IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D23-1288

BOATS GROUP, LLC,

Appellant,

v.

VERIHULL LLC d/b/a BOAT HISTORY REPORT,

Appellee.

BRIEF OF APPELLEE, VERIHULL LLC d/b/a BOAT HISTORY REPORT

ON APPEAL FROM A FINAL JUDGMENT ENTERED IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI DADE COUNTY, FLORIDA

A. Sheila Oretsky
Florida Bar No. 31365
Brigid F. Cech Samole
Florida Bar No. 730440
Bethany J. M. Pandher
Florida Bar No. 1010814
Sandra Ramirez Loe
Florida Bar No. 1010385
GREENBERG TRAURIG, P.A.
333 Southeast Second Avenue
Suite 4400
Miami, FL 33131
Telephone: 305.579.0500
Sheila.Oretsky@gtlaw.com
Brigid.CechSamole@gtlaw.com
Bethany.Pandher@gtlaw.com
Sandra.Loe@gtlaw.com
miamiappellateservice@gtlaw.com

Counsel for Appellee, VeriHull LLC d/b/a Boat History Report

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INTRODUCTION

This is a case about a multi-million-dollar company, Boats Group LLC (hereinafter, BG) that exploited a small business, VeriHull LLC d/b/a Boat History Report (hereinafter, BHR), for its own benefit. When it no longer had use for BHR, BG "efficiently breached" an agreement which it knew BHR only entered into with BG because of BG's ability to give BHR the exposure it needed to grow a specific customer base. Throughout its negotiations with BG, BHR made clear that it was not entering into the agreement for monetary compensation, but rather for the valuable integrations on BG's multiple websites, which effectively hold a monopoly over the online advertising of used boats for sale. Despite knowing this, BG dangled the carrot of the integration services to get BHR to enter into the agreement. Discovery later revealed that BG never intended to perform the integration services, which were central to the agreement.

In this appeal, BG asks the Court to overturn an order granting BHR's motion for leave to amend to assert a claim for punitive damages. Because BHR's proffer in the trial court meets the evidentiary requirements to grant the motion, the trial court's order should be affirmed.

STATEMENT OF THE CASE AND FACTS

I. BACKGROUND AND THE ORIGIN OF THIS DISPUTE.

A. The Parties and their Marine Industry Businesses.

BHR was founded in 2005 as a small online company with a vision to service customers globally as a trusted resource for boat history information. (A:31). Akin to Carfax and its role in the pre-owned vehicle market, BHR provides critical historical information, including boat accident and damage history, to customers interested in purchasing a pre-owned boat. (A:31). BHR's business model was originally structured as a business-to-consumer company, where BHR delivered boat history information through its website to pre-owned boat purchasers, in exchange for a fee. (A:31).

Originally known as Dominion Marine Media (DMM),[1] BG is a Miami-based advertising and software company that operates as a one-stop shop for the purchase and sale of boats online. (A:31–32). Representing itself as the "internet partner of choice for the recreational marine industry" and "the leading global marine classifieds marketplace and marketing software

[1] DMM owned the brand of service marks in the marine industry known as Boat Trader, YachtWorld, and boats.com. (A:32). In 2016, DMM and its brands were acquired by the private equity fund APAX Partners, LLP. See p. 11–13, *infra*. After the acquisition, DMM changed its name to BG, and the brands all operate under the "Boats Group" umbrella. (A:32). In the operative complaint, "[a]ll references to BG . . . [also] refer to DMM." (A:32).

solutions provider to marine brokers and dealers," BG operates several well-known websites in the boating industry.[2] (A:31–32). Functioning as a "lead generator" for its "internet partners," BG provides digital solutions serving thousands of dealers and brokers in over 143 countries. (A:32).

BG essentially serves as the MLS for the boating industry. (A:32). On the back-end of its various websites, boat dealers and brokers have access to a portal called BoatWizard, through which they can post, manage, and search inventory online. (A:32). Once uploaded, on the front-end, consumers can directly access that inventory through the world's largest regional marine marketplace for boats and yachts. (A:32).

B. The Parties Extensively Negotiate to Go into Business Together.

As early as 2014, the parties began discussing a potential partnership. (A:33). BHR was to provide BG with several solutions to enhance BG's customer experience and to streamline the purchase and sale process on BG's websites. (A:33). These solutions, along with others that were not being provided by BHR, were collectively dubbed "Project Tugboat," which was created as a response to the web-based contract management solution provided by YachtCloser who BG viewed as its "1st credible competitor."

[2] These websites include www.boattrader.com, www.yachtworld.com, and www.boats.com. (A:31).

(A:33). The goal was for BHR to help BG develop a solution that would compete with YachtCloser. (A:33).

The parties negotiated heavily for almost two years. (A:33). BHR ultimately agreed to provide to BG a library of the documents required by each state/territory and the United States Coast Guard (USCG) for the registration and titling of a boat (the Documentation Services). (A:33). BHR would also keep abreast of any changing laws and documentation requirements and keep the document library updated. (A:33). In addition, BHR agreed to create a custom API, known as the YachtTracker API, which would allow BG to access BHR's current and historical USCG data to aid in the automated completion of forms for boats listed and sold through BG's websites (the YachtTracker API Service). (A:33).

BHR agreed to provide these solutions for a largely reduced fee in exchange for valuable integrations on BG's websites and BoatWizard, as well as display and banner advertising. (A:33). The integrations would offer BHR's boat history and damage reports to BG's dealers and brokers, as well as consumers on certain listings on BG's website. (A:34). The advertising would give BHR access to BG's over 5,000 subscribing dealers and brokers and 65 million unique website visitors annually. (A:33). Overall, the integrations and display/advertising would greatly increase the visibility of

BHR's product—providing exposure to millions of customers and thousands of brokers and dealers while serving BG's goal of being a "lead generator." (A:34). This was not only a tremendous growth opportunity for BHR, but it would have revolutionized the boating industry much like CarFax had done for the automotive industry. (A:34). Due to the profound impacts on each of their businesses, negotiations between BG and BHR continued for approximately two years. (A:34).

As early as February 2015, the parties understood the importance of the integrations to BHR as the foundation of any deal. (A:18). After meeting with BG executives in Miami to discuss an updated proposal regarding a forthcoming agreement, Caroline Mantel, BHR's Director of Business Development, expressed her understanding that, based on BG's representations at the meeting, the "BoatWizard integration" could be executed "rather quickly," while some additional time would be needed for BG to revamp its site to accommodate "the new search results text links/icons." (A:18). BHR emphasized "**monetary compensation is not [our] primary goal in this proposal**" and that BHR would be "covering the upfront costs of developing [the] project in exchange for integrating the [Integration Services] quickly," *i.e.,* "within the next few months." (A:19 (emphasis added)). In March 2015, Ian Atkins, CEO of BG, responded,

"CLEARLY WE ARE INCENTIVISED [sic] TO PROVIDE THE FUNCTIONALITY YOU SEEK AND WILL KEEP YOU APPRAISED OF PROGRESS TOWARDS YOUR GOAL." (A:19). Marius de Beer, BG's Director of Technology, added, "[BG] is incentivised [sic] to incorporate BoatHistoryReport into BoatWizard and the search result pages" and represented that BoatWizard Integration would be possible by "early Q3 2015." (A:19).

Through the summer of 2015, BG continued to provide BHR "updates" concerning the planning and preparation of the integration services. For example, on July 15, 2015, Tim Claxton, BG's Director of Product Development, inquired about a "revenue share opportunity" if BG sales force was to market BHR's products "for integration into our sites and BoatWizard." (A:19). Days later, Mr. Claxton represented that "the BHR being added into [BG]" was discussed, "should happen **asap**," and that he would "jump on defining this as **first priority**"—even suggesting a call to "focus on the BHR/provisioning integration." (A:19 (emphasis added)). By the end of July 2015, BG represented to BHR "we **now have everything we need. . . for integration**." (A:19 (emphasis added)). The parties continued to correspond and, in February 2016, BHR again reemphasized the importance of integrations to any potential agreement, stating "[b]ased on previous

conversations and contracts, we should have the[] integrations by March or soon after; we have brokers waiting for these integrations to take place." (A:20). Mr. Atkins responded, "your integration is on our agenda." (A:20).

BG's internal correspondence during this time exposes a different story. (A:20). For example, on March 2, 2016, BG executives described the integration services aspect of the agreement as "**all bollox**." (A:20 (emphasis added)). On April 13, 2016, Mr. Atkins and another BG executive described the integration services, referred to in the Agreement as the Elite Services Program, as "**irrelevant and stupid**." (A:21 (emphasis added)). Indeed, despite assurances to BHR that BG was fast-tracking integration, BG never even began to scope the work for provision of such services. (A:21–22).

C. The Agreement.

On July 1, 2016, BHR and BG entered into a Memorandum of Understanding (the Agreement) whereby each party was to act "as a supplier of services to the other." (A:34, 46–52).[3] Pursuant to the Agreement, BHR would provide the Documentation Services, including: "compil[ing] and deliver[ing] all documents and forms required by the laws of each

[3] Because the Agreement was executed before DMM was acquired and changed its name, the Agreement references DMM. (A:32, 46–52). In the acquisition, APAX Partners, LLP assumed the Agreement. (A:32).

state/territory of the United States and by the [USCG] in connection with the documentation, registration, and titling of yachts, boats, marine vessels, and other watercraft." (A:34). For the Documentation Services, BHR was to receive $250 monthly for each jurisdiction, with payment commencing upon the delivery of each jurisdiction-specific document set. (A:34, 46–47 (§1)). For the YachtTracker API Service, BHR would provide BG with an Application Programing Interface (API) that would allow BG to search BHR's USCG documentation database. (A:35). This would enable BG to use the information to pre-populate USCG documents provided by BHR under the Document Services, as well as in connection with DMM's other products and services. (A:35). For this service, BHR was to receive $4,000 per month with an annual 10% increase. (A:35, 47 (§2)).

For its part, BG agreed to provide (1) advertising services and (2) the implementation of an Elite Services Program (hereinafter, the Integration Services) to BHR. (A:35). For the advertising services, BG was to: (i) display banner advertising each month on its website until $7,000 in value (based on "impressions" or the number of times a customer accesses the advertisement) was delivered to BHR; and (ii) provide fixed-position links on the ad-details pages of United States boat listings on BG's various websites, similar to those advertisements BHR had placed with DMM since January 1,

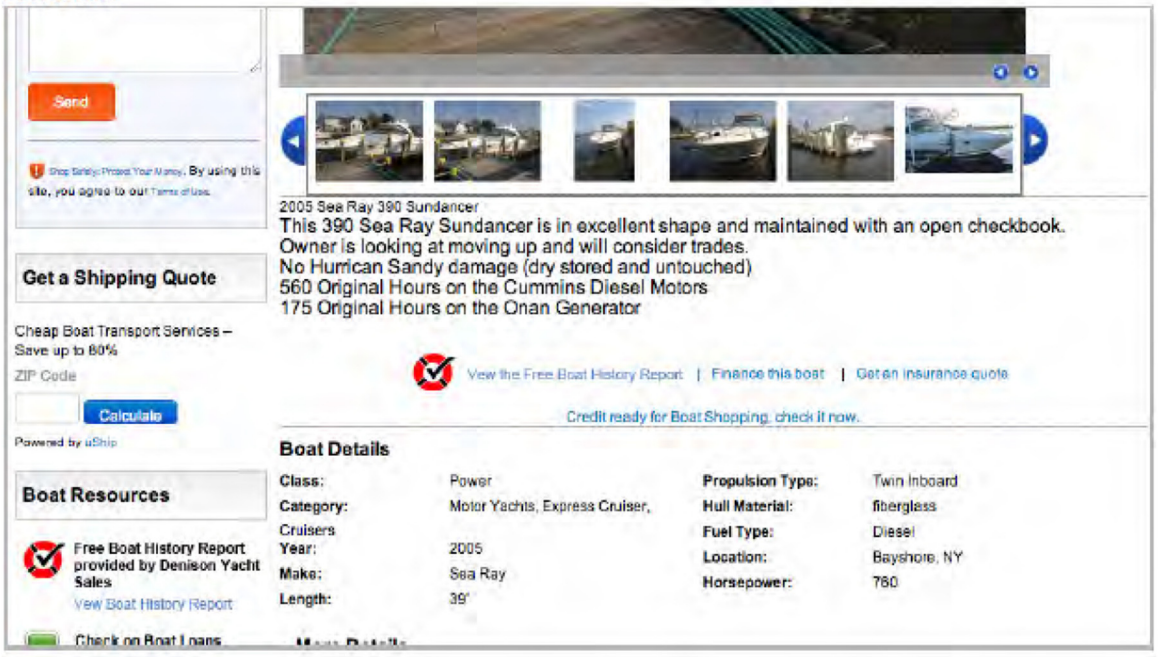
2016. (A:35). Finally, BG agreed that it would not furnish advertising to another company that provides the same services that BHR was advertising. (A:35, 47–48 (§3)).

As to the Integration Services, BG agreed to integrate BHR's website through the use of BHR's Fast Link API to provide automated access for subscribed dealers and brokers to BHR's boat history and damages reports, while also streamlining subscriptions for new dealers and brokers. (A:35–36; 47–48 (§4)). Importantly, the Integration Services would also prominently place BHR's services on BoatWizard and the front-end portion of BG's websites, allowing BG to conveniently provide this critical information to dealers, brokers, and consumers. (A:36). In performing the Integration Services, BG was also obligated to provide additional value to BHR by utilizing its account managers to offer and promote BHR's services and displaying BHR's icon and text link on certain BG search result pages, among other obligations. (A:36). Specifically, on BG's websites and the BoatWizard portal, brokers and dealers would be able to incorporate a "Free Boat History Report" link on their boat listings. (A:10–11). Boats with the Free Boat History Report would be highlighted with a red circle and a black checkmark indicator, BHR's logo, followed by a link:

Search Results:

(A:10–11).

Ad Details:



(A:12).

These Integration Services would differentiate listings and advertisements from those without a BHR subscription. (A:10–12). Boats

advertised by brokers or dealers without a BHR subscription would not include the symbol and link. (A:10–12).

The Agreement contained a clause that incentivized BG's prompt performance of the Integration Services by imposing a delay fee of $2,750 per month (hereinafter, the Integration Delay Fee) with an additional $2,750 due the first day of each subsequent month that services were not launched. (A:36, 48). The Agreement also contained an exclusivity provision, by which BG agreed that BHR would be the exclusive provider of the services contemplated therein. (A:36).

D. The Apax Acquisition, BHR's Performance Under the Agreement, and the Aftermath.

At no time during the two-year negotiation period did BG reference a potential acquisition or change of ownership. (A:38). Instead, on July 19, 2016, eighteen days after the Effective Date of the Agreement, BHR learned by press release that BG had been acquired by APAX Partners, LLP (hereinafter, Apax), a private equity fund which claims to have raised and advised funds with aggregate commitments in excess of $50 billion. (A:38). As part of the acquisition, Apax assumed the Agreement. (A:32).

In August 2016, BHR began providing the Document Services to BG. (A:36). By December 2016, BHR had completed forty states/territories/USCG. (A:38). In October 2016, BHR began providing the

YachtTracker API Service to BG. (A:37, 54). On October 28, 2016, BHR advised BG that the YachtTracker API Service was ready for use and BG replied this was "great news" and that it would "forward . . . for testing." (A:37, 54).

BG failed to perform the Integration Services (and other services) under the Agreement altogether. (A:37–38). Indeed, BG **failed to take even preliminary steps** to complete the Integration Services.[4]

During this time, BG continued to represent that the Integration Services were near-completion, and that BG would perform its obligations under the Agreement. (A:18–25). Unbeknownst to BHR, however, internal discussions at BG were not focused on performance of the Integration Services—in fact, the work was never even "scoped" as misrepresented to BHR—or BG's other contractual obligations. (A:22, *see also* 18–25). BG did not internally recognize its obligations under the Agreement in a document with the heading "Obligation: Under contract to do." (A:21–22).

[4] With respect to BHR's provision of services, BG, after three months, ceased paying monthly fees for the Document and YachtTracker API Services. (A:35). After BG made a single $4,000 payment to BHR for the YachtTracker API Service BHR was providing, BG ceased making such payments from November 2016 onward. (A:35). At the same time, BG ceased paying the monthly Integration Delay Fee due to BHR. (A:37, 39). Overall, BG never provided any of the $7,000 in value, per month, of the advertising services to BHR and never completed (or even took steps to complete) the Integration Services. (A:37–38).

Instead, on September 26, 2016, BG described the BHR Agreement as a "**must**," using quotation marks to describe the fact that BG's obligations existed "because we signed a contract – **one we're in violation of since day 1**." (A:22–23 , 200 (emphasis added)). Through the fall of 2016, BHR continued to follow up with BG regarding the status of the integration, and BG continued to misrepresent that "the integration is in the priority stack." (A:23). But BG's internal communications again revealed that as of October 13, 2016, "the instruction was to pause all efforts until further notice." (A:352). By December 2016, BG's internal communications relating to the Agreement reflected it was looking for "**get out options**." (A:56 (emphasis added)).

On December 14, 2016, despite BHR's full performance of its obligations under the Agreement, BG called BHR and unexpectedly requested that it cease all work. (A:37). One month later, on January 27, 2017, BG announced via press release that it had acquired YachtCloser (a violation of the exclusivity provision of the Agreement)—the competitor BG had contracted BHR to assist in competing against. (A:38).

II. THE TRIAL COURT PROCEEDINGS.

A. BHR's Claims.

After BG's sudden termination of the Agreement and its acquisition of YachtCloser to provide services, in violation of the Agreement, and after attempting to negotiate a resolution for over two years, BHR sued BG. (A:556–601). BHR pleaded claims for breach of contract (Counts I and II), breach of the implied covenant of good faith and fair dealing (Count III), unjust enrichment (Count IV), and fraud in the inducement (Count V). (A:556–601).

BHR moved for partial summary judgment (the Partial MSJ) on its breach of contact claims (Counts I and II) based on the undisputed validity of the Agreement and BG's pleadings, discovery responses, and testimony, which established that BG materially breached the Agreement as a matter of law. (A:612–56). In its opposition to the Partial MSJ (the Opposition), BG conceded to breaching the Agreement and that partial summary judgment was proper as to most of the breaches. (A:666). BG admitted that (i) "the Court should grant summary judgment as to Count I on liability only for the services related to documentation and YachtTracker API"; and (ii) "summary judgment is appropriate on liability for the breach of the general exclusivity provision." (A:657–58, 666). BG argued summary judgment should be

denied as to a breach of contract related to the advertising services under the Agreement because of disputed facts. (A:657–58).

The trial court entered an agreed order on the Partial MSJ, finding in favor of BHR under Count I for BG's failure to (i) pay the contracted fee for its provision of the Document Services and the YachtTracker API Service and (ii) provide BHR with the contacted-for Integration Services. (A:674–81). Under Count II, the trial court granted the motion, in part, because "BG breached the exclusivity provision of the Agreement prohibiting BG from engaging a third party to provide substantially similar services to those provided by BHR" when it acquired YachtCloser. (A:677–78). The court denied the Partial MSJ on BHR's claim based on BG's failure to (i) provide the advertising services; and (ii) provide advertising to a BHR competitor, citing disputed facts. (A:676–77).

B. BHR's Motion for Leave to Assert a Claim for Punitive Damages and Proffer.

In April 2023, BHR moved for leave to file a second amended complaint to add a claim for punitive damages (the Motion). (A:8–28 (Motion), 29–445 (Proffer)). Based on BG's "marathon of lies and deception aimed at inducing BHR to enter into the Agreement and keeping BHR on the hook for its [contractual] obligations"—despite the fact that "BG had no plan or intention to fulfill its obligations to BHR at all"—BHR asked the court to authorize a

claim for punitive damages. (A:14; *see also* 8–28). In support, BHR proffered over 400 pages of documents and testimony, secured in discovery, which showcased, among other things:

- BG's understanding of the importance of the Integration Services to BHR as a basis for BHR to enter into the Agreement;
- BG's repeated assurances to BHR concerning the timely development and speedy implementation of the Integration Services **before** the Agreement was executed with BG's knowledge of the concealment of the impending Apax acquisition;
- BG's internal communications and testimony by its corporate representatives that proved those representations false; and
- BG's repeated false assurances after execution of the Agreement as to progress made toward scoping the Integration Services, among other omissions and misconduct.

(A:29–445); *see also* p. 7–9, *supra*.

As part of its Motion and Proffer, BHR attached its proposed Second Amended Complaint (the SAC). (A:29–445). Count V asserted a claim for fraud in the inducement. (A:43–44). In Paragraph 71 of that Count, BHR specifically alleged BG's omissions and misconduct:

> BG intended to induce BHR to enter into the Agreement and immediately obtain BHR's solutions knowing that it would eventually cease performing on its own end. Specifically, BG knew that plans to acquire YachtCloser with Apax funds were on the horizon and that if the acquisition was completed, it would no longer need BHR's services. **Moreover, BG never intended to perform the Integration Services it was obligated to perform under the Agreement**. BHR reasonably relied on BG's omission by conceding to several terms and lower fees that it would not have otherwise agreed to had it known that BG would be operating under new ownership.

(A:43–44 (emphasis added)).

Based on the allegations, in connection with its fraud in the inducement claim, BHR included its request to seek punitive damages. (A:44).

C. BG's Opposition.

BG opposed the Motion for Leave on three primary bases: that "1) BHR fails to allege an independent tort[;] 2) there are absolutely no facts that even allude to an intentional misconduct or gross negligence by BG as required under the statute[;] and 3) any facts that show miscommunication are just that, as BG had no benefit from intentionally misleading BHR." (A:450; *see also* 446–56).

BG reproduced a series of communications attached to the Proffer, offering its interpretation of what those communications showed. (A:452–54). BG did not, however, address any of the proffered communications that pre-dated execution of the Agreement. *See* A:446–56. Likewise, nowhere

in the opposition did BG argue that punitive damages would be improper for an apparent failure to allege vicarious liability as it does in this Court or that BHR had failed to plead that BG had fraudulently misrepresented its intention to perform the Integration Services.[5] *See* A:446–56. BG argued that BHR failed to meet the legal standard to add a punitive damages claim under section 768.72(2) because "[a]t best, BHR has put forth a showing of BG miscommunicating information." (A:448). BG argued that the "more common reading of the evidence" was its interpretation that BG was "under new ownership who had their own priorities" which "did not include allocating resources to the BHR [Agreement]." (A:448–49).

D. The Trial Court's Ruling.

i. The hearing on the Motion.

On July 6, 2023, the trial court conducted a hearing on the Motion. (A:490–546). BHR explained its Proffer established four essential facts. (A:505). First, that "BG fraudulently misrepresented its intent to perform the integration obligations under the [A]greement." (A:505). Second, BG

[5] BG's assertion that it obtained no benefit from intentionally misleading BHR is not relevant to the analysis but nevertheless completely ignores the fact that the Integration Services were the only reason BG was able to (1) obtain BHR's services and agreement to enter into the Agreement; and (2) secure much lower rates for the services BHR was required to perform for BG under the Agreement.

"engaged in this conduct with the intent to induce BHR to enter into and perform under the [A]greement, despite having no intention to comply with its own obligations under the [A]greement." (A:505–06). Third, that "BG was fully aware of the importance of the integrations . . . [a]nd BHR's expectation that [it] would happen rather quickly." (A:506). And fourth, that "BG repeatedly provided BHR, before and after the contract was signed, with false reassurances by insisting that the integrations were in progress, although BG had no desire to move forward with the integration services"; essentially, to "dangle the carrot in front of BHR so BHR would enter into the [A]greement and keep working on its own obligations" thereunder. (A:506).

Consistent with its written Opposition, BG argued the Motion should be denied for BHR's failure to: (i) allege an intentional tort separate from the Agreement; (ii) proffer a reasonable evidentiary basis sufficient to make a reasonable showing of intentional misconduct or gross negligence to support punitive damages; and (iii) because there was "no intention to not fulfill [BG's] obligations" under the Agreement. (A:520–23). BG also argued, for the first time, that BHR had failed to plead its fraud in the inducement claim based on BG's misrepresentation regarding its intent to perform the Integration Services. (A:520–23). BG asked the court to ignore all of the proffered evidence that predated the July 1, 2016 signing of the Agreement as "not

relevant at all" because BHR was suing based on the contract.[6] (A:520–21). Summarizing its position, BG argued the facts did not rise to "some level of egregiousness" because "even if there were miscommunications, even if there was some right hand not knowing what the left hand is doing, that does not rise to the level of an intentional tort" or "egregious conduct." (A:529). BG did not raise the issue of vicarious liability with the court. *See* (A:490–546).

ii. The trial court's oral pronouncement.

Articulating the standard under section 768.72, Florida Statutes, the trial court clarified BHR's burden: "In order for a party to plead the punitive damages claim, they have to . . . [make] a reasonable showing in the evidence – in this case, it was proffered evidence by the claimant – which would provide a reasonable basis for the recovery of such damages." (A:543). Looking at the July 1, 2016 date of the Agreement, the court found:

> There has been evidence shown, proffered by the Plaintiff, of **what the discussions were in the form of e-mails precontract.** And those evidence show what the promises were that the Defendant made to the Plaintiff, and it was very clear from the beginning that the Plaintiff would only enter this contract, this [A]greement, if there was integration, if these services – this was an essential part of the [A]greement. And then, thereafter, the Plaintiff has proffered evidence of what the allegations are

[6] Later during the hearing, counsel for BG conceded because BHR asserted a fraud in the inducement claim, "the statements you're looking at that go to that are right before . . . the contract is signed." (A:540).

> that the defense's true intention were, that they really thought that this [A]greement was irrelevant, that it was stupid, this term "bullocks" [sic] that was used, an admission on the part of Mr. Selzer that it was never a priority, and a statement by the BG individual, I think it was the September 26th, 2016 email, that said they were in violation from day one.
>
> Ultimately, this Court is not here to determine if there was, in fact, fraud in the inducement. That's ultimately, for the jury, and **that's the evidence that's going to go to them**, and they are to make a reasonable inference from the facts and anything else that's presented at trial as to whether there was, in fact, an intent to defraud the Plaintiff into entering this [A]greement where they had no intention to act on it or not. If the jury believes it, that's the case.

(A:543–44 (emphasis added)).

The Court clarified:

> So at this point, I think that the Plaintiff has provided sufficient evidence – and I'm not taking into account the delays, because I agree with Mr. Wahid that those were . . .not real evidence of any kind of intent to defraud. . . . **But I think Plaintiff has provided enough evidence in the form of pre-contract and post-contract emails that goes to show that there is a reasonable basis for the punitive damages claim**, and for that reason, I'm going to grant the [Motion].

(A:544–45 (emphasis added)).

iii. The trial court's written order.

Following BHR's submission of a proposed order, the trial court entered its written order. (A:5–6). The court, "having reviewed the Motion, [BG's] Response in Opposition to [the Motion] . . . , having heard argument of counsel, including the proffer of evidence presented by [BHR's] counsel,

and being otherwise fully advised in the premises" granted the Motion. (A:5). The court expressly ruled "Plaintiff has made a reasonable showing, through the proffer of evidence, that provides a reasonable basis for the recovery of punitive damages." (A:5 (citing § 768.72(1), Fla. Stat.; Fla. R. Civ. P. 1.190(f); *The Bentley Condo. Ass'n, Inc. v. Bennett*, 321 So. 3d 315, 317 (Fla. 3d DCA 2021))).

This appeal timely followed.

SUMMARY OF ARGUMENT

1. *First*, as is clear from the face of the pleadings, BHR's fraud in the inducement claim was always premised on the theories that BG omitted or concealed facts regarding the impending Apax acquisition ***and*** BG misrepresented its intention to provide (and make progress toward) the valuable Integration Services that would have revolutionized BHR's business. The trial court correctly rejected BG's inconsistency argument because it was contradicted on the face of the pleadings and by the proffered evidence.

2. *Second*, BG takes the untenable position that BHR's allegations somehow cannot establish fraud in the inducement because BHR did not plead vicarious liability. Having failed to present this argument below, BG has not preserved it for appellate review. Regardless, BG's argument lacks

merit. The SAC asserts a theory of direct liability against BG, alleging that BG engaged in intentional misconduct (or at least gross negligence) by withholding specific information and misrepresenting its true intentions. BHR is not asserting any claim against any individual at BG—it is pursuing its claims against BG **directly**, as authorized under Florida law.

3. *Third,* BG claims that BHR failed to make a reasonable showing by evidence in the record to support the recovery of punitive damages . BG is wrong. BG essentially argues a pleading deficiency exists that precluded the trial court from authorizing the punitive damages amendment. The trial court rejected BG's arguments regarding the sufficiency of the pleadings as contradicted by the express allegations in BHR's complaint that "BG never intended to perform the Integration Services it was obligated to perform under the Agreement" and correctly found a reasonable evidentiary basis exists to satisfy section 768.72 based on pre- and post-execution emails and the testimony of BG's corporate representatives. Florida law is clear—when a reasonable evidentiary basis is shown, the question of punitive damages recovery is one for the jury. Because BHR need only make, at the pleading stage, a reasonable showing by evidence in the record, the trial court correctly determined that a reasonable evidentiary basis exists for recovery of punitive damages by the proffered communications and testimony

illustrating BG's lack of intent to ever provide the Integration Services by its repeated omissions and misrepresentations regarding the progress toward and delivery of the Integration Services.

4. *Finally*, the trial court's oral and written rulings fully comply with Florida law. The trial court, in its oral pronouncement of the ruling, specifically articulated how the evidence BHR proffered supports a reasonable basis for recovery of punitive damages. Quoting from BHR's SAC, BG's internal correspondence, and BG's corporate representative deposition testimony, the court expressly found these communications supported the requisite reasonable showing to seek punitive damages. Then, the court's written order made the required statutory finding that BHR satisfied the requirements of section 768.72 and granted the Motion. Together, the oral ruling and written order supply this Court with a complete record to facilitate appellate review. The trial court was required to do nothing more and this Court should affirm.

STANDARD OF REVIEW

This Court reviews an order granting leave to amend to assert a claim for punitive damages de novo. *Grove Isle Ass'n v. Lindzon*, 350 So. 3d 826, 829–30 (Fla. 3d DCA 2022). A movant's burden at the pleading stage, however, is lower than at trial. To plead a claim for punitive damages, a

movant need only make a "**reasonable showing** by evidence in the record or proffered by the claimant which would provide a **reasonable basis** for recovery of such damages." *Id.* at 830 (quoting § 768.72(1), Fla. Stat. (emphasis added)); *accord Deaterly v. Jacobson*, 313 So. 3d 798, 801 (Fla. 2d DCA 2021) (citing § 768.72, Fla. Stat.; Fla. R. Civ. P. 1.190(f)) (distinguishing pleading burden from burden of proof at trial). Clear and convincing proof is not required. *Deaterly*, 313 So. 3d at 801.

ARGUMENT

I. BHR'S FRAUD IN THE INDUCEMENT CLAIM IS CONSISTENT WITH ITS MOTION AND PROFFER.

BG begins with the uncontroversial proposition that "[i]ssues in a case are made solely by the pleadings" and a litigant must "state [its] legal positions within a . . . pleading" to put the parties and court on notice of the nature of its claims. IB:11 (citing *Hart Props., Inc. v. Slack*, 159 So. 2d 236, 239 (Fla. 1963); *Bank of Am. Nat' Ass'n v. Asbury*, 165 So. 3d 808 (Fla. 2d DCA 2015)).[7] BHR does not dispute that a proposed amended complaint

[7] *Slack* and *Ashbury* bear marginal relevance to the issues on appeal. *See* IB:11. Neither case concerned a trial court's ruling on a motion for leave to assert a claim for punitive damages, which is the subject under review by this Court. *See Slack*, 159 So. 2d at 239 (discussing general pleading requirement in context of summary judgment); *Asbury*, 165 So. 3d at 808–09 (reversing entry of final judgment in a foreclosure action for plaintiff's failure to allege condition precedent or noncompliance in complaint).

must accompany a motion for leave to amend to add a claim for punitive damages, and that the trial court "must first consider whether [that complaint] actually sets forth a claim that the defendants' conduct" was, at least, grossly negligent. *See Varnedore v. Copeland*, 210 So. 3d 741, 744–45 (Fla. 5th DCA 2017). That is why, unlike the plaintiff in *Varnedore*, BHR attached its proposed SAC to the Motion. *Compare id.* at 745–46 (court departed from essential requirements of the law when it heard and ruled on motion to amend when plaintiff had not attached a proposed amended complaint) *with* (A:8–44). BHR alleged precise facts to establish its theories of liability for BG's fraudulent acts and omissions (A:30–44), and thereafter proffered evidence to make a reasonable evidentiary showing of its entitlement to seek punitive damages on its fraudulent inducement claim. (A:45–445).

In its Opposition, BG never argued that BHR's SAC was inconsistent with the facts or evidence proffered with the Motion. (A:446–56; 519–32). Instead, BG claimed BHR failed to allege an independent tort, and that, even if it did, the facts and proffered evidence were insufficient to establish a reasonable basis to seek punitive damages. (A:446–56; 519–32). Then, during the hearing on the Motion, BG for the first time asserted that BHR had failed to (1) plead an intentional tort and (2) assert that its punitive damages claim was tied to a fraud in the inducement claim. (A:520–21). However, in

comparing BHR's allegations in the SAC to those alleged in the Motion and Proffer, BG merely recasts BHR's pleadings to manufacture an "inconsistency." IB:13–16.

Contrary to BG's assertion, BHR's allegation that "BG fraudulently misrepresented its intent to perform the integration obligations under the [A]greement" was not asserted "for the first time" at the hearing on the Motion. IB:12. As is clear from not only the SAC—but also the Amended Complaint, filed in August of 2020, and the Motion—BHR's fraudulent inducement claim was **always** predicated on the theory that "BG never intended to perform the Integration Services it was obligated to perform under the Agreement" as expressly alleged within the Amended Complaint, the SAC, and the Motion. (A:43 at ¶71, 569 at ¶71; *see also* A:18–26).

To avoid this truth, BG misconstrues BHR's fraudulent inducement allegations. From the outset, the Court should reject BG's invitation to engage in improper, premature appellate review of the sufficiency of the pleading of BHRs fraudulent inducement claim as "[t]he procedural limitations imposed by the [Florida Rules of Appellate Procedure] do not permit review of 'tag along' orders contained within reviewable non-final orders." *Suggs v. Sw. Fla. Water Mgmt. Dist.*, 953 So. 2d 699, 700 (Fla. 5th DCA 2007) (citing *RD & G Leasing, Inc. v. Stebnicki*, 626 So. 2d 1002 (Fla.

3d DCA 1993)); *accord Swartz v. CitiMortgage, Inc.*, 97 So. 3d 267, 268 n.1 (Fla. 5th DCA 2012) ("Even if the two rulings had been made in the same order, the issues relating to the denial of the motion to dismiss would not properly be before us."). The Florida Rules of Appellate Procedure do not authorize interlocutory review of the trial court's determination in BHR's favor of the sufficiency of its claims. *E.g., Swartz*, 97 So. 3d at 268 n.1.

Even so, BG's argument lacks merit. BG essentially claims that because BHR did not duplicate the exact language from the Motion in the SAC, it cannot proceed on the theory that BG omitted or concealed facts[8]—including BG's true intention to never deliver the Integration Services—to induce BHR to enter into the Agreement. IB:11–17; *see DeSanto v. Grahn*,

[8] The Florida Supreme Court has recognized, "misrepresentation and concealment both may constitute actionable fraud, and in some cases **may factually be but two sides of the same legal coin**." *Prentice v. R.J. Reynolds Tobacco Co.*, 338 So. 3d 831, 842 n.3 (Fla. 2022) (emphasis added). Thus, the Supreme Court "has observed that 'where a failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative representations is tenuous.'" *Id.* (citing *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985); *Little v. First Cal. Co.*, 532 F.2d 1302, 1304 n.4 (9th Cir. 1976) ("The categories of 'omission' and 'misrepresentation' are not mutually exclusive. All misrepresentations are also nondisclosures, at least to the extent that there is a failure to disclose which facts in the representation are not true.")). The key for actionable fraud in a concealment case is that "the defendant's fraudulent conduct must convey to the plaintiff a representation, one that is capable of being believed or disbelieved." *Prentice*, 338 So. 3d at 842 n.3. And in evaluating the Motion in the context of BHR's fraudulent inducement claim, the trial court correctly determined BHR satisfied that test.

362 So. 3d 247, 248 (Fla. 4th DCA 2023) (distinguishing between allegations and proffers of evidence, noting "'a reasonable showing by evidence in the record or proffered by the claimant' refers to actual evidence that would provide a prima facie basis to recover punitive damages,'" not bare allegations). But BG's attempt to narrow the scope of BHR's fraud allegations finds no support in the record.

While it is certainly true that BHR alleged more than one fraudulent act by BG to induce BHR to enter into the Agreement (*i.e.,* hiding the impending Apax acquisition and BG's undisclosed true intention never to perform the Integration Services), it cannot be disputed that BG's lack of intent to perform the Integration Services was in fact pled. Indeed, the court was tasked with considering BG's alleged conduct, and evaluating the Motion and proffered evidence to determine if BHR made a reasonable showing by evidence in the record to establish a reasonable basis for recovery of punitive damages on BHR's fraudulent inducement claim. (A:543–45).

The court correctly answered that inquiry in BHR's favor. The court ruled BHR "has proffered evidence of what the allegations are that [BG's] true intentions were, that they really thought this [A]greement was irrelevant," that it was "stupid," . . . "bullocks," [sic] . . . "never a priority," and that BG was "in violation of [the Agreement] since day one." (A:543–44, 534). While the

court did not determine "if there was, in fact, fraud in the inducement"—leaving that to the jury, as is appropriate—BHR "provided enough evidence in the form of pre-contract and post-contract emails" that "rises to the level of intentional misconduct" required to supply a reasonable basis for punitive damages under section 768.72. (A:544–45). BHR's claims asserted in the SAC and the Motion are consistent and no authority BG cites mandates a higher pleading burden.

II. BHR WAS NOT REQUIRED TO PLEAD BG'S VICARIOUS LIABILITY AS A SEPARATE COUNT BUT, IN ANY EVENT, THE SECOND AMENDED COMPLAINT AND MOTION SATISFY SECTION 768.72(3).

Next, BG claims that BHR failed to allege "vicarious liability" in order to impute the wrongful conduct of BG's employees to BG as a corporate entity. IB:17. This argument is not preserved but, even if it was, it lacks merit.

A. BG Failed to Preserve Any Argument Regarding BHR's Failure to Allege Vicarious Liability.

BG raises a new argument entirely absent from its Opposition below, claiming BHR failed to allege BG's vicarious liability to satisfy section 768.72(3), Florida Statutes. IB:17–18. But BG cannot be heard on this argument for the first time in this Court. *Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 So. 2d 306, 308 (Fla. 4th DCA 1990). In *Savage*, the Fourth DCA affirmed a jury's finding of fraud in the inducement and violation of the

Florida Deceptive and Unfair Trade Practices Act, which was sufficient to support a claim for punitive damages being presented to the jury. *Id.* The Court found where the defendant had failed to assert its vicarious liability argument in the trial court, it had waived the challenge for appeal. *Id.* ("We find appellant's *Mercury Motors* vicarious liability argument waived by appellant's failure to raise it at trial and the use of the undisputed jury instructions and stipulated verdict.").

There is no material distinction between the appellant's actions in *Savage*, and BG's conduct here. BG's Opposition was silent as to any concern with respect to vicarious liability as a basis for denial of the Motion for Leave, BG failed to raise that argument at the hearing on the Motion, and BG conceded to liability rulings for breach of contract based on a direct theory and allegations of BG's conduct directly. By failing to raise this apparent pleading deficiency below, BG has waived this argument and the Court should disregard it entirely.

B. The Second Amended Complaint and Motion Allege BG's Wrongful Conduct in Support of BHR's Fraudulent Inducement Claim.

BG's failure to preserve aside, BHR's allegations of BG's misconduct in both the SAC and the Motion assert a **direct** liability theory against BG for

its conduct in fraudulently inducing BHR to enter into the Agreement. BG cites no authority that supports finding a pleading deficiency here. IB:17–19.

A corporation "may be held liable for punitive damages based on either . . . direct or vicarious liability." *Lindzon*, 350 So. 3d at 831; *accord Werner Enters., Inc. v. Mendez*, 362 So. 3d 278, 282 (Fla. 5th DCA 2023) ("A corporation can incur liability for punitive damages based on the actions of its managing agents." (citing *Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158, 1159–61 (Fla. 1995)); *Wells Fargo Bank, N.A. v. Elec. Funds Transfer Corp.*, 326 So. 3d 753, 757 (Fla. 5th DCA 2021); *Fla. Power & Light Co. v. Dominguez*, 295 So. 3d 1202, 1205 (Fla. 2d DCA 2019)). To satisfy this standard, a plaintiff need only allege "wrongdoing by the [corporate entity]." *Lindzon*, 350 So. 3d at 831–32 (no alleged direct liability where plaintiff failed to include **any** "separate, independent allegations in the complaint setting forth any actions taken by an Association officer, director or managing member" and "the absence of any allegations or record evidence showing even simple negligence on the part of the Association"). To support a claim for punitive damages, section 768.72(3) requires that a plaintiff establish that the defendant is "guilty of intentional misconduct or gross negligence." § 768.72(3), Fla. Stat.

BG relies on *Grove Isle Association, Inc. v. Lindzon*, 350 So. 3d 826, 829–32 (Fla. 3d DCA 2022) and invokes case law in which plaintiffs sought recovery by vicarious liability, suggesting that because BHR did not pursue a vicarious liability theory here, it has not satisfied the criteria in section 768.72. IB:17–18. BG's argument ignores the allegations in the SAC, the Motion, and the proffered evidence, and *Lindzon* is plainly distinguishable. There, a condominium owner sued his Condominium Association for violation of Florida's condominium laws by failing to maintain a common element, which resulted in a leaking roof. 350 So. 3d at 828–29. Because the complaint alleged no separate, independent actions taken by the Association or an Association officer, director, or managing member, this Court ruled the plaintiff failed to allege or establish entitlement to assert his claims against the Association as a corporation. *Id.* at 828–29.

Unlike the plaintiff in *Lindzon*, in the SAC, BHR alleged specific wrongdoing **by BG directly** and proffered communications and testimony by BG's corporate representatives and executives acting on BG's behalf. It is undisputed that BHR alleged BG withheld information and misrepresented its true intentions (A:43 (SAC at ¶71)), including attaching the communications BHR relied upon from BG employees and executives to the pleading itself. (A:695–96, 697–98, 712–25). BG argued at the hearing on

the Motion that "even if there were some miscommunications, even if there was some right hand not knowing what the left hand is doing, that does not rise to the level of an intentional tort." (A:529). In addition to those same pre-contract and post-contract emails that BHR attached to the pleading, BHR attached and proffered numerous additional emails in support of the Motion, along with deposition testimony by BG's corporate representative, which the trial court correctly deemed supplied a reasonable evidentiary basis. (A:543–45). For BG to claim an absence of allegations as to its direct wrongdoing is patently false.

Moreover, BG ignores that BG **already admitted** to breaching the Agreement, including by failing to provide the Integration Services. (A:657–58; *see also* 675 ("Given that BG does not, for the most part, dispute BHR's Statement of Undisputed Material Facts and concedes that entry of summary judgment as to portions of Counts I and II is proper, it is clear that on the conceded breaches BHR's Motion should be granted")). Thus, it naturally flows that BG fraudulently induced BHR into signing the Agreement because only BG benefited from dangling the carrot of the Integration Services to induce BHR into signing the Agreement. (A:657–72).

BG preposterously attempts to convince this Court that BHR cannot hold BG liable for its fraudulent acts unless BHR also sues one of BG's

employees personally. The law does not support this argument and BG fails to cite a single case to support that proposition. IB:17–18.

III. BHR MADE A REASONABLE SHOWING BY EVIDENCE IN THE RECORD TO PROVIDE A REASONABLE BASIS FOR RECOVERY OF PUNITIVE DAMAGES.

After a brief detour reasserting its unpreserved vicarious liability and "inconsistency" arguments, BG moves on to challenge the sufficiency of the evidence BHR proffered. BG remarkably declares "[n]o evidence, emails or deposition testimony introduced or proffered by [BHR], show intentional misconduct or gross negligence[,] even under a reasonable basis standard." IB:21. The central theme of BG's evidentiary challenge is its tortured interpretation of what it claims that the evidence shows. BG argues that the evidence shows that it "had full intention to follow through" on the Agreement; that the Apax acquisition simply "shifted" BG's priorities; and that despite internal negotiations to acquire YachtCloser, BG continued to "champion[]" the buildout of Project Tugboat with BHR.[9] IB:21–23. Unfortunately for BG,

[9] Importantly, the decision related to the buildout of Project Tugboat had absolutely nothing to do with BG's obligation to provide the Integration Services to BHR under section 4 of the Agreement and therefore BG's failed attempt to offer a different interpretation is nothing more than a red-herring. To be clear, **BHR was providing** components of "Project Tugboat" under the Agreement, which were created as a response to the web-based contract management solution provided by YachtCloser—**not** the separate, independent and valuable Integration Services that BG was supposed to

this theory misses the thrust of BHR's fraudulent inducement claim. In reality, BG offers nothing more than a competing interpretation of the evidence that the trial deemed sufficient to provide a reasonable basis for recovery of damages. IB:21–35. But an alternative interpretation does not justify a reversal of the trial court's ruling.

A. BHR Made a Reasonable Showing by Record Evidence that BG Engaged in Intentional Misconduct and/or Gross Negligence.

BG quotes the correct statutory framework that governs amendment of claims for punitive damages but misstates a plaintiff's burden. IB:19–25 (Heading III.A.). For clarity, section 768.72 does not require—as BG suggests—a plaintiff to make a reasonable showing as to a defendant's "intentional misconduct **and** gross negligence." *See* IB:23 (emphasis added). Instead, the plain language of section 768.72 requires ***a reasonable showing*** by record evidence that a defendant engaged in "intentional misconduct **or** gross negligence." § 768.72, Fla. Stat. (emphasis added).

"Intentional misconduct" is found when "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,

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provide to BHR, which BG admitted it had never even begun to scope the work for. (A:21–22, 124–25, 127–28).

intentionally pursued that course of conduct, resulting in injury or damages." § 768.72(2)(a), Fla. Stat. "Gross negligence" is found when a "defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct." § 768.72(2)(b), Fla. Stat.

The SAC sets forth BG's intentional misconduct or, at a minimum, its gross negligence, in inducing BHR to enter into the Agreement with false representations and omissions:

> BG **intended to** induce BHR to enter into the Agreement and immediately obtain BHR's solutions **knowing** that it would eventually cease performing on its own end. Specifically, BG **knew** that plans to acquire YachtCloser with Apax funds were on the horizon and that if the acquisition was completed, it would no longer need BHR's services. Moreover, **BG never intended to perform the Integration Services it was obligated to perform under the Agreement**. BHR reasonably relied on BG's omission by conceding to several terms and lower fees that it would not have otherwise agreed to had it known that BG would be operating under new ownership.

(A:43–44 (emphasis added)).

BG meanders between apparently challenging the evidentiary basis BHR proffered and BHR's allegations set forth in support of its fraudulent inducement claim, citing—for reasons that are unclear—Florida precedent that requires a plaintiff to plead fraud claims with specificity. IB:24 (citing *Cedars Healthcare Grp., Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3d DCA

2009); *Robertson v. PHF Life Ins. Co.*, 702 So. 2d 555, 556 (Fla. 1st DCA 1997)). In its application, however, BG wholly ignores the specific allegations in the SAC that substantiate BHR's fraud claim and request for punitive damages based on BG's intentional misconduct and/or gross negligence. *Compare* IB:24–25 *with* (A:43–44 (¶ 71).[10] As set forth above, BHR's fraud claim is based not just on the omission of the Apax acquisition, but also on BG's lack of intent to perform the Integration Services when inducing BHR to sign and perform under the Agreement—an allegation that BG ignores in its brief. *See* Point I, *supra*; (A:43–44 (¶ 71) (alleging "BG **intended to** induce BHR to enter into the Agreement and immediately obtain BHR's solutions **knowing** that it would eventually cease performing on its own end. Specifically, BG **knew** that plans to acquire YachtCloser with Apax funds were on the horizon and that if the acquisition was completed, it would no longer need BHR's services. **Moreover, BG never intended to perform the Integration Services it was obligated to perform under the Agreement**") (emphasis added)). And BG cites no authority that required the trial court to view the proffered communications in a vacuum, considering

[10] Although BG claims to be challenging BHR's "reasonable showing" over BG's intentional misconduct and/or gross negligence, again, BG advocates pleading deficiencies. But under the correct legal standard, BHR properly alleged its fraud in the inducement claim, which provides the hook for punitive damages.

only those that pre-dated execution of the Agreement.[11] IB:25. Surely, as BG asks this Court to view "all communications cited by [BHR]" in "context," the trial court was entitled to do the same. IB:25.

B. The Trial Court Properly Weighed the Proffered Evidence and Determined BHR Established a Reasonable Evidentiary Basis.

Turning to BHR's evidentiary Proffer, BG appears to argue that evidence of fraud is insufficient to support a claim for punitive damages. IB:25–26. While BHR agrees that, pursuant to section 768.72, a plaintiff must proffer evidence providing a reasonable evidentiary basis that the defendant acted with "intentional misconduct" or at least "gross negligence," this Court recognizes "[p]unitive damages are . . . appropriate when a defendant engages in conduct which is **fraudulent**, malicious, deliberately violent or oppressive, or **committed with such gross negligence as to indicate a wanton disregard for the rights and safety of others**." *Manheimer v. Fla. Power & Light Co.*, No. 3D22-1534, 2023 WL 4919540, at *4 (Fla. 3d DCA Aug. 2, 2023) (emphasis added).

"When deciding if the plaintiff has made the required 'reasonable showing' of a 'reasonable basis' for recovery of punitive damages, the trial

[11] Notably, this assertion completely contradicts BG's representation to the trial court that "anything before the July 1, 2016, date [of the execution of the Agreement] was not relevant at all to [BHR's] Motion." (A:521).

court makes a legal determination that is 'similar to the standard that is applied to determine whether a complaint states a cause of action.'" *Werner*, 362 So. 3d at 281–82. Fulfilling its role as gatekeeper, the trial court may not simply accept allegations as true. *Manheimer*, 2023 WL 4919540, at *3 (citing *Bistline v. Rogers*, 215 So. 3d 607, 610 (Fla. 4th DCA 2017)). Instead, the court must weigh both parties' showing when considering whether a reasonable evidentiary basis exists to recover punitive damages. *Id.* (citation omitted). But "[a]t the leave to amend stage, it is not for [the Court] to definitively forecast which view a jury will take, but **only to determine if there is a reasonable view of the evidence that supports the plaintiff's position**." *Werner*, 362 So. 3d at 282 (emphasis added). "Even if the court is of the opinion that the preponderance of the evidence is against the plaintiffs, **it should be left to the jury to decide**." *Bulk Express Transp. Inc. v. Diaz*, 343 So. 3d 646, 647 (Fla. 3d DCA 2022) (emphasis added; citing *Otey v. Fla. Power & Light Co.*, 400 So. 2d 1289, 1291 (Fla. 5th DCA 1981)).

This Court's recent decision in *Manheimer v. Florida Power and Light Company*, is instructive. 2023 WL 4919540, at *4. There, a homeowner sued FPL for ejectment and declaratory relief after discovering a powerline encroached on his property. *Id.* Based on FPL's failure to remove the powerline after learning of its encroachment, the homeowner moved to

assert a claim for punitive damages, alleging intentional misconduct and gross negligence. *Id.* Review of the evidence proffered by the parties showed that "the shifting of the powerline onto [the homeowner's property] was not intentional and [had] resulted in no injury to [the homeowner] other than alleged trespass itself." *Id.* This Court affirmed the trial court's denial of plaintiff's motion for leave because "there [was] **nothing in the record to show** that [FPL] or its contractor acted with wantonness, actual malice, deliberation, gross negligence, or utter disregard of appellees' property" by failing to remove the powerline "while the litigation was ongoing." *Id.* at *4–5 (emphasis added). This Court emphasized "[p]unitive damages are [only] appropriate when a defendant engages in conduct which is **fraudulent**, malicious, deliberately violent or oppressive, or **committed with such gross negligence as to indicate a wanton disregard for the rights and safety of others**." *Id.* at *4 (citation omitted; emphasis added). Unlike the homeowner in *Manheimer*, BHR proffered evidence of such conduct here:

- As early as February 2015, the parties understood the importance of the integrations to BHR as the foundation of any deal. (A:18, 89–91).
- In March 2015, after meeting with BG executives in Miami to discuss an updated proposal regarding a forthcoming agreement, Caroline Mantel, BHR's Director of Business Development, expressed her understanding that, based on BG's representations at the meeting, "BoatWizard integration" could be executed "**rather quickly**," while some additional time would be needed for BG to revamp its site to

accommodate "the new search results text links/icons." (A:18, 89 (emphasis added)).

- BHR emphasized "**monetary compensation is not [our] primary goal in this proposal**" and that BHR would be "covering the upfront costs of developing [the] project in exchange for integrating [the Integration Services] quickly," *i.e.,* "within the next few months." (A:19, 90 (emphasis added)).

- In March 2015, Ian Atkins, CEO of BG, responded, "CLEARLY WE ARE INCENTIVISED [sic] TO PROVIDE THE FUNCTIONALITY YOU SEEK AND WILL KEEP YOU APPRAISED OF PROGRESS TOWARDS YOUR GOAL." (A:19, 90). Mr. Atkins added, "[BG] is incentivised [sic] to incorporate BoatHistoryReport into BoatWizard and the search result pages" and represented that BoatWizard Integration would be possible "early Q3 2015." (A:19, 90).

- Through the summer of 2015, BG continued to provide BHR "updates" concerning the planning and preparation of the Integration Services. For example, on July 15, 2015, Marius de Beer, BG's Director of Technology, inquired about a "revenue share opportunity" if BG sales force was to market BHR's products "for integration into our sites and BoatWizard." (A:19, 99).

- Days later, Tim Claxton, BG's Director of Product Development, represented that "the BHR being added into [BG]" was discussed, "**should happen asap**," and that he would "jump on defining this as a **first priority**"—even suggesting a call to "focus on the BHR/provisioning integration." (A:19, 102 (emphasis added)).

- By the end of July 2015, BG represented to BHR "we now have everything we need . . . for integration." (A:19, 104).

- In February 2016, BHR again reemphasized the importance of integrations to any potential agreement, stating "[b]ased on previous conversations and contracts, we should have the[] integrations by March or soon after; we have brokers waiting for these integrations to take place." (A:20, 112). Mr. Atkins responded, "your integration is on our agenda." (A:20, 112).

- BG's internal correspondence during this time exposes a different story. (A:20, 120–22, 127–28). For example, on March 2, 2016, BG executives described the Integration Services aspect of the Agreement as "**all bollox**." (A:20, 120 (emphasis added)).

- On April 13, 2016, Mr. Atkins and another BG executive described the Integration Services "relating to the BHR/BG elite contract" as "**irrelevant and stupid**." (A:21, 127–28 (emphasis added)). Despite assurances to BHR that BG was fast-tracking integration, BG had **not even begun to scope the work for provision of such services** even acknowledging in a September 2016 email that the integrations remained **"unscoped"**. (A:21–22, 124–25, 127–28 (emphasis added)).

- BG's corporate representative testified that, despite having repeatedly assured BHR that the Integration Services were near completion and would be provided "asap," BG never even started building the integrations: "Q. . . . Do you know whether the integrations were ever provided by DMM to BHR? A. Best of my knowledge, they were not. Q. Okay. Do you know whether DMM took any steps towards providing these integrations to BHR at any point in time? A. Other than planning in the way that we talked about Dan and the other contractors planning to build, **no, we certainly didn't start any kind of product building**." (A:393 (emphasis added)).

- BG's corporate representative testified that BG knew that BHR was "chasing for delivery" of the Integration Services given BG's repeated assurances that delivery was imminent: "Q. . . . So it's your testimony that at the time that the inquiries from BHR were being made post [Agreement], you were not aware of such inquiries. . . . A. Yeah, I was probably aware, but I almost certainly would have heard it from Dan that **they were chasing for delivery, and I would have expected for them to be**. But **they were told we'd get to it as soon as we could**. Q. All right. Why did you expect them to be chasing for delivery of the integrations? A. Because we were late, and **we knew we were late**. (A:394).

- BG also admitted that the Integration Services would have revolutionized BHR's business by providing direct access to new

> customers in brokers and dealers already using the BG platform. (A:396 ("Q. . . . And you would agree with me that all of your customers would have had knowledge of [BHR] had these integrations actually been implemented. . . . A. I don't think I can claim that they all would, but certainly more than if we hadn't done it.)).

BG does not dispute the authenticity or content of these proffered emails and testimony—all of which preceded execution of the Agreement. *See* IB:26–29. Instead, BG asks the Court to disregard BHR's Motion and Proffer and credit BG's interpretation of what those communications actually meant. IB:21–22, To do so would be improper.

The Court's role at this stage in the proceedings is not to predict whether the jury will credit BHR or BG's interpretation of the proffered evidence; it is to determine if there is "**a reasonable view of the evidence that supports the plaintiff's position**." *Werner*, 362 So. 3d at 283 (emphasis added). The question is not whether "a jury **will** ultimately find for [BHR] on these issues," it is whether "reasonable jury **could** credit the proffered evidence as demonstrating [BG's] intentional misconduct and/or gross negligence." *Id.* at 284 (citing *Varnedore*, 210 So. 3d at 747 (emphasis added)). "Whether the respondents are entitled to punitive damages must be left to the jury to decide once there is any evidence to show entitlement to such an award." *Diaz*, 343 So. 3d at 647. This Court has recognized that even if the "preponderance of the evidence is against the plaintiffs," the

question "**should be left to the jury**." *Id.* (emphasis added; citing *Otey*, 400 So. 2d at 1291).

BG cannot escape the dispositive fact that distinguishes this case from *Manheimer*, *Varnedore*, and other similar decisions. Here, BHR proffered correspondence, deposition testimony, and other evidence that provides a reasonable basis that: (1) BG knew the Integration Services were of chief importance to BHR in entering into the Agreement; (2) BG failed to disclose the Apax acquisition, despite overlapping negotiations; (3) BG failed to disclose its true intention and never intended to deliver the Integration Services, among other obligations under the Agreement; and (4) BG continued to represent delivery of the Integration Services were on the horizon, despite internal correspondence providing the work had not even been scoped. *See* p. 41–44, *supra*. That proffered evidence supplies the reasonable basis for BHR to seek punitive damages based on its fraud in the inducement claim. *Bric McMann Indus. v. Regatta Beach Club Condo. Ass'n*, No. 2D22-2454, 2023 WL 5986432, at *3 (Fla. 2d DCA Sept. 15, 2023) (plaintiff seeking to recover punitive damages "need only proffer evidence of intentional misconduct [or gross negligence]" as defined by the Legislature in the revised version of section 768.72(2)).

The same is true as to the evidence BHR proffered that post-dates the execution of the Agreement. BG contradicts its own position (claiming the Court should disregard any post-execution evidence), despite offering its own interpretation of the same. Again, BG merely advocates what inferences are supported by the evidence BHR proffered. (IB:29–35). But a competing interpretation of BHR's evidentiary Proffer does not undermine the reasonable basis the trial court found. *See Werner*, 362 So. 3d at 282–84 (competing interpretation of proffered emails and text message conversations did not undermine reasonable evidentiary showing of a reasonable basis for recovery of punitive damages; trial court erred in adopting defendant's explanation of several key messages in plaintiff's proffer and denying leave to amend); *Diaz*, 343 So. 3d at 647 (entitlement to punitive damages "must be left to the jury to decide" "[e]ven if the court is of the opinion that the preponderance of the evidence is against the plaintiffs" (citing *Otey*, 400 So. 2d at 1291).

The trial court's ruling was express:

> There has been evidence shown, proffered by the Plaintiff, of **what the discussions were in the form of e-mails precontract**. And those evidence show what the promises were that the Defendant made to the Plaintiff, and it was very clear that the Plaintiff would only enter this contract, this agreement, if there was integration, if these services – this was an essential part of the agreement. And then, thereafter, **the Plaintiff has proffered evidence of what the allegations are that the defense's true**

> **intention were, that they really thought that this agreement was irrelevant, that it was stupid, this term "bullocks" [sic] that was used**, an admission on the part of Mr. Selzer that it was **never a priority**, and a statement by the BG individual, I think it was the September 26th, 2016, email, that said they were **in violation from day one**.
>
> Ultimately, this Court is not here to determine if there was, in fact, fraud in the inducement. **That's, ultimately, for the jury, and that's the evidence that's going to go to them**, and they are to make a reasonable inference from the facts and anything else that's presented at trial as to whether there was, in fact, an intent to defraud the Plaintiff in entering into this agreement where they had no intention to act on it or not. If the jury believes it, that's the case.

(A:543–44 (emphasis added)).

The trial court adhered to this Court's precedent when it determined BHR "provided enough evidence in the form of pre-contract and post-contract emails" that "rises to the level of intentional misconduct" to "show that there is a reasonable basis for the punitive damages claim," ultimately granting the Motion. (A:545–46); *see also Diaz*, 343 So. 3d at 647; *Werner*, 362 So. 3d at 282–84. Nothing BG offers on appeal supports a different result.

IV. THE TRIAL COURT'S ORAL RULING AND WRITTEN ORDER SATISFY ALL REQUIREMENTS TO AUTHORIZE BHR'S PUNITIVE DAMAGES AMENDMENT.

In its final argument, BG claims the trial court failed to make findings identifying the evidence it considered sufficient to establish the "reasonable

basis" for recovery of punitive damages. IB:36. BG is wrong. Even a cursory analysis reveals this case is nothing like those BG relies upon. IB:36–37.

For example, in *Cat Cay Yacht Club, Inc. v. Diaz*, 264 So. 3d 1071, 1075 (Fla. 3d DCA 2019), a trial court's order and rulings on the record were insufficient where the court did not articulate **any** "findings identifying the evidence it considered sufficient to provide a statutory 'reasonable basis' for granting the motion."[12] Here, the Court made express findings on the record. Likewise, in *Key West Convalescent Center, Inc. v. Doherty*, 619 So. 2d 367, 369 (Fla. 3d DCA 1993), this Court reaffirmed the well-settled standard for leave to assert a claim for punitive damages: "no claim . . . shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages."[13] Unlike the plaintiff in *Doherty*—who relied upon a single

[12] *Diaz* involved of a seven-count complaint against fifteen separate defendants, and the trial court there failed to make any findings whatsoever as to what evidence provided a reasonable basis to support claim for punitive damages as to each defendant or claim. *Diaz*, 264 So. 3d at 1075. Unlike in *Diaz*, BHR moved for punitive damages in connection with its fraud in the inducement claim asserted against BG—the sole defendant—and the trial court specifically identified the evidence it deemed sufficient to supply the reasonable basis for recovery of punitive damages under BHR's fraud claim. *See* Point III.A. & B., *supra*.

[13] *Doherty* does not inform this Court's review. There, the personal representative of the decedent moved for punitive damages against the defendant-nursing home based on section 400.022—Florida's Nursing Home Residents' Rights Statute. 619 So. 2d at 368–69. Construing section

affidavit to show that the defendant-nursing home failed to provide adequate nursing home care under Florida's Residents' Rights nursing home statute—BHR proffered communications and sworn testimony showing BG's intentional misconduct and gross negligence by repeated, false assurances of progress and prompt implementation of the valuable Integration Services to induce BHR to enter the Agreement. *See* p. 41–44, *supra*.

BG's citation to *Fetlar, LLC v. Suarez*, 230 So. 3d 97, 99 (Fla. 3d DCA 2017), is also misplaced. In that case, the trial court erred in authorizing punitive damages where the plaintiff failed to attach a proposed amended complaint and the proffer failed to show any intentional conduct or gross negligence, including a failure to allege any individual actor played a role in corporate management to impute conduct to the corporate defendant.[14] The

400.022 as allowing a punitive damages claim "without pleading or proving malicious, wanton, and willful disregard of the rights of others," the trial court deemed a single affidavit showing that the defendant "failed to provide adequate nursing home care" provided a sufficient basis to grant the punitive damages claim. *Id.* Because section 400.022 authorizes punitive damages only when such recovery is warranted under Florida law, this Court reversed. *Id. Doherty* merely affirms that a claimant seeking punitive damages must make a "reasonable showing by evidence in the record or proffered . . . which would provide a reasonable basis for recovery of such damages." *Id.* at 369. BHR did exactly that.

[14] BG gains nothing by citing this Court's unpublished table decision in *Gonzalez v. Menendez*, 348 So. 3d 573 (Fla. 3d DCA 2020). IB:36. There, the Court denied a Petition for Writ of Certiorari citing the previously applicable certiorari standard, which circumscribed review to "determine whether a court has conducted the evidentiary inquiry required by section

same defects are not present here. Indeed, *Feltar* contains no analysis regarding sufficiency of a trial court's findings in ruling on motion for leave to add a claim for punitive damages. *See* Point II, *supra*.

On appeal, BG misrepresents the record, ignoring the trial court's full compliance with the framework Florida law instructs in ruling on a punitive damages amendment. The trial court's order articulated the correct statutory standard and its rulings on the record provided the requisite specificity, identifying the evidence it deemed sufficient to provide a reasonable basis for recovery of punitive damages. That is all that was required to grant BHR's Motion.

A. The Order Expressly Made the Required Statutory Finding.

In reproducing the relevant portion of the Order, BG proves its own argument wrong. IB:37–38. Contrary to BG's assertion, in its written order, the trial court was required to do nothing more than find that BHR "made a reasonable showing, through the proffer of evidence, that provides a reasonable basis for the recovery of punitive damages." (A:5 (citing § 768.72(1), Fla. Stat.)). And the court did exactly that. *Omega Title Naples, LLC v. Butschky*, 327 So. 3d 424, 426 (Fla. 2d DCA 2021) (harmless error

768.72, Florida Statutes, but not so broad as to encompass review of the sufficiency of the evidence considered in that inquiry." *Gonzalez*, 340 So. 3d at 573 (citations omitted).

where the "trial court's oral and written orders . . . did not make any findings of fact or otherwise state the basis on which it granted the [plaintiff's] motion" but court could "discern from the record that the court followed all applicable procedures and applied the correct standard in granting the [plaintiff's] motion [such that] the failure to make express findings was harmless").

B. The Trial Court's Oral Pronouncement Specifically Identified the Proffered Evidence that Provides a Reasonable Basis for Recovery of Punitive Damages.

Finally, BG claims the trial court's "oral pronouncements were not sufficiently specific to provide a statutory reasonable basis for granting the motion to amend . . . ." IB:38. But BG's complete reproduction of the court's oral ruling proves its own argument false. IB:39–40. By reproducing the court's express findings on the record of the **specific evidence** it found to form a reasonable evidentiary basis for the jury's evaluation of an award of punitive damages, BG demonstrates the trial court fully complied with Florida law. *Id.*

To be clear, this Court, along with the Second, Fourth, and Fifth Districts, agrees that a trial court "must identify the admissible evidence proffered by the plaintiff on the record within the order **and/or articulate on the record how the evidence supports a reasonable basis** to believe the claimant can demonstrate by clear and convincing evidence that recovery of

punitive damages is warranted." *E. Bay NC, LLC v. Reddish*, 306 So. 3d 1225, 1227 (Fla. 2d DCA 2020) (emphasis added); *accord Petri Positive Pest Control, Inc. v. CCM Condo. Ass'n*, 174 So. 3d 1122, 1122 (Fla. 4th DCA 2015) (citing *Henn v. Sandler*, 589 So. 2d 1334, 1335 (Fla. 4th DCA 1991)); *Doherty*, 619 So. 2d at 369 (same); *Varnedore*, 210 So. 3d at 747–48 (same).

Here, BG's own argument proves that the trial court's oral ruling satisfied that test. The trial court articulated exactly what evidence it was relying on to establish the reasonable evidentiary basis authorizing amendment of BHR's punitive damages claim. IB:39–40 (quoting A:543–45 (articulating proffered evidence which provided reasonable basis for recovery of punitive damages, including "e-mails precontract" that "show what the promises were that the Defendant made to the Plaintiff"; that "it was very clear from the beginning that the Plaintiff would only enter this contract . . . if there was integration"; that "these services" were an "essential part of the [A]greement"; that "Plaintiff has proffered evidence of what the allegations are that the defense's true intentions were, that they really thought that this [A]greement was irrelevant, that it was stupid, this term 'bullocks' was used, an admission on the part of Mr. Selzer that it was never a priority, and a statement by the BG individual, I think it was the September

26th, 2016 email, that said they were in violation from day one.")). Having done so, Florida law did not require the trial court to repeat those same findings in a written order.[15] *See Butschky*, 327 So. 3d at 426 ("**Absent oral findings in the record which establish entitlement to plead punitive damages**, a boilerplate order that parrots the provisions of the statue without identifying the admissible evidence adduced at the evidentiary hearing is insufficient" because "[s]uch an order renders the appellate court unable to identify what, if any, admissible evidence was relied upon to make the determination" (emphasis added; quoting *Reddish*, 306 So. 3d at 1227)).

Implicitly recognizing the sufficiency of the court's ruling by written order and on the record, BG reasserts its familiar, meritless argument challenging the relationship between the fraud claims, as alleged, and the evidence BHR proffered. IB:41; *see also* 11–17. But there was no reliance on "[b]are allegations" here. IB:36 (citing *Espirito Santo Bank v. Rego*, 990 So. 2d 1088, 1090 (Fla. 3d DCA 2007)), 41. Instead, the court's evaluation of BHR's fraud allegations and Proffer—along with its finding that BHR made a reasonable showing by specific evidence in the record that would provide a reasonable basis for recovery of punitive damages—was entirely proper.

[15] BG's citation to *Diaz* and *Gonzalez* does not impact the analysis. IB:40–41; *see* Point IV, *supra* (distinguishing *Diaz*, 264 So. 3d at 1075 and *Gonzalez*, 348 So. 3d at 573).

CONCLUSION

Based upon the foregoing, BHR respectfully requests the Court to affirm the Order and remand for further proceedings consistent therewith.

Respectfully Submitted,

A. Sheila Oretsky
Florida Bar No. 31365
Brigid F. Cech Samole
Florida Bar No. 730440
Bethany J. M. Pandher
Florida Bar No. 1010814
Sandra Ramirez Loe
Florida Bar No. 1010385
GREENBERG TRAURIG, P.A.
333 Southeast Second Avenue
Suite 4400
Miami, FL 33131
Telephone: 305.579.0500
Sheila.Oretsky@gtlaw.com
Brigid.CechSamole@gtlaw.com
Bethany.Pandher@gtlaw.com
Sandra.Loe@gtlaw.com
miamiappellateservice@gtlaw.com

/s/ A. Sheila Oretsky
A. Sheila Oretsky

Counsel for Appellee, VeriHull LLC d/b/a Boat History Report

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 13, 2023, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida Courts E-Filing Portal, which will send an electronic copy of the foregoing to counsel listed below:

Scott J. Link, Esq.
Florida Bar No. 602991
scott@linkrocklaw.com
LINK & ROCKENBACH, PA
1555 Palm Beach Lakes Boulevard
Suite 930
West Palm Beach, Florida 33401
Tel: (561) 847-4408

Sean A. Burstyn, Esq.
Florida Bar No. 1028778
sean.burstyn@burstynlaw.com
BURSTYN LAW PLLC
1101 Brickell Avenue
Suite S-700
Miami, Florida 33131
Tel: (305) 204-9808

Attorneys for Appellant, Boats Group, LLC

/s/ A. Sheila Oretsky
A. Sheila Oretsky

CERTIFICATE OF COMPLIANCE

I hereby certify that this answer brief was prepared using Arial 14-point font in compliance with Rule 9.045 of the Florida Rules of Appellate Procedure. I also certify that this brief contains 12,426 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

/s/ A. Sheila Oretsky
A. Sheila Oretsky