CASE NO.
A24A1282
(Related Case No. A24A1281)

IN THE COURT OF APPEALS
STATE OF GEORGIA

STERLING PLANET, INC.
Appellant/Cross-Appellee

v.

GRP HOLDCO, LLC; GRP MADISON, LLC and GRP FRANKLIN, LLC
Appellees/Cross-Appellants

CROSS-APPELLEE STERLING PLANET, INC.'S RESPONSE TO BRIEF OF CROSS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. Introduction

Cross-Appellants GRP Holdco, LLC; GRP Madison, LLC and GRP Franklin, LLC (collectively "GRP") seek review of the Order on Pending Motions entered by the Georgia State-wide Business Court ("trial court") on February 28, 2024 ("Order"), contending 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-Appellee 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(a) for attorneys' fees and expenses of litigation against Sterling and Sterling's counsel." (Brief of Cross-Appellants at 1).

GRP's arguments in its cross appeal are meritless. The record demonstrates myriad fact issues as to the third and fourth elements of GRP's conversion claim. In addition, the trial court thoroughly analyzed and properly denied GRP's motion for sanctions under section 9-15-14(a). As detailed below, the trial court's Order below should be affirmed as challenged by GRP by its cross appeal.

II. Response to GRP's Statement of the Case

Sterling disagrees with GRP's statement of the case as follows. While Sterling agrees that this action involves Renewable Energy Certificates ("RECs"), Sterling

disagrees with GRP's legal conclusion that the RECs in question are GRP's "property." (Brief of Cross-Appellants at 5). Rather, as argued in Sterling's related appeal in this matter, the environmental attributes and RECs at issue here have never before been recognized as "property" under Georgia law, and the trial court erred when it concluded that environmental attributes and RECs constitute property as a matter of law. (Case No. A24A1281, Appellant's Brief at 25-33). Sterling accordingly incorporates those arguments, fully briefed in Sterling's Appellant's Brief in case number A24A1281, herein. (*See id.*; *see also* V6 – 4659-4661).[1]

In addition, Sterling disagrees with GRP's representations regarding the Responsible Party designation. When GRP designated Sterling as the Responsible Party for GRP facilities in question, this designation gave Sterling sole managerial authority over the transaction and activities related to the GRP Plants within the North American Renewables ("NAR") Registry. (V4 – 2427 at ¶ 47). Moreover, 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).

[1] References to the record refer to the appellate record in case A24A1281 unless designated "R2," which refers to the record in case A24A1282.

Sterling likewise disputes that, as the Responsible Party for GRP's RECs, it "refused" any "demand" for the return of GRP's RECs. Rather, as detailed fully below with regard to GRP's conversion claim, the record shows that GRP never made any communication, never mind a "demand," to Sterling for the return of any assets or RECs. (V4 – 2459 at ¶ 110 & ex. 35; 2461 at ¶ 117 & ex. 37).[2] Likewise, the record demonstrates that Sterling did not "refuse" to return GRP's RECs. Rather, it is undisputed that Sterling transferred RECs to GRP on the first day GRP had a NAR account available to accept the RECs. (V4 – 2479 at ¶ 163 & Ex. 44).

In addition, as briefed fully below, Sterling disagrees with the legal conclusions in Sterling's Statement of Facts that the trial court erred by denying summary judgment on GRP's conversion claims or by denying GRP's motion for sanctions.

III. Argument

A. Enumeration of Error 1: Fact issues remain as to GRP's demand for return of property.

In Enumeration of Error 1, GRP argues that the trial court erred by determining that a genuine issue of material fact existed as to the third element of GRP's conversion claim, namely that GRP demanded a return of the property in question. To establish a prima facie case for conversion, the complaining party must

[2] The exhibits to GRP's motion for partial summary judgment are filed under seal in case A24A1281, Volume 5.

show (1) title to the property or the right of possession, (2) actual possession in the other party, (3) demand for return of the property, and (4) refusal by the other party to return the property. *See Bo Phillips Co., Inc. v. R.L. King Properties, LLC,* 336 Ga. App. 705, 707, 783 S.E.2d 445, 449 (2016)

As a threshold matter, while the trial court determined that GRP had established the first two elements of conversion as a matter of law, this determination was erroneous. As stated above, Sterling argues in its related appeal in this matter the trial court erred when it concluded that environmental attributes and RECs constitute property as a matter of law, and incorporates those arguments from case number A24A1281 herein.[3]

Even if the trial court had correctly determined that GRP established the first two elements of conversion as a matter of law, the trial court properly determined that GRP had *not* established elements 3 and 4. Element 3 requires a demand for return of the property. *Bo Phillips Co., Inc.,* 336 Ga. App. at 707. Georgia courts consistently hold that this demand must be "unequivocal." *See Spooner v. Lossiah,*

[3] These same property arguments apply to GRP's fifth cause of action for "intentional interference with property rights." As discussed by the trial court, it is far from clear that such a claim exists in Georgia: "GRP titled its Fifth Cause of Action 'intentional interference with property rights,' a phrase whose limited efficacy at describing an applicable cause of action recognized in Georgia required the Court's careful attention. The Court only located two reported Georgia cases that contain that exact phrase, each only restating a party's pleading verbatim without discussing the elements or viability of such a claim." (R2 V2 – 27 n.35).

185 Ga. App. 876, 877, 366 S.E.2d 236, 238 (1988) (in dispute over mobile home, conversations in which the "defendant expressed his willingness to return the mobile home upon payment of a sum of money" was "no evidence that either plaintiff made an ***unequivocal demand*** for delivery of the mobile home to himself or herself") (emphasis added); *Int'l Images, Inc. v. Smith*, 171 Ga. App. 172, 174, 318 S.E.2d 711, 714 (1984) (conversion claim fails when "there is nothing in the record that [claimant] made an ***unequivocal statement*** that the property was his, furnished proof thereof, and demanded delivery to himself at that time to permit a partial sale or delivery") (emphasis added); *McDaniel v. White*, 140 Ga. App. 118, 119, 230 S.E.2d 500, 501 (1976) (in dispute over vehicle, the plaintiff merely "informed the defendant of a loan against the vehicle—he did not make an ***unequivocal demand*** for the return of his property") (emphasis added).

GRP cannot meet its burden to show an unequivocal demand to Sterling as a matter of law. GRP argues that it made such a demand on July 21, 2022. (Brief of Cross-Appellants at 11-14). Remarkably, GRP does not present evidence of any communications between GRP and Sterling on July 21, 2022. Instead, GRP relies on an email from GRP President and CEO Charles Abbott to a third party, APX Senior Administrator Charles Li, stating, "I'd like to rescind this authority from Sterling Planet." (V4 – 2459 at ¶ 110 & ex. 35). GRP also points to subsequent communications from Li to Sterling representative Valerie Christopher Johnson, in

which Li stated, "Charles has requested these assets and all the RECs associated with these two assets be transferred to his account. The list of RECs is attached to this email. Can you confirm?" (V4 – 2461 at ¶ 117 & ex. 37).

These communications do not, as a matter of law, show that GRP made an unequivocal demand that Sterling return its RECs. Indeed, these communications fail to show that GRP made any demand to Sterling whatsoever, given that there are no communications between GRP and Sterling at all. Accordingly, GRP fails to prove even the most basic portion of its conversion claim, which is a demand *from* GRP *to* Sterling regarding the RECs. *See Johnson v. Pioneer Fin. Co.*, 104 Ga. App. 820, 821, 123 S.E.2d 205, 206–07 (1961) ("Neither the plaintiff nor the defendant introduced any evidence ***of an actual demand by the plaintiff or its agent on the defendant*** for possession of the property covered by the conditional sale contract.") (emphasis added).

Instead, GRP argues the novel and remarkable proposition that its communications to Li, a disinterested third party, may support its conversion claim. This argument finds no support in Georgia law. Even *Johnson*, the case cited by GRP for this argument, weighs against GRP, as it requires at the very least that the demand be made by GRP *or its agent*. *See id.* There is no evidence in the record that Li has ever acted as GRP's agent. By GRP's own description, Li is "a Senior Manager at APX," a company that manages the NAR registry. (Brief of Cross-

Appellants at 9-10). According to GRP, Li "manages the NAR Registry as the administrator" for APX. *Id.* GRP cites no applicable authority for its extraordinary argument that an "unequivocal demand" sufficient to support a conversion claim may be made not by the party seeking the return of its property, but rather by a disinterested third party working for an unaffiliated company.

Even if the communications at issue somehow constituted a demand from GRP to Sterling, any "demand" is not "unequivocal." Abbott's email to Li simply states, "I'd like to rescind this authority from Sterling Planet," which is ambiguous on its face and makes no reference either to RECs or the return thereof. (V4 – 2459 at ¶ 110 & ex. 35). And Li's email to Sterling simply states that Abbott "requested" transferal of RECs to his account. (V4 – 2461 at ¶ 117 & ex. 37). This again does not meet the stringent requirements of an unequivocal demand for the return of property. *See Int'l Images, Inc.*, 171 Ga. App. at 174 (conversion claim fails when "there is nothing in the record that [claimant] made an unequivocal statement that the property was his, furnished proof thereof, and demanded delivery to himself at that time to permit a partial sale or delivery").

GRP has not met its burden to show, as a matter of law, that it made a demand for the return of property.[4] Accordingly, the trial court did not err in denying GRP's partial summary judgment motion as to its conversion claim.

B. Enumeration of Error 2: Fact issues remain as to GRP's refusal to return property.

Likewise, fact issues remain as to element 4 of GRP's conversion claim, which requires GRP to prove refusal by Sterling return the property in question. *See Bo Phillips Co., Inc.*, 336 Ga. App. at 707. At the outset, it is worth reiterating that there were no direct communications between GRP and Sterling on the matter of the transfer of RECs. Rather, all of the communications were made through Li, a disinterested intermediary. (V4 – 2459 at ¶ 110 & ex. 35; 2461 at ¶ 117 & ex. 37).

Moreover, the contents of those communications do not indicate, never mind prove as a matter of law, that Sterling refused to return GRP's RECs. After Li emailed Sterling representative Johnson about Abbott's "request" to transfer the RECs, Johnson responded, "No, I cannot confirm at this time. Some of these RECs are already committed to customers and have not yet been transferred or retired." (V4 – 2461 at ¶ 117 & ex. 37). Johnson later stated that further communications on

[4] Strangely, GRP frames its argument on the element of demand as, "STERLING DID NOT DISPUTE THAT GRP DEMANDED RETURN OF ITS PROPERTY ON JULY 21, 2022." (Brief of Cross-Appellants at 11). In addition to misrepresenting the record, this assertion misapprehends the burden of proof. Under the summary judgment standard, it is GRP's burden to prove its entitlement to summary judgment, not Sterling's burden to disprove it. *See* OCGA § 9-11-56(c).

this issue "need to go through our attorneys." *Id.* As correctly explained by the trial court, neither these nor other communications by Johnson regarding logistical issues with the return of the RECs "clearly refused GRP's alleged demand." (R2 V2 – 42). This is consistent with Georgia law, which holds that communications regarding logistics of the return of property do not themselves constitute a "refusal" for conversion purposes. *See Int'l Images, Inc.*, 171 Ga. App. at 175 ("While Smith in effect conceded that as of the time of the suit the property rightfully belonged to Chrietzberg, Smith as of the alleged time of conversion simply demanded the payment of rent and indicia of ownership or right to possession ***prior to surrender***. As we have held, that does not legally amount to a conversion.") (emphasis added).

Likewise, as pointed out by the trial court, the evidence in the record, viewed in the light most favorable to Sterling, demonstrates that Sterling *couldn't* return the RECs to GRP because GRP did not have a NAR account to which to transfer the RECs. (R2 V2 – 42-43). Specifically, "the record does contain a sworn assertion by Johnson that '[b]efore Nov[ember] 18, 2022, Sterling could not transfer Assets or RECs to GRP' because GRP lacked an active NAR Registry account." *Id.* As the trial court aptly summarized, under these circumstances, "[g]enuine issues of material fact thus exist as to whether *could not* or *would not* return GRP's property, and as to when any potential refusal occurred." *Id.* at 43.

Finally, and importantly, the evidence shows that Sterling did, in fact, transfer GRP's RECs to GRP immediately after GRP set up a NAR account. (V4 – 2479 at ¶ 163 & Ex. 44). The mere fact that a period of time elapsed between GRP's purported demand and Sterling's transfer of RECs does not prove the refusal element as a matter of law. Rather, "where a demand is shown and period of time elapses . . . it is a question for the tri[e]r of facts to determine if the demand was refused." *Willis v. Midland Fin. Co.*, 97 Ga. App. 443, 444–45, 103 S.E.2d 185, 187 (1958).

Because a multitude of fact questions remain as to GRP's conversion claim, the trial court did not err by denying GRP's motion for partial summary judgment as to that claim.

C. Enumeration of Error 3: GRP's expansive reading of OCGA § 9-15-14(a) is not supported under current Georgia law and GRP has not articulated a reason for modifying existing law.

In Enumeration of Error 3, GRP argues that the trial court "misapplied the statutory requirements in denying GRP's motion for sanctions under OCGA § 9-15-14(a)." (Brief of Cross-Appellants at 24). GRP appears to take issue with Sterling's pretrial conduct and litigation conduct, vaguely asserting that the trial court failed to adequately explain a denial of sanctions (which it is not required to do). More specifically, GRP asserts Sterling committed sanctionable misconduct with respect to the following: "(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**; 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." *Id.* at 26-27 (record citations omitted). GRP further argues that "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." *Id.* at 30 (record citations omitted).

GRP's arguments are meritless.[5] Section 9-15-14(a) provides for an award of fees and expenses to a party "against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed

[5] Likewise, GRP's assertion that the trial court did not give substantial reasons for denying the motion for sanctions is without merit. GRP's Brief cites testimony at length, but it is difficult to decipher what specific conduct GRP contends is sanctionable misconduct; thus, its request for sanctions should fail on that basis alone. The Court noted at footnote 3 of the Order on Pending Motions that its interpretation of GRP's claim that Sterling engaged in litigation misconduct was as follows: "Specifically, GRP's request for attorney fees under Code Section 9-15-14 seeks sanctions against Sterling for filing the breach of [written] contract counterclaim that this Court dismissed in its July 7, 2023 Order on GRP's Motion to Dismiss Sterling's Counterclaims ('Motion to Dismiss Order'). *See* GRP Mots. for PSJ Br. 42–62; *see generally* Order on GRP's Mot. to Dismiss Sterling's Countercls. ('Mot. to Dismiss Order'). GRP's request for attorney fees under Code Section 9-15-14 is discussed *infra* in Part III.G.2 [of the Order on Pending Motions]." (R2 V2 – 7-8 n.3).

that a court would accept the asserted claim, defense, or other position." OCGA 9-15-14(a).[6]

Contrary to GRP's arguments, the trial court did not apply an incorrect standard. Rather, the trial court appropriately determined that sanctions are not available in the instance under the plain meaning of the statute. In order to argue otherwise, GRP resorts to misrepresenting Sterling's claims in an attempt to manufacture some sort of sanctionable conduct, and likewise ignores key record evidence. As above, GRP bases its motion for sanctions on Sterling's purported "positions" that the Exhibit C agreements "were binding" and "contained written terms and obligations that were plainly not contained." Sterling's "position" as to its breach of contract claims, however, is broader than what GRP would have the Court believe. Instead of arguing that the Exhibit C agreements are enforceable individually, Sterling simply pleaded that the agreements, among other evidence, demonstrated the existence of an enforceable contract between the parties. (V2 – 968-69, 977-78). Accordingly, the fact that the Exhibit C agreements might be unenforceable on their own is a red herring.

[6] While the trial court analyzed both subsections (a) and (b) of section 9-15-14 in the portion of its Order denying GRP's motion for sanctions, GRP appeals only under subsection (a). Regardless, for the same reasons argued herein, GRP is also not entitled to relief under subsection (b), as correctly determined by the trial court.

Regardless, under the deferential standard applied to the trial court's ruling and the record evidence below, GRP's motion for sanctions fails for a host of reasons, including (1) the evidence in the record, (2) the deference owed the trial court, and (3) the merits of Sterling's arguments.

1. GRP ignores key record evidence and omits key individuals.

In order to argue for sanctions under section 9-15-14(a), GRP must ignore key evidence in the record. "The standard of review for this [sub]section is the 'any evidence rule.'" *Citizens & S. Tr. Co. v. Tr. Co. Bank*, 262 Ga. 345, 345, 417 S.E.2d 148, 149 (1992) (quoting *Haggard v. Bd. of Regents*, 257 Ga. 524, 527(4)(c), 360 S.E.2d 566 (1987). Here, there is ample evidence of an agreement between the parties, including the Exhibit C agreements and the sworn statements attached to Sterling's pleadings. (V2 – 968-969, 977-978, 988-998).

In addition, while GRP's brief identifies "key individuals" at pages 9 and 10, GRP fails to give introductory treatment to the following individuals who possess(ed) knowledge and evidence related to Sterling's counterclaims:

- Dennis Carroll: Mr. Carroll, of Makai Group, was a consultant for GRP and for Sterling at various times from in or about 2015 to 2021. (V4 – 1971-1974; V5 – 3196 (Murphy Dep. p. 81)). Mr. Carroll underwent chemotherapy in November 2021 (V4 – 2016) and passed away in the timeframe when disputes began to erupt between

the parties (V5 – 3196), rendering it impossible during the discovery phase of this litigation to obtain any testimony or copies of fully executed agreements Mr. Carroll likely had in his possession related to the transactions at issue. Mr. Carroll was tasked by GRP with negotiating the REC agreements attached Sterling's Answer, Counterclaim and Amended Counterclaim. (V5 – 3196).

- Sherman E. Golden: Mr. Golden at times relevant to the litigation was an attorney with Seyfarth Shaw, representing GRP. Mr. Golden sent an email to Sterling dated May 26, 2015, with subject "Executed Signature Page", with attachment file name "GRP Franklin Sterling REC Syndication Agmt_1.pdf". (V2 – 894).
- Daniel H. Sherman IV: Mr. Sherman (deceased, as reflected in the Georgia Bar Directory) was an attorney with Seyfarth Shaw. On behalf of GRP, Mr. Sherman sent an email dated May 22, 2015, subject line "Revised REC Marketing Agreement for Franklin with Sterling Planet," stating "I promised to get this out by week's end. Please see slightly revised agreement that makes clear that the scope of this initial engagement relates to Franklin and that the operating entity is the contracting party. Let me know if you want to discuss. Thanks." (V2 – 885).

- David Shaffer. Mr. Shaffer was past president of GRP who provided Sterling a *pre-suit* declaration and affidavit (dated and April 18, 2022 and June 2, 2022, respectively). (V2 – 191-192, 814-815).

Mr. Shaffer's affidavit state as follows:

1. My name is David Shaffer I am above eighteen years of age and otherwise capable of making this affidavit. The acts stated herein are within my personal knowledge and are true and correct.
2. I am the past President of Georgia Renewable Power LLC (hereinafter referred to as GRP)
3. GRP is in the business of owning and operating biomass power plants.
4. GRP owns and operates two biomass power plants in Georgia known as GRP Franklin and GRP Madison.
5. In 2014, GRP purchased the Plant Carl Biomass Project from Sterling Planet and developed it as GRP Franklin.
6. During the negotiations of this transaction, GRP and Sterling reached an agreement that Sterling Planet would market the RECs from GRP's Georgia biomass plants.
7. During the development and construction of the plants, both placed online in 2019, GRP and Sterling defined and redefined the terms and conditions of their marketing agreement and future business relationship.
8. It was agreed that Sterling would set up the necessary trading platforms and obtain necessary certifications including Green-e. Sterling would put necessary business systems in place to facilitate the GRP and Sterling interface in the marketing endeavor.
9. 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 by GRP.
10. It was my understanding that Sterling and GRP executed documents in 2021 necessary to set up the trading platforms and obtain the necessary certifications to begin marketing the GRP RECs. This has been accomplished and Sterling has sold and is selling GRP RECs from 2020, 2021 and 2022 under this Agreement.

> 11. I have reviewed the attached agreement and find that it accurately reflects the agreements written above.

(V2 – 814-815). On June 9, 2023 (well after the litigation commenced) Mr. Shaffer was deposed.[7] In the deposition, Mr. Shaffer testified as follows:

> [By GRP Counsel, Mr. Siegel]
>
> Q. Mr. Shaffer having now more closely read Paragraph 9 [of previously sworn affidavit], is it fair to say that you would not have signed this affidavit today?
> A: I would've had to clarify that and to say I would stop that – I'd say it's agreed that Sterling compensation for – that Sterling would be compensated for setting this up, but never agreed to the methodology of compensation. I believe that's a reach by, by Sonny [Murphy] to write that and I should have been more careful before I signed [the affidavit], but at the time it wasn't very important to me to be very truthful.

(V9 – 6298).

Sterling's reliance on the presuit declaration and affidavit of Mr. Shaffer is not sanctionable misconduct. If anything, the declaration and affidavit clearly establish that Sterling conducted a reasonable pre-suit investigation. In any event, pre-suit conduct is not an appropriate subject of OCGA § 9-15-14. *See generally Cobb County v. Sevani*, 196 Ga. App. 247, 395 S.E.2d 572 (1990) (the statues does not contemplate recovery for pre-litigation activities). Moreover, the evidence presented by Sterling clearly meets the "any evidence" threshold applicable to claims for sanctions under section 9-15-14(a), warranting the denial of GRP's

[7] Less than one month after the June 9, 2023 Shaffer Deposition, the Court entered an Order on the Motion to Dismiss on July 7, 2023.

motion for sanctions. *Citizens & S. Tr. Co.*, 262 Ga. at 345; *see also Dalenberg v. Dalenberg*, 325 Ga. App. 833, 834, 755 S.E.2d 228, 230 (2014) ("In applying this standard, we must determine whether the claim asserted below either had some factual merit or presented a justiciable issue of law.") (quotation omitted).

2. The trial court was not required to make specific findings to support *a denial of sanctions* under OCGA § 9-15-14, but it did so, and such findings should be given great deference.

A court declining to award fees is not required to make specific findings of fact to support its denial. *Haney v. Camp*, 320 Ga. App. 111, 115, 739 S.E.2d 399, 403 (2013); *Campbell v. The Landings Assoc. Inc.*, 311 Ga. App. 476, 483, 716 S.E.2d 543, 549 (2011); *Evers v. Evers*, 277 Ga. 132, 133, 587 S.E.2d 22, 23 (2003) (when the trial court declines to award attorney fees, findings of fact and conclusions of law are unnecessary); *Bellah v. Peterson*, 259 Ga. App. 182, 576 S.E.2d 585 (2003) (same). Indeed, "[i]nherent in a ruling of the trial court denying attorney fees under OCGA § 9–15–14(a) is a determination that there does not exist 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." *Hyre v. Denise*, 214 Ga. App. 552, 556, 449 S.E.2d 120, 125 (1994). Nevertheless, the trial court's Order explained in great factual detail why it declined to sanction Sterling or its attorneys under OCGA §§ 9-15-14(a) and (b), as follows:

Attorney Fees and Expenses Under Code Section 9-15-14

In GRP's Motions for PSJ, GRP argues that it must be awarded attorney fees under Code Section 9-15-14(a) "because Sterling premised its breach of contract claim on factually inaccurate pleadings and affidavits" and asserted "positions '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 assert[ions]. . . .'" GRP Mots. for PSJ Br. 42–43 (quoting O.C.G.A. § 9-15-14(a)). Alternatively, GRP argues for an award under Code Section 9-15-14(b) on the basis that "Sterling's positions, claims, and defenses 'lacked substantial justification' and because Sterling 'unnecessarily expanded the proceeding' by knowingly making factually inaccurate allegations, by alleging the Exhibit C Agreements were and had remained binding against GRP with unsupportable claimed terms, and by defending its breach of contract counterclaim with baseless legal theories." *Id.* at 43. Although ultimately unsuccessful, Sterling's arguments in support of its breach of contract claim do not demonstrate such a "complete absence of justiciable law or fact" so as to warrant sanctions under Code Section 9-15-14. *See Hyre v. Denise*, 214 Ga. App. 552, 556 (1994) ("A prevailing party is not perforce entitled to an award of attorney fees under [Code Section 9-15-14]." (citing *Deljou v. Sharp Boylston Mgmt. Co.*, 194 Ga. App. 505, 505 (1990))). In its Motion to Dismiss Order, this Court found that 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 the other GRP entities to obtain financing. Mot. to Dismiss Order 10 n.16, 25; *see also supra* notes 15 & 32. Emails exchanged in connection with the GRP Franklin agreement characterize it as 'relevant to our overall financing' and an 'initial engagement relate[d] to Franklin' with the 'operating entity [a]s the contracting party.' Sec. Am. Answer & Countercl. Ex. C, at 16–17. And the subsequent actions taken by the parties, including executing the Responsible Party designations in favor of Sterling in 2021, and efforts undertaken by Sterling to obtain Greene-e certification for GRP's RECs suggest a more formal arrangement or understanding between the parties, even if the record demonstrates that no formal, enforceable agreement ultimately materialized. *See, e.g.*, GRP SMF ¶¶ 27–32, 38–42, 54–56. Indeed, the Court noted that whether Sterling's alleged agreement with GRP was subject to the partial performance exception to the Statute of Frauds presented 'a closer question' than other contract-based arguments raised by Sterling.

> *Id.* at 28. Given this, justiciable issues of law and fact existed between the parties related to Sterling's breach of contract claim. For the same reasons, the Court finds that an award under Code Section 9-15-14 is also not warranted.
>
> Because an award of attorney fees is neither required under Code Section 9-15-14(a) nor warranted under Code Section 9-15-14(b), GRP's request for attorney fees pursuant to Code Section 9-15-14 is **DENIED**.

(R2 V2 – 66-68).

This analysis by the trial court applies the proper standard to section 9-15-14 and reaches the correct result. *Cf. Rental Equip. Grp., LLC v. MACI, LLC*, 263 Ga. App. 155, 164, 587 S.E.2d 364, 372 (2003) (affirming denial of fees in dispute over whether letter of intent was or became a binding contract and subject to promissory estoppel). As noted by the trial court, the mere fact that GRP prevailed on its motion to dismiss Sterling's breach of contract claims does not itself warrant an award of sanctions. *See Hyre*, 214 Ga. App. at 556 (holding that party that prevailed on motion to dismiss was not entitled to fees under section 9-15-14(a)). The same holds true here – the mere fact that Sterling's contract claims were dismissed does not warrant the imposition of fees based on the record in this case.

3. Attaching Exhibit C to Sterling's Answer, Counterclaim, and Amended Counterclaim is not sanctionable misconduct.

Even if assuming for the sake of argument on appeal the trial court did not adequately analyze GRP's motion for sanctions under OCGA § 9-15-14 as GRP claims, GRP has failed to establish as a matter of law that sanctions are warranted

with regard to Sterling's attachment of the agreements in Exhibit C to its Answer, Counterclaim and Amended Counterclaim. As discussed above, even if the trial court determined that these agreements were unenforceable in and of themselves, the agreements serve as evidence of an agreement between the parties. Moreover, it is worth noting that the trial court's analysis of the enforceability of the agreements spanned more than 20 carefully reasoned pages of the Order below, at the very least suggesting that Sterling's arguments were not in any way frivolous or sanctionable under section 9-15-14.

Likewise, GRP's contentions below that there are inconsistencies between Mr. Shaffer's pre-suit declaration and affidavit as well as his deposition testimony, by itself, does not give rise to an award of the sanctions requested.[8] OCGA § 9-15-

[8] Again, GRP's argument is difficult to decipher here but appears to raise a recurring theme. In a motion seeking to strike Mr. Murphy's affidavit from the record, GRP claimed to be outraged by *both Mr. Murphy and his affidavit testimony*, stating, "[i]n an act of pure hubris, and after nearly a year into the litigation of this Action, Mr. Murphy continues to make statements devoid of any concern for their accuracy. His mendacious and unfounded statements must cease." (V8 – 5947). The trial court was not persuaded by GRP's advocacy by disparagement. At footnote 32, Order on Pending Motions the trial court noted, "[c]ontrary to GRP's allegations, Sonny Murphy did not 'explicitly testif[y] that there was no agreement between the Parties, and that he knew that . . . nearly a year before he verified the . . . breach of contract counterclaim that he asserted against GRP.' [citing GRP's Motion to Strike Murphy Affidavit Brief at p. 9]. Rather, Sonny Murphy testified that he did not know if a marketing agreement was actually signed, but that he 'believe[d] there was [one]' and just 'couldn't find it and so [t]hat's why he sent [the REC Marketing Agreement template 80-20].'" [citing S. Murphy Dep. at 119:23-120:5; *see also id.* at 120:9-121:3 (testifying that, "at the time . . . [he] was sure that it was [sic] signed agreement, and that's the reason [he was] looking for it so hard' and '[w]hen [he]

14 cannot be read to hold a party or its counsel responsible for inconsistent statements of a witness especially where, as here, GRP has altogether failed to show Sterling had any reason to believe Mr. Shaffer was not paying careful enough attention to the affidavit he signed. Only six weeks before Mr. Shaffer signed the affidavit, he had signed a declaration with the exact wording of the affidavit, which would lead any reasonable person to believe Mr. Shaffer had read and understood the affidavit contents not once, but at least twice, before swearing to same. Parties cannot be held to an impossible standard of ensuring the complete consistency of statements of witnesses. There is no caselaw under OCGA § 9-15-14 to support such a standard. Instead, OCGA § 9-15-14 seeks to regulate and, if appropriate, punish inappropriate litigation *tactics*. *O'Keefe v. O'Keefe*, 285 Ga. 805, 806, 684 S.E.2d 266 (2009); *Ettrick v. SunTrust Mortg. Inc.*, 349 Ga. App. 703, 705 (2019); *Ferguson v. City of Doraville*, 186 Ga. App. 430, 367 S.E.2d 551 (1988), *overruled on other grounds*, *Vogtle v. Coleman*, 259 Ga. 115, 376 S.E.2d 861 (1989). GRP's vague and unsupported claim that Sterling obtained Mr. Shaffer's affidavit under "false pretenses" simply cannot serve as a basis of a claim of inappropriate litigation tactics such as would warrant sanctions under OCGA § 9-15-14(a). If anything, GRP's

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couldn't fit it anywhere, and . . . kept finding all of the drafts and whatnot . . . [he] became unsure' and '[he] knew [he] had an agreement that outlined the terms of the agreement' but '[he] couldn't find the signed agreement' so ultimately 'was unsure whether there was a signed agreement')." (R2 V2 – 30-31 n.32).

implied claim of evidence manipulation *without proof* is the very type of inappropriate litigation tactic OCGA § 9-15-14(a) seeks to discourage.

Finally, the agreements in Exhibit C clearly evidence the course of dealing or course of conduct between the parties. GRP continues to take a myopic approach that Sterling continues to maintain that it had valid written contracts, when it was aware at this stage of the litigation Exhibit C instead shows the agreement of the parties justifying Sterling's promissory estoppel claim. GRP's argument that Sterling continues to maintain its breach of contract action intentionally misdirects the Court in an effort to lend additional support to their claim to attorney fees when such is not the case.

4. GRP cannot establish inappropriate expansion of the proceeding nor a nexus between fees and improper conduct warranting an award of fees in the amount of approximately $800,000.

Finally, the timeline surrounding the Motion to Dismiss makes it illogical for GRP to argue that Sterling wrongfully expanded any proceedings by virtue of attaching Exhibit C to the Answer, Counterclaim or Amended Counterclaim or that the Exhibit C attachments so tainted the case that an award of $800,000 in attorney fees is warranted.

GRP filed a Motion to Dismiss and accompanying brief on January 11, 2023. (V2 – 430-431, 432-459). On February 6, 2023, Sterling filed a Brief in Opposition to Motion to Dismiss. (V2 – 522-560). On February 18, 2023, Sterling filed a

Motion for Leave to Amend Verified Counterclaim, with attached emails from former counsel for GRP (from attorneys of Seyfarth Shaw, one attorney of whom is now deceased and cc'ing GRP/Sterling consultant Mr. Carroll, now deceased). The emails lead to the logical assumption that written contracts had indeed been signed by GRP as Mr. Murphy believed to be the case. The emails also lead Sterling to a reasonable belief that signed written contracts and/or signature pages referenced in the emails could be obtained through discovery.

In mid-February 2023, a partially executed contract (signed by GRP Franklin) was found by Sterling related to GRP Franklin. On February 21, 2023, the parties entered into a Joint Stipulation to Amend Counterclaim signed by the court on that same day. (V2 – 595-603). Because motion practice had already commenced (at that point GRP had already filed a motion to dismiss and Sterling filed a response) with respect to the Sterling's Counterclaim, the parties stipulated and the Court ordered:

> 1. Plaintiff Motion to Dismiss is deemed to apply to Defendant's operative pleading – Defendant's Amended Verified Answer and Counterclaim, which is dated February 18, 2023, and will be filed with leave of Court pursuant to an order being issued contemporaneously herewith (citation omitted).
> 2. Plaintiff's reply brief in support of their Motion to Dismiss is due by February 22, 2023.
> . . . .

(V2 – 599). On February 22, 2023, Sterling's Amended Counterclaim was filed (amending Exhibit C) and on that same day, pursuant to the Court's February 22, 2023, Order, GRP filed a Reply Brief in Further Support of [its] Motion to Dismiss

Sterling's Counterclaim. GRP's Reply Brief was filed immediately after Sterling amended its Counterclaim to add the new Exhibit C. The Reply brief essentially raised the same legal arguments previously raised by GRP in its Motion to Dismiss (i.e., largely reiterating contract construction and statute of frauds arguments). (*Compare* V2 – 430-459 *with* V2 – 853-878).

On July 7, 2023, the Court issued an Order on GRP's Motion to Dismiss and Sterling prevailed on all but two of its six claims. [Doc 82]. Specifically, with respect to GRP's Motion to Dismiss, the Court Ordered:

> the Court GRANTS the Motion [to Dismiss] with respect to Count I [related to Exhibit C unexecuted or partially executed contracts] and Count III (seeking specific performance and injunctive relief) but DENIES the Motion with respect to Count II (asserting promissory estoppel, quantum meruit, and unjust enrichment) and Count IV (seeking expenses of litigation under Code Section 13-6-11).

(V2 – 1386).

Thus, while Sterling's written contract counterclaim did not survive GRP's Motion to Dismiss, Sterling's in-the-alternative claims for equitable relief and OCGA 13-6-11 claim did survive. Thus, the Exhibit C documents continued to have a direct bearing on Sterling's quantum meruit, promissory estoppel, unjust enrichment, and 13-6-11 claims and Sterling's defenses. *See, e.g.*, *Blau v. Blau*, 368 Ga. App. 701, 707, 890 S.E.2d 50 (Ga. App. 2023) (citation omitted) (the theory of promissory estoppel applies only in those cases when "(1) no written agreement exists, (2) the written agreement is unenforceable for some reason, or (3) there was

a promise that post-dated the written agreement. In short, the principle of promissory estoppel 'merely provides that, in certain circumstances, the reliance by the promisee or third party upon the promise of another is sufficient consideration, in and of itself, to render [an] executory promise enforceable against the promisor.'"). Therefore, there is nothing nefarious as GRP would have this Court believe related to Sterling's decision to attach unsigned or partially executed documents to its Answer, Counterclaim and Amended Counterclaim and there is nothing improper about Sterling procuring or offering testimony from Mr. Shaffer and Mr. Murphy regarding their understanding of the parties' longstanding business relationship.

Considering the trial court had two occasions – once at the motion to dismiss phase and again at the motion for summary judgment phase – to closely examine the circumstances surrounding Exhibit C documents attached to the Answer, Counterclaim and Amended Counterclaim, and regarding Mr. Shaffer's and Mr. Murphy's affidavits, it is only reasonable for the Appellate Court to conclude that the Trial Court gave due consideration to GRP's OCGA § 9-15-14 sanctions motions and appropriately rejected same.

Importantly, there must be a nexus between the improper conduct and the amount of attorney's fees requested under OCGA 9-15-14. *See LabMD, Inc. v. Savera*, 331 Ga. App. 463, 467, 771 S.E.2d 148, 152 (2015) ("In cases involving attorney fees awards pursuant to OCGA § 9–15–14(a) or (b), the trial court must

limit the fees award to those fees incurred because of the sanctionable conduct.") (quotation omitted). No such nexus has been established by GRP. GRP has further failed to show that it spent resources it would not have but for Sterling's conduct. *See id.* Indeed, given the intertwined nature of the claims at issue, GRP cannot show that it would have defended the case any differently had the breach of contract claim not been brought, making it essentially impossible to parse fees for purportedly sanctionable conduct. *See id*; *see also Connolly v. Smock*, 338 Ga. App. 754, 761, 791 S.E.2d 853, 859 (2016) (evidence of specific sanctionable conduct required under section 9-15-14, and such conduct must be separated from non-sanctionable conduct in fee award); *Trotter v. Summerour*, 273 Ga. App. 263, 266–67, 614 S.E.2d 887, 890 (2005) (reversing overly broad and nonspecific award of fees under section 9-15-14 and explaining that "'[l]ump sum' attorney fees awards are not permitted in Georgia"). Finally, there has been no finding that Sterling was vexatious, brought the claim for delay or harassment, or brought the claim to expand the proceedings.[9]

For all of these reasons, the trial court's denial of fees should be affirmed.

[9] Indeed, GRP's request for sanctions is all the more remarkable given GRP's assertion of a potentially non-existent claim for "intentional interference with property rights." *See supra* n.3.

IV. Conclusion

For the foregoing reasons, Sterling requests that the trial court's order be affirmed as to the enumerations of error asserted by GRP on cross appeal, and that Sterling be granted all other relief to which it has shown itself entitled.

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

Respectfully submitted this 30th day of May, 2024.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served a true and correct copy of the foregoing Cross-Appellee's Response to Brief of Cross-Appellants 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.

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