sterling's refusal to return GRP's property – the Assets and RECs – back to GRP. (R1 V5-1744–1844.)

GRP withdrew its Emergency Motion after Sterling agreed to return the GRP's Assets and RECs on November 18, 2022. (R1 V5-1734–44.)

Sterling then asserted counterclaims for breach of contract and for specific performance, claiming that it is entitled to a 20% commission on sales of the GRP RECs for a multi-year and exclusive period pursuant to a purported "80/20 Provision" that Sterling claimed was contained in various "Exhibit C Agreements" that Sterling attached to its counterclaims and that Sterling claimed were binding and effective against GRP. (R1 V5-1270–1405.)

Following GRP's motion to dismiss, the Trial Court dismissed Sterling's breach of contract and specific performance counterclaims, holding that the Exhibit C Agreements proffered by Sterling were not enforceable against any GRP party. (R1 V2-1356–1380; R2 V2-13, at n.15; V2-17–18.) In reaching this holding, the Trial Court did "not address GRP's [certain] arguments regarding the Exhibit C Agreements," namely, that Sterling's proffered 80/20 Provision was plainly not contained in any of its proffered Exhibit C Agreements, and that those Agreements' limitation of liability provisions barred substantially all damages sought by Sterling. (R1 V2-1379, at n.36.)

B. GRP's Cross-Appeal

As relevant to the instant cross-appeal, each of the parties moved for summary judgment and GRP moved for sanctions pursuant to O.C.G.A. § 9-15-14. (R2-V2-6–9.) The Trial Court granted partial summary judgment to each of the parties and denied GRP's motion for sanctions pursuant to O.C.G.A. § 9-15-14. (*Id.*)

GRP had alleged that Sterling converted GRP's property, namely, the GRP Assets and the GRP RECs. The Trial Court held that (i) GRP proved that the GRP RECs and the GRP Assets are GRP's property; (ii) that GRP's property was possessed by Sterling; and (iii) that GRP demanded the return of that property on

September 16, 2022. The Trial Court thus held that GRP established the first, second, and third elements of conversion. (*See* R2 V2-39–43.)

The Trial Court, however, erred in holding that there is a genuine issue of fact regarding whether GRP established that Sterling refused to return GRP's property in satisfaction of the fourth "refusal to return" element. (R2 V2-42.) GRP also contends that the Trial Court erred in holding that the third conversion element was met only as of September 16, 2022, and not earlier. (*See* R2 V2-42–43.) GRP also asserts that the Trial Court erred in not awarding mandatory sanctions pursuant to O.C.G.A. § 9-15-14(a) and incorrectly applied the standard required by that statute. (*See* R2 V2-66–68.)

Sterling had filed an Amended Notice of Appeal dated March 21, 2024 seeking a direct appeal of the Order because the Trial Court had granted summary judgment on its promissory estoppel counterclaim pursuant to O.C.G.A. § 9-11-56(h) and § 5-6-34 (Case. No. A241281). (R1 V2-5–6.) GRP then filed a Notice of Cross-Appeal dated March 26, 2024 pursuant to O.C.G.A. § 5-6-38 (Case. No. A241282). (R2 V2-1–3.) GRP's enumerations of errors have been preserved for appeal because these issues arise from the Order. (*See* R2 V2-35–38; V2-61–63.) GRP's brief for this cross-appeal is being timely filed because this Court granted an extension of time for the enumeration of errors and briefs to be filed until May 9, 2024. (A24A1282, April 22, 2024 Order.)

Sterling also filed an application for discretionary appeal of the Trial Court's order which this Court dismissed as "superfluous" in light of Sterling's direct Notice of Appeal of the Order. (A24I0151, April 16, 2024 Order.)

C. Key Individuals Referenced Herein

For ease of this Court's reference, the following individuals will be referenced throughout this brief:

- **Charles Abbott ("Abbott")** has been President and CEO of GRP HoldCo since February 1, 2022. (*See* R1 V5-32, at 31:6-12.) Abbott is also a partner with Fairlead Advisors. (*Id.*) GRP HoldCo retained Fairlead Advisors for interim management duties of GRP. (R1 V5-28–29, at 27:8-28:14.) Abbott's responsibilities include the management of GRP's Assets and RECs. (R1 V5-40–41, at 39:23–40:8.)

- **Carey Davis ("Davis")** was executive vice president of GRP Madison and GRP Franklin from January 5, 2018 to January 28, 2022. (R1 V5-496, at 30:12–16.) Davis's responsibilities included discussions with Sterling regarding the transaction of RECs beginning in 2021. (R1 V5-504–05, at 38:3-39:25.)

- **Charles Li ("Li")** is a Senior Administrator at APX and has been employed by APX for over ten years. (*See* R1 V5-332, at 10:21–25.) APX manages the North American Renewables Registry (the "NAR Registry"). (R1 V5-332, at

10:18-20.) Li manages the NAR Registry as the administrator. (R1 V5-332, at 10:21-23.)

- **Therrell "Sonny" Murphy, Jr. ("Murphy")** is the founder, current CEO, and chairman of Sterling and has been since 2000. (*See* R1 V5-651–52, at 19:23–20:13.)

- **Valerie Christopher Johnson ("Johnson")** has been a Sterling employee since 2005. (R1 V5-832, at 10:9–14.) Johnson is currently vice president of client services and has been in that position since 2012. (R1 V5-824–25, at 12:14–13:10.) Johnson described her responsibilities as the following: "anything from proposals, pricing out the products, contracts, drafting the contracts, fulfillment, purchasing the products, compliance, certification, delivery." (R1 V2-835–36, at 13:23–14:3.)

PART SIX

ARGUMENT AND CITATION OF AUTHORITIES

The Court of Appeals reviews the denial of summary judgment *de novo*. *See Hathaway Dev. Co., Inc. v. Am. Empire Surplus Lines Ins. Co.*, 301 Ga. App. 65, 66 (2009). Summary judgment should be granted when the movant shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." O.C.G.A. § 9-11-56(c). If the moving party meets its

initial burden of proof, the nonmoving party cannot rely on mere allegations or denials in its pleadings. O.C.G.A. § 9-11-56(e).

The Court's denial of mandatory O.C.G.A. § 9-15-14(a) sanctions was based on a misapplication of the standard required by that statute, and the appeal of the Order thus presents a question of law which is reviewed *de novo*. *See Gibson Constr. Co. v. GAA Acquisitions I, LLC*, 314 Ga. App. 674, 676 (2012). Otherwise, the standard of review for O.C.G.A. § 9-15-14(a) is the "any evidence" rule, while O.C.G.A. § 9-15-14(b) is discretionary and the standard of review is abuse of discretion. *See LabMD, Inc. v. Savera*, 331 Ga. App. 463, 465 (2015).

I. STERLING DID NOT DISPUTE THAT GRP DEMANDED RETURN OF ITS PROPERTY ON JULY 21, 2022

To succeed on its conversion claim, GRP must establish four elements, including a demand for the return of its property. *See Stockton v. Shadwick*, 362 Ga. App. 779, 788 (2022). While the Trial Court correctly held that GRP satisfied the first two conversion elements (that the property at issue was GRP's property and that Sterling possessed GRP's property), the Trial Court erred its ruling that it could only determine, as a matter of law, that GRP's demand for the return of its Assets and RECs was made on September 16, 2022, and not by July 21, 2022. (R2 V2-40–41.) A straightforward reading of multiple emails and deposition testimony unequivocally demonstrates that there is no genuine issue of fact regarding the demand for the return of the Assets and RECs made to Sterling on July 21, 2022.

Sterling did not contest that GRP demanded the return of GRP's property on July 21, 2022. However, the Trial Court erroneously held that there is a genuine issue of fact regarding whether GRP demanded the return of the RECs on July 21, 2022, because GRP sent the demand to a third party, Li, an APX administrator, who then sent the demand to Sterling. (R2 V2-40–41.) But there is no requirement that a demand for return of property under conversion has to be made ***directly*** from the Plaintiff to Defendant. *See J.H. Johnson v. Pioneer Fin. Co.*, 104 Ga. App. 820, 821 (1961) (no evidence of a demand for return of the property "by the plaintiff or its agent").[3] Only that GRP must make a demand for return that is then sent to Sterling, which, based on the record, indisputably occurred on July 21, 2022. (*See* R1 V5-1707–10.)

The Trial Court's ruling ignores that Abbott's demand to Li was then sent directly to Johnson at Sterling and disregards the express language in the email exchange between Abbott of GRP, Johnson of Sterling, and Li of APX. The first email from Li clearly states that GRP is unequivocally demanding its Assets and RECs be returned to GRP:

[3] Abbott made the demand for the return of the RECs to the APX Administrator, Li, on July 21, 2022 because the Assets and RECs were located on the NAR Registry and only the APX Administrator could affect the transfer once both Parties agreed to a transfer. (R2 V4-489–90.) Sterling never agreed to transfer until after GRP had filed this Action.

- **July 21, 2022 2:09 pm (Li email to Johnson with Abbott copied on the email):**

  Val,

  Charlie [Abbott of GRP] has requested these assets and all the RECs associated with these two assets be transferred to his account. The list of RECs are attached to this email. Can you confirm?

(R1 V5-1707–10.)

In response, Sterling's Johnson acknowledges GRP's demand for the return of its Assets and RECs in a response 33 minutes later:

- **July 21, 2022 2:42 pm (Johnson email to Li with Abbott copied on the email):**

  Hi Charles,

  No, I cannot confirm at this time. Some of these RECs are already committed to customers and have not yet been transferred or retired.

(*Id.* (emphasis added).)

Further, Johnson's deposition testimony confirms that it was clear to her and Sterling that GRP requested the return of its Assets and RECs on July 21, 2022, demonstrating that there is no genuine issue of fact regarding GRP's demand:

> Q. (. . .) So regarding the responsible party designation, when was the first time you had any conversations with anyone at Sterling regarding the plaintiffs' request to rescind that designation?
>
> A. I -- I just cannot recall when that came in. I believe an email came in from NAR. I -- I remember receiving the email about returning the RECs. ***That is more fresh to my memory, and there was a lot of -- what they were saying is Charlie [Abbott GRP] wanted all of the RECs that***

> ***were active, returned, but RECs remain active even when they're sold sometimes.***
>
> So that's why we had to make sure that everything was properly put in place so that all of the RECs didn't go that were -- had already been sold -- to be sold that went along with the assets. (. . ..)

(R1 V5-898, at 76:10–20 (emphasis added).)[4]

Additionally, Sterling's purported actions of running reconciliation reports to determine the status of RECs after the July 21, 2022 emails, signify an understanding that the request was indeed a demand for the return of GRP's Assets and RECs.[5] As there is no genuine issue of fact that GRP demanded the return of the RECs on July 21, 2022, the Trial Court's denial of summary judgment on this issue should be reversed.

II. STERLING REFUSED TO RETURN GRP'S PROPERTY UPON DEMAND IN JULY 2022

A. Sterling Clearly Refused to Return GRP's Property Even After GRP's Repeated Demands

The Trial Court erred in its ruling that there was a genuine issue of fact as to whether Sterling refused to return GRP's Assets and RECs to GRP in July and August 2022. (R2 V2-41–42.) The Trial Court based its ruling on the notion that

[4] Moreover, Sterling has never asserted that it didn't receive the demand on July 21, 2022 to return the Assets and RECs back to GRP in any of its briefs it submitted in support of its motion of summary judgment and in opposition to GRP's motion for Summary Judgment. (*See* R1 V6-132–136; V9-27–29.)

[5] (*See* R1 V5-898, at 82:18–83:22.)

Johnson's July 21, 2022 response to Li, stating that she could not confirm the transfer of RECs associated with GRP's Assets due to potential commitments, did not constitute a clear refusal of GRP's demands. (*See* R2 V2-42.) The Trial Court also deemed Johnson's email to Abbott on August 10, 2022, directing further communications through counsel, as insufficient to constitute a refusal by Sterling as a matter of law. (*Id.*) But there is no genuine issue of fact that Sterling failed to return GRP's property until after GRP commenced this Action, and that fact combined with the July 21 and August 10, 2022 refusals along with Sterling's unresponsiveness to requests from APX regarding the transfers make clear that there is no genuine of fact that Sterling refused to return the Assets and RECs.[6]

The Trial Court's ruling overlooked the express language in Johnson's email to both Li and Abbott, in which Sterling refused to return the Assets and RECs to GRP:

[6] *See Graham v. State Street Bank & Tr. Co.*, 111 Ga. App. 416, 418 (1965) (conversion requires "a demand for return of the property and defendant's failure or refusal to redeliver") *Travelers Cas. and Surety Co. of Am. v. Woodard*, 2022 WL 17070530, at *4 (M.D. Ga. Nov. 17, 2022) (plaintiff established conversion on a motion for summary judgment by showing that it had "demand[ed] repayment" to defendant and that defendant "failed to make any payment" to plaintiff).

- **July 21, 2022 2:42 pm (Johnson email to Li and Abbott):**

  Hi Charles,

  No, I cannot confirm at this time. Some of these RECs are already committed to customers and have not yet been transferred or retired.

(R1 V5-1707–10 (emphasis added).)

Six minutes later, Abbott followed up with a request for a report on the committed RECs, to which Johnson did not respond:

- **July 21, 2022 2:47 pm (Abbott email to Johnson and Li):**

  Val,

  Please provide a reconciliation of those RECs that you believe cannot be transferred because they are "committed."

(*Id.*)

Receiving no response, Abbott sent another email, 12 days later, again requesting Johnson to provide a reconciliation report:

- **August 2, 2022 10:48 am (Abbott email to Johnson and Li):**

  Val,

  Any update on providing a reconciliation of the RECs that you believe are "committed?"

(*Id.*)

Johnson finally responded a day later but still did not have a reconciliation report ready to send:

- **August 3, 2022 2:44 pm (Johnson email to Abbott and Li):**

  Hi all,

  I apologize for the delayed response. I will have an update by the end of the week for Charlie, so we can all discuss next steps.

(*Id.*)

Johnson did not respond at the end of the week and so Abbott again had to request the report:

- **August 9, 2022 8:46 am (Abbott email to Johnson and Li):**

  Val,

  It has now been more than two weeks since our request for a simple reconciliation of "committed" RECs.

  Please provide today.

(*Id.*)

Despite these subsequent follow-up emails from Abbott, Johnson failed to provide the requested report and instead, on August 10, 2022, still not having sent the reconciliation report, stating that any further communications should go "through our attorneys," indicating a refusal to discuss this issue further:

- **August 10, 2022 12:59 am (Johnson email to Abbott and Li):**

  Hi Charlie,

  I have been advised that any further communications related to the GRP projects need to go through our attorneys. The information you are requesting will be sent to them shortly.

> Thank you all for understanding while both parties sort out any contractual disputes.

(*Id.*)

These communications unequivocally demonstrate Sterling's adamant refusal to transfer the Assets and RECs back to GRP. Initially, Sterling cited potential commitments of RECs to customers as the reason for withholding the transfer, and later, it attributed its stance to "contractual disputes."[7] Regardless of the rationale, there exists no genuine issue of fact that Sterling refused to return the Assets and RECs back to GRP after a demand was made on July 21, 2022. In fact, Li himself recognized the unprecedented nature of Sterling's refusal, remarking that it was his "first case" with a party declining to transfer Assets and RECs after such a demand was made:

> Q. Do you recall any of these emails?
>
> A. I do recall.
>
> Q. What do you recall regarding them?
>
> A. ***Well, I recall that – that this was a very unusual matter in the facts that in all the time as a registry administrator, I've actually never had anyone decline transferring the asset over or having any dispute regarding the issued RECs that have already been issued for Val.***

[7] In actual fact, Sterling continued to sell GRP RECs without GRP's authorization or knowledge. (*See* R1 V5-1714–16.) Sterling sold GRP's RECs on at least the following dates after GRP's July 21, 2022 return demand for its property: August 1, 2022, August 8, 2022, August 17, 2022, and August 26, 2022. (*Id.*)

So this is my first case where you know, I – I – I've seen something like this where somebody is actually declining to transfer the asset and declining to transfer –

MR. MOORE: Right I – there's been a hold on what he's saying. I can't –

THE REPORTER: For the witness, I apologize. What we've got so far from your response was –

(Readback performed.)
Then we lost you.

THE WITNESS: ***Declining to transfer the RECs over as well.***

BY MR. FLEMING

Q. ***Because Sterling Planet refused to transfer the RECs here, correct?***

A. ***Correct.***

(R1 V4-533–534 (emphasis added).)

Furthermore, no emails or communications by Sterling were ever directed to either GRP or APX after July 21, 2022, stating that Sterling was willing to transfer the Assets and RECs back to GRP until after GRP initiated litigation on October 31, 2022. Therefore, there exists no genuine issue of fact that Sterling refused to return the Assets and RECs back to Sterling, warranting a reversal of the Trial Court's ruling on this issue.

B. Sterling's Claim Regarding GRP's NAR Registry Account Does Not Excuse Sterling's Refusal to Return the Assets and RECS to GRP

The Trial Court erroneously entertained Sterling's diversionary argument, suggesting that GRP's lack of an account on the NAR Registry excuses Sterling's refusal to transfer the Assets and RECs back to GRP. (R2-V2-42–43.) However, there is nothing in the record showing that Sterling's failure to return the RECs back to GRP was anything other than its refusal to agree to the transfer, which it did on numerous occasions.[8] Because there is no genuine issue of fact that Sterling never agreed to return until after the commencement of litigation, the Court of Appeals should reverse the Trial Court's ruling that GRP failed to satisfy the fourth element of conversion, Sterling's refusal on July 21, 2022 and on subsequent days, as a matter of law.[9]

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[8] The Trial Court ruled that nothing in the record supported Sterling's allegations that it had no ability to transfer the Assets and RECs back to GRP because GRP did not have a NAR Registry Account or that Sterling ever requested GRP to create a NAR Registry Account. (*See* R2 V2-42–43.) The Trial Court further ruled that Sterling's citation in support of this assertion (Affidavit of Therrell "Sonny" Murphy, Jr., dated September 5, 2023 ¶ 16 (R1 V7-33)) was inadmissible as either an unsupported conclusion of law or a self-serving conclusory statement not supported by fact. (*See* R2 V2-28; V2-42–43.)

[9] In fact, GRP intended to create a NAR Registry account on July 21, 2022, but did not because Sterling refused to return the Assets and RECs on that same day:

- **July 21, 2022 7:28 pm (Li email to Abbott and Davis):**

  Carey,

  Sterling is saying they do not want to transfer the assets and RECs ***over to an account that Charlie plans on creating***. Sterling planet [sic] is saying the RECs are earmarked for transfers/retirement.

Sterling's post-litigation assertions regarding GRP's NAR Registry account are irrelevant because Li, the administrator of the NAR Registry for APX, expressly stated that the sole requirement for transferring the Assets and RECs was mutual agreement between the parties:

> Q. Okay. What would be sufficient to show to APX that both parties confirm the assets are transferred on the NAR Registry?
>
> A. We would need a email with both parties on the email and both parties agreeing that the asset is going to be transferred over.
>
> It could be one party reaching out to me and another party reaching out to me.
>
> But in both scenarios if – we just need to make sure that we have confirmation from that – they confirm that the asset can be transferred over.

(R1 V5-348–49, at 26:19–27:6.)

> Q. For purposes of transferring the RECs between two parties, the only thing – only item that APX requires is cooperation from both parties, correct?
>
> A. That's correct.

(R1 V5-349, at 27:17–20.)

This was made abundantly clear to Abbott in emails on September 7, 2022, when he sought clarification on this issue:

(R1 V5-1703–06 (emphasis added).)

- **September 7, 2022 9:12 am PDT (C. Abbott to C. Li)**

  Charles [Li of APX],

  We are working through a solution with Sterling Planet.

  What forms would be needed to between the parties to effect a transfer a transfer of the generating units and associated RECs to an account held by GRP HoldCo LLC?

- **September 7, 2022 10:12 am PDT (C. Li responsive email to C. Abbott)**

  Charles [Abbott of GRP],

  I will only need Sterling Planet to confirm I can transfer the assets over to your account. Please ensure with them that any necessary RECs that belong to you are transferred over before I initiate the transferring of the assets.

- **September 7, 2022 10:39 am PDT (C. Abbott to C. Li)**

  OK, Is there a form of some sort?

- **September 7, 2022 10:46 am PDT (C. Li responsive email to C. Abbott)**

  Charles [Abbott of GRP],

  No form is necessary for generator redirect, we just ask that both parties confirm the assets are being transferred and that any RECs owed to the receiver of the asset transfers.

(R1-V5-1722–24 (emphasis added).)

Subsequently, on that same day, Li emailed Johnson, asking her to confirm if he could transfer the Assets and RECs back to GRP:

> Val,
>
> I have received word that you and Charles have been working on the situation. ***Please confirm when I can transfer*** the assets over. Additionally, if you need to transfer the RECs over to their account, please do it before I transfer the assets over.

(R1 V5-1846–56 (emphasis added).)

However, Sterling's Johnson never responded, and no one else from Sterling ever responded.[10] In fact, despite GRP's demands,[11] Sterling persisted in refusing to return GRP's property and unbeknownst to GRP, Sterling continued to unlawfully sell thousands of GRP's RECs to others after July 21, 2022, and on multiple occasions. (R1 V5-1715–16.) Sterling only returned GRP's property on November 18, 2022 after GRP initiated this action and filed an Emergency Motion. (R1 V5-1735–43.)

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[10] The trial court refers to language in Johnson's affidavit that 'Sterling could not transfer Assets or RECs to GRP' because GRP lacked an active NAR Registry account" (R2 V2-42–43), but this is clearly contradicted by Johnson's deposition testimony that she did not attempt to effectuate a transfer of the Assets and RECs back to GRP until after GRP had filed this action. (*See* R1 V5-931, at 109:13–20.) Whether GRP had a NAR Registry Account is irrelevant because Sterling refused to return the RECs until after litigation was commenced. (*Id.*)

[11] Sterling refused to return the Assets and RECs after multiple other return demands. (*See* R1 V5-1704; V5-1718.)

Indeed, just a month before GRP initiated this Action, Sterling refused to return GRP's property and instead asked that GRP execute a "Temporary Forbearance Agreement allowing for [Sterling] ***to continue marketing GRP RECs through [Sterling's] account at NAR***," and which would have kept Sterling in possession and control over GRP's property. (R1 V2-1170 (emphasis added); R1 V5-1725–28.)

Even after Sterling finally returned GRP's property, Sterling then filed counterclaims replete with allegations demanding damages for GRP's failure to upload GRP RECs to Sterling so that Sterling could take possession of those RECs. (R1 V2-961, ¶ 25; V2-962, ¶ 26; V2-967, ¶ 44; V2-974, ¶ 22.) Consequently, the Trial Court's denial of GRP's motion for summary judgment on Sterling's refusal to return the Assets and RECs should be reversed.

III. THE COURT APPLIED THE WRONG LEGAL STANDARD IN DENYING MANDATORY O.C.G.A. § 9-15-14(a) SANCTIONS

The Trial Court misapplied the statutory requirements in denying GRP's motion for sanctions under O.C.G.A. § 9-15-14(a). (*See* R2 V2-61–63.) Rather than addressing the specific sanctionable "claim[s], defense[s], or other position[s]" taken by Sterling and asserted by GRP as sanctionable conduct, the Trial Court denied GRP's motion for O.C.G.A. § 9-15-14(a) sanctions on the basis that ***certain*** arguments made by Sterling were cognizable. (*Id.*) The Trial Court held that because there was "justiciable issues of law and fact [that] existed between the parties ***related to*** Sterling's breach of contract claim," it was denying GRP's motion for sanctions regarding sanctionable conduct. (R2 V2-62–63 (emphasis added).)[12]

[12] Indeed, the Trial Court reasoned that "sanctions were not required because (i) "one agreement on which Sterling based its breach of contract counterclaim was partially executed by GRP Franklin and Sterling believed similar agreements had been executed by other GRP entities"; (ii) the record "suggest[ed] a more formal

But that is not the standard required by O.C.G.A. § 9-15-14(a). Under the statute, sanctions are appropriate upon the assertion of ***a*** claim, defense or other position with respect to which there existed such a complete absence of any justiciable law or fact. *See* O.C.G.A. § 9-15-14(a).[13] Therefore, the presence of certain justiciable issues of law and fact cannot excuse other clearly sanctionable conduct of Sterling. Taken to its logical conclusion, the Trial Court's Order means that making any cognizable legal argument provides a safe harbor for Sterling to engage in otherwise sanctionable conduct.

Pursuant to OCGA § 9-15-14(a):[14]

> In any civil action … reasonable and necessary attorney's fees and expenses of litigation ***shall be awarded*** to any party against whom another party has asserted ***a claim***, defense, or ***other position*** with

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arrangement or understanding between the parties, even if the record demonstrates that no formal, enforceable agreement ultimately materialized" and (iii) that the partial performance exception to the Statute of Frauds presented a 'closer question' than other contract-based arguments raised by Sterling." (R2 V2-62.)

[13] *See Modi v. India-American Cultural Assoc.*, 370 Ga. App. 458, 461–62 (Jan. 10, 2024) (addressing "instances" and "examples" of sanctionable conduct under O.C.G.A. § 9-15-14); *Viente v. Maiden*, 362 Ga. App. 264, 268 (2022) (remanding attorneys' fees award under O.C.G.A. § 9-15-14 because it should be limited to sanctionable conduct when it was based on only one of his three claims of contempt); *Bailey v. Maner Builders Supply Co., LLC*, 348 Ga. App. 882, 884 (2019) (attorneys' fees award should be limited because opposing party had rebutted two of the claims asserted by the party seeking attorneys' fees under O.C.G.A. § 9-15-14).

[14] "The purpose of [O.C.G.A. § 9-15-14] is twofold: to both punish and deter litigation abuses and to recompense litigants who are forced to expend resources in contending with abusive litigation." *Hindu Temple & Community Center of the High Desert, Inc. v. Raghunathan*, 311 Ga. App. 109, 118 (3) (2011).

> respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded ***shall be assessed*** against the party asserting ***such*** claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

The singular "a" and singular "other" in O.C.G.A. § 9-15-14(a) is clear that ***each*** claim, defense, and position asserted by a party may independently necessitate sanctions. And here, Sterling asserted multiple claims, defenses and positions that mandate sanctions.

In support of its motion for O.C.G.A. § 9-15-14 sanctions, GRP asserted, among other things, that Sterling: (i) made multiple specious allegations in its counterclaims; (ii) asserted factually inaccurate affidavits; (iii) asserted defenses to GRP's claims while knowing the statements made therein were factually inaccurate at the time they were made and thereafter; and (iv) asserted baseless legal positions and made multiple factually inaccurate claims when opposing GRP's motion to dismiss Sterling's breach of contract claim. (R1 V4-462–63.)

The two primary arguments made by Sterling that served as a foundation for this sanctionable conduct included: (i) Sterling's claim that the Exhibit C Agreements attached to Sterling's answer & counterclaims were binding even though Murphy admitted they were only ***drafts*** (R1 V5-738–39, at 106:15–107:16); and (ii) Sterling's claims and positions that the ***written*** terms of the

Exhibit C Agreements contained ***written*** terms and obligations that were plainly not contained in those Agreements (R1 V5-1941–47).

A. Murphy Testifies that the Exhibit C Agreements Were Only "Drafts" and Not Effective

Sterling conceded in its opposition to GRP's motion for O.C.G.A. § 9-15-14 sanctions that Sterling's principal, Murphy, "became unsure as whether or not he had a signed agreement when he could not locate it." (*See* R1 V9-22.) Further, Murphy confirmed that he understood the Exhibit C Agreements were "drafts" and "blank," rather than effective agreements:

> Q: Mr. Murphy, do you understand that Exhibit 15 contains the Exhibit C agreements that are attached to Sterling's answer and counterclaims?
>
> A: Yes.
>
> Q: Which of these agreements did you claim to be effective between GRP and Sterling Planet?
>
> A ***I don't think any of them are. I think they're all drafts*** -- versions of the -- contract – see the one that Raymon [Bean] signed here. I saw where Raymon signed it, but -- I saw his signature, but it looked like -- but it's -- ***the contract is blank. It's a draft contract***.

(R1 V5-738, at 106:5–16 (emphasis added).)

Mr. Murphy also testified:

> Q. ***All three agreements in*** **[Sterling's Counterclaim's]** ***Exhibit C look like drafts to you***?
>
> A. ***Yes***.
>
> Q. ***That's a yes***?

A. ***Yes. Yes. They all look like drafts to me***.

(R1 V5-739, at 107:10–16 (emphasis added).)

Despite this, and despite Sterling's awareness that such an agreement likely did not exist, Sterling has persisted in its baseless arguments that the Exhibit C Agreements obligated GRP to a multi-year, 80/20 compensation structure even though none of those "draft" and "blank" agreements were binding on GRP. (*See* V5-1315, ¶¶ 5–6.)

In fact, Murphy testified that he wasn't sure a marketing agreement was ever signed:

> Q. So sitting here today, you don't know if you ever actually signed a marketing agreement with GRP, correct?
>
> A. Correct.

(R1 V5-708, at 76:12–19.)

> Q. Prior to sending [to GRP] the REC Marketing Agreement template 80-20 that was attached in your email that was dated February 1, 2022 in Exhibit 35, do you believe there was a signed REC Marketing Agreement between any GRP entity and Sterling Planet?
>
> A. I am – I am – I was – I believed there was and I looked – did it look into the reports. I couldn't – couldn't find it and so. That's why I sent this.

(R1 V5-751–52, at 119:18–120:1.)

Even though Sterling and Murphy have either expressly admitted or confirmed by conduct that: (i) Murphy is unsure whether the parties ever executed

a marketing agreement; (ii) Sterling's Exhibit C Agreements were just drafts; and that (iii) Sterling knew as of February 1, 2022 (and months before asserting its counterclaims), that GRP had not agreed to an 80/20 Provision – Sterling nonetheless saw fit to assert defenses and allege that Sterling's ***written*** Exhibit C Agreements somehow bound each GRP party to an 80/20 Provision along with other onerous and unreasonable terms. (*See* V5-1315, at ¶¶ 5–6.) Such baseless assertions should not have been pursued, and sanctions should result because they were baselessly pursued.

Despite ample opportunity to correct its outright falsehoods, Sterling chose not to do so. Instead, Sterling has maintained its baseless assertions in its counterclaims to date, even after multiple amendments to its counterclaims. (*See id*.)

Sterling's unfounded arguments have wasted judicial resources and have caused GRP to incur unnecessary attorneys' fees and costs in defending against them. O.C.G.A. § 9-15-14(a) sanctions are mandatory and the Trial Court erred in not addressing Sterling's specific false claims, defenses and positions regarding Sterling's proffered Exhibit C Agreements in light of the concession and confirming testimony that Sterling's principal was "unsure" that any of the Exhibit C Agreements were executed, and in light of his characterization of those Exhibit C Agreements as "drafts" and "blank." (*See supra*, at 30–31.)

B. Sterling's Baseless Legal Positions Regarding the Written, Plain Terms in the Exhibit C Agreements Mandate Sanctions

GRP also asserted that sanctions were mandatory because Sterling asserted multiple baseless legal contractual positions when opposing GRP's motion to dismiss Sterling's breach of contract claim. (R1 V4-479–482.)

Specifically, while claiming that the written Exhibit C Agreements were enforceable against GRP, Sterling made baseless legal arguments that: (i) non-parties were bound to the Exhibit C Agreements; (ii) the Exhibit C Agreements were somehow enforceable long after they had expired by their plain six-year terms; (iii) Sterling was entitled to various damages expressly barred by those Agreements' limitation of liability clauses; and (iv) GRP was bound by an 80/20 Provision plainly not contained in any of those Agreements. (*Id.*)

Notwithstanding Sterling's baseless legal positions, the Trial Court did not award mandatory sanctions and also did not address the substance of Sterling's baseless contractual interpretations, and which contravened the plain terms of the very Exhibit C Agreements that Sterling sought to enforce in its counterclaims. (R2 V2-66-68.)

Rather than addressing Sterling's baseless legal positions, the Trial Court instead held that sanctions were not mandated because other arguments made by Sterling were cognizable. This holding was in error under O.C.G.A. § 9-15-14, and

GRP requests that this issue be remanded to the Trial Court for further consideration.

CONCLUSION

Based on the foregoing, this Court should reverse the Trial Court's ruling in its Order denying GRP's motion for summary judgment regarding the third and fourth elements of GRP's Second Cause of Action, Conversion. GRP further asserts that this Court should remand for further consideration the Trial Court's ruling in its Order denying GRP's motion, pursuant to O.C.G.A § 9-15-14 for attorneys' fees and expenses of litigation against Sterling and Sterling's counsel.

Respectfully submitted, this 9th day of May 2024.

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

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2024, I caused the Brief of the Cross-Appellants, dated May 9, 2024 to be served via electronic service via email to the below-referenced email addresses. I certify that there is a prior agreement with Cross-Appellee's counsel to allow documents in a PDF format sent via email to suffice for service to Cross-Appellee at the below-referenced email addresses:

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