IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SIXTH DISTRICT

CASE NO.: 6D24-287
L.T. CASE NO. 2021-CA-011761-O

AKBAR A. ALI, an individual,
A.A. ALI, CPA, P.A., a Florida corporation,
MALIKA ALI, an individual, and
JBARA CONSULTING, LLC, a Florida
Limited Liability Company

Defendants/Appellants,
v.

CENTRAL FLORIDA TAX AND
ACCOUNTING SERVICES, INC.,
a Florida corporation,

Plaintiff/Appellee.
_____/

On Appeal from the Circuit Court for the Ninth Judicial Circuit, in and for Orange County, Florida

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

Defendants/Appellants, AKBAR A. ALI ("ALI"), A.A. ALI, CPA, P.A. ("A.A. ALI"), MALIKA ALI ("MALIKA"), and JBARA CONSULTING, LLC ("JBARA") (collectively referred to as "Defendants"), have initiated this appeal regarding the lower court's January 10, 2024 Order Granting Plaintiff's Motion for Leave to Amend Second Amended Complaint (the "Order Granting Leave to Amend"). The Order Granting Leave to Amend gave Plaintiff/Appellee, CENTRAL FLORIDA TAX AND ACCOUNTING SERVICES, INC. ("CFTAS"), leave to file its Third Amended Complaint seeking punitive damages in its claims for Fraudulent Inducement and Fraudulent Misrepresentation against ALI, adding two counts for contractual indemnification against ALI and A.A. ALI, amending several counts to be brought against A.A. ALI, and to amend its count for Breach of Contract as to the Asset Purchase Agreement to seek disgorgement damages.

As further set forth below, the lower court did not err or abuse its discretion in entering the Order Granting Leave to Amend, and this Court should affirm same.

STATEMENT OF THE CASE AND FACTS

A. The Asset Purchase Agreement and Noncompete

In connection with the Asset Purchase Agreement ("APA"), ALI entered into a Covenant Not to Compete individually [App. 118-119],[1] and agreed to the restrictive covenants, on behalf of A.A. ALI, set forth in the First and Second Amendments to the APA. [App. 86-92] (the Covenant Not to Compete and the restrictive covenants in the First and Second Amendments to the APA are referred to herein as the "Non-Compete"). Additionally, CFTAS and ALI entered into an Independent Contractor Agreement with a term from April 8, 2019 through April 15, 2021. [App. 127-133]. The Non-Compete became effective as of the closing of the transaction on April 8, 2019, and would have expired three (3) years later on April 8, 2021, had Defendants complied with same. [App. 124]. However, CFTAS later discovered that ALI essentially never stopped providing tax and accounting services and that he has continuously violated the Non-Compete since his time as an independent contractor. This fact has been accepted by the lower court in its May 10, 2023 Order Granting

[1] Citations to "App." followed by the referenced pages refer to the Appendix to Appellants' Initial Brief.

Verified Petition for Preliminary Injunction and Temporary Restraining Order (the "Preliminary Injunction Order"). [App. 233-234].

In addition to ALI and A.A. ALI's violations of the Non-Compete, they have also violated the provision in the APA regarding the transfer of intangible assets. Pursuant to the APA, ALI and A.A. ALI were to transfer the following:

> **All intangible assets of the Business**, including without limitation, all **trade names**, customer lists, supplier lists, licenses, computer software licenses, **advertising material and listings**, "Yellow Pages" listings, "White Pages" listings, **any and all URL's listed on the World Wide Web**, all existing customer contracts, **goodwill**, logos, trade names, trademarks, services marks, **fictitious names** and other proprietary information owned by Seller which is used by or is necessary for the operation of the Business.

[App. 71] (emphasis added). Despite the obligation to transfer these assets, ALI has continued to use and profit from the use of the A.A. ALI CPA fictitious name, the URLs and phone numbers associated with A.A. ALI CPA (which ALI has used to direct business directly to himself and away from CFTAS), and as a result the goodwill of A.A.

ALI CPA that he had relied on to induce CFTAS to enter into the APA. [App. 239-240].

B. Plaintiff's Claims

Accordingly, CFTAS initiated this action on December 14, 2021, by filing a complaint that brought, *inter alia,* a cause of action for Temporary and Permanent Injunction relating to the violations of the Non-Compete. [Ans. App. 5-21].[2] On February 25, 2022, CFTAS filed its Verified Petition for Preliminary Injunction and Temporary Restraining Order. [Ans. App. 22-62]. Even though the Non-Compete was set to expire on April 8, 2022, the Non-Compete included the following tolling provision:

> If the Buyer or its successors in interest shall make application to a court of competent jurisdiction for injunctive relief**, then the Noncompetition Period specified herein shall be tolled from the time of application for injunctive relief until the date of final adjudication of the claim for injunctive relief.**

[App. 87] (emphasis added). Accordingly, the three-year period in the Non-Compete was tolled starting on December 14, 2021, when

[2] The Appendix to Appellee's Answer Brief will be referred to herein as "Ans. App." Followed by the referenced pages.

CFTAS filed its Complaint bringing a claim for injunctive relief. *Id.;* [Ans. App. 5-21].

On November 7, 2022, CFTAS filed its Second Amended Complaint, which brought additional causes of action, including the claims for Fraud in the Inducement and Fraudulent Misrepresentation (Counts XVIII and XIX, respectively and collectively referred to herein as the "Fraud Claims"), the causes of action for which CFTAS sought leave, which the court granted, to seek punitive damages. [App. 63-65]. Additionally, the Second Amended Complaint included allegations in all causes of action where applicable, including the Fraud Claims, reserving the right to amend the Second Amended Complaint to seek punitive damages pursuant to Fla. Stat. § 768.72. [App. 45-65].

C. <u>The Preliminary Injunction Order</u>

On November 16, 2022 the parties entered into an Agreed Order and Joint Stipulation to Postpone Hearing on Plaintiff's Verified Petition for Preliminary Injunction and Temporary Restraining Order and the Parties' Depositions ("November 16 Agreed Order"), rescheduling the evidentiary hearing on the Petition, which was set for November 17, 2022, and establishing a new procedure whereby

the parties stipulated that in lieu of an evidentiary hearing on the Petition the parties would submit written briefs and all evidence supporting their positions to the Court. [Ans. App. 64]. The November 16 Agreed Order also held that the parties were to exchange exhibits in support of their briefs and also as long as the exchanged exhibits were "deposition transcripts, affidavits timely exchanged as required above, and/or documents that were bates labeled and produced in discovery in this action, the Parties stipulate to the admissibility of all such exhibits at the Future Hearing with no objections and all such exhibits are deemed admitted into evidence for the Judge to consider." [Ans. App. 65]. Accordingly, on April 3, 2023, CFTAS filed its Brief in Support of Verified Petition for Preliminary Injunction and Temporary Restraining Order ("Preliminary Injunction Brief") [Ans. App. 67-850], which included approximately 745 pages of exhibits, all of which were accepted into the record as evidence pursuant to the November 16 Agreed Order. [Ans. App. 65]. Included in the exhibits to the Preliminary Injunction Brief was the entire transcript of ALI's depositions from March 11 and 13, 2023 [Ans. App. 167-746] and documents establishing ALI's violations of the Non-Compete and APA, including bank statements

showing payments received for tax and accounting work provided during the non-competition period [Ans. App. 753-802] and LinkedIn and Facebook pages showing ALI's improper use of the A.A. ALI CPA fictitious name [Ans. App. 829-839]. Additionally, on April 4, 2023, CFTAS filed its Exhibit List for Special Set Hearing on April 13, 2023 (the "Hearing on Petition for Preliminary Injunction"), wherein it listed 107 exhibits that, pursuant to the November 16 Agreed Order, were admitted into evidence for the "Hearing on Petition for Preliminary Injunction. [Ans. App. 851-857]. Based on the Preliminary Injunction Brief, the record evidence attached thereto, oral argument of counsel on April 13, 2023, and additional exhibits entered at the April 13 hearing, the Court entered the Preliminary Injunction Order on May 10, 2023. [App. 230-243].

The Preliminary Injunction Order enjoined ALI from "[d]irectly or indirectly engaging in any business interest substantially similar to that of Plaintiff, including, but not limited to, the business of providing tax and accounting services within a 50-mile radius of Plaintiff," *inter alia*, "until a final judgment is entered in this case." [App. 242]. In the Preliminary Injunction Order, the Court stated that it relied on ALI's deposition testimony, the tax returns filed by A.A.

ALI, and ALI's interrogatory responses and affidavit, in making its finding. [App. 233-234].

D. The Motion for Leave to Amend Second Amended Complaint and Seek Punitive Damages

On August 16, 2023, CFTAS filed its Motion for Leave to Amend Second Amended Complaint ("Motion for Leave"), which sought leave to seek punitive damages pursuant to Fla. Stat. § 768.72 in its Fraud Claims [App. 246-1229]. In addition to seeking leave to seek punitive damages, the Motion for Leave also sought leave to add two claims for contractual indemnification against ALI and A.A. ALI, to add A.A. ALI as a party to Count IV (Tortious Interference with Advantageous Business Relationships), Count VII (Unjust Enrichment), Count X (Restitution), Count XIII (Breach of Contract as to the Asset Purchase Agreement), and Count XVII (Temporary and Permanent Injunction as to the Asset Purchase Agreement), and to seek disgorgement damages in Count XIII (Breach of Contract as to the APA). [App. 246-1229].

Pursuant to Fla. Stat. § 768.72, the Motion for Leave identified the evidence in the record upon which it relied to establish a reasonable basis for the recovery of punitive damages. The Motion for

Leave attached the entire transcript from the March 11 and 13, 2023 deposition of ALI [App. 376-955], the entire transcript from the July 11, 2023, deposition of MALIKA [App. 957-1229], and incorporated the Preliminary Injunction Order "as if stated fully herein" [App. 249].

On September 15, 2023, CFTAS filed its Reply in Support of its Motion for Leave (the "Reply") [App. 1287]. In the Reply, CFTAS reiterated that the Preliminary Injunction Ordered was incorporated into the Motion for Leave and made clear that the record evidence admitted into evidence and accepted by the Court are being identified as evidence in the record to establish a reasonable basis for punitive damages. [App. 1291-1292].

E. Plaintiff's Supplemental Proffer of Evidence

Thereafter, on November 21, 2023, CFTAS filed its Supplement to Motion for Leave to Amend Second Amended Complaint, which set forth an additional proffer of evidence to support a reasonable basis for punitive damages (the "Supplemental Proffer"). [Ans. App. 858-1006]. The Supplemental Proffer was timely filed, pursuant to Fla. R. Civ. P. 1.190(f), which states:

> A motion for leave to amend a pleading to assert a claim for punitive damages shall make a reasonable showing, by evidence in the record

> or evidence to be proffered by the claimant, that provides a reasonable basis for recovery of such damages. The motion to amend can be filed separately and before the supporting evidence or proffer, but each shall be served on all parties at least 20 days before the hearing.

The hearing on the Motion for Leave took place on December 11, 2023 (the "Motion for Leave Hearing"), twenty (20) days after the Supplemental Proffer was filed. [App. 1315]. Accordingly, the Supplemental Proffer was timely filed pursuant to the Florida Rules of Civil Procedure. The Supplemental Proffer made additional citations to ALI's deposition transcript, and served the following documents (the evidence that was also already part of the record evidence submitted in connection with the Preliminary Injunction Order is bolded below):

> **1. The Bill of Sale for the transaction;**
> **2. ALI's LinkedIn Page;**
> **3. ALI's Facebook Page;**
> **4. Memorialized Conversations Document;**
> **5. ALI's Notice of Serving Amended Answer to Plaintiff's Second Set of Interrogatories;**
> 6. IRS Report (Bates Stamped Def 100029-100031);
> 7. TaxWise Summaries for 2019 through 2022 (DEF0008414-008444);
> 8. Preliminary Report of CFTAS's expert, Richard Dotson;
> **9. March 30, 2023 Affidavit of Akbar A. Ali;**

10. Plaintiff's Corrected Motion for Sanctions for Fraud on the Court.

[Ans. App. 873-1006]. Notwithstanding the timely service of the Supplemental Proffer, on December 7, 2023, three (3) days before the Motion for Leave Hearing, Defendants filed a baseless Motion to Strike "Supplement" to Plaintiff's Motion for Leave to Amend Second Amended Complaint or Alternatively to Reschedule Hearing on Motion to Amend (the "Motion to Strike"). [Ans. App. 1007-1014]. Defendants' primary argument for striking the Supplemental Proffer was based off the Circuit Court for the Ninth Judicial Circuit, in and for Orange County, Florida's Business Court Procedures ("BCP"). [Ans. App. 1078-1112]. Specifically, Defendants took issue with the BCP's page limits for reply memoranda and that the filing of the Supplemental Proffer was untimely because it was done after the Motion for Leave Hearing was set. [Ans. App. 1009-1010]. Noticeably, Defendants do not cite to Fla. R. Civ. P. 1.190 or section 768.72(1), Florida Statutes to support the striking of the Supplemental Proffer. *Id.* Further, the BCP rules state that "[t]he Business Court Procedures are intended to supplement, not supplant, the rules adopted by the Supreme Court of Florida. Should any conflict be

deemed to exist between the Business Court Procedures and the rules adopted by the Supreme Court of Florida, then the rules adopted by the Supreme Court of Florida shall control." [Ans. App. 1081]. The Supplemental Proffer was timely submitted pursuant to the Florida Rules of Civil Procedure and Florida Statutes, which controls what the lower court (and this Court) can consider in evaluating the reasonable basis for punitive damages.

At the Motion for Leave Hearing, the Court held that the Motion to Strike was moot because CFTAS agreed to rely only on the documents attached to the Supplemental Proffer and not the written portion that Defendants claimed violated the BCP rules:

> Mr. Segal: The entire proffer is everything that is going to be put into evidence.
> The Court: Has it already gone into evidence from previous hearings?
>
> Mr. Segal: There's two or three things that have been produced since the preliminary injunction.
>
> . . .
>
> Mr. Segal: And I will go ahead and raise them as I'm going to go through the proffer. But the bulk of what is in there has been put into evidence at the preliminary injunction.
>
> The Court: All right. Has Mr. Sambol seen this?
>
> Mr. Segal: He has a copy of it.

> The Court: Okay. Is there anything you're objecting to? We can just do it as a composite exhibit.
>
> . . .
>
> Mr. Sambol: Yeah. This is –
>
> The Court: All right. So we'll make it a composite exhibit, unless you want to –
>
> Mr. Sambol: Yeah. I mean, again, for purposes of the file. All right.
>
> The Court: So we'll do that. And then we'll – the subheadings are as tabbed.

[App. 1328-1329]. Accordingly, and with Mr. Sambol's *agreement*, the binder containing the proffer was entered into evidence as Composite Exhibit 1 and referred to as such throughout the hearing. [App. 1329, 1330, 1334; Ans. App. 1113 – 1586].

F. The Hearing on the Motion for Leave to Seek Punitive Damages

At the Motion for Leave Hearing, CFTAS relied upon the evidence in the record and the proffered evidence to establish a "reasonable basis" that ALI had no intention of honoring his obligations to transfer intangible assets under the APA or to comply with the Non-Compete prior to the execution of same and that he intentionally, with full knowledge of the wrongfulness of his conduct, accepted payment from CFTAS only to subsequently fully deprive

CFTAS from the benefit of its bargain. [App. 1332-1334]. First, CFTAS discussed the Memorialized Conversation Document, which was part of the record evidence supporting the Preliminary Injunction Order and part of the Supplemental Proffer. [App. 1341]. This document stated that ALI would "retire after the first year." [Ans. App. 889-890]. ALI testified that he understood that whether or not he would be retiring would be relevant to Mr. Anees Tanoli's, the owner of CFTAS, decision to purchase A.A. ALI's assets. [App. 544-546] (testifying that his intention to retire would be important to Mr. Tanoli in deciding whether or not to purchase A.A. ALI CPA). ALI has admitted he made this material representation to Mr. Tanoli prior to the execution of the agreements and that he has not in fact retired:

> Q: -- No. 16, "to retire after first year and help out occasionally," right?
>
> A: Yes.
>
> Q: That's what it says. You wrote that?
>
> A: Yes.
>
> …
>
> Q: Well, we had already talked about when you're buying a business and a CPA firm that it's important to know whether or not the seller is going to retire or not, right?
>
> A: Correct.

> Q: And here you are in your own words typing out that you're going to retire after one year and help out occasionally, right?
>
> . . .
>
> A: Correct.
>
> Q: Are you retired right now?
>
> A: Semi-retired.

[App. 587-588]. Later on at the Motion for Leave Hearing, detailed below, CFTAS presented the record evidence showing that ALI never had any intention to retire (or even semi-retire).

Next, CFTAS proffered the evidence demonstrating ALI's fraudulent intentional misrepresentations regarding the transfer of intangible assets. ALI agreed to transfer certain intangible assets under the APA, including but not limited to "advertising material and lists . . . any and all URL's listed on the World Wide Web . . . goodwill . . . trade names . . . fictitious names . . . [and] other proprietary information owned by Seller which is used by or is necessary for the operation of the Business." [App. 71]. Notwithstanding, ALI has continued to use and profit from the use of the A.A. ALI CPA fictitious name, the URLs and phone numbers associated with A.A. ALI CPA (which ALI has used to direct business directly to himself and away

from CFTAS), and benefitted from the goodwill of A.A. ALI CPA that he had relied on to induce CFTAS to enter into the APA. ALI has admitted that he had agreed and was obligated to transfer these items to CFTAS:

> Q: You agreed to go ahead and transfer all intangible assets from A.A. Ali, CPA, P.A. to Central Florida Tax, correct?
>
> A: Correct.
>
> Q: That included and was without limitation trade names, right?
>
> A: Correct.
>
> Q: Goodwill?
>
> A: Correct?
>
> Q: Fictitious names?
>
> A: Yes.

[App. 550-552; 1344-1346]. ALI has continued representing to the public that he is providing services under the fictious name, A.A. Ali, CPA, thereby driving business to himself and away from CFTAS. For example, both his professional LinkedIn and Facebook pages state that he is a CPA at A.A. Ali CPA. [App. 1346-1347]; [Ans. App. 877-887]. Further, the Facebook page references the Pine Hills Office

transferred to CFTAS under the APA as the address, lists allan@aaalicpa.com for the contact information, and aaalicpa.com as the website for ALI. [App. 1347; Ans. App. 887]. ALI represented that he would transfer all these assets to CFTAS with the clear intention of dishonoring his obligations. [App. 1344-1351]. ALI has also continued to use approximately *ten* different telephone numbers, which he represented would be transferred to CFTAS, that all forward to his cell phone in Lakeville (only several short miles from Pines Hill Road) where he operates his business in violation of the Non-Compete. [App. 1347-1348, 563]. In particular, he has an 888 number ending in 1040, which he hand-picked due to its tax reference, that he failed to transfer to CFTAS:

> Q: And so this number 888-893-1040 is a number that you've been using for approximately ten years?
>
> A: About, let's say, five years.
>
> Q: And this particular number also rings through to your cell phone in Lakeville, correct?
>
> A: Correct.

[App. 1348, 409]. In addition to the fictitious name and phone numbers, ALI also kept the URLs he was obligated to transfer for his own use. [App. 1349]. At the time of the APA, the websites for A.A. Ali

CPA, P.A. were aaalicpa.com and myfloridacpa.com and ALI owned, but had not activated, myglobaladviser.us. [App. 1349, 548-549, 554]. ALI has admitted that aaalicpa.com belongs to CFTAS because of the APA and that he has not transferred any of the three URLs in existence at time of the APA. [App. 553-555]. ALI intentionally misrepresented that these three websites would belong to CFTAS, despite his knowledge that he would continue to use them to funnel business to himself and divert it away from CFTAS. [App. 599]. (admitting that aaalicpa.com and myglobaladviser.us drive traffic to A.A. Ali CPA, P.A.). Additionally, the transfer of the aaalicpa.com domain would include emails associated with this domain; however, ALI continues to use the allan@aaalicpa.com email address and has blocked CFTAS' ability to use any and all @aaalicpa.com email addresses. [App. 1350-1351, 765, 768] (testifying that he blocked the email addresses so that CFTAS would not have access to them, but that he did not block his own email, allan@aaalicpa.com). Based on the foregoing, CFTAS demonstrated at the Motion for Leave Hearing that ALI's conduct and continued use of these intangible assets demonstrates that his intention was to make false promises to induce CFTAS to enter into the agreement with the knowledge that he would

subsequently ignore the terms of his agreements and deprive CFTAS from the benefit of what it paid $1.3 million for.

Lastly, CFTAS detailed ALI's violations of the Non-Compete to show the course of conduct that can be relied upon to infer ALI's clear intentional misrepresentations to induce CFTAS to enter into the APA. The record evidence shows that while working as an independent contractor at CFTAS, ALI was secretly processing transactions through a Square machine and depositing the amounts directly into the Bank of America account for A.A. ALI:

> Q: From April 2019 through April of 2021 is there a single time that you used the Square credit card processing machine to run a transaction for tax and consulting work for a client of Central Florida Tax?
>
> . . .
>
> A: Yes.

[App. 1352-1353, 250 and 776]. While he was supposed to be working for CFTAS to help transition the clients and business, which he was paid for via the purchase price in the APA and payments under the ICA, ALI was competing with CFTAS and stealing monies belonging to CFTAS:

> Q: . . . when you were running the Square credit card processing machine . . . when you ran it

> for tax and consulting work for Central Florida Tax clients, those monies went into the A.A. Ali, CPA Bank of America Account 5823, correct?
>
> A: Yes.

[App. 250-251, 777]. After leaving CFTAS as an independent contractor in or around April 2021, ALI continued his wrongful conduct by performing tax services, such as filing returns and consulting individuals and corporations, through A.A. ALI, for clients he transferred to CFTAS and for which CFTAS paid him for under the APA. [App. 251]. ALI produced bank statements from A.A. CPA's bank account at Bank of America from May 2021 through April 2022 that contain many pages of transfers from Zelle and Square Inc. to A.A.CPA. ALI admitted that "outside of a few transactions" the payments through Zelle, which amount to hundreds, are for tax and consulting work for clients that existed as of the execution of the APA. [App. 1361-1362, 251 and 748-749]. In addition to the bank statements, ALI testified as to checks deposited into A.A. CPA's bank account during the three-year non-competition period. [App. 252, 822-823]. Additionally, the IRS Report and Taxwise Summary produced by Defendants after the entry of the Preliminary Injunction Order and served through the Supplemental Proffer, show that ALI

filed over eight hundred tax returns and/or tax filings during the non-compete period. [Ans. App. 897-931].

All of the foregoing was either evidence in the record identified in the Motion for Leave and/or Reply or proffered evidence attached to the Supplemental Proffer. Additionally, all of the foregoing was entered into the record by the Court as "Composite Exhibit 1" at the Motion for Leave Hearing without objection from Defendants' attorneys. [App. 1328-1329, 1113-1586]. Thereafter, on January 10, 2024, the Court entered its Order Granting Leave to Amend where it supported its finding of a reasonable basis by citation to "Ex. 1, Tab ___," which clearly refers to the Composite Exhibit 1 accepted by the Court into evidence, with Mr. Sambol's agreement. [App. 1398]. In the Initial Brief, Defendants disingenuously claim that they do not know what "Ex. 1" means, but assume it is the "documents that CFTAS untimely filed as a Supplement to its Motion to Amend," and that "CFTAS withdrew it from consideration and therefore, it should not have relied upon by the court in its Order." Initial Brief at p. 14-15. Defendants misrepresent to this court by stating "if 'Ex. 1' is anything other than the documents attached to CFTAS' Motion to Amend or Reply, it was not timely filed at least twenty days before

the hearing as required by section 768.72, Florida Statutes and Florida Rule of Civil Procedure 1.190(f), and therefore, should not have been considered by the court." Initial Brief at p. 15. As demonstrated above, the Supplemental Proffer, contained within Composite Exhibit 1, was timely filed twenty days before the Motion for Leave Hearing [Ans. App. 858-1006]. Defendants attacked the Supplemental Proffer based on the BCP rules, not section 768.72 or Rule 1.190(f). Accordingly, CFTAS agreed not to specifically refer to the Supplemental Proffer, but that the documents proffered therein contained in the binder entered into evidence by agreement as Composite Exhibit 1, would be relied upon at the hearing. [App. 1328-1329; Ans. App. 1113-1586]. Defendants' representations that the Motion for Leave and Reply are all that the Court should have considered is a self-serving misrepresentation of the record and Defendants' counsel's agreements. Tellingly, Defendants' counsel did not object a single time to CFTAS presenting its proffer set forth in Composite Exhibit 1 during the Motion for Leave Hearing.

G. Evidence in the Record and/or Proffered Evidence Relied Upon in the Order Granting Leave to Amend

In the Order Granting Leave to Amend, the Court specifically

cites to six documents and ALI's deposition to support its finding:

1. On page 4 of the Order the Court cites to "Ex 1, Tab 2," which is a pre-closing document created by the parties wherein ALI represented that he planned to retire after the first year of selling his business, that has been referred to in the record as the "Memorialized Conversations" document [App. 1398; Ans. App. 889-890]. This document was admitted into evidence in connection with the Preliminary Injunction Brief and the Hearing on Petition for Preliminary Injunction [Ans. App. 855], submitted as part of the Supplemental Proffer twenty (20) days before the hearing [Ans. App. 889-890], and admitted into the record as part of Composite Exhibit 1 by the lower court at the hearing [Ans. App. 1225-1226].

2. On page 4 of the Order the Court cites to "Ex 1, Tabs 9-10," which are the LinkedIn and Facebook pages demonstrating that ALI has continued representing to the public that he is providing services under the A.A. Ali, CPA fictious name [Ans. App. 829-839]. These documents were admitted into evidence in connection with the Preliminary Injunction Brief and the Hearing on Petition for Preliminary Injunction [App. 1398; Ans. App. 829-839], submitted as part of the Supplemental Proffer twenty (20) days before the hearing [Ans. App. 877-887], and admitted into the record as part of Composite Exhibit 1 by the lower court at the hearing [Ans. App. 1255-1264].

3. On page 4 of the Order the Court cites to "Ex 1, Tab 26," which is a Taxwise Summary produced by ALI after the entry of the Preliminary

Injunction Order that shows that ALI provided tax and accounting services to clients transferred to CFTAS during his time as an independent contractor. [App. 1398; Ans. App. 901-931]. This document was submitted as part of the Supplemental Proffer twenty (20) days before the hearing *id.* and admitted into the record as part of Composite Exhibit 1 by the lower court at the hearing [Ans. App. 1374-1404].

4. On page 4 of the Order the Court cites to "Ex 1, Tab 25," which is an IRS Report produced by ALI after the entry of the Preliminary Injunction Order showing hundreds of tax returns and tax documents filed by ALI for the years 2019 through 2022. [App. 1398; Ans. App. 897-899]. This document was submitted as part of the Supplemental Proffer twenty (20) days before the hearing *id.* and admitted into the record as part of Composite Exhibit 1 by the lower court at the hearing [Ans. App. 1371-1373].

5. On page 4 of the Order the Court cites to "Ex 1, Tab 23," which includes copies of checks deposited into ALI's bank account for tax and accounting services he provided in 2020. [App.1398; Ans. App. 1350-1367]. These documents were an exhibit to ALI's deposition and admitted into evidence and in connection with the Preliminary Injunction Brief and the Hearing on Petition for Preliminary Injunction [Ans. App. 853]and admitted into the record as part of Composite Exhibit 1 by the lower court at the hearing [Ans. App. 1350-1367].

The Court held that these documents, along with ALI's deposition testimony, established a reasonable basis for punitive damages.

H. The Continuation of the Trial Date Was Ordered Based on ALI's Counsel's Request for Consolidating, Not the Granting of the Motion to Leave

In the Initial Brief, ALI argues that granting the Motion for Leave caused the trial in this matter to be pushed back and caused harm to ALI. This is a gross misrepresentation of the record. On January 31, 2024, the Court entered two orders, one to consolidate the underlying case with a related case brought by ALI against CFTAS, at ALI's request [Ans. App. 2011-1023], and the other amended the Case Management Order to continue the trial until January 2025. [Ans. App. 1024-1028]. These orders were entered after a hearing held on January 30, 2024, on multiple discovery motions filed by CFTAS [Ans. App. 1029-1077]. At the January 30 hearing, the lower court initiated a discussion about the trial docket, which at the time was currently set for July of 2024, stating "I suggest, let's talk about the trial docket. It's set for July and that is not going to happen." [Ans. App. 1037-1038]. One of the reasons for the Judge's concern was ALI's counsel's position that it would be a ten-day jury trial. [Ans. App. 1038]. Additionally, ALI's counsel made an ore tenus motion to

the court requesting that the underlying case should be consolidated with the related case brought by ALI, which is set for trial in January 2025:

> The cases really should be consolidated. It's the same case. You know, the other case is simply our counter-claim for expenses that our client paid during this transition period. It all arises out of this asset purchase agreement. I mean, it would be absurd to try this case then try another mini case involve the exact same asset purchase agreement, the exact same transaction. I don't even understand why opposing counsel would be opposed of that. It just would seem to be the most efficient way to handle all of this.

[Ans. App. 1040]. ALI's counsel even agreed to draft the order consolidating the underlying case into the related case set for the January 2025 trial docket. [Ans. App. 1043]. This is the second instance in the Initial Brief of Defendants ignoring counsel's agreements and representations to the lower court in an attempt to misrepresent the reality of the record to this Court. ALI's claim that the granting of the Motion for Leave has harmed him due to the continuation of the trial is demonstrably false.

SUMMARY OF THE ARGUMENT

The Initial Brief argues that the lower court erred in granting the Motion for Leave because (1) CFTAS purportedly failed to timely identify evidence in the record or timely file a proffer to provide a reasonable basis for recovery that satisfied the intent element for fraud in the inducement and fraudulent misrepresentation, and (2) that the Court abused its discretion in permitting the amendment because doing so prejudices ALI by pushing the trial date back. Both of these arguments are easily refuted by the record in this case. First, as demonstrated above, CFTAS both identified evidence in the record and filed a proffer of additional evidence within the time-period set forth by the applicable Florida rules and statutes. ALI's argument at the hearing that the Supplemental Proffer should be struck under the BCP does not change the fact that the Court at the hearing ruled that ALI's Motion to Strike was moot because CFTAS's counsel agreed to not reference the argument in the Supplemental Proffer, but instead only relied upon the identified record evidence and the documents/evidence attached to the Supplemental Proffer. The Court admitted the identified record evidence and documents/evidence attached to the Supplemental Proffer, ***with***

ALI's counsel's agreement, as Composite Exhibit 1 (referenced in the Order as "Ex. 1, Tab ___), and found that the evidence contained in the record and proffer established a reasonable basis for punitive damages [App. 1328-1329; 1395-1400]. Additionally, the lower court held that CFTAS pled independent torts and established a reasonable basis of the specific intent necessary for such claims. [App. 1398-1399].

Moreover, ALI's argument regarding the purported prejudice caused to him as a result of the amendment is blatantly false. The Order Granting Leave to Amend acknowledged that even though the Case Management Order deadline to amend pleadings had passed, the applicable liberal standard supports leave because Defendants will not suffer prejudice, the amendment privilege has not been abused, and amendment is not futile. [App. 1399]. In support of this finding the Order Granting Leave to Amend actually states "[h]ere, the Motion was filed on August 16, 2023, and trial is scheduled for a period starting several months later on July 1, 2024." [App. 1399]. As discussed above, the continuation of the trial was completely independent from the granting of leave to amend and in response to ALI's counsel's ore tenus request at the January 30 hearing on

CFTAS's discovery motions to consolidate the underlying action with the related action set for trial in January 2025.

For these reasons, the Court's Order Granting Leave to Amend should be affirmed.[3]

ARGUMENT

1. Standard of Review

As stated in the Initial Brief, this challenge of the lower court's granting of leave to amend to seek punitive damages is subject to the *de novo* review standard. Fla. R. App. P. Rule 9.310(a)(3)(G); *John Knox Village of Central Florida, Inc. v. Estate of Lawrence by and Through Castelman,* 379 So. 3d 1205, 1209 (Fla. 5th DCA 2024) ("a trial court is in no better position than an appellate court to determine [the record evidence's or proffer's] sufficiency because the trial court is not called upon to evaluate and weigh testimony and

[3] Defendants' misrepresentations regarding the continuation of trial and the purported prejudice should be stricken and Defendants' counsel should be sanctioned for such misrepresentations in violation of the Appellate Rules of Procedure. Fla. R. App. P. Rule 9.410 (stating that the court may impose sanctions for "any violation of these rules, or for the filing of any proceeding, motion, brief, or other document that is frivolous or in bad faith. Such sanctions may include reprimand, contempt, striking of briefs or pleadings, dismissal of proceedings, costs, attorneys' fees, or other sanctions."). The record unequivocally refutes Defendants' bald assertion.

evidence.") (quoting *Est. of Despain v. Avante Grp., Inc.,* 900 So. 2d 637, 644 (Fla. 5th DCA 2005). Accordingly, this Court can consider (1) the Motion for Leave, including the full deposition transcripts attached thereto, (2) the Preliminary Injunction Order and the record evidence relied upon by the lower court in entering same, as the Motion for Leave and Reply identified as record evidence supporting its request for leave to seek punitive damages incorporated the injunction, and (3) the documents and evidence submitted with the Supplemental Proffer and admitted into evidence by the Court, with agreement of ALI's counsel, as Composite Exhibit 1 at the December 11 Hearing, in conducting its *de novo* review. Further, the court is "required to view the record evidence and the proffer in the light most favorable to [the moving party] and accept it as true." *Cook v. Florida Peninsula Ins. Co.,* 371 So. 3d 958, 964 (Fla. 5th DCA 2023).

In addition to challenging the lower court's finding that CFTAS established a reasonable basis for recovery of punitive damages, Defendants also seek reversal of the Order Granting Leave to Amend on the grounds that leave to amend constituted an abuse of discretion which resulted in prejudice to ALI. *See Drish v. Bos,* 298 So. 3d 722, 724 (Fla. 2d DCA 2020) (finding that the standard of

review for a lower court's ruling on a motion for leave to amend is an abuse of discretion standard).

2. The Trial Court Applied the Correct Standard in Determining that CFTAS Met the Requirements of Section 768.72(1) by Making a Reasonable Showing, With Record and Proffered Evidence, to Support a Reasonable Basis for Punitive Damages.

"A motion for leave to amend a pleading to assert a claim for punitive damages shall make a reasonable showing, by evidence in the record or evidence to be proffered by the claimant, **that provides a reasonable basis for recovery of such damages**." Fla. R. Civ. P. 1.190(f) (emphasis added); *accord* Fla. Stat. § 768.72 (1) ("In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claim which would provide a reasonable basis for recovery of such damages.") "[T]he standard that applies to determine whether a reasonable basis has been shown to plead a claim for punitive damages should be similar to the standard that is applied to determine whether a complaint states a cause of action," and the Court should "view the record evidence and the proffer in light most favorable to [the moving party] and accept it as true." *Estate of Despain v. Avante Group, Inc.,* 900 So. 2d 637, 644 (Fla. 5th DCA

2005); *see also Cook v. Florida Peninsula Ins. Co.,* 371 So. 3d 958, 962 (Fla. 5th DCA 2023) (reversing order denying leave to seek punitive damages because the lower court made a determination regarding whether the allegations had been proven instead of whether a "reasonable basis" had been shown).

As set forth in the Initial Brief, there is currently a split between the Florida district courts circuits of appeal as to a trial court's inquiry under section 768.72. The Fourth District Court of Appeal has adopted a standard requiring the trial court to "make a preliminary determination of whether a reasonable jury, viewing the totality of proffered evidence in the light most favorable to the movant, could find by clear and convincing evidence that punitive damages are warranted." *Federal Insurance Company v. Perlmutter,* 376 So. 3d 24, 35 (Fla. 4th DCA 2023) (emphasis and footnote omitted). This line of cases in the Fourth District applies the standard from subsection (2) of 768.72, which covers proving punitive damages at trial, to the pleading standard. *Id.;* section 768.72(2), Florida Statutes. This departs from the Second, Fifth, and Third Courts of Appeal, which have held that the trial court is *not* required to consider the clear and convincing evidence standard at the

pleading stage. *See Cook,* 371 So. 3d at 962; *Deaterly v. Jacobson,* 313 So. 3d 798, 801 (Fla. 2d DCA 2021) (finding that the "legislature has written section 768.72(1) and (2) such that each subsection applies to distinct stages of the litigation process . . . Under subsection (1), a trial court can allow a claimant to add a count for punitive damages after reviewing the evidence and concluding there is a reasonable basis for recovering such damages."). In a decision entered on March 27, 2024, the Third District made its position clear in this certified conflict as well:

> [W]hile the trial court's role as gatekeeper requires it to consider and weigh the competing showings of the parties and to act as a factfinder, the statute does not require the plaintiff prove an entitlement to punitive damages by clear and convincing evidence at the pleading stage of the case. To impose such a requirement 'would circumvent the statute and impair a claimant's ability to plead punitive damages, and no court of this state has the discretion 'to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications.

Gattorno v. Souto, Case No. 3D23-0639, 2024 WL 1289889, at *3 (Fla. 3d DCA Mar. 27, 2024) (quoting *Deaterly v. Jacobson,* 313 So. 3d 798, 801 (Fla. 2d DCA 2021)). While the Sixth District Court of Appeal

has not issued an opinion regarding this issue, it has recently affirmed a lower court decision granting a motion for leave to amend complaint to add punitive damages based on the reasonable basis, not the clear and convincing, standard. *See Florida Investments Unlimited, Inc. v. Tummarello,* 381 So. 3d 694 (Mem) (Fla. 6th DCA 2024) (affirming lower court order granting leave to add claims for punitive damages applying the reasonable basis standard set forth in section 768.72(1)).

Pursuant to Fla. Stat. § 768.72(2), punitive damages may be awarded when there is evidence of "intentional misconduct," and thus, the movant must establish a "reasonable basis" of intentional misconduct. The statute defines "intentional misconduct" as meaning "that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage." *Id.* (2)(a). The requisite intent may be inferred from circumstantial evidence and the defendant's course of conduct. *See Cook,* 371 So. 3d at 963 ("[u]nder section 768.72(2)(a), if there are reasonable inferences and sufficient circumstances then the issue of

intent typically becomes a question of fact for the jury, not the trial court."); *see also International Ship Repair and Marine Services, Inc. v. St. Paul Fire and Marine Ins. Co.*, 944 F. Supp. 886, 896 (M.D. Fla. 1996) ("The requisite evil intent may also be inferred from the defendant's having pursued a course of action in wanton disregard of the consequences."); *Cohen v. Kravit Estate Buyers, Inc.,* 843 So.2d 989, 991 (Fla. 4th DCA 2003) ("Fraudulent intent usually must be proved by circumstantial evidence and such circumstances may, by their number and joint consideration, be sufficient to constitute proof.").[4] Under the foregoing parameters, the lower court correctly analyzed the evidence to reach its ruling that the evidence demonstrated a reasonable basis for punitive damages to be submitted for consideration by the trier of fact.

A. CFTAS Timely Identified and Proffered Sufficient Evidence in Support of its Motion for Leave.

[4] Even the Fourth District case applying the clear and convincing standard allows for it to be met through inferences drawn from the evidence and proffers. *Perlmutter*, 376 So. 3d at 34 (stating that "the preliminary determination by the trial court considers the evidence presented by all parties and gives the movant the benefit of all reasonable inferences," and stating in a parenthetical that "movant's counsel is free to argue inferences that may be drawn from the timely filed evidence and proffers.").

The motion for leave may be supported by evidence already in the record ***or*** evidence that the claimant plans to proffer to support the motion. Fla. R. Civ. P. 1.190(f); section, 768.72, Florida Statutes. All of the record and/or proffered evidence relied upon in the Order Granting Leave to Amend and set forth herein for this Court's consideration was either identified as evidence already in the record as part of the Preliminary Injunction Order in the Motion for Leave and Reply or submitted as part of the Supplemental Proffer served twenty days before the Motion for Leave Hearing. *Supra* at pp. 22-25. Defendants' argument that anything not specifically referenced in CFTAS's Motion for Leave or Reply cannot be considered by the lower court is factually and legally baseless. For example, Defendants argue that CFTAS's proffer is limited to the specific cites to ALI's deposition testimony in the body of the Motion for Leave. Initial Brief at p. 17. This argument is contrary to the record in that it ignores the full deposition transcripts attached to CFTAS's Motion for Leave. [App. 375-1229]. Further, neither the applicable Florida Rule of Civil Procedure nor the Florida Statute support such a position, as they only require that there be a reasonable basis for punitive damages based on evidence in the record or proffered evidence served twenty

(20) days before a hearing on a motion for leave. *See* Florida Rule of Civil Procedure 1.190(f); section 768.72(1), Florida Statutes. Since the complete deposition transcripts were attached to CFTAS's Motion for Leave, Defendants' position is not a plausible argument for reversal.

However, *assuming* arguendo, that the Court's consideration was limited to the specific cites to ALI's deposition testimony in the body of the Motion for Leave (it is not), ALI has failed to dispute these violations. Whether or not ALI received payments via check, Square, or otherwise that were separate from the tax business does not change the record evidence that he also accepted payments for tax and accounting services provided in violation of the Non-Competes. In ALI's deposition, he admitted to countless violations of the Non-Compete:

> Q: . . . Who's K & G Trucking of Central Florida, Inc.
>
> . . .
>
> A: Oh. That's a client of Central Florida.
>
> . . .
>
> Q: All right. So it was a client of Central Florida pursuant to the Asset Purchase Agreement, right?

A: Yes.

Q: Irrespective of that, on February 5th, 2020, during the non-compete period, they're paying you $300, right, pursuant to Check No. 9868?

A: Yes. I see that.

[App. 1292-1293]. (identifying additional testimony that he received a $200 check on January 31, 2021, from Affordable Electrical Solutions, an Orlando Company, for accounting services and that he received a $500 check on May 28, 2021 for "tax prep" from a client at the time of the APA). The same is true of the Square and Zelle transactions Defendants attempt to severely downplay. [App. 1293] (identifying testimony that he used a credit card processing machine through Square, which was connected to the Bank of America account for A.A. Ali CPA, P.A. from April 2019 through April 2021 when he was an independent contractor, admitting that "outside of a few transactions" the payments through Zelle are for tax and consulting work for clients that existed as of the execution of the APA, and testifying that most transactions paid through Square were for tax and consulting services provided to clients that existed at time of APA). *see also* Order Granting Preliminary Injunction at p. 4-5 (listing evidence considered by the court and stating that "outside of a few

transactions, the hundreds of payments from Zelle and Square were for tax and consulting work for Plaintiff's clients."). ALI also attempts to insert an argument that has already been rejected by the lower court in arguing that "CFTAS failed to present evidence that any return was prepared for anyone whom the restrictions applied." Initial Brief at p. 33. In support of this argument, ALI cites to the pages in Defendants' Response to Plaintiff's Motion for Leave to Amend Second Amended Complaint (the "Response") where he argued that Zelle transactions or services provided to his clients that allegedly live in other states are not violations of the Non-Compete. The Preliminary Injunction Order accepted CFTAS's interpretation of the restrictive covenants, however, and enjoined ALI from "[d]irectly or indirectly engaging in any business interest substantially similar to that of Plaintiff, including, but not limited to, the business of providing tax and accounting services within a 50-mile radius of Plaintiff." [App. 242 and1294]. Accordingly, that argument is without merit.

Moreover, Defendants completely fail to address the evidence cited to in the Order Granting Leave to Amend which demonstrated a reasonable basis for finding the requisite intentional misconduct:

- ALI's fraudulent misrepresentations to retire after the transaction;
- ALI's failure to transfer the intangible assets under the APA; and
- ALI's filing of hundreds of tax returns and filings both during his time as an independent contractor and thereafter as set forth in the TaxWise Summary and IRS Report.

[App. 1397-1398]. The evidence in the record and proffered herein establishes a "reasonable basis," as required by Fla. Stat. § 768.72, that ALI knowingly, wrongfully, and in complete disregard for the consequences or damages it would cause to CFTAS, intentionally misrepresented that he would transfer all tangible and intangible assets to CFTAS and that he would not engage in activity to compete with CFTAS for a period of three years (and in fact be retiring after the transaction). The record evidence establishes a "reasonable basis" that ALI had no intention of honoring these representations and that he intentionally, with full knowledge of the wrongfulness of his conduct, accepted payment from CFTAS only to subsequently fully deprive CFTAS from the benefit of its bargain. ALI's wrongful intention can be inferred by his conduct subsequent to the closing of the transaction, which was completely contrary to ALI's representations that he would be retiring and to his misleading characterization of himself as "semi-retired." *Cook,* 371 So. 3d at 963;

Cohen, 843 So. 2d at 991. This is not a situation where ALI subsequently decided to breach his Non-Compete for a few isolated clients or purported "friends and family" as ALI maintains. ALI's conduct exhibits an intentional and willful fraudulent scheme to trick CFTAS into purchasing the goodwill and assets of A.A. ALI and then subsequently carry-on his business as if the sale never happened.

That is what the lower court held in its Order Granting Leave to Amend, and such finding should be affirmed by this Court.

B. CFTAS Identified and Proffered Sufficient Evidence of Specific Intent to Support a Reasonable Basis for Punitive Damages for its Fraud Claims.

At the Motion for Leave Hearing, Defendants argued for the first time that CFTAS's fraud claims were not independent torts for which punitive damages were proper.[5] This argument fails because it is contrary to Florida precedent. Punitive damages are available for fraud claims despite the presence of additional and related breach of contract claims. *Connecticut General Life Ins. Co. v. Jones*, 764 So. 2d 677, 682 (Fla. 1st DCA 2000); *Accord Associates, Inc. v. Wetmore*

[5] Ironically, in support of this argument, Defendants relied upon cases that were not set forth in their opposition to the Motion, and thus were not permitted to be relied upon at the Hearing by the Ninth Circuit Business Court Procedures. [App. 1230-1246, 1370-1375].

Printing Co., 427 F.3d 867, 877 (11th Cir. 2005) ("punitive damages are awardable for sufficient fraudulent inducement claims, even when those claims involve facts related to a collateral breach of contract claim."), *see also Burton v. Linotype Co.,* 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989) ("Fraud in the inducement and deceit are independent torts for which compensatory and punitive damages may be recovered.").

Notwithstanding, and as set forth above, CFTAS has identified and proffered evidence that allowed the court to find that the requisite intent can be inferred by ALI's course of conduct and the surrounding circumstances. *Supra* at pp. 13-20; 22-24, CFTAS proffered the "Memorialized Conversations" document which twice reflects ALI's misrepresentation that he intended to retire. [Ans. App. 889-890]. This document was admitted into evidence and relied upon by the Court in entering the Preliminary Injunction Order [Ans. App. 855], timely submitted as part of the Supplemental Proffer twenty (20) days before the hearing [Ans. App. 889-890], and admitted into the record as part of Composite Exhibit 1 by the lower court at the hearing [Ans. App. 1225-1226]. Additionally, at his deposition, ALI admitted he made this material representation to Mr.

Tanoli prior to the execution of the agreements and that he has not in fact retired:

> Q: -- No. 16, "to retire after first year and help out occasionally," right?
>
> A: Yes.
>
> Q: That's what it says. You wrote that?
>
> A: Yes.
>
> …
>
> Q: Well, we had already talked about when you're buying a business and a CPA firm that it's important to know whether or not he seller is going to retire or not, right?
>
> A: Correct.
>
> Q: And here you are in your own words typing out that you're going to retire after one year and help out occasionally, right?
>
> . . .
>
> A: Correct.
>
> Q: Are you retired right now?
>
> A: Semi-retired.

[App. 587-588]. Additionally, ALI admitted that he understood that whether or not he would be retiring would be relevant to Mr. Anees Tanoli's decision to purchase A.A. ALI's assets. [App. 545-546] (testifying that his intention to retire would be important to Mr. Tanoli in deciding whether or not to purchase A.A. ALI CPA). ALI has filed

over five hundred tax returns since entering into the APA and Non-Competes. This reality can in no way be considered "semi-retired," and is clear evidence that ALI had no intention of retiring when he made such representation to CFTAS.

C. Defendants' Integration Clause Argument is Not Properly Preserved for Appellate Review.

In an attempt to refute the "Memorialized Conversations" document as evidence of Defendants' intent, Defendants rely on the APA's integration clause. Defendants' argument regarding the integration clause was not raised in its Response to the Motion for Leave or at the hearing [App. 1230-1286], and thus, it is improperly included in its Initial Brief. *See Greenberg v. Bekins of South Florida,* 337 So. 3d 372, 375 (Fla. 4th DCA 2022) ("It is generally inappropriate for a party to raise an issue for the first time on appeal. '[T]o be preserved for further review by a higher court, an issue must be presented to the lower court and the **specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.'"**) (*quoting Tillman v. State,* 471 So. 2d 32, 35 (Fla. 1985)) (internal citations omitted) (emphasis added). Notwithstanding, Florida courts routinely find that

the existence of an integration clause like the one ALI cites to does not bar claims for fraudulent inducement or fraudulent misrepresentation. *See Rodriquez v. Tombrink Enters, Inc.*, 870 So. 2d 117, 119 (Fla. 2d DCA 2003)("The existence of an integration clause does not bar a claim for fraudulent misrepresentation."); *Mejia v. Jurich,* 781 So. 2d 1175, 1178 (Fla. 3d DCA 2001) ("The existence of a merger or integration clause, which purports to make oral agreements not incorporated into the written contract unenforceable, does not affect oral representations which are alleged to have fraudulently induced a person to enter into the agreement."); *NM Residential, LLC v. Prospect Park Development, LLC,* 336 So. 3d 807, 811 (Fla. 2d DCA 2022) (finding that the integration clause did not bar the fraud claims because the contract "merely disclaimed the *making of* and reliance on any misrepresentations, not legal responsibility for representations that *might have been* made").

D. Defendants' Misconduct Rises to the Level of Outrageousness Required for Punitive Damages

As part of their argument, Defendants once again misrepresent the record evidence and proffered evidence that support CFTAS's claims for punitive damages at this pleading stage. As repeatedly

addressed above, there is sufficient record and proffered evidence to establish a "reasonable basis" that ALI had no intention of honoring his representations regarding his transfer of intangible assets, post-transaction retirement, and/or lack of competitive activity, and that he intentionally, with full knowledge of the wrongfulness of his conduct, accepted payment from CFTAS only to subsequently fully deprive CFTAS from the benefit of its bargain. This is the type of "outrageous conduct" carried out with "wrongful intention" that is contemplated by the cases cited by Defendants. *See Perlmutter,* 376 So. 3d at 36; *see also Lee Cnty. Bank v. Winson,* 444 So. 2d 459, 463 (Fla. 2d DCA 1983) ("Punitive damages may be properly awarded only where a tort involves malice, moral turpitude, **or wanton and outrageous disregard of a plaintiff's rights.**") (emphasis added). The record and proffered evidence establish a reasonable basis that ALI engaged in an intentional fraudulent scheme in complete derogation of CFTAS's rights. Cheating CFTAS out of $1.3 million by removing any value from the assets sold is exactly the type of outrageous conduct that punitive damages are intended to punish.

3. The Trial Court Did Not Abuse its Discretion and A.A. Ali and Ali Have Not Been Prejudiced.

In determining whether to grant a motion for leave to amend, "all doubts should be resolved in favor of allowing an amendment, and the refusal to do so generally constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." *Crown v. Chase Home Fin.,* 41 So. 3d 978, 979-80 (Fla. 5th DCA 2010); *Drish,* 298 So. 3d at 724 (same). In the absence of one of these three elements, the Court should not deny leave solely based on the passing of a case management deadline. *See State Farm Mut. Auto. Ins. Co. v. Global Neuro and Spine Institute,* 323 So. 3d 754 (Fla. 4th DCA 2021) ("The reasons the county court gave for denying State Farm's motion for leave to amend – the pretrial order and how long the case was pending – may be relevant to a court's determination of prejudice or abuse of the amendment process. But, without more, those reasons are not enough to find prejudice or abuse of the process."). Further, "[w]hether granting the proposed amendment would prejudice the opposing party is analyzed primarily in the context of the opposing party's ability to prepare for the new allegations or defenses prior to

trial." *Drish,* 298 So. 3d at 724 (quoting *Morgan v. Bank of N.Y. Mellon,* 200 So. 3d 792, 795 (Fla. 1st DCA 2016).

In the Initial Brief, Defendants misrepresent that "[a]llowing CFTAS to amend its Second Amended Complaint caused the trial in this matter to be postponed." Initial Brief at p. 43. Further, Defendants argue that the "court abused its discretion in determining that 'Defendants will not suffer prejudice'" because their continued restriction by the injunction "has caused and continues to cause prejudice to" ALI and A.A. ALI. *Id.* First, as discussed above, the continuation of the trial occurred completely separately from the granting of leave to amend, and at Defendants' request. *Supra* at pp. 24-26. In its discussion of the lack of prejudice to Defendants the lower court even explicitly mentions that the Motion for Leave was filed sufficiently before the trial set for July 1, 2024. [App. 1399]. The lower court also noted that "Defendants have had notice of the issues presented by the amendment both because of the allegations in the operative Second Amended Complaint and also because the issues sought by the amendment were addressed during discovery, as shown by the record evidence." [App.1399-1400]. Accordingly, the court found that there was no prejudice because Defendants had

sufficient time to prepare for the new allegations before trial. *Drish,* 298 So. 3d at 724.

Moreover, Defendants' argument that they are prejudiced by the lower court granting leave because of the continuation of the injunction is based on flawed logic as the Second Amended Complaint (and the Third Amended Complaint) seek a permanent injunction against ALI and A.A. ALI (Counts VI and XVII), and thus, they may continue to be enjoined if CFTAS prevails.

CONCLUSION

For all of the above reasons, the Court should affirm the trial court's Order granting CFTAS leave to claim punitive damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June, 2024, this document was filed with the Court of this Court via the Florida Courts E-Filing Portal, and that a true and correct copy of the foregoing was served via the Florida Court's E-Filing Portal on: Stephen B. Sambol, Esq., ssambol@orlandolaw.net; jdiminich@orlandolaw.net; Erin J. O'Leary, Esq., eoleary@orlandolaw.net; nham@orlandolaw.net; Garganese, Weiss, D'Agresta & Salzman, P.A., Attorneys for Appellants.

By: */s/ Richard I. Segal*
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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Initial Brief has been prepared on a computer using Microsoft Word and Adobe Acrobat, and that it is printed in Bookman Old Style 14-Point font. It contains 9,849 words, exclusive of the cover page, tables, signature block, certificate of service, and certificate of compliance.

By: */s/ Richard I. Segal, Esq.*
Richard I. Segal, Esq.