

No. \_\_\_\_\_

**IN THE COURT OF APPEALS  
FOR THE SEVENTH JUDICIAL DISTRICT  
AMARILLO, TEXAS**

FILED IN  
7th COURT OF APPEALS  
AMARILLO, TEXAS  
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Clerk

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**IN RE SALVATORE MAZZAMUTO, RELATOR**

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*Original Proceeding from the 237th Judicial District Court,  
Lubbock County, Texas*  
Cause No. DC-2023-CV-0668

*Gabevitela Enterprise, LLC, Plaintiff v. Salvatore Mazzamuto, Defendant*  
The Honorable Les Hatch, Judge  
237<sup>th</sup> District Court of Lubbock County, Texas, Respondent

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**PETITION FOR WRIT OF MANDAMUS**

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**ORAL ARGUMENT REQUESTED**

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## LIST OF PARTIES AND COUNSEL

### RELATOR/DEFENDANT

Salvatore Mazzamuto (Defendant) (referred to herein for most purposes as **Sal**)

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### **Respondent/Trial Court Judge**

The Honorable Les Hatch

Judge, 237<sup>th</sup> District Court of Lubbock County

904 Broadway, Suite 606

Lubbock, Texas 79401

### **REAL PARTY IN INTEREST/Plaintiff**

Gabevitela Enterprise, LLC (Plaintiff) (Defendant) (referred to herein for most purposes as **Vitela**)

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## APPENDIX REFERENCES

The attached Appendix ("Appx.") consists of the following:

Plaintiff's Petition and Application for Temporary and Permanent Injunction. . . . .	002-016
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## STATEMENT OF THE CASE

- Nature of the Case:* This suit seeks enforcement of a limited covenant not to compete. The Trial Court denied Relator's motion to dismiss under TEX. R. CIV. P. 91a. Relator seeks review by mandamus.
- Respondent:* Hon. Les Hatch, 237<sup>th</sup> District Court of Lubbock County, Texas
- Relief Requested:* Respondent should be compelled to: (a) withdraw his order denying Relator's Rule 91a motion; (b) to dismiss all claims seeking damages as a means of enforcement of the limited covenant to compete; and (c) dismiss the claims for breach of contract, fraud and conspiracy.

## **STATEMENT OF JURISDICTION**

Mandamus relief is appropriate for the denial of a Motion to Dismiss pursuant to TEX. R. CIV. P. 91a. *See In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014); *In re Farmers Texas County Mut. Ins. Co.*, 621 S.W.3d 261, 266 (Tex. 2021).

## **STATEMENT REGARDING ORAL ARGUMENT**

Relator requests oral argument and believes it would be useful to the court in this case.

## ISSUE PRESENTED

1. Whether the Trial Court abused its discretion by denying Relator's motion to dismiss under TEX. R. CIV. P. 91a because the claims against him had no basis in law and/or in fact.<sup>1</sup>

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<sup>1</sup> Without regard to the disposition of the Rule 91a motion presented for review, certain aspects of the suit in the Trial Court will require the Trial Court's consideration. These include questions relating to the reformation of the limited covenant not to compete and questions relating to the award of attorneys' fees.

## STATEMENT OF FACTS

The matters described in this Statement of Facts, due to the nature of the Rule 91a motion process, are not facts as they existed, but facts as alleged by Vitela. Relator does not, by reciting the following facts, admit that such facts are true.

On August 24, 2020, Sal entered into an Intellectual Property Rights Purchase and Transfer Agreement with Vitela (the “IP Agreement”) related to the sale and use of the trade name "One Guy From Italy." [Appx. 044] This occurred a "long time" after Sal was out of the pizza business in Lubbock. [Appx. 032 ¶ 1; 33 ¶ 17]

The relevant portion of the Intellectual Property Agreement provides:

Seller cannot open any food business in Lubbock County, Texas, without the written consent of GabeVitela Enterprise, LLC.

[Appx. 045, ¶ 3 (d)]

On May 19, 2022, Totomazza Inc. purchased the real property located at 8008 Abbeville in Lubbock, Lubbock County, Texas (Abbeville location) [Appx. 032, ¶ 11] . The Abbeville location was previously operated as a restaurant. [Appx. 032, ¶ 11] The purchase included restaurant equipment, including “[r]efrigeration, freezers, sandwich tables, prep tables, tables, chairs, sinks, patio

tables and chairs, and shelves.” [Appx. 074]

Sal, through Totmazza, Inc., purchased the real estate, which was previously a restaurant location. Sal specifically sought restaurant property as an investment. [Appx. 053-054] Jerry opened and operated Papa V Pizza beginning in October of 2022. [Appx. 033, ¶ 14] Jerry was a tenant of Totomazza. [Appx. 055]

Vitela, in conclusory fashion, pleads that “[w]ithout Sal’s financial aid and assistance, Papa V Pizza could not have opened. [Appx. 033-035, ¶15]

The Plaintiff’s First Amended Petition [Appx. 030 *et seq*] contains no allegation: (1) that Jerry was constrained by any agreement or any law from directly competing with Vitela; (2) that Sal has an ownership or operational interest in Papa V Pizza, or that he is in any way active in the promotion or operation of the Papa V. Pizza restaurant; or (3) that Sal’s involvement in Papa V Pizza was anything other than that of a landlord and a tenant relationship. Vitela does state a factual conclusion that Sal “admitted that he opened a food business” based upon an exchange in a deposition which does not support that conclusion. [Appx. 031, ¶ 10]

Vitela filed an application for a Rule 202 deposition and, after obtaining Court approval, deposed Sal for one hour and twenty minutes. [Appx. 036] Vitela filed suit on May 26, 2023, seeking recovery of damages for breach of contract.

[Appx. 035-037 ¶¶ 22-34] Sal filed a timely motion under TEX. R. CIV. P. 91a.

[Appx.017 *et seq*] In response to the motion, Vitela amended its petition and included a claim for fraud in very general terms. [Appx.037-039, ¶¶ 35-36] The Court entered an order denying Sal's motion to dismiss. [Appx. 076]

## **SUMMARY OF THE ARGUMENT**

The Intellectual Property Agreement contains a provision restricting Sal from opening a food business for an indeterminate period. Vitela has not pleaded facts which, even if accepted as true, show that Sal opened a food business. Furthermore, because the Intellectual Property Agreement lacks any sort of time limitation, it cannot be enforced by a suit for damages. TEX. BUS. & COMM. CODE §§ 15.50 (a); 15.51 (c). Lastly, Vitela's added claims for fraud and conspiracy are facially deficient and implausible.

Because there are no facts pleaded which, even if accepted as true, would entitle Vitela to succeed on a claim for breach of contract, fraud, or conspiracy, the Rule 91a motion was improperly denied.



## **STANDARD OF REVIEW**

A court of appeals reviews a ruling under Rule 91a *de novo* because the availability of a remedy under the facts alleged is a question of law and the rule's factual plausibility standard is akin to a legal-sufficiency review. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016).

## ARGUMENT

### Standard of Review - Granting Mandamus Relief

Mandamus relief is appropriate when a petitioner demonstrates a clear abuse of discretion by the trial court and no adequate remedy by appeal. *In re Geomet Recycling, LLC*, 578 S.W.3d 82, 91 (Tex. 2019) (citations omitted). A trial court abuses its discretion when it improperly denies a Rule 91a motion to dismiss. *In re Farmers Tex. Cty. Mut. Ins. Co.*, 621 S.W.3d 261, 266 (Tex. 2021) (citing *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014)).

### Rule 91a Standard

Texas Rule of Civil Procedure 91a provides that a party “may move to dismiss a cause of action on the grounds that it has no basis in law or fact.” TEX. R. CIV. P. 91a.1. “A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought.” *Id.* “A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.” *Id.*

In ruling on a Rule 91a motion, a court “may not consider evidence ... and must decide the motion based solely on the pleading of the cause of action.” TEX. R. CIV. P. 91a.6. Rule 91a limits the factual inquiry to the pleadings and the documents attached to the pleadings, but not the legal inquiry of the court. *Bethel*

v. *Quilling*, 595 S.W.3d 651, 655 (Tex. 2020).

The merits of a Rule 91a motion are reviewed *de novo*. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam)). In deciding whether the trial court properly granted a motion to dismiss under Rule 91a, a reviewing court applies the fair-notice pleading standard in determining whether the allegations in the petition were sufficient to allege a cause of action. *Lecody v. Anderson*, No. 07-20-00020-CV, 2021 WL 1202348, at \*3 (Tex. App.—Amarillo Mar. 30, 2021, no pet.) (mem. op.); *see also Thomas v. 462 Thomas Family Props., LP*, 559 S.W.3d 634, 639-40 (Tex. App.—Dallas 2018, pet. denied). In conducting review, the pleadings are liberally construed in favor of the plaintiff. *Koenig v. Blaylock*, 497 S.W.3d 595, 599 (Tex. App.—Austin 2016, pet. denied).

The Court is not required, however, to accept conclusory allegations as true. “We remain cognizant that ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.’” *Vasquez v. Legend Nat. Gas III, LP*, 492 S.W.3d 448, 451 (Tex. App.—San Antonio 2016, pet. denied) (quoting *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied)). *See also Taylor v. Aspy*, No. 04-21-00387-CV, 2023 WL 5257677, at \*4 (Tex. App.—San Antonio Aug. 16, 2023, no pet. h.)

## Rule 91a as Applied to this Case

*"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means what I choose it to mean - neither more nor less." "The question is," said Alice, "whether you can make words mean so many things." <sup>2</sup>*

*When a contract uses the phrase "open a food business," it should be construed to mean what it plainly says—neither more nor less.*

The Intellectual Property Agreement contains a covenant not to "open a food business. [Appx. 045] This provision is a restriction on competition but it is not a broad covenant prohibiting competitive activity. The Agreement does not prohibit "direct or indirect" competition, prohibit Sal from assisting others to compete, or prohibit Sal from leasing property to a competing food business. The fact that the restriction as agreed does not indirectly protect Vitela from competition by Jerry is not a basis for expanding the restriction beyond its plain meaning.

In determining this case, the Court is confronted by the question of whether the Plaintiff has properly pleaded facts which, if true, would establish that Sal Mazzamuto "[opened] a food business." If the plausibly pleaded acts of Sal cannot be interpreted to allege the opening a food business, then the contract claims,

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<sup>2</sup> See Parker B. Potter, Jr., *If Humpty Dumpty Had Sat on the Bench . . . : An Eggheaded Approach to Legal Lexicography*, 30 WHITTIER L. REV. 367, 369 (2009).

declaratory judgment claims, and the conspiracy claims cannot survive.<sup>3</sup>

### *Contractual Interpretation*

Courts endeavor to discern the parties' intent from the words expressed in the writing as a whole and to give words used therein their ordinary meaning. *In re G.D.H.*, 366 S.W.3d 766, 769 (Tex. App.—Amarillo 2012, no pet.). The meaning of a written contract is a question of law for the Court, *BlueStone Nat. Res. II, LLC v. Randle*, 620 S.W.3d 380, 387 (Tex. 2021). The application of the law to the facts of a case is also a question of law for the Court. *See Brown v. Gen. Brick Sales Co., Inc.*, 39 S.W.3d 291, 294 (Tex. App.—Fort Worth 2001, no pet.)

In this case Vitela adequately pleads the following relevant facts:

- 1) Sal (or Totomazza) purchased a building that had been previously operated by someone as a restaurant;
- 2) Sal made improvements to the building; and,

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<sup>3</sup> The Intellectual Property Agreement did not contain any limitation on the time period in which Sal could not open a food business. [Appx. 043-048]

TEX. BUS. & COMM. CODE §15.50 (a) provides

. . . a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made **to the extent that it contains limitations as to time**, geographical area, and scope of activity to be restrained **that are reasonable** and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.  
*[emphasis added]*

- 3) Sal's brother (or this entity) began operating a restaurant in Sal's building.

For context, the following facts are supported by the contents of Vitela's

Amended Petition:

- 1) Sal bought the building as an investment; and,
- 2) Jerry is not an officer, director, or shareholder of Totmazza, Inc. but is a tenant.

The Amended Petition contains no factual pleading supporting any of the following:

- 1) that Sal owned a financial interest in the business operated in his building by Jerry;
- 2) that Sal participated in any way in the operation of Jerry's restaurant business other than being the landlord;
- 3) that Sal competed with Vitela in a food business;<sup>4</sup>
- 4) that Jerry's competition with Vitela violated any agreement between Jerry and Vitela; or,

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<sup>4</sup>Agreements in restraint of trade are unlawful. TEX. BUS. & COMM. CODE §15.05 (a). The provision of the Intellectual Property Agreement restricting Sal from opening a food business can be legally justified to protect a legitimate interest of Vitela. TEX. BUS. & COMM. CODE §15.51(a). Under the facts of this case, the only legitimate protectable interest which Vitela had was the protection of the interest in the name "One Guy from Italy." There is no claim that Sal has improperly used that name, but more importantly, there is no factual pleading that Sal competed with Vitela in a way that interfered with the goodwill attached to the name "One Guy from Italy." Vitela only claims that Sal assisted Jerry in unquestionably legal competition with Vitela. It is clear that Vitela seeks to quash Jerry's competition, not Sal's.

- 5) that Sal started, established, or engaged in any food business after signing the Intellectual Property Agreement; or,
- 6) facts, as opposed to conclusory allegations, that Sal opened a food business after the Intellectual Property Agreement was signed.

Neither the conclusory statements made in the pleadings, for example ¶ 10 of the Amended Petition ("Sal admitted that he opened a food business . . ."), nor the [t]hreadbare recitals of the elements of an implausible fraud claim in ¶ 36 of the Amended Petition, are sufficient allegations for the purpose of Rule 91a. *See discussion supra*. Under the properly pleaded facts, there is neither a plausible factual allegation made that Sal "opened a food business" nor a reasonable inference supporting that conclusion.

#### *The Role of Inference*

Black's Law Dictionary (11th ed. 2019) defines "inference," when used as a noun, as "[a] conclusion reached by considering other facts and deducing a logical consequence from them."

An ultimate fact may be established by circumstantial evidence, but the circumstances relied upon must have probative force sufficient to constitute a basis of legal inference. It is not enough that the facts raise a mere surmise or suspicion of the existence of the fact or permit a purely speculative conclusion. The circumstances relied on must be of such a character as to be reasonably satisfactory and convincing, and must not be equally consistent with the non-existence of the ultimate fact.

*Roth v. FFP Operating Partners, L.P.*, 994 S.W.2d 190, 197 (Tex.App.—Amarillo 1999, pet. denied). “When circumstances are consistent with either of two facts and nothing shows that one is more probable than the other, neither fact can be inferred.” *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 324 (Tex.1984). A vital fact, essential to establishing legal elements for recovery may not be established by “piling inference upon inference.” *Schlumberger Well Sur. Corp. v. Nortex Oil & G. Corp.*, 435 S.W.2d 854, 858 (Tex.1968).

Any conclusion inferred from the fact that Sal owned a restaurant building and, therefore, he "opened a food business" is one based on conjecture or speculation. The mere fact that owning the building is *consistent (or not inconsistent)* with the conclusion advanced does not make the inference reasonable. The inferred conclusion must be deducible from the facts, not merely consistent with them. *See Alabama Power Co. v. Robinson*, 447 So. 2nd 148, 153-54 (Ala. 1983). *See also Valdez v. Lyman-Roberts Hospital, Inc.*, 638 S.W.2d 111, 114-15 (Tex.App.-Corpus Christi-Edinburg 1982, writ ref'd n.r.e.)(possible cause not evidence of medical causation in the absence of other explanations).

An inference is not reasonable if it is premised on mere suspicion, as “some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence.” *Suarez*, 465 S.W.3d at 634. Nor is an inference reasonable if it is susceptible to multiple, equally probable inferences, requiring the fact finder to



guess to reach a conclusion. *Id.* at 634; \*821 *Smith v. Landry's Crab Shack, Inc.*, 183 S.W.3d 512, 514 (Tex.App.—Houston [14th Dist.] 2006, no pet.). An inference stacked only on other inferences is not legally sufficient evidence. *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 728 (Tex.2003).

*Alarcon v. Alcolac Inc.*, 488 S.W.3d 813, 820–21 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). Pleading facts indicating that something is possible does not give rise to a reasonable inference that an act occurred. It establishes possibility—not plausibility.

It cannot be reasonably inferred that Sal "opened a food business" because he bought a building and equipment suitable for use as a restaurant even though it might be *consistent* with an intention to open a restaurant because it does not, in and of itself, constitute proof or provide the basis for a logical or reasonable deduction that Sal opened a restaurant. Even if a reasonable deduction could be drawn from that conduct, in context of the circumstances that can be gleaned from Vitela's amended petition, this conduct is more susceptible to the inference that the property was being prepared for rental, keeping in mind that Sal testified that he bought the property as an investment, that he referred to Jerry as a tenant, and Jerry was the operator of the restaurant on the property. [Appx. 053-054, 055]

There is no pleading of any facts to show that the probable deduction from that activity was that Sal entered the "food business." In fact, the record only shows that Sal intended the purchase as an investment and that Jerry was intended to be Sal's tenant and that Jerry operated the restaurant.

The commonly known fact that many persons own real property for investment purposes and lease it to tenants for operation of the tenant's businesses is a fact which is subject to judicial notice. A court may take judicial notice of "facts generally known within the trial court's territorial jurisdiction." TEX. R. EV. 201 (b)(1).

### **CONCLUSION AND PRAYER**

Properly interpreted under the rules of construction, none of the conduct which was pleaded, even if true, would be violative of the Intellectual Property Agreement. Therefore, the Trial Court erred by denying Relator's motion to dismiss.

THEREFORE, Relator prays that the Court of Appeals grant a writ of mandamus commanding the Trial Court to grant Relator's 91a motion. Relator further prays for general relief.

RESPECTFULLY SUBMITTED,

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*/s/ Don C. Dennis*

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ATTORNEYS FOR RELATOR,  
SALVATORE MAZZAMUTO

**TEX. R. APP. P. 52.3(J) CERTIFICATION**

I have reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record, as required by TEX. R. APP. P. 52.3(j)

/s/ Don C. Dennis

**RULE 9.4(I) CERTIFICATION**

Relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this brief (excluding any caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix) is **2691** words.

/s/ Don C. Dennis

Certificate of Service

I hereby certify that on **October 11, 2023**, I electronically filed the foregoing document with the clerk of the Court stated above. I further certify that the following attorneys of record have been contemporaneously served through the Court's electronic filing system:

The Honorable Les Hatch  
Judge, 237th District Court of Lubbock County  
904 Broadway, Suite 606  
Lubbock, Texas 79401

*above also served by regular mail*

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Lubbock, Texas 79408

*/s/ Don C. Dennis*

No. \_\_\_\_\_

**IN THE COURT OF APPEALS  
FOR THE SEVENTH JUDICIAL DISTRICT  
AMARILLO, TEXAS**

---

*In re*  
**LUBBOCK COUNTY HOSPITAL DISTRICT  
D/B/A UNIVERSITY MEDICAL CENTER, RELATOR**

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The Honorable William C. Sowder, Judge  
99<sup>th</sup> District Court of Lubbock County, Texas, Respondent

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**APPENDIX**

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CAUSE NO. DC-2023-CV-0668

GABEVITELA ENTERPRISE LLC                   §           IN THE **237th**DISTRICT COURT  
                                                          §  
*Plaintiff,*                                           §  
                                                          §  
v.                                                   §           OF  
                                                          §  
SALVATORE MAZZAMUTO,                   §  
                                                          §  
*Defendant.*                                   §           LUBBOCK COUNTY, TEXAS

**PLAINTIFF’S PETITION AND APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTIONS**

Plaintiff GabeVitela Enterprise LLC alleges as follows against Defendant Salvatore Mazzamuto, and respectfully shows the Court:

**I. PARTIES**

- 1. Plaintiff GabeVitela Enterprise LLC (Vitela) is a Texas Limited Liability Company.
- 2. Defendant Salvatore Mazzamuto (Sal) is an individual citizen of the State of Texas. He may be served with process at 5907 93rd Street, Lubbock, Lubbock County, Texas 79424.

**II. JURISDICTION AND VENUE**

- 3. This Court has jurisdiction over this civil action because the amount in controversy exceeds the minimum jurisdictional limits of this Court.
- 4. Venue in this action is proper in this Court pursuant to Texas Civil Practice & Remedies Code Section 15.002(a)(1) because all or a substantial part of the events giving rise to the claims herein occurred in Lubbock County, Texas.



**III. AMOUNT IN CONTROVERSY**

5. Pursuant to Rule 47(c) of the Texas Rules of Civil Procedure, Plaintiff seeks monetary relief of \$250,000.00 or less, excluding interest, statutory or punitive damages, and attorney's fees and costs and non-monetary relief.

**IV. CONDITIONS PRECEDENT**

6. All conditions precedent have been performed or have occurred.

**V. FACTUAL BACKGROUND**

7. Vitela and Sal entered into an Intellectual Property Rights Purchase and Transfer Agreement on August 24, 2020 (the IP Agreement) related to the *One Guy From Italy* business, goodwill, and brand. See Exhibit A.

8. The IP Agreement specifically prohibited Sal from opening a food business of any kind in Lubbock County, Texas, without the consent of Vitela.

9. On November 4, 2020, Sal formed Totomazza Inc. for the purpose of purchasing and holding real estate.

10. On May 19, 2022, Totomazza Inc. purchased the real property located at 8008 Abbeville in Lubbock, Lubbock County, Texas (Abbeville location).

11. In October 2022, Papa V Pizza opened at the Abbeville location, operated by Sal's brother, Girolamo (Jerry) Mazzamuto.

12. Without Sal's financial aid and assistance, Papa V Pizza could not have opened. In fact, Sal purchased the real estate, which was previously a restaurant location for another business. He also, at his expense, made expensive improvements and bought valuable fixtures, which were to be used for the restaurant business of Papa V Pizza.





13. Witnesses have stated that the products sold by Papa V Pizza at the Abbeville location are the same as those sold by *One Guy From Italy*, which business, brand, recipes, methods, and formulas were purchased by Vitela.

## VI. CLAIMS FOR RELIEF

### A. Count 1 – Breach of Contract

14. Pursuant to the IP Agreement, Sal agreed not to open a food business in Lubbock County, Texas, yet has opened a food business in Lubbock County, Texas, in violation of the non-compete contained within the IP Agreement.

15. Vitela performed his obligations under the IP Agreement. Vitela paid Sal \$100,000.00 for the intellectual property identified in the IP Agreement, including goodwill.

16. Vitela has been damaged by Sal's opening of the competing restaurant business in Lubbock County, Texas, in violation of the IP Agreement.

17. The non-compete contained within the IP Agreement limits the geographic area and scope of activity subject to the non-compete. The non-compete was not limited in time; although the non-compete was heavily negotiated with Sal and his counsel and agreed to by Sal and his counsel.

18. Because the non-compete is not limited in time, Vitela seeks to reform the non-compete contained in the IP Agreement, **only if deemed necessary**, to include such limitation, if required by the Court.

19. A non-compete agreement is ancillary to the sale of the goodwill of a business. *See, e.g. Chandler v. Mastercraft Dental Corp. of Texas Inc.*, 739 S.W.2d 460, 464-65 (Tex. App.-Fort Worth 1987, writ denied).



20. A non-compete agreement in association with the sale of a business protects the buyer and the seller because it allows buyer to pay full value for the goodwill of a business with assurance that the seller will not shortly thereafter start a competing business.

21. A ten-year non-compete period is not unreasonable as a matter of law when ancillary to a contract for the sale of a business. *Heritage Operating, L.P. v. Rhine Brothers, LLC*, 2012 WL 2344864, \*6 (Tex. App.—Fort Worth June 21, 2012). “A noncompete signed by an owner selling a business is quite different than one signed by an employee.” *Id.* at \*5.

22. Furthermore, “Courts have been more inclined to enforce a long or limitless period barring competition after a sale of a business. *See, e.g., Oliver v. Rogers*, 976 S.W.2d 792, 801 (Tex. App.-Houston [1st Dist.] 1998, pet. denied) (holding that a lack of a time limitation did not render noncompete unreasonable as a matter of law); *Greenstein v. Simpson*, 660 S.W.2d 155, 159 (Tex. App.-Waco 1983, writ ref’d n.r.e.) (‘[A] person may agree [ ] in connection with the sale of his business[ ] not to re-enter a similar competitive business for the remainder of his life.’); *York v. Dotson*, 271 S.W.2d 347, 348 (Tex. Civ. App.-Fort Worth 1954, writ ref’d n.r.e.) (‘One may lawfully agree not to compete in a particular business, in a reasonably limited territory, during the remainder of his life. Such contracts are held not to be in restraint of trade.’); *Clay v. Richardson*, 290 S.W. 235, 236 (Tex. Civ. App.-Fort Worth 1926, writ disp’d w.o.j.) (upholding covenant of theater seller never to open a theater again in town where theater was located).” *Id.*

23. In *Heritage*, “Kendall L. was ‘semiretired,’ and he had ownership interests in other companies. Kendall L. had presented no evidence of any great hardship borne by him by staying out of the area subject to the non-compete, nor did he demonstrate any injury to the public that outweighed the legitimate benefits that the negotiated noncompete granted to Heritage.” *Id.* (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681–82 (Tex. 1990) (noting that a noncompete is



reasonable if neither hardship to the promisor nor public injury outweighs the covenant's legitimate benefits to the promisee).”

24. Vitela seeks to enforce the non-compete language of the IP Agreement as written. The unlimited term was negotiated. The territory of the non-compete was limited to Lubbock County, Texas. Sal represented that he did not intend to open a food business in Lubbock County, Texas, at the time of the negotiation of the terms of the IP Agreement.

25. Further, Sal represented himself as retired after the sale of *One Guy From Italy* located on 50<sup>th</sup> Street in 2017. *See*, Ex. C, Deposition of Salvatore Mazzamuto taken 3/9/2023, 41:8-12. The IP Agreement was signed in August 2020, after the sale of the other *One Guy From Italy* location, which was sold to an entity in which Vitela held an interest. A lifetime non-compete is not unreasonable given these facts.

26. Alternatively, Vitela seeks to reform the non-compete to a term of 10-years and no fewer than 5-years from the date of execution of the IP Agreement.

**B. Count 2 – Declaratory Judgment**

27. Vitela re-alleges and incorporates by reference each of the allegations made above as though the allegations were fully set forth herein.

28. Sal has opened a food business in Lubbock County, Texas, in violation of the IP Agreement.

29. Accordingly, Vitela asks the Court to issue a declaration that Sal has breached the IP Agreement by his actions in opening a competing food business in violation of the non-compete provision of the IP Agreement.

C. Count 3 – Temporary and Permanent Injunctive Relief Under Tex. Bus. & Com. Code Ann. §§ 15.50, 15:51(a), and 15.52

30. Vitela re-alleges and incorporates by reference each of the allegations made above as though the allegations were fully set forth herein.

31. “Under the common law, a party seeking an injunction must show that without injunctive relief he will suffer irreparable injury for which he has no adequate legal remedy.” *Heritage Operating, LP*, 2012 WL 2344864, \*6 (citing *Tom James Co. v. Mendrop*, 819 S.W.2d 251, 253 (Tex. App.-Fort Worth 1991, no writ). However, if a party relies on a statute that defines the requirements for injunctive relief, the express statutory language “supersedes common law requirements.” *Id.* (citing *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787, 795 (Tex. App.-Houston [1st Dist.] 2001, no pet.). Damages, *injunctive relief, or both* are provided by the Covenants Not to Compete Act for a breach of a non-compete by the promisor. Tex. Bus. & Com. Code Ann. § 15.51(a) (“ . . . a court may award . . . damages, injunctive relief, or both damages and injunctive relief for a breach by the promisor of the covenants”).

32. Thus, a party seeking injunctive relief under the Covenants Not to Compete Act does not have to show irreparable injury for which he has no adequate legal remedy as a prerequisite to injunctive relief. *Heritage Operating, L.P.*, 2012 WL 2344864, \*6 (citing *Letkeman v. Reyes*, 299 S.W.3d 482, 486 (Tex. App.-Amarillo 2009, no pet.) (“It is enough simply to prove a distinct or substantial breach.”); *see also* Tex. Bus. & Com. Code Ann. § 15.52 (stating that “the procedures and remedies . . . provided by Section 15.51 . . . are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise”).

33. Vitela seeks injunctive relief under the Covenants Not to Compete Act and therefore is entitled to injunctive relief without having to show irreparable injury as a prerequisite



to injunctive relief. Further, because the Covenants Not to Compete Act provides procedures and remedies under Section 15.51, such procedures and remedies are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law.

34. For these reasons, Vitela is entitled to seek injunctive relief under the Covenants Not to Compete Act. Further, Vitela is required only to prove a distinct or substantial breach by Sal of the covenant not to compete. Sal has opened a food business in Lubbock County, Texas, in violation of the covenant not to compete contained in the IP Agreement. Therefore, Vitela is entitled to injunctive relief.

35. After entry of a Temporary Injunction, which should persist through trial on the merits, and thereafter, Vitela requests the entry of a permanent injunction.

#### **VII. ATTORNEYS' FEES**

36. Vitela seeks recovery of attorneys' fees under Tex. Civ. Prac. & Rem. Code § 37.009 and § 38.001.

#### **VIII. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Vitela respectfully requests that the Court issue a Temporary Restraining Order, and after a hearing on Vitela's Application for Temporary Injunction, set this case for trial on the merits, and after a trial, that the Court grant Vitela the following relief against Sal, as follows:

- a. A temporary and permanent injunction, enjoining Sal from his violations of the IP Agreement, as stated above;
- b. A declaration that Sal breached the IP Agreement when he opened a food business in Lubbock County, Texas;



- c. Confirmation of the unlimited term of the non-compete agreement or reformation of the non-compete agreement within the IP Agreement, if required by the Court;
- d. Actual and special damages to be proven at trial on all issues available;
- e. Attorneys' fees and costs of suit;
- f. Pre-judgment and post-judgment interest at the maximum rate allowed by law; and
- g. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

By: /s/ Fernando M. Bustos

Fernando M. Bustos; SBN: 24001819

[fbustos@bustoslawfirm.com](mailto:fbustos@bustoslawfirm.com)

Deirdre Kelly Trotter; SBN: 45006069

[dtrotter@bustoslawfirm.com](mailto:dtrotter@bustoslawfirm.com)

BUSTOS LAW FIRM, P.C.

P.O. Box 1980

Lubbock, Texas 79408-1980

(806) 780-3976

(806) 780-3800 FAX

ATTORNEYS FOR PLAINTIFF



**DECLARATION OF GABRIEL VITELA**

My name is Gabriel Vitela, my date of birth is 9/20/1978, and my address is 6801 Nashville Avenue, Lubbock, Lubbock County, Texas 79413, the United States of America. I declare under penalty of perjury that the factual allegations in the Plaintiff's Petition and Application for Temporary and Permanent Injunctions are within my personal knowledge and are true and correct.

Executed in Lubbock County, State of Texas on May 23, 2023.

GABEVITELA ENTERPRISE LLC

By: Gabriel Vitela  
Gabriel Vitela, Managing Member



**INTELLECTUAL PROPERTY RIGHTS PURCHASE AND TRANSFER AGREEMENT**

This Intellectual Property Rights Purchase and Transfer Agreement ("Agreement") is made and entered into effective on the date shown below by and between Sal Mazzamuto, 5907 93<sup>rd</sup> Street, Lubbock, Lubbock County, Texas 79424 (together "Seller"), and GabeVitela Enterprise, LLC, a Texas limited liability company, 6801 Nashville Avenue, Lubbock, Lubbock County, Texas 79413 ("Buyer").

**Recitals**

WHEREAS, Seller represents, subject to the terms and provisions hereof, that Seller owns or has the right to use certain Intellectual Property Rights (hereafter Asset) identified below and subject to this Agreement and is duly authorized to execute, sell, and deliver said Asset, free of any and all liens or encumbrances.

WHEREAS, Buyer represents, subject to the terms and provisions hereof, that it is duly authorized and able to execute, deliver, and perform under this Agreement;

WHEREAS, Seller desires to sell all rights, title, and interest in certain assets, and Buyer desires to purchase all rights, title, and interest in certain assets pursuant to the terms of this Agreement.

**DEFINITIONS**

Intellectual Property Rights means all (i) Internet Domain names, trademarks, service marks, trade dress, trade names, logos and corporate names and registrations and applications for registration thereof together with all of the goodwill associated therewith, (ii) copyrights (registered or unregistered) and copyrightable works and registrations and applications for registration thereof, and (iii) copies and tangible embodiments thereof (in whatever form or medium), in connection with the tradename "One Guy From Italy" and any derivation thereof. The definition of Intellectual Property is restricted to the use of the trade name of "One Guy from Italy." Buyer understands that Seller has not filed any trademark, tradename, or copyright applications with regard to the name "One Guy from Italy" and that Seller does not represent that any registerable marks or names exist.

**AGREEMENT**

THEREFORE, in consideration of the mutual promises and the representations and warranties herein made, the parties agree as follows:

**Purchase and Sale**

1. On the terms and subject to all of the conditions of this Agreement and the performance by each of the parties to this Agreement of their respective obligations under this Agreement, Buyer agrees to purchase from Seller and Seller agrees to sell to Buyer all of the Intellectual Property Rights as defined above.

Intellectual Property Rights Purchase and Transfer Agreement

**EXHIBIT**  
**A**

Page 1 of 6





**Purchase Price and Other Conditions and Terms of Sale**

2. Consideration. The purchase price of the Asset is ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00) and such other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged.

3. Other Conditions and Terms of Sale.

3.1 Buyer and Seller agree that Seller has the right to open any type of restaurant after Closing of this Agreement on the following conditions and terms:

- (a) Seller will not use the name "One Guy from Italy" in any form or fashion, even by word of mouth in association with such restaurant;
- (b) Seller will not use any symbol or artwork, whether or not registered or copyrighted, that would represent or attempt to represent such restaurant is or was associated with One Guy from Italy.
- (c) Seller may any existing recipes, ingredients, or suppliers of Seller with such restaurant;
- (d) Seller cannot open any food business in Lubbock County, Texas, without the written consent of GabeVitela Enterprise, LLC;
- (e) Seller does not need consent of GabeVitela Enterprise, LLC to open any food business outside of Lubbock County, Texas;
- (f) Seller cannot sell or share the recipes, methods, and formulas currently used by Seller, or which are a close derivative of the currently used recipes, methods, and formulas to any third party;
- (g) Seller warrants that no part of the assets transferred pursuant to this agreement are owned by One Guy from Italy Pizza & Restaurant, Inc.; and,
- (h) Seller agrees to change the name of his corporation, One Guy from Italy Pizza & Restaurant, Inc., to remove the phrase "One Guy from Italy" from the name within 90 days after Closing.

**Closing**

4. Closing. The Closing of the transaction contemplated by this Agreement (the "Closing") shall occur at 10:00 o'clock a.m. on September 21, 2020.

Closing of this sale, and the obligations of both parties hereto is conditioned upon the Closing of the sale of the 1101 University Avenue location of "One Guy from Italy" by One Big Cat, Inc. to SDMVG, Ltd.



**Time of the Essence**

5. Time is of the essence in this Agreement. If the date specified in this Agreement for giving any notice or taking any action is not a business day, then the date for giving such notice or taking such action shall be the next day which is a business day.

**Miscellaneous Provisions**

6. Representations and Authority of the Parties. Each party to this Agreement represents that such party is fully authorized and empowered to execute this Agreement and to close the transaction contemplated hereby pursuant to the terms and provisions hereof. These representations and warranties shall survive the Closing.

7. Notices. All notices, requests, demands, and other communications required or permitted by this Agreement shall be in writing and shall be deemed to have been delivered if delivered in person to the party entitled thereto, against receipt, or if deposited in the United States mail, postage prepaid, certified mail, return receipt requested, addressed to the party entitled thereto at the address shown below. In the case of mailing, the time of receipt shall be deemed to be three days after depositing in the mail addressed as follows:

(a) In case of Seller, to:

Sal Mazzamuto  
5907 93<sup>rd</sup> Street  
Lubbock, Texas 79424

with a copy to:

Don C. Dennis  
Boerner, Dennis & Franklin, PLLC  
P.O. Box 1738  
Lubbock, Texas 79408

(b) In case of Buyer, to:

Gabe Vitela Enterprise, LLC  
6801 Nashville Avenue  
Lubbock, TX 79413  
Attn: Gabe Vitela  
with copy to:

Fernando M. Bustos  
Bustos Law Firm, P.C.  
P. O. Box 1980  
Lubbock, Texas 79408-1980



8. Default. If all the conditions of sale of the transaction contemplated herein are met in accordance with this Agreement or the Seller refuses to go forward to the Closing or otherwise fails or refuses to consummate the sale, Buyer shall have the right to enforce specific performance or shall have the right to pursue any other legal or equitable remedies available to it. If all the conditions to the sale and the closing of the transaction contemplated hereby are met in accordance with this Agreement except that Buyer refuses to go forward to the Closing or otherwise fails or refuses to consummate the sale, Seller may enforce specific performance or pursue any other legal or equitable remedy available to them.

9. Law Governing. This Agreement shall be construed in accordance with the laws of the State of Texas. Exclusive jurisdiction and venue shall be in the state or federal courts of Lubbock County, Texas.

10. Successors and Assigns. This Agreement shall inure to the benefit of the parties hereto and to their respective heirs, personal representatives, successors, and assigns.

11. Survival of Representations. All representations, covenants, and warranties contained herein shall survive the Closing of the transaction contemplated hereby.

12. Entirety. This Agreement contains the entire agreement of the parties with respect to the matters covered hereby and supersedes all prior and contemporaneous agreements by the parties. It may be amended or modified only in writing executed by both parties.

13. Counterparts. This Agreement and any document or other instrument delivered hereunder may be executed in counterparts, each of which shall be deemed an original instrument, but which together shall constitute but one and the same instrument. Any counterpart of this agreement or any document or other instrument delivered hereunder may be delivered by facsimile or by electronic mail, to be followed by delivery of the original as soon as practicable.

14. Modification/Waiver. This Agreement may not be modified or amended except by an instrument in writing signed by both parties. Any party hereto may, only by an instrument in writing, waive compliance by another party with any term or provision of this Agreement on the part of such other party hereto to be complied with or performed. The waiver by any party hereto of a breach of any term or provision of this Agreement shall not be construed as a waiver of any subsequent breach.

15. Severability. If any provision of this Agreement or the application thereof to any person or circumstance shall, at any time or to any extent, be invalid or unenforceable, the remaining provisions of this Agreement shall not be affected thereby and shall continue to be valid and enforceable.

16. Attorney's Fees. If any action at law or in equity is brought to enforce the provisions of this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees from the other party, which fees may be set by the court at the trial of such action or may be enforced in a



separate action brought for that purpose, and which fees shall be in addition to any other relief which may be awarded.

17. Fees and Costs. Each party shall bear the cost of its attorneys' fees, expenses, and any closing costs associated this Agreement for Sale and Purchase.

18. Third Party Beneficiary. No provision of this Agreement shall in any way inure to the benefit of any third party (including the public at large) so as to constitute any such person a third party beneficiary of this Agreement or any provision hereof, or otherwise give rise to any cause of action in any person not a party hereto.

19. Contra Proferentem. Seller and Buyer acknowledge that they have read this Agreement, have had the opportunity to review it with an attorney of their respective choice, and have agreed to all its terms. Under these circumstances, Seller and Buyer agree that the rule of construction that a contract be construed against the drafter shall not be applied in interpreting this Agreement and that in the event of any ambiguity in any of the terms or conditions of this Agreement, including any Exhibit hereto and whether or not placed of record, such ambiguity shall not be construed for or against any party hereto on the basis that such party did or did not author same.

20. Seller to Use Reasonable Efforts. Seller shall use all reasonable efforts, and cooperate with the Buyer, to obtain all necessary approvals, consents or waivers, or to resolve any impracticalities of transfer necessary to assign or convey to Buyer the Asset as soon as practicable; provided, however, that neither Seller nor Buyer shall be obligated to pay any consideration therefor except for filing fees and other ordinary administrative charges which shall be paid by Seller to the third party from whom such approval, consent or waiver is requested. Such approvals, consents, and waivers shall be in favor of the Buyer.

IN WITNESS WHEREOF, this Agreement is executed and effective as of the 24 day of June, 2020.

[signatures follow]



**SELLER:**

*Sal Mazzamuto*  
Sal Mazzamuto

**BUYER:**

**GABEVITELA ENTERPRISE, LLC**

By: *[Signature]*  
Name: Gabe Vitela  
Title: Managing Member

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I, Sara L. Smith, District Clerk, in and for Lubbock County, Texas, do hereby certify this to be a true and correct copy of a like instrument now on file in this office.

This 11th day of October, 2023 Meli Post Deputy  
Clerk of District Court, Lubbock County, Texas pg. 15 of 15



No. DC-2023-CV-0668

MP

GABEVITELA ENTERPRISES LLC	§	IN THE 237 <sup>TH</sup> DISTRICT COURT
	§	
	§	
V.	§	OF
	§	
SALVATORE MAZZAMUTO	§	LUBBOCK COUNTY, TEXAS

**DEFENDANT SALVATORE MAZZAMUTO’S  
MOTION TO DISMISS BASELESS CAUSE OF ACTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW SALVATORE MAZZAMUTO (“Sal Mazzamuto” herein), and asks the Court to dismiss certain of Plaintiff’s pleaded claims that have no basis in law or fact and in support thereof would show the Court as follows:

**I.  
BACKGROUND & FACTS**

1.01 On or about June 24, 2020, Sal Mazzamuto and Gabevitela Enterprises LLC (“Plaintiff” herein) entered into an Intellectual Property Rights Purchase and Transfer Agreement (“Agreement” herein). Within the Agreement, Sal Mazzamuto agreed, among other things, not to “open a food business.”

1.02 On or about December 6, 2022, Plaintiff filed a Petition to take Depositions before Suit pursuant to Texas Rule of Civil Procedure Rule 202. Plaintiff subsequently took Sal Mazzamuto’s deposition on March 9, 2023.

1.03 On or about May 26, 2023, Plaintiff filed Plaintiff’s Petition and Application for Temporary and Permanent Injunctions against Sal Mazzamuto.



**II.**  
**ARGUMENT & AUTHORITIES**

2.01 Defendant files this motion to dismiss certain of Plaintiff's claims or causes of action under the authority of TEXAS RULE OF CIVIL PROCEDURE 91a. TEX. R. CIV. P. 91a.1, 91a.2. Under Rule 91a, the Court can dismiss a cause of action that has no basis in law or fact. *Id.*

2.02 The Court should dismiss Plaintiff's causes of action for breach of contract, declaratory judgment, temporary and permanent injunctive relief because they have no basis in law. TEX. R. CIV. P. 91a.1, 91a.2. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the plaintiff to the relief sought. Tex. R. Civ. P. 91a.1; *Bethel v. Quilling, Selander, Landaus, Winslett & Moser, P.C.*, 595 S.W.3d 651, 654-55 (Tex. 2020); *In re Hous. Specialty Ins. Co.*, 569 S.W.3d 138, 139 n.1 (Tex. 2019); see *In re Essex Ins. Co.*, 450 S.W.3d 524, 527-28 (Tex. 2014).

2.03 Plaintiff's claims found in its Petition have no basis in law because the Plaintiff has not pleaded the facts that would entitle it to the relief sought, or alternatively, plead only conclusions, not facts which support those claims. First, Plaintiff does not allege that Sal Mazzamuto engaged in conduct which can be construed as opening a food business in Lubbock County. Second, Plaintiff admits that Pappa V's Pizza was opened and operated by Jerry Mazzamuto. Third, Plaintiff does not allege that Sal Mazzamuto performed any of the normal actions of opening a restaurant such as obtaining any permits necessary for a food business. Fourth, Plaintiff does not allege that Papa V Pizza is Sal Mazzamuto's food business, because it is not. Fifth, and finally, Plaintiff's failures are indicative of its baseless claim because Plaintiff already conducted discovery by taking Sal Mazzamuto's deposition and requesting documents.



2.04 To recap, Plaintiff's allegations assert that Sal Mazzamuto purchased real estate and leased it to Jerry Mazzamuto who opened and operates Papa V Pizza. The allegations do not allege Sal Mazzamuto opened, owns, operates, or controls Papa V Pizza business. All of Plaintiff's claims or causes of action, other than its request for reformation rest on pleading and proof that Sal Mazzamuto opened a food business in Lubbock County, accordingly, they have no basis in fact under the Petition.

2.05 Further, the Plaintiff's claims are presently unenforceable because the restrictions on competition imposed by Sal Mazzamuto's agreement not to open a food business in Lubbock County are not limited to a reasonable time or a reasonable scope of activity.

2.06 Plaintiff's Petition consists of conclusory statements that do not sufficiently allege a cause of action under Rule 91a standards. *Fiamma Statler, LP v. Challis*, 02-18-00374-CV, 2020 WL 6334470, at \*8 (Tex. App.—Fort Worth Oct. 29, 2020, pet. denied). There must be factual allegations supporting the elements of a cause of action. *Id.* Here, the Plaintiff fails to provide any facts that establish the elements of its claims nor does Plaintiff present any factual allegations supporting its claims that Sal Mazzamuto breached the Agreement or caused any of the injuries alleged in Plaintiff's Petition. Plaintiff's Petition also fails to give fair notice of any facts that support the basis of its claims.

**III.**  
**ATTORNEY FEES & COSTS**

3.01 The prevailing party on a motion to dismiss can be awarded reasonable and necessary attorney fees and all costs incurred as a result of plaintiff's cause of action. See TEX. CIV. PRAC. & REM. CODE § 30.021; TEX. R. CIV. P. 91a.7. Therefore, if the Court grants Defendant, Sal





Mazzamuto's Motion to Dismiss, either in whole or in part, Defendant asks the Court to award Sal Mazzamuto reasonable and necessary attorney fees and all costs incurred as a result of defending against Plaintiff's baseless claims. See TEX. CIV. PRAC. & REM. CODE § 30.021; TEX. R. CIV. P. 91a.7.

**IV.**  
**CONCLUSION**

4.01 Plaintiff's petition fails to establish any elements of its claims against Sal Mazzamuto due to its lack of any factual allegations forming the basis of its claims. The Plaintiff merely makes conclusory statements of law and recite the elements of its claims. Plaintiff's Petition fails to provide any facts that would support or establish Sal Mazzamuto's liability. Therefore, Plaintiff's claims, with the exception to its request for reformation, should be dismissed against Sal Mazzamuto under TEXAS RULE OF CIVIL PROCEDURE 91a.

**V.**  
**PRAYER**

WHEREFORE PREMISES CONSIDERED, Defendant, Sal Mazzamuto, prays that the Court sets this Motion for hearing and, after the hearing, grant this Motion, dismiss the challenged causes of action and award Defendant reasonable and necessary attorney fees and all costs and such further relief to which it is justly entitled, provided however, the relief requested does not include the dismissal of the request for reformation.



RESPECTFULLY SUBMITTED

**BOERNER, DENNIS & FRANKLIN, PLLC**

P.O. Box 1738

Lubbock, Texas 79408

Tel: (806) 763-0044

Fax: (806) 763-2084

/s/ Don C. Dennis

Don C. Dennis

SBN 05749400

Email: [dcdennis@bdfllawfirm.com](mailto:dcdennis@bdfllawfirm.com)

Orion Hutchin

SBN 24122288

Email: [ohutchin@bdfllawfirm.com](mailto:ohutchin@bdfllawfirm.com)

ATTORNEYS FOR DEFENDANT

Certificate of Service

I hereby certify that on July 18, 2023 I electronically filed the foregoing document with the clerk of the Court stated above. I further certify that the following attorneys of record have been contemporaneously served through the Courts electronic filing system:

Fernando M. Bustos  
Deirdre Kelly Trotter  
BUSTOS LAW FIRM, P.C.  
P. O. Box 1980  
Lubbock, Texas 79408

/s/ Don C. Dennis

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(7-18-23)

Salvatore Mazzamuto's Motion to Dismiss

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### Automated Certificate of eService

This automated certificate of service was created by the e filing system. The filer served this document via email generated by the e filing system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

William Franklin on behalf of Don Dennis  
 Bar No. 5749400  
 lescoop@bdfllawfirm.com  
 Envelope ID: 77621134  
 Filing Code Description: MDIS - Motion To Dismiss  
 Filing Description: Defendant Salvatore Mazzamuto's Motion to Dismiss  
 Baseless Cause of Action  
 Status as of 7/18/2023 11:35 AM CST

Associated Case Party: GabeVitela Enterprise LLC

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Associated Case Party: Salvatore Mazzamuto

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I, Sara L. Smith, District Clerk, in and for Lubbock County, Texas, do hereby certify this to be a true and correct copy of a like instrument now on file in this office.

This 11th day of October, 2023 Melissa Deputy Clerk of District Court, Lubbock County, Texas pg. 6 of 6



CAUSE NO. DC-2023-CV-0668

GABEVITELA ENTERPRISE LLC	§	IN THE 237TH DISTRICT COURT
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	OF
	§	
SALVATORE MAZZAMUTO and	§	
GIROLAMO MAZZAMUTO,	§	
	§	
<i>Defendants.</i>	§	LUBBOCK COUNTY, TEXAS

**PLAINTIFF’S RESPONSE TO DEFENDANT’S RULE 91A MOTION TO DISMISS**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff GabeVitela Enterprise LLC (“Plaintiff”) files this Response to Defendant Salvatore Mazzamuto’s Rule 91a Motion to Dismiss Baseless Cause of Action, and in support thereof respectfully shows the Court as follows:

**I. Background**

1. On May 26, 2023, Plaintiff filed its Petition and Application for Temporary and Permanent Injunctions (“Original Petition”).
2. On July 7, 2023, Defendant filed his Original Answer.
3. On July 18, 2023, Defendant filed his Motion to Dismiss Baseless Cause of Action.
4. On August 3, 2023, Plaintiff filed its First Amended Petition and Application for Temporary and Permanent Injunctions (“First Amended Petition”).
5. Because Plaintiff filed an amended pleading that moots the grounds contained in Defendant’s Motion to Dismiss, the Motion to Dismiss should be denied as moot.

**II. Argument and Authorities**

6. The Texas Rules of Civil Procedure require only that pleadings provide fair notice of the claims and the relief sought. Tex. R. Civ. P. 45, 47. Because Texas is a fair notice pleading



jurisdiction, that doctrine is applied to a Rule 91a motion. *In re Odebrecht Construction, Inc.*, 548 S.W.3d 739, 744 (Tex. App.—Corpus Christi 2018, no pet.).

7. In adjudicating a Rule 91a motion, the trial court construes the pleadings liberally in favor of the plaintiff, looks at the plaintiff's intent, and accepts plaintiff's factual allegations as true. *Vasquez v. Legend Nat. Gas III, L.P.*, 492 S.W.3d 448, 450 (Tex. App.—San Antonio 2016, pet. denied). The court may also draw reasonable inferences from the factual allegations. *Id.* at 451.

8. A Rule 91a motion must identify each cause of action as to which dismissal is requested and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both. Tex. R. Civ. P. 91a.2. A cause of action has no basis in law “if the allegations, taken as true, together with the inferences reasonably drawn from them, do not entitle the claimant to the relief sought.” Tex. R. Civ. P. 91a.1. “[I]f nothing in the pleading itself triggers a clear legal bar to the claim, then there is a basis in law.” *In re: RNDC Tex., LLC*, 2018 WL 2773262 at \*1 (Tex. App.—Dallas 2018, original proceeding). A cause of action has no basis in fact if no reasonable person could believe the facts pleaded. Tex. R. Civ. P. 91a.1.

9. A cause of action has a basis in fact if a reasonable person could believe the facts pleaded. Tex. R. Civ. P. 91a.1; e.g., *Drake v. Walker*, No. 05-14-00355-CV, 2015 WL 2160565 (Tex. App.—Dallas 2015, no pet.) (memo op.; 5-8-15).

10. Rule 91a allows the respondent to amend its pleadings at least three days before the hearing. Tex. R. Civ. P. 91a.5(b). If the respondent does amend in accordance with 91a.5(b), the movant may withdraw or amend their motion directed at the amended cause of action. *Id.* The Court must rule on the motion unless it has been properly withdrawn. Tex. R. Civ. P. 91a.5(c).



11. An issue becomes moot when there has ceased to exist a justiciable controversy between the parties. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 162 (Tex. 2012). To establish a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests. *Sw. Elec. Power Co. v. Lynch*, 585 S.W.3d 678, 685 (Tex. 2020).

### III. Amended Pleading Has Been Filed.

12. On August 3, 2023, Plaintiff filed its First Amended Petition. Said pleading is incorporated herein by reference. Said pleading provides additional details as to the claims made against Defendant.

### IV. Factual Presentation

13. While Plaintiff denies that its Original Petition failed to plead facts that would entitle it to the relief sought and that it pled “only conclusions,” Plaintiff’s First Amended Petition provides Defendant’s own words to plead facts that also entitle Plaintiff to the relief sought.

14. Plaintiff has alleged that Defendant has engaged in conduct that can and should be construed as opening a food business in Lubbock County.

15. Defendant’s assertion that Plaintiff alleged in its Original Petition that Jerry Mazzamuto opened Papa v. Pizza is false. Plaintiff alleged that Papa V Pizza opened in October 2022, operated by Sal’s brother, Jerry Mazzamuto. *See* First Amended Petition at ¶ 14. Plaintiff also alleged that Papa V Pizza could not have opened without Defendant. *Id.* at ¶ 15.

16. Defendant’s allegation that any failure on the part of Defendant to obtain a permit necessary for a food business is conclusive that Defendant did not open a food business in Lubbock County is unsupported. *See* ¶ 2.03, Defendant’s Motion to Dismiss. In addition, Defendant’s allegation that Plaintiff asserted in its Original Petition that Defendant leased real estate to Jerry Mazzamuto is false. *See* ¶ 2.04, Defendant’s Motion to Dismiss. Defendant’s assertion that



Plaintiff is required to allege that Defendant “opened, owns, operates, or controls” Papa V Pizza business is unfounded. *Id.* Plaintiff is only required to show that Plaintiff opened a food business in Lubbock County in violation of the non-compete agreement within the Intellectual Property Rights Purchase and Transfer Agreement (the “IP Agreement”), which is the subject of this litigation. *See* ¶ 3.1(d), IP Agreement.

17. The basic facts are set forth in Plaintiff’s First Amended Petition. Plaintiff has provided fair notice of the nature of its claims against Defendant. Defendant entered into a non-compete agreement as part of the IP Agreement. As confirmed by Defendant in his Motion to Dismiss, Defendant agreed not to open a food business in Lubbock County, Texas. *See* ¶ 1.01, Defendant’s Motion to Dismiss.

18. However, within two years and two months of executing the Agreement, Defendant opened a food business in Lubbock County, Texas.

19. Defendant admitted that he opened a food business. *See* First Amended Petition, ¶ 9, even though Defendant represented himself as retired after the sale of *One Guy From Italy* located on 50<sup>th</sup> Street in 2017. *See* First Amended Petition, ¶ 17. Defendant maintained that representation and stated that he did not intend to open a food business in Lubbock County, Texas, during the negotiation of the terms of the IP Agreement in 2020. A lifetime non-compete is not unreasonable given these facts. *See* First Amended Petition, ¶¶ 17, 31.

20. Defendant did not purchase a property that could be used for just any purpose; Defendant specifically purchased a restaurant property. The property came with restaurant equipment and Defendant made a specific agreement to purchase the existing restaurant equipment with the real property. *See* First Amended Petition, ¶ 11.



21. Defendant paid \$20,000 to \$30,000 for additional restaurant equipment to get Papa V Pizza open. *See* First Amended Petition ¶ 12.

22. Defendant also paid for other costs related to remodeling the property for a restaurant, which is not the normal course of business of a disinterested landlord. *See* First Amended Petition ¶ 13.

#### V. Attorneys' Fees

23. The prevailing party on a motion to dismiss can be awarded reasonable and necessary attorney fees and all costs incurred. Tex. R. Civ. P. 91a.7. Therefore, if the Court denies Defendant's Motion to Dismiss, Plaintiff requests the Court award Plaintiff reasonable and necessary attorney fees and all costs incurred as a result of defending Defendant's baseless motion to dismiss. Tex. R. Civ. P. 91a.7.

#### VI. Conclusion

24. Plaintiff's Original Petition plead facts that would entitle it to the relief sought and the First Amended Petition has added additional facts and Defendant's own words in support of Plaintiff's claims.

25. The First Amended Petition moots the grounds asserted in Defendant's Motion to Dismiss. If the Court hears the motion and rules for Plaintiff, attorney fees and costs should be awarded to Plaintiff. Tex. R. Civ. P. 91a.7. (prevailing party may be awarded all costs and reasonable attorney fees incurred from the challenged cause of action).

26. The First Amended Petition provides additional details for Plaintiff's claims. Thus, the Court should deny Defendant's Motion to Dismiss as moot.

27. Plaintiff's has not filed a baseless claim under Rule 91a, and Defendant's Rule 91a Motion to Dismiss should be in all things denied.





**Prayer**

Plaintiff prays that Defendant's Rule 91a Motion to Dismiss be in all things denied and that Plaintiff be awarded such other and further relief, at law or in equity, to which Plaintiff is entitled, including all costs and reasonable attorney fees for preparing this Response and attending the hearing on the Rule 91a Motion.

Respectfully submitted,

By: /s/ Fernando M. Bustos  
Fernando M. Bustos; SBN: 24001819  
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ATTORNEYS FOR PLAINTIFF

**CERTIFICATE OF SERVICE**

This is to certify that on August 3, 2023, a true and correct copy of the foregoing document was served on all counsel of record through the electronic Texas file and serve system.

/s/ Fernando M. Bustos  
Fernando M. Bustos



**Automated Certificate of eService**

This automated certificate of service was created by the e filing system. The filer served this document via email generated by the e filing system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Amy Dobberstein on behalf of Fernando Bustos  
 Bar No. 24001819  
 adobberstein@bustoslawfirm.com  
 Envelope ID: 78192925  
 Filing Code Description: ANSR - Answer/Contest/Response  
 Filing Description: Plaintiff's Response to Defendant's Rule 91a Motion to Dismiss  
 Status as of 8/4/2023 10:23 AM CST

Associated Case Party: GabeVitela Enterprise LLC

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Name	BarNumber	Email	TimestampSubmitted	Status
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Don Dennis		dcdennis@bdfllawfirm.com	8/3/2023 4:59:55 PM	SENT



I, Sara L. Smith, District Clerk, in and for Lubbock County, Texas, do hereby certify this to be a true and correct copy of a like instrument now on file in this office.

This 11th day of October 2023 Melinda Deputy Clerk of District Court, Lubbock County, Texas pg. 1 of 1



MP

CAUSE NO. DC-2023-CV-0668

GABEVITELA ENTERPRISE LLC	§	IN THE 237TH DISTRICT COURT
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	OF
	§	
SALVATORE MAZZAMUTO and	§	
GIROLAMO MAZZAMUTO,	§	
	§	
<i>Defendants.</i>	§	LUBBOCK COUNTY, TEXAS

**PLAINTIFF'S FIRST AMENDED PETITION AND APPLICATION FOR  
TEMPORARY AND PERMANENT INJUNCTIONS**

COMES NOW, Plaintiff GabeVitela Enterprise LLC and files this First Amended Petition and Application for Temporary and Permanent Injunctions against Defendants Salvatore Mazzamuto and Girolamo Mazzamuto, and respectfully shows the Court:

**I. PARTIES**

1. Plaintiff GabeVitela Enterprise LLC (Vitela) is a Texas Limited Liability Company.
2. Defendant Salvatore Mazzamuto (Sal) has previously entered an appearance in this case.
3. Defendant Girolamo Mazzamuto (Jerry) is an individual citizen of the State of Texas. He may be served with process at 5719 91st Street, Lubbock, Texas 79424.

**II. JURISDICTION AND VENUE**

4. This Court has jurisdiction over this civil action because the amount in controversy exceeds the minimum jurisdictional limits of this Court.



5. Venue in this action is proper in this Court pursuant to Texas Civil Practice & Remedies Code Section 15.002(a)(1) because all or a substantial part of the events giving rise to the claims herein occurred in Lubbock County, Texas.

### **III. AMOUNT IN CONTROVERSY**

6. Pursuant to Rule 47(c) of the Texas Rules of Civil Procedure, Plaintiff seeks monetary relief of \$250,000.00 or less, excluding interest, statutory or punitive damages, and attorney's fees and costs and non-monetary relief.

### **IV. CONDITIONS PRECEDENT**

7. All conditions precedent have been performed or have occurred.

### **V. FACTUAL BACKGROUND**

8. Vitela and Sal entered into an Intellectual Property Rights Purchase and Transfer Agreement on August 24, 2020 (the "IP Agreement") related to the *One Guy From Italy* business, goodwill, and brand, wherein Sal sold to Vitela the intellectual property related to this restaurant business. *See* Exhibit A.

9. The IP Agreement specifically prohibited Sal from opening a food business of any kind in Lubbock County, Texas, without the consent of Vitela.

10. Sal admitted that he opened a food business in Lubbock County. Sal specifically stated in his deposition:

Q: All right. Before you bought this location [8008 Abbeville – the Restaurant Property], did you talk to Jerry and say "Hey, Jerry, I am going to buy this location. Do you want to put a restaurant there?"

A: No. But I email if he wants to open a restaurant because he wanted to open a restaurant with Gabe. He wanted him as a partner too. He looked for a restaurant. So – and I do – I am investing. That is why I did it.

Q: Okay. You invested?

A: Invested. That is it.



See Ex. B, Deposition of Salvatore Mazzamuto taken on March 9, 2023 at page 53 line 16 through page 54 line 1.

11. On May 19, 2022, Totomazza Inc. purchased the real property located at 8008 Abbeville in Lubbock, Lubbock County, Texas (Abbeville location). The Abbeville location was previously operated as a restaurant. The purchase included restaurant equipment, including “[r]efrigeration, freezers, sandwich tables, prep tables, tables, chairs, sinks, patio tables and chairs, and shelves” [sic]. See Ex. C, Commercial Contract – Improved Property, Non-Realty Items Addendum, Doc Prod 1-10-23 - #0020. Further, Sal testified in his deposition that the building was a restaurant building and the purchase included restaurant equipment:

Q: So after you signed your trade name agreement with Mr. Vitela and he paid you a hundred thousand dollars, were you out of the restaurant business in Lubbock?

A: I have been a long time out of business in restaurant in Lubbock.

Q: In less than two years after you sold the trademark to Mr. Vitela you bought a restaurant building in Lubbock; right?

A: Yes, sir.

Q: The restaurant building on 8008 Abbeville; correct?

A: It was an investment.

Q: And it happened to be a restaurant building; right?

A: Yeah.

Q: With all the –

A: Equipment.

Q: -- that you would need for a restaurant; right?



A: Yeah.

See Ex. B at 51:10-20.

12. Sal also testified in his deposition that he spent \$20,000 to \$30,000 to purchase additional restaurant equipment to assist in opening the Papa V Pizza restaurant. Specifically, Sal testified:

Q: Okay. So I want to just focus on how much you paid for restaurant equipment –

A: Uh-huh.

Q: -- to get Papa V Pizza open. About how much; do you know?

A: I don't remember. Maybe 20,000, 25.

Q: Okay.

A: 30, less. I don't know.

Q: Okay. Somewhere in that range probably?

A: Yeah. I don't know exactly. Yeah.

*Id.* at 59:14-23.

13. Sal testified that he also paid for other costs related to remodeling the property for the restaurant. Specifically, Sal has stated:

Q: You did pay for some of these receipts –

A: Yeah. Yeah.

Q: -- for the remodeling costs?

A: Yeah.

*Id.* at 63:5-8.

14. In October 2022, Papa V Pizza opened at the Abbeville location, operated by Sal's brother, Girolamo (Jerry) Mazzamuto.

15. Without Sal's financial aid and assistance, Papa V Pizza could not have opened. In fact, Sal purchased the real estate, which was previously a restaurant location. Sal specifically



sought restaurant property. Sal also, at his expense, made expensive improvements and bought valuable fixtures, which were to be used for the restaurant business of Papa V Pizza.

16. Witnesses have stated that the products sold by Papa V Pizza at the Abbeville location are the same as those sold by *One Guy From Italy*, which business, brand, recipes, methods, and formulas were purchased by Vitela.

17. Sal represented himself as retired upon the sale of the *One Guy from Italy* located on 50<sup>th</sup> Street in 2017, which is supported by Sal’s testimony.

Q: How did Mr. Ghandour introduce you to Mr. Vitela?

A: Mr. Ghandour, I told him I want to sell the place because I want to retire. And he just bring him as a buyer.

*Id.* at 41:8-12.

18. Sal maintained that claim, and stated that he did not intend to open a food business in Lubbock County, Texas, during the negotiation of the terms of the IP Agreement in 2020.

19. The terms “open” and “food business” are not defined in the IP Agreement. Black’s Law Dictionary defines “business” as a “commercial enterprise carried on for profit.”<sup>1</sup> Black’s Law Dictionary defines “open” as manifest, apparent, notorious.<sup>2</sup> Merriam-Webster defines open as “being in operation, especially ready for business, patronage, or use.”<sup>3</sup> Law Insider defines food business as “any undertaking, carrying out any of the activities related to any stage of production, processing and distribution of food.”<sup>4</sup>

<sup>1</sup> Black’s Law Dictionary, p. 239, 10<sup>th</sup> Ed. (2010).

<sup>2</sup> *Id.* at 1263.

<sup>3</sup> <https://www.merriam-webster.com/dictionary/open> (accessed Jul. 31, 2023).

<sup>4</sup> <https://www.lawinsider.com/dictionary/food-business>. (accessed July 31, 2023).



20. Given the definitions of “open” and “food business,” Sal opened a good business in Lubbock County, Texas, in violation of the non-compete agreement contained within the IP Agreement.

21. Sal falsely and fraudulently promised to Vitela that upon selling One Guy from Italy to Vitela and executing the IP Agreement, Sal would not compete with Vitela and would not open a food business in Lubbock County. Sal’s brother, Jerry, had knowledge of Sal’s false and fraudulent statements that induced Vitela to sign the IP Agreement. Jerry and Sal planned together to open Papa V Pizza, as part of Sal’s plan to defraud Vitela.

## **VI. CLAIMS FOR RELIEF**

### **Count 1 – Breach of Contract**

22. Pursuant to the IP Agreement, Sal agreed not to open a food business in Lubbock County, Texas, yet has opened a food business in Lubbock County, Texas, in violation of the non-compete contained within the IP Agreement.

23. Vitela performed his obligations under the IP Agreement. Vitela paid Sal \$100,000.00 for the intellectual property identified in the IP Agreement, including goodwill.

24. Vitela has been damaged by Sal’s opening of the competing restaurant business in Lubbock County, Texas, in violation of the IP Agreement.

25. The non-compete contained within the IP Agreement limits the geographic area and scope of activity subject to the non-compete. The non-compete was not limited in time; although the non-compete was heavily negotiated with Sal and his counsel and agreed to by Sal and his counsel.

26. Because the non-compete is not limited in time, Vitela seeks to reform the non-compete contained in the IP Agreement, **only if deemed necessary**, to include such limitation, if required by the Court.





27. A non-compete agreement is ancillary to the sale of the goodwill of a business. *See, e.g. Chandler v. Mastercraft Dental Corp. of Texas Inc.*, 739 S.W.2d 460, 464-65 (Tex. App.-Fort Worth 1987, writ denied).

28. A non-compete agreement in association with the sale of a business protects the buyer and the seller because it allows buyer to pay full value for the goodwill of a business with assurance that the seller will not shortly thereafter start a competing business.

29. A ten-year non-compete period is not unreasonable as a matter of law when ancillary to a contract for the sale of a business. *Heritage Operating, L.P. v. Rhine Brothers, LLC*, 2012 WL 2344864, \*6 (Tex. App.—Fort Worth June 21, 2012). “A noncompete signed by an owner selling a business is quite different than one signed by an employee.” *Id.* at \*5.

30. Furthermore, “Courts have been more inclined to enforce a long or limitless period barring competition after a sale of a business. *See, e.g., Oliver v. Rogers*, 976 S.W.2d 792, 801 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1998, pet. denied) (holding that a lack of a time limitation did not render noncompete unreasonable as a matter of law); *Greenstein v. Simpson*, 660 S.W.2d 155, 159 (Tex. App.-Waco 1983, writ ref’d n.r.e.) (‘[A] person may agree [ ] in connection with the sale of his business[ ] not to re-enter a similar competitive business for the remainder of his life.’); *York v. Dotson*, 271 S.W.2d 347, 348 (Tex. Civ. App.-Fort Worth 1954, writ ref’d n.r.e.) (‘One may lawfully agree not to compete in a particular business, in a reasonably limited territory, during the remainder of his life. Such contracts are held not to be in restraint of trade.’); *Clay v. Richardson*, 290 S.W. 235, 236 (Tex. Civ. App.-Fort Worth 1926, writ dism’d w.o.j.) (upholding covenant of theater seller never to open a theater again in town where theater was located).” *Id.*

31. In *Heritage*, “Kendall L. was ‘semiretired,’ and he had ownership interests in other companies. Kendall L. had presented no evidence of any great hardship borne by him by staying



out of the area subject to the non-compete, nor did he demonstrate any injury to the public that outweighed the legitimate benefits that the negotiated noncompete granted to Heritage.” *Id.* (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681–82 (Tex. 1990) (noting that a noncompete is reasonable if neither hardship to the promisor nor public injury outweighs the covenant’s legitimate benefits to the promisee).”

32. Vitela seeks to enforce the non-compete language of the IP Agreement as written. The unlimited term was negotiated. The territory of the non-compete was limited to Lubbock County, Texas. Sal represented that he did not intend to open a food business in Lubbock County, Texas, at the time of the negotiation of the terms of the IP Agreement.

33. Further, Sal represented himself as retired after the sale of *One Guy From Italy* located on 50<sup>th</sup> Street in 2017. See Ex. B at 41:8-12. The IP Agreement was signed in August 2020, after the sale of the other *One Guy From Italy* location, which was sold to an entity in which Vitela held an interest. A lifetime non-compete is not unreasonable given these facts.

34. Alternatively, Vitela seeks to reform the non-compete to a term of 10-years and no fewer than 5-years from the date of execution of the IP Agreement.

**Count 2 – Fraud**

35. Sal represented to Vitela that if Vitela would pay him \$100,000.00 and sign the IP Agreement, that Sal would abide by a non-compete agreement and not open a food business in Lubbock County. This representation was material and false, and when Sal made this representation, Sal knew that it was false or made the representation recklessly, as a positive assertion, and without knowledge of its truth. Further, Sal made this representation with the intent that Vitela act on it. Vitela relied on this representation, causing him injury. Accordingly, Vitela asserts a cause of action against Sal for fraud under Texas Common Law.



**Count 3 – Conspiracy to Commit Fraud**

36. Defendants were a member of a combination of two or more persons, and had an object of their combination to accomplish an unlawful purpose, or a lawful purpose by unlawful means. Defendants had a meeting of the minds on the object or course of action, namely, defrauding Vitela by having him pay Sal \$100,000.00 in exchange for a non-compete agreement that Sal knew he would not honor, thus paving the way for Sal to have additional financial capital with which to invest with Jerry and together open their competing restaurant, Papa V Pizza. Sal committed an unlawful and overt act to through the object or course of action, namely, making the false representation to Vitela as described above. Finally, Vitela suffered economic injury as approximate result of the wrongful act. Accordingly, Vitela asserts a cause of action against Defendants for conspiracy to commit fraud.

**Count 4 – Declaratory Judgment**

37. Vitela re-alleges and incorporates by reference each of the allegations made above as though the allegations were fully set forth herein.

38. Sal has opened a food business in Lubbock County, Texas, in violation of the IP Agreement.

39. Accordingly, Vitela asks the Court to issue a declaration that Sal has breached the IP Agreement by his actions in opening a competing food business in violation of the non-compete provision of the IP Agreement.

**Count 5 – Temporary and Permanent Injunctive Relief Under Tex. Bus. & Com. Code Ann. §§ 15.50, 15:51(a), and 15.52**

40. Vitela re-alleges and incorporates by reference each of the allegations made above as though the allegations were fully set forth herein.



41. “Under the common law, a party seeking an injunction must show that without injunctive relief he will suffer irreparable injury for which he has no adequate legal remedy.” *Heritage Operating, LP*, 2012 WL 2344864, \*6 (citing *Tom James Co. v. Mendrop*, 819 S.W.2d 251, 253 (Tex. App.-Fort Worth 1991, no writ). However, if a party relies on a statute that defines the requirements for injunctive relief, the express statutory language “supersedes common law requirements.” *Id.* (citing *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787, 795 (Tex. App.-Houston [1<sup>st</sup> Dist.] 2001, no pet.). Damages, *injunctive relief, or both* are provided by the Covenants Not to Compete Act for a breach of a non-compete by the promisor. Tex. Bus. & Com. Code Ann. § 15.51(a) (“ . . . a court may award . . . damages, injunctive relief, or both damages and injunctive relief for a breach by the promisor of the covenants”).

42. Thus, a party seeking injunctive relief under the Covenants Not to Compete Act does not have to show irreparable injury for which he has no adequate legal remedy as a prerequisite to injunctive relief. *Heritage Operating, L.P.*, 2012 WL 2344864, \*6 (citing *Letkeman v. Reyes*, 299 S.W.3d 482, 486 (Tex. App.-Amarillo 2009, no pet.) (“It is enough simply to prove a distinct or substantial breach.”); *see also* Tex. Bus. & Com. Code Ann. § 15.52 (stating that “the procedures and remedies . . . provided by Section 15.51 . . . are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise”).

43. Vitela seeks injunctive relief under the Covenants Not to Compete Act and therefore is entitled to injunctive relief without having to show irreparable injury as a prerequisite to injunctive relief. Further, because the Covenants Not to Compete Act provides procedures and remedies under Section 15.51, such procedures and remedies are exclusive and preempt any other



criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law.

44. For these reasons, Vitela is entitled to seek injunctive relief under the Covenants Not to Compete Act. Further, Vitela is required only to prove a distinct or substantial breach by Sal of the covenant not to compete. Sal has opened a food business in Lubbock County, Texas, in violation of the covenant not to compete contained in the IP Agreement. Therefore, Vitela is entitled to injunctive relief.

45. After entry of a Temporary Injunction, which should persist through trial on the merits, and thereafter, Vitela requests the entry of a permanent injunction.

#### **VII. ATTORNEYS' FEES**

46. Vitela seeks recovery of attorneys' fees under Tex. Civ. Prac. & Rem. Code § 37.009 and § 38.001.

#### **VIII. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Vitela respectfully requests that the Court issue a Temporary Restraining Order, and after a hearing on Vitela's Application for Temporary Injunction, set this case for trial on the merits, and after a trial, that the Court grant Vitela the following relief against Defendants, as follows:

- a. A temporary and permanent injunction, enjoining Sal from his violations of the IP Agreement, as stated above;
- b. A declaration that Sal breached the IP Agreement when he opened a food business in Lubbock County, Texas;
- c. Confirmation of the unlimited term of the non-compete agreement or reformation of the non-compete agreement within the IP Agreement, if required by the Court;



- d. Actual and special damages to be proven at trial on all issues available;
- e. Punitive damages;
- f. Attorneys' fees and costs of suit;
- g. Pre-judgment and post-judgment interest at the maximum rate allowed by law; and
- h. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

By: /s/ Fernando M. Bustos

Fernando M. Bustos; SBN: 24001819

[fbustos@bustoslawfirm.com](mailto:fbustos@bustoslawfirm.com)

Deirdre Kelly Trotter; SBN: 45006069

[dtrotter@bustoslawfirm.com](mailto:dtrotter@bustoslawfirm.com)

BUSTOS LAW FIRM, P.C.

P.O. Box 1980

Lubbock, Texas 79408-1980

(806) 780-3976

(806) 780-3800 FAX

ATTORNEYS FOR PLAINTIFF

#### **CERTIFICATE OF SERVICE**

This is to certify that on August 3, 2023, a true and correct copy of the foregoing document was served on all counsel of record through the electronic Texas file and serve system.

/s/ Fernando M. Bustos

Fernando M. Bustos



**DECLARATION OF GABRIEL VITELA**

My name is Gabriel Vitela, my date of birth is September 20, 1978, and my address is 6801 Nashville Avenue, Lubbock, Lubbock County, Texas 79413, the United States of America. I declare under penalty of perjury that the factual allegations in the Plaintiff's First Amended Petition and Application for Temporary and Permanent Injunctions are within my personal knowledge and are true and correct.

Executed in Lubbock County, State of Texas on August 3, 2023, 2023.

GABEVITELA ENTERPRISE LLC

By:   
Gabe Vitela, Managing Member





# Audit Trail

DigiSigner Document ID: 6e0a3bda-9905-4279-b81c-faafe20201de

## Signer

Email: gabevitela@gmail.com  
IP Address: 2600:1700:5861:3740:c48f:5f70:e083:48a9

## Signature

Event	User	Time	IP Address
Create as copy	adobberstein@bustoslawfirm.com	8/3/23 4:56:30 PM EDT	66.76.183.26
Send for signing	adobberstein@bustoslawfirm.com	8/3/23 4:57:36 PM EDT	66.76.183.26
Open document	gabevitela@gmail.com	8/3/23 5:41:33 PM EDT	2600:1700:5861:3740:c48f:5f70:e083:48a9
Sign document	gabevitela@gmail.com	8/3/23 5:43:04 PM EDT	2600:1700:5861:3740:c48f:5f70:e083:48a9
Close document	gabevitela@gmail.com	8/3/23 5:43:04 PM EDT	2600:1700:5861:3740:c48f:5f70:e083:48a9





**INTELLECTUAL PROPERTY RIGHTS PURCHASE AND TRANSFER AGREEMENT**

This Intellectual Property Rights Purchase and Transfer Agreement (“Agreement”) is made and entered into effective on the date shown below by and between Sal Mazzamuto, 5907 93<sup>rd</sup> Street, Lubbock, Lubbock County, Texas 79424 (together “Seller”), and Gabe Vitela Enterprise, LLC, a Texas limited liability company, 6801 Nashville Avenue, Lubbock, Lubbock County, Texas 79413 (“Buyer”).

**Recitals**

WHEREAS, Seller represents, subject to the terms and provisions hereof, that Seller owns or has the right to use certain Intellectual Property Rights (hereafter Asset) identified below and subject to this Agreement and is duly authorized to execute, sell, and deliver said Asset, free of any and all liens or encumbrances.

WHEREAS, Buyer represents, subject to the terms and provisions hereof, that it is duly authorized and able to execute, deliver, and perform under this Agreement;

WHEREAS, Seller desires to sell all rights, title, and interest in certain assets, and Buyer desires to purchase all rights, title, and interest in certain assets pursuant to the terms of this Agreement.

**DEFINITIONS**

Intellectual Property Rights means all (i) Internet Domain names, trademarks, service marks, trade dress, trade names, logos and corporate names and registrations and applications for registration thereof together with all of the goodwill associated therewith, (ii) copyrights (registered or unregistered) and copyrightable works and registrations and applications for registration thereof, and (iii) copies and tangible embodiments thereof (in whatever form or medium), in connection with the tradename “One Guy From Italy” and any derivation thereof. The definition of Intellectual Property is restricted to the use of the trade name of “One Guy from Italy.” Buyer understands that Seller has not filed any trademark, tradename, or copyright applications with regard to the name “One Guy from Italy” and that Seller does not represent that any registerable marks or names exist.

**AGREEMENT**

THEREFORE, in consideration of the mutual promises and the representations and warranties herein made, the parties agree as follows:

**Purchase and Sale**

1. On the terms and subject to all of the conditions of this Agreement and the performance by each of the parties to this Agreement of their respective obligations under this Agreement, Buyer agrees to purchase from Seller and Seller agrees to sell to Buyer all of the Intellectual Property Rights as defined above.

Intellectual Property Rights Purchase and Transfer Agreement

**EXHIBIT**

**A**

Page 1 of 6



**Purchase Price and Other Conditions and Terms of Sale**

2. Consideration. The purchase price of the Asset is ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00) and such other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged.

3. Other Conditions and Terms of Sale.

3.1 Buyer and Seller agree that Seller has the right to open any type of restaurant after Closing of this Agreement on the following conditions and terms:

- (a) Seller will not use the name "One Guy from Italy" in any form or fashion, even by word of mouth in association with such restaurant;
- (b) Seller will not use any symbol or artwork, whether or not registered or copyrighted, that would represent or attempt to represent such restaurant is or was associated with One Guy from Italy.
- (c) Seller may any existing recipes, ingredients, or suppliers of Seller with such restaurant;
- (d) Seller cannot open any food business in Lubbock County, Texas, without the written consent of Gabe Vitela Enterprise, LLC;
- (e) Seller does not need consent of Gabe Vitela Enterprise, LLC to open any food business outside of Lubbock County, Texas;
- (f) Seller cannot sell or share the recipes, methods, and formulas currently used by Seller, or which are a close derivative of the currently used recipes, methods, and formulas to any third party;
- (g) Seller warrants that no part of the assets transferred pursuant to this agreement are owned by One Guy from Italy Pizza & Restaurant, Inc.; and,
- (h) Seller agrees to change the name of his corporation, One Guy from Italy Pizza & Restaurant, Inc., to remove the phrase "One Guy from Italy" from the name within 90 days after Closing.

**Closing**

4. Closing. The Closing of the transaction contemplated by this Agreement (the "Closing") shall occur at 10:00 o'clock a.m. on September 21, 2020.

Closing of this sale, and the obligations of both parties hereto is conditioned upon the Closing of the sale of the 1101 University Avenue location of "One Guy from Italy" by One Big Cat, Inc. to SDMVG, Ltd.



**Time of the Essence**

5. Time is of the essence in this Agreement. If the date specified in this Agreement for giving any notice or taking any action is not a business day, then the date for giving such notice or taking such action shall be the next day which is a business day.

**Miscellaneous Provisions**

6. Representations and Authority of the Parties. Each party to this Agreement represents that such party is fully authorized and empowered to execute this Agreement and to close the transaction contemplated hereby pursuant to the terms and provisions hereof. These representations and warranties shall survive the Closing.

7. Notices. All notices, requests, demands, and other communications required or permitted by this Agreement shall be in writing and shall be deemed to have been delivered if delivered in person to the party entitled thereto, against receipt, or if deposited in the United States mail, postage prepaid, certified mail, return receipt requested, addressed to the party entitled thereto at the address shown below. In the case of mailing, the time of receipt shall be deemed to be three days after depositing in the mail addressed as follows:

(a) In case of Seller, to:

Sal Mazzamuto  
5907 93<sup>rd</sup> Street  
Lubbock, Texas 79424

with a copy to:

Don C. Dennis  
Boerner, Dennis & Franklin, PLLC  
P.O. Box 1738  
Lubbock, Texas 79408

(b) In case of Buyer, to:

GabeVitela Enterprise, LLC  
6801 Nashville Avenue  
Lubbock, TX 79413  
Attn: Gabe Vitela  
with copy to:

Fernando M. Bustos  
Bustos Law Firm, P.C.  
P. O. Box 1980  
Lubbock, Texas 79408-1980



8. Default. If all the conditions of sale of the transaction contemplated herein are met in accordance with this Agreement or the Seller refuses to go forward to the Closing or otherwise fails or refuses to consummate the sale, Buyer shall have the right to enforce specific performance or shall have the right to pursue any other legal or equitable remedies available to it. If all the conditions to the sale and the closing of the transaction contemplated hereby are met in accordance with this Agreement except that Buyer refuses to go forward to the Closing or otherwise fails or refuses to consummate the sale, Seller may enforce specific performance or pursue any other legal or equitable remedy available to them.

9. Law Governing. This Agreement shall be construed in accordance with the laws of the State of Texas. Exclusive jurisdiction and venue shall be in the state or federal courts of Lubbock County, Texas.

10. Successors and Assigns. This Agreement shall inure to the benefit of the parties hereto and to their respective heirs, personal representatives, successors, and assigns.

11. Survival of Representations. All representations, covenants, and warranties contained herein shall survive the Closing of the transaction contemplated hereby.

12. Entirety. This Agreement contains the entire agreement of the parties with respect to the matters covered hereby and supersedes all prior and contemporaneous agreements by the parties. It may be amended or modified only in writing executed by both parties.

13. Counterparts. This Agreement and any document or other instrument delivered hereunder may be executed in counterparts, each of which shall be deemed an original instrument, but which together shall constitute but one and the same instrument. Any counterpart of this agreement or any document or other instrument delivered hereunder may be delivered by facsimile or by electronic mail, to be followed by delivery of the original as soon as practicable.

14. Modification/Waiver. This Agreement may not be modified or amended except by an instrument in writing signed by both parties. Any party hereto may, only by an instrument in writing, waive compliance by another party with any term or provision of this Agreement on the part of such other party hereto to be complied with or performed. The waiver by any party hereto of a breach of any term or provision of this Agreement shall not be construed as a waiver of any subsequent breach.

15. Severability. If any provision of this Agreement or the application thereof to any person or circumstance shall, at any time or to any extent, be invalid or unenforceable, the remaining provisions of this Agreement shall not be affected thereby and shall continue to be valid and enforceable.

16. Attorney's Fees. If any action at law or in equity is brought to enforce the provisions of this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees from the other party, which fees may be set by the court at the trial of such action or may be enforced in a



separate action brought for that purpose, and which fees shall be in addition to any other relief which may be awarded.

17. Fees and Costs. Each party shall bear the cost of its attorneys' fees, expenses, and any closing costs associated this Agreement for Sale and Purchase.

18. Third Party Beneficiary. No provision of this Agreement shall in any way inure to the benefit of any third party (including the public at large) so as to constitute any such person a third party beneficiary of this Agreement or any provision hereof, or otherwise give rise to any cause of action in any person not a party hereto.

19. Contra Proferentem. Seller and Buyer acknowledge that they have read this Agreement, have had the opportunity to review it with an attorney of their respective choice, and have agreed to all its terms. Under these circumstances, Seller and Buyer agree that the rule of construction that a contract be construed against the drafter shall not be applied in interpreting this Agreement and that in the event of any ambiguity in any of the terms or conditions of this Agreement, including any Exhibit hereto and whether or not placed of record, such ambiguity shall not be construed for or against any party hereto on the basis that such party did or did not author same.

20. Seller to Use Reasonable Efforts. Seller shall use all reasonable efforts, and cooperate with the Buyer, to obtain all necessary approvals, consents or waivers, or to resolve any impracticalities of transfer necessary to assign or convey to Buyer the Asset as soon as practicable; provided, however, that neither Seller nor Buyer shall be obligated to pay any consideration therefor except for filing fees and other ordinary administrative charges which shall be paid by Seller to the third party from whom such approval, consent or waiver is requested. Such approvals, consents, and waivers shall be in favor of the Buyer.

IN WITNESS WHEREOF, this Agreement is executed and effective as of the 24 day of DEC, 2020.

[signatures follow]




**SELLER:**

  
\_\_\_\_\_  
Sal Mazzamuto

**BUYER:**

**GABEVITELA ENTERPRISE, LLC**

By:   
\_\_\_\_\_  
Name: Gabe Vitela  
Title: Managing Member

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CAUSE NO. DC-2022-CV-1560

IN RE: ) IN THE 72ND DISTRICT COURT  
)  
) OF  
)  
GABEVITELA ENTERPRISES, )  
LLC ) LUBBOCK COUNTY, TEXAS

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ORAL DEPOSITION OF  
SALVATORE MAZZAMUTO  
MARCH 9, 2023

-----

ORAL DEPOSITION OF SALVATORE MAZZAMUTO, produced as  
a witness at the instance of the Petitioner, and duly  
sworn, was taken in the above-styled and numbered cause  
on March 9, 2023, from 9:03 a.m. to 10:40 a.m., before  
Elaine Shogren, CSR in and for the State of Texas,  
reported by machine shorthand, at the law offices of  
Boerner, Dennis & Franklin, PLLC, 920 Avenue Q, Lubbock,  
Texas, pursuant to the Texas Rules of Civil Procedure  
and the provisions stated on the record or attached  
hereto.

**EXHIBIT  
B**



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A P P E A R A N C E S

FOR THE PETITIONER:

FERNANDO M. BUSTOS  
DEIRDRE KELLY TROTTER  
Bustos Law Firm, P.C.  
PO Box 1980  
1001 Main Street, Suite 501  
Lubbock, Texas 79408-1980  
(806) 780-3976  
fbustos@bustoslawfirm.com

FOR THE RESPONDENT:

DON C. DENNIS  
ORION HUTCHIN  
Boerner, Dennis & Franklin, PLLC  
920 Avenue Q  
Lubbock, Texas 79401  
(806) 763-0044  
dcdennis@bdflawfirm.com

ALSO PRESENT:

Gabriel Vitela  
Jerry Mazzamuto





1 is G -- what is it? G-h --

2 MR. DENNIS: G-h-a-n-d-o-u-r, I believe.

3 Q. (BY MR. BUSTOS) Okay. Ghandour, okay.

4 A. Yeah, Ghandour.

5 Q. All right.

6 MR. DENNIS: He is a broker.

7 MR. BUSTOS: Yeah.

8 Q. (BY MR. BUSTOS) How did Mr. Ghandour introduce  
9 you to Mr. Vitela?

10 A. Mr. Ghandour, I told him I want to sell the  
11 place because I want to retire. And he just bring him  
12 as a buyer.

13 Q. Okay. So this is an arms-length transaction?

14 A. What do you mean arm length?

15 Q. You had never known Mr. Vitela before  
16 Mr. Ghandour introduced you; right?

17 A. No.

18 Q. All right. So as part of this transaction you  
19 sold the 50th Street location of One Guy From Italy to  
20 Mr. Vitela. Is that right?

21 A. Yes, sir.

22 Q. Did you sell the goodwill of the business?

23 A. What do you mean goodwill?

24 Q. If you don't know -- did you sell the inventory  
25 that was in the business?



1 Q. So after you signed your trade name agreement  
2 with Mr. Vitela and he paid you a hundred thousand  
3 dollars, were you out of the restaurant business in  
4 Lubbock?

5 A. I have been a long time out of business in  
6 restaurant in Lubbock.

7 Q. In less than two years after you sold the  
8 trademark to Mr. Vitela you bought a restaurant building  
9 in Lubbock; right?

10 A. Yes, sir.

11 Q. The restaurant building on 8008 Abbeville;  
12 correct?

13 A. It was an investment.

14 Q. And it happened to be a restaurant building;  
15 right?

16 A. Yeah.

17 Q. With all the --

18 A. Equipment.

19 Q. -- that you would need for a restaurant; right?

20 A. Yeah.

21 (Exhibit 14 marked.)

22 Q. (BY MR. BUSTOS) All right. Let's take a look  
23 at Exhibit 14. Exhibit 14 is the Commercial Contract  
24 for Totomazza, Inc. --

25 A. Uh-huh.



1 That was the reduction in the purchase price --

2 A. Yeah.

3 Q. -- because you fixed the place up?

4 A. Yeah.

5 Q. Okay. That makes sense. All right.

6 (Exhibit 16 marked.)

7 Q. (BY MR. BUSTOS) Let's take a look at  
8 Exhibit 16. And this was the deed then; right?

9 A. Yeah.

10 Q. On the building at 8000 -- it says 8004  
11 Abbeville.

12 A. No, 8008.

13 Q. Okay. I wanted to make sure we got that  
14 correct.

15 A. Yeah.

16 Q. All right. Before you bought this location,  
17 did you talk to Jerry and say "Hey, Jerry, I am going to  
18 buy this location. Do you want to put a restaurant  
19 there?"

20 A. No. But I email if he wants to open a  
21 restaurant because he wanted to open a restaurant with  
22 Gabe. He wanted him as a partner too. He looked for a  
23 restaurant. So -- and I do -- I am investing. That is  
24 why I did it.

25 Q. Okay. You invested?



1 A. Invested. That is it.

2 Q. Thank you. Do you know if Jerry was working at  
3 the University location of One Guy From Italy in April  
4 and May of 2002?

5 A. Yeah, he working there. And he was  
6 [indecipherable], him and his son.

7 Q. Is Jerry a shareholder in Totomazza, Inc.?

8 A. Not at all.

9 Q. Okay. Is he an officer or a director?

10 A. Not at all.

11 Q. All right. Let's --

12 A. He is a tenant.

13 (Exhibit 17 marked.)

14 Q. (BY MR. BUSTOS) Okay. Let's take a look at  
15 Exhibit 17. This is the Certificate of Formation for  
16 Papa V, Inc. filed on May 13th, 2022. Do you see that?

17 A. Okay.

18 Q. Okay. As far as you know, is Brad Smith your  
19 brother Jerry's accountant also?

20 A. I don't know. He might have -- I don't know.

21 Q. So Papa V, Inc. was formed on May 13th, 2022,  
22 four days before Totomazza bought the restaurant  
23 building; right?

24 A. I don't know.

25 Q. Okay. Look at the date here. The top



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CAUSE NO. DC-2022-CV-1560

IN RE: ) IN THE 72ND DISTRICT COURT  
)  
) OF  
)  
GABEVITELA ENTERPRISES, )  
LLC ) LUBBOCK COUNTY, TEXAS

REPORTER'S CERTIFICATION  
DEPOSITION OF SALVATORE MAZZAMUTO  
MARCH 9, 2023

I, Elaine Shogren, Certified Shorthand Reporter in  
and for the State of Texas, hereby certify to the  
following:

That the witness, SALVATORE MAZZAMUTO, was duly  
sworn by the officer and that the transcript of the oral  
deposition is a true record of the testimony given by  
the witness;

That the deposition transcript was submitted on  
\_\_\_\_\_, 2023, to the witness or to the  
attorney for the witness for examination, signature and  
return to me;

That the amount of time used by each party at the  
deposition is as follows:

FERNANDO M. BUSTOS - 1 hour 20 minutes  
DON C. DENNIS - 0 minutes

That pursuant to information given to the  
Deposition officer at the time said testimony was taken,



1 the following includes counsel for all parties of  
2 record:

3 FERNANDO M. BUSTOS, Attorney for Petitioner  
4 DON C. DENNIS, Attorney for Respondent

5 I further certify that I am neither counsel for,  
6 related to, nor employed by any of the parties or  
7 attorneys in the action in which this proceeding was  
8 taken, and further that I am not financially or  
9 otherwise interested in the outcome of the action.

10 Further certification requirements pursuant to Rule  
11 203 of TRCP will be certified to after they have  
12 occurred.

13 Certified to by me this 22nd day of March, 2023.

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*Elaine Shogren*

Elaine Shogren, Texas CSR 5881  
Expiration Date: 1/31/2024  
Rogers, Harvey & Crutcher  
Firm Registration No. 168  
709 Broadway  
Lubbock, Texas 79401  
(806) 744-7754

Rogers, Harvey & Crutcher (806) 744-7754



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FURTHER CERTIFICATION UNDER RULE 203 TRCP

The original deposition was/was not returned to the deposition officer on \_\_\_\_\_;

If returned, the attached Changes and Signature page contains any changes and the reasons therefor;

If returned, the original deposition was delivered to Mr. Fernando M. Bustos, Custodial Attorney;

That \$ \_\_\_\_\_ is the deposition officer's charges to the Petitioner for preparing the original deposition transcript and any copies of exhibits;

That the deposition was delivered in accordance with Rule 203.3, and that a copy of this certificate was served on all parties shown herein on and filed with the Clerk..

Certified to by me this the \_\_\_\_ day of \_\_\_\_\_, 2023.

\_\_\_\_\_  
Elaine Shogren, Texas CSR 5881  
Expiration Date: 1/31/2024  
Rogers, Harvey & Crutcher  
Firm Registration No. 168  
709 Broadway  
Lubbock, Texas 79401  
(806) 744-7754

Rogers, Harvey & Crutcher (806) 744-7754





COMMERCIAL CONTRACT - IMPROVED PROPERTY

USE OF THIS FORM BY PERSONS WHO ARE NOT MEMBERS OF THE TEXAS ASSOCIATION OF REALTORS, INC. IS NOT AUTHORIZED. ©Texas Association of REALTORS®, Inc. 2021

1. PARTIES: Seller agrees to sell and convey to Buyer the Property described in Paragraph 2. Buyer agrees to buy the Property from Seller for the sales price stated in Paragraph 3. The parties to this contract are:

Seller: SK&H PROPERTIES LLC

Address: 8004 Abbeville Ave, Lubbock, TX 79424-2806

Phone: E-mail:

Fax: Other:

Buyer: Totomaza, Inc

Address: 4501 50th St, Lubbock, TX 79414-3613

Phone: E-mail: joseph.lubbock@gmail.com

Fax: Other:

2. PROPERTY:

A. "Property" means that real property situated in Lubbock County, Texas at 8008 ABBEVILLE AVE, LUBBOCK, TX 79424 (address)

and that is legally described on the attached Exhibit or as follows:

FARRAR ESTATES TR E-2-X

B. Seller will sell and convey the Property together with:

- (1) all buildings, improvements, and fixtures;
(2) all rights, privileges, and appurtenances pertaining to the Property, including Seller's right, title, and interest in any minerals, utilities, adjacent streets, alleys, strips, gores, and rights-of-way;
(3) Seller's interest in all leases, rents, and security deposits for all or part of the Property;
(4) Seller's interest in all licenses and permits related to the Property;
(5) Seller's interest in all third party warranties or guaranties, if transferable, relating to the Property or any fixtures;
(6) Seller's interest in any trade names, if transferable, used in connection with the Property; and
(7) all Seller's tangible personal property located on the Property that is used in connection with the Property's operations except:

Any personal property not included in the sale must be removed by Seller prior to closing.

(Describe any exceptions, reservations, or restrictions in Paragraph 12 or an addendum.)

(If mineral rights are to be reserved an appropriate addendum should be attached.)

(If the Property is a condominium, attach Commercial Contract Condominium Addendum (TXR-1930) or (TXR-1946).)

3. SALES PRICE: At or before closing, Buyer will pay the following sales price for the Property:

A. Cash portion payable by Buyer at closing \$ 550,000.00

B. Sum of all financing described in Paragraph 4 \$

C. Sales price (sum of 3A and 3B) \$ 550,000.00

(TXR-1801) 09-01-21

Initialed for Identification by Seller

Handwritten initials 'DS' and 'TW' in a box

and Buyer

Page 1 of 15

EXHIBIT C

Doc Prod 1-10-23 - # 0005





8008 ABBEVILLE AVE, LUBBOCK, TX 79424

Commercial Contract - Improved Property concerning \_\_\_\_\_

4. FINANCING: Buyer will finance the portion of the sales price under Paragraph 3B as follows:

- A. Third Party Financing: One or more third party loans in the total amount of \$ \_\_\_\_\_. This contract:
  - (1) is not contingent upon Buyer obtaining third party financing.
  - (2) is contingent upon Buyer obtaining third party financing in accordance with the attached Commercial Contract Financing Addendum (TXR-1931).
- B. Assumption: In accordance with the attached Commercial Contract Financing Addendum (TXR-1931), Buyer will assume the existing promissory note secured by the Property, which balance at closing will be \$ \_\_\_\_\_.
- C. Seller Financing: The delivery of a promissory note and deed of trust from Buyer to Seller under the terms of the attached Commercial Contract Financing Addendum (TXR-1931) in the amount of \$ \_\_\_\_\_.

5. EARNEST MONEY:

- A. Not later than 3 days after the effective date, Buyer must deposit \$ \$3,000.00 as earnest money with \_\_\_\_\_ Joy Title (title company) at \_\_\_\_\_ (address) \_\_\_\_\_ (closer). If Buyer fails to timely deposit the earnest money, Seller may terminate this contract or exercise any of Seller's other remedies under Paragraph 15 by providing written notice to Buyer before Buyer deposits the earnest money.
- B. Buyer will deposit an additional amount of \$ \_\_\_\_\_ with the title company to be made part of the earnest money on or before:
  - (i) \_\_\_\_\_ days after Buyer's right to terminate under Paragraph 7B expires; or
  - (ii) \_\_\_\_\_.
 Buyer will be in default if Buyer fails to deposit the additional amount required by this Paragraph 5B within 3 days after Seller notifies Buyer that Buyer has not timely deposited the additional amount.
- C. Buyer may instruct the title company to deposit the earnest money in an interest-bearing account at a federally insured financial institution and to credit any interest to Buyer.

6. TITLE POLICY, SURVEY, AND UCC SEARCH:

- A. Title Policy:
  - (1) Seller, at Seller's expense, will furnish Buyer an Owner's Policy of Title Insurance (the title policy) issued by any underwriter of the title company in the amount of the sales price, dated at or after closing, insuring Buyer against loss under the title policy, subject only to:
    - (a) those title exceptions permitted by this contract or as may be approved by Buyer in writing; and
    - (b) the standard printed exceptions contained in the promulgated form of title policy unless this contract provides otherwise.
  - (2) The standard printed exception as to discrepancies, conflicts, or shortages in area and boundary lines, or any encroachments or protrusions, or any overlapping improvements:
    - (a) will not be amended or deleted from the title policy.
    - (b) will be amended to read "shortages in areas" at the expense of  Buyer  Seller.
  - (3) Within 30 days after the effective date, Seller will furnish Buyer a commitment for title insurance (the commitment) including legible copies of recorded documents evidencing title exceptions. Seller authorizes the title company to deliver the commitment and related documents to Buyer at Buyer's address.

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B. Survey: Within 10 days after the effective date:

- (1) Buyer will obtain a survey of the Property at Buyer's expense and deliver a copy of the survey to Seller. The survey must be made in accordance with the: (i) ALTA/NSPS Land Title Survey standards, or (ii) Texas Society of Professional Surveyors' standards for a Category 1A survey under the appropriate condition. Seller will reimburse Buyer \_\_\_\_\_ (insert amount) of the cost of the survey at closing, if closing occurs.
- (2) Seller, at Seller's expense, will furnish Buyer a survey of the Property dated after the effective date. The survey must be made in accordance with the: (i) ALTA/NSPS Land Title Survey standards, or (ii) Texas Society of Professional Surveyors' standards for a Category 1A survey under the appropriate condition.
- (3) Seller will deliver to Buyer and the title company a true and correct copy of Seller's most recent survey of the Property along with an affidavit required by the title company for approval of the existing survey. If the existing survey is not acceptable to the title company,  Seller  Buyer (updating party), will, at the updating party's expense, obtain a new or updated survey acceptable to the title company and deliver the acceptable survey to the other party and the title company within 30 days after the title company notifies the parties that the existing survey is not acceptable to the title company. The closing date will be extended daily up to 30 days if necessary for the updating party to deliver an acceptable survey within the time required. The other party will reimburse the updating party \_\_\_\_\_ (insert amount or percentage) of the cost of the new or updated survey at closing, if closing occurs.

C. UCC Search:

- (1) Within \_\_\_\_\_ days after the effective date, Seller, at Seller's expense, will furnish Buyer a Uniform Commercial Code (UCC) search prepared by a reporting service and dated after the effective date. The search must identify documents that are on file with the Texas Secretary of State and the county where the Property is located that relate to all personal property on the Property and show, as debtor, Seller and all other owners of the personal property in the last 5 years.
- (2) Buyer does not require Seller to furnish a UCC search.

D. Buyer's Objections to the Commitment, Survey, and UCC Search:

- (1) Within \_\_\_\_\_ days after Buyer receives the last of the commitment, copies of the documents evidencing the title exceptions, any required survey, and any required UCC search, Buyer may object to matters disclosed in the items if: (a) the matters disclosed are a restriction upon the Property or constitute a defect or encumbrance to title to the real or personal property described in Paragraph 2 other than those permitted by this contract or liens that Seller will satisfy at closing or Buyer will assume at closing; or (b) the items show that any part of the Property lies in a special flood hazard area (an "A" or "V" zone as defined by FEMA). If the commitment or survey is revised or any new document evidencing a title exception is delivered, Buyer may object to any new matter revealed in such revision or new document. Buyer's objection must be made within the same number of days stated in this paragraph, beginning when the revision or new document is delivered to Buyer. If Paragraph 6B(1) applies, Buyer is deemed to receive the survey on the earlier of: (i) the date Buyer actually receives the survey; or (ii) the deadline specified in Paragraph 6B.
- (2) Seller may, but is not obligated to, cure Buyer's timely objections within 15 days after Seller receives the objections. The closing date will be extended as necessary to provide such time to cure the objections. If Seller fails to cure the objections by the time required, Buyer may terminate this contract by providing written notice to Seller within 5 days after the time by which Seller must cure the objections. If Buyer terminates, the earnest money, less any independent consideration under Paragraph 7B(1), will be refunded to Buyer.

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(3) Buyer's failure to timely object or terminate under this Paragraph 6D is a waiver of Buyer's right to object except that Buyer will not waive the requirements in Schedule C of the commitment.

**7. PROPERTY CONDITION:**

A. Present Condition: Buyer accepts the Property in its present condition except that Seller, at Seller's expense, will complete the following before closing: \_\_\_\_\_

B. Feasibility Period: Buyer may terminate this contract for any reason within 25 days after the effective date (feasibility period) by providing Seller written notice of termination.

(1) Independent Consideration. (Check only one box and insert amounts.)

(a) If Buyer terminates under this Paragraph 7B, the earnest money will be refunded to Buyer less \$ 100.00 that Seller will retain as independent consideration for Buyer's unrestricted right to terminate. Buyer has tendered the independent consideration to Seller upon payment of the amount specified in Paragraph 5A to the title company. The independent consideration is to be credited to the sales price only upon closing of the sale. If no dollar amount is stated in this Paragraph 7B(1) or if Buyer fails to deposit the earnest money, Buyer will not have the right to terminate under this Paragraph 7B.

(b) Not later than 3 days after the effective date, Buyer must pay Seller \$ \_\_\_\_\_ as independent consideration for Buyer's right to terminate by tendering such amount to Seller or Seller's agent. If Buyer terminates under this Paragraph 7B, the earnest money will be refunded to Buyer and Seller will retain the independent consideration. The independent consideration will be credited to the sales price only upon closing of the sale. If no dollar amount is stated in this Paragraph 7B(2) or if Buyer fails to pay the independent consideration, Buyer will not have the right to terminate under this Paragraph 7B.

(2) Feasibility Period Extension: Prior to the expiration of the initial feasibility period, Buyer may extend the feasibility period for a single period of an additional \_\_\_\_\_ days by depositing additional earnest money in the amount of \$ \_\_\_\_\_ with the title company. If no dollar amount is stated in this Paragraph or if Buyer fails to timely deposit the additional earnest money, the extension of the feasibility period will not be effective.

C. Inspections, Studies, or Assessments:

(1) During the feasibility period, Buyer, at Buyer's expense, may complete or cause to be completed any and all inspections, studies, or assessments of the Property (including all improvements and fixtures) desired by Buyer.

(2) Seller, at Seller's expense, will turn on all utilities necessary for Buyer to make inspections, studies, or assessments.

(3) Buyer must:

- (a) employ only trained and qualified inspectors and assessors;
- (b) notify Seller, in advance, of when the inspectors or assessors will be on the Property;
- (c) abide by any reasonable entry rules or requirements of Seller;
- (d) not interfere with existing operations or occupants of the Property; and
- (e) restore the Property to its original condition if altered due to inspections, studies, or assessments that Buyer completes or causes to be completed.

(4) Except for those matters that arise from the negligence of Seller or Seller's agents, Buyer is responsible for any claim, liability, encumbrance, cause of action, and expense resulting from



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Buyer's inspections, studies, or assessments, including any property damage or personal injury. Buyer will indemnify, hold harmless, and defend Seller and Seller's agents against any claim involving a matter for which Buyer is responsible under this paragraph. This paragraph survives termination of this contract.

**D. Property Information:**

(1) **Delivery of Property Information:** Within \_\_\_\_\_ days after the effective date, Seller will deliver to Buyer: *(Check all that apply.)*

- (a) a current rent roll of all leases affecting the Property certified by Seller as true and correct;
- (b) copies of all current leases, including any mineral leases, pertaining to the Property, including any modifications, supplements, or amendments to the leases;
- (c) a current inventory of all personal property to be conveyed under this contract and copies of any leases for such personal property;
- (d) copies of all notes and deeds of trust against the Property that Buyer will assume or that Seller will not pay in full on or before closing;
- (e) copies of all current service, utility, maintenance, and management agreements relating to the ownership and operation of the Property;
- (f) copies of current utility capacity letters from the Property's water and sewer service provider;
- (g) copies of all current warranties and guaranties relating to all or part of the Property;
- (h) copies of fire, hazard, liability, and other insurance policies that currently relate to the Property;
- (i) copies of all leasing or commission agreements that currently relate to the tenants of all or part of the Property;
- (j) a copy of the "as-built" plans and specifications and plat of the Property;
- (k) copies of all invoices for utilities and repairs incurred by Seller for the Property in the 24 months immediately preceding the effective date;
- (l) a copy of Seller's income and expense statement for the Property from \_\_\_\_\_ to \_\_\_\_\_;
- (m) copies of all previous environmental assessments, geotechnical reports, studies, or analyses made on or relating to the Property;
- (n) real and personal property tax statements for the Property for the previous 2 calendar years;
- (o) Tenant reconciliation statements including, operating expenses, insurance and taxes for the Property from \_\_\_\_\_ to \_\_\_\_\_; and
- (p) \_\_\_\_\_

(2) **Return of Property Information:** If this contract terminates for any reason, Buyer will, not later than 10 days after the termination date: *(Check all that apply.)*

- (a) return to Seller all those items described in Paragraph 7D(1) that Seller delivered to Buyer in other than an electronic format and all copies that Buyer made of those items;
- (b) delete or destroy all electronic versions of those items described in Paragraph 7D(1) that Seller delivered to Buyer or Buyer copied in any format; and
- (c) deliver to Seller copies of all inspection and assessment reports related to the Property that Buyer completed or caused to be completed.

This Paragraph 7D(2) survives termination of this contract.

**E. Contracts Affecting Operations:** Until closing, Seller: (1) will operate the Property in the same manner as on the effective date under reasonably prudent business standards; and (2) will not transfer or dispose of any part of the Property, any interest or right in the Property, or any of the personal property or other items described in Paragraph 2B or sold under this contract. After the feasibility period ends, Seller may not enter into, amend, or terminate any other contract that affects the operations of the Property without Buyer's written approval.



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**8. LEASES:**

A. Each written lease Seller is to assign to Buyer under this contract must be in full force and effect according to its terms. Seller may not enter into any new lease, fail to comply with any existing lease, or make any amendment or modification to any existing lease without Buyer's written consent. Seller must disclose, in writing, if any of the following exist at the time Seller provides the leases to the Buyer or subsequently occur before closing:

- (1) any failure by Seller to comply with Seller's obligations under the leases;
- (2) any circumstances under any lease that entitle the tenant to terminate the lease or seek any offsets or damages;
- (3) any non-occupancy of the leased premises by a tenant;
- (4) any advance sums paid by a tenant under any lease;
- (5) any concessions, bonuses, free rents, rebates, brokerage commissions, or other matters that affect any lease; and
- (6) any amounts payable under the leases that have been assigned or encumbered, except as security for loan(s) assumed or taken subject to under this contract.

B. Estoppel Certificates: Within \_\_\_\_\_ days after the effective date, Seller will deliver to Buyer estoppel certificates signed not earlier than \_\_\_\_\_ by each tenant that leases space in the Property. The estoppel certificates must include the certifications contained in the current version of TXR Form 1938 - Commercial Tenant Estoppel Certificate and any additional information requested by a third party lender providing financing under Paragraph 4 if the third party lender requests such additional information at least 10 days prior to the earliest date that Seller may deliver the signed estoppel certificates.

**9. BROKERS:**

A. The brokers to this sale are:

Principal Broker: Keller Williams Realty

Cooperating Broker: Caprock Realty Group

Agent: Daniel Stanton

Agent: Joseph Ghandour

Address: \_\_\_\_\_

Address: 4501 50th St Lubbock, Tx 79414

Phone & Fax: \_\_\_\_\_

Phone & Fax: (806)786-0111

E-mail: Dstanton@usa.com

E-mail: joseph.lubbock@gmail.com

License No.: 423463

License No.: 559996

Principal Broker: (Check only one box)

- represents Seller only.
- represents Buyer only.
- is an intermediary between Seller and Buyer.

Cooperating Broker represents Buyer.

B. Fees: (Check only (1) or (2) below.)

(Complete the Agreement Between Brokers on page 14 only if (1) is selected.)

(1) Seller will pay Principal Broker the fee specified by separate written commission agreement between Principal Broker and Seller. Principal Broker will pay Cooperating Broker the fee specified in the Agreement Between Brokers found below the parties' signatures to this contract.

(2) At the closing of this sale, Seller will pay:

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Principal Broker a total cash fee of:  
 \_\_\_\_\_ % of the sales price.  
 \_\_\_\_\_

Cooperating Broker a total cash fee of:  
 3.000 % of the sales price.  
 \_\_\_\_\_

The cash fees will be paid in \_\_\_\_\_ County, Texas. Seller authorizes the title company to pay the brokers from the Seller's proceeds at closing.

*NOTICE: Chapter 62, Texas Property Code, authorizes a broker to secure an earned commission with a lien against the Property.*

C. The parties may not amend this Paragraph 9 without the written consent of the brokers affected by the amendment.

**10. CLOSING:**

A. The date of the closing of the sale (closing date) will be on or before the later of:

- (1)  5 days after the expiration of the feasibility period.  
 \_\_\_\_\_ (specific date).  
 \_\_\_\_\_

(2) 7 days after objections made under Paragraph 6D have been cured or waived.

B. If either party fails to close by the closing date, the non-defaulting party may exercise the remedies in Paragraph 15.

C. At closing, Seller will execute and deliver to Buyer, at Seller's expense, a  general  special warranty deed. The deed must include a vendor's lien if any part of the sales price is financed. The deed must convey good and indefeasible title to the Property and show no exceptions other than those permitted under Paragraph 6 or other provisions of this contract. Seller must convey the Property:

- (1) with no liens, assessments, or Uniform Commercial Code or other security interests against the Property which will not be satisfied out of the sales price, unless securing loans Buyer assumes;
- (2) without any assumed loans in default; and
- (3) with no persons in possession of any part of the Property as lessees, tenants at sufferance, or trespassers except tenants under the written leases assigned to Buyer under this contract.

D. At closing, Seller, at Seller's expense, will also deliver to Buyer:

- (1) tax statements showing no delinquent taxes on the Property;
- (2) a bill of sale with warranties to title conveying title, free and clear of all liens, to any personal property defined as part of the Property in Paragraph 2 or sold under this contract;
- (3) an assignment of all leases to or on the Property;
- (4) to the extent that the following items are assignable, an assignment to Buyer of the following items as they relate to the Property or its operations:
  - (a) licenses and permits;
  - (b) service, utility, maintenance, management, and other contracts; and
  - (c) warranties and guaranties;
- (5) a rent roll current on the day of the closing certified by Seller as true and correct;
- (6) evidence that the person executing this contract is legally capable and authorized to bind Seller;
- (7) an affidavit acceptable to the title company stating that Seller is not a foreign person or, if Seller is a foreign person, a written authorization for the title company to: (i) withhold from Seller's proceeds an amount sufficient to comply with applicable tax law; and (ii) deliver the amount to the Internal Revenue Service together with appropriate tax forms; and
- (8) any notices, statements, certificates, affidavits, releases, and other documents required by this contract, the commitment, or law necessary for the closing of the sale and the issuance of the title policy, all of which must be completed and executed by Seller as necessary.

E. At closing, Buyer will:

- (1) pay the sales price in good funds acceptable to the title company;

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- (2) deliver evidence that the person executing this contract is legally capable and authorized to bind Buyer;
- (3) sign and send to each tenant in the Property a written statement that:
  - (a) acknowledges Buyer has received and is responsible for the tenant's security deposit; and
  - (b) specifies the exact dollar amount of the security deposit;
- (4) sign an assumption of all leases then in effect; and
- (5) execute and deliver any notices, statements, certificates, or other documents required by this contract or law necessary to close the sale.

F. Unless the parties agree otherwise, the closing documents will be as found in the basic forms in the current edition of the State Bar of Texas Real Estate Forms Manual without any additional clauses.

11. **POSSESSION:** Seller will deliver possession of the Property to Buyer upon closing and funding of this sale in its present condition with any repairs Seller is obligated to complete under this contract, ordinary wear and tear excepted. Any possession by Buyer before closing or by Seller after closing that is not authorized by a separate written lease agreement is a landlord-tenant at sufferance relationship between the parties.
12. **SPECIAL PROVISIONS:** The following special provisions apply and will control in the event of a conflict with other provisions of this contract. *(If special provisions are contained in an Addendum, identify the Addendum here and reference the Addendum in Paragraph 22D.)*  
**Seller to pay the Buyer \$75000.00 at Closing .**



**13. SALES EXPENSES:**

- A. Seller's Expenses: Seller will pay for the following at or before closing:
  - (1) releases of existing liens, other than those liens assumed by Buyer, including prepayment penalties and recording fees;
  - (2) release of Seller's loan liability, if applicable;
  - (3) tax statements or certificates;
  - (4) preparation of the deed and any bill of sale;
  - (5) one-half of any escrow fee;
  - (6) costs to record any documents to cure title objections that Seller must cure; and
  - (7) other expenses that Seller will pay under other provisions of this contract.
- B. Buyer's Expenses: Buyer will pay for the following at or before closing:
  - (1) all loan expenses and fees;
  - (2) preparation fees of any deed of trust;
  - (3) recording fees for the deed and any deed of trust;
  - (4) premiums for flood and hazard insurance as may be required by Buyer's lender;
  - (5) one-half of any escrow fee; and
  - (6) other expenses that Buyer will pay under other provisions of this contract.

**14. PRORATIONS:**

- A. Prorations:
  - (1) Interest on any assumed loan, taxes, rents, and any expense reimbursements from tenants will be prorated through the closing date.

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- (2) If the amount of ad valorem taxes for the year in which the sale closes is not available on the closing date, taxes will be prorated on the basis of taxes assessed in the previous year. If the taxes for the year in which the sale closes vary from the amount prorated at closing, the parties will adjust the prorations when the tax statements for the year in which the sale closes become available. This Paragraph 14A(2) survives closing.
- (3) If Buyer assumes a loan or is taking the Property subject to an existing lien, Seller will transfer all reserve deposits held by the lender for the payment of taxes, insurance premiums, and other charges to Buyer at closing and Buyer will reimburse such amounts to Seller by an appropriate adjustment at closing.

- B. **Rollback Taxes:** If Seller's use or change in use of the Property before closing results in the assessment of additional taxes, penalties, or interest (assessments) for periods before closing, the assessments will be the obligation of Seller. If this sale or Buyer's use of the Property after closing results in additional assessments for periods before closing, the assessments will be the obligation of Buyer. This Paragraph 14B survives closing.
- C. **Rent and Security Deposits:** At closing, Seller will tender to Buyer all security deposits and the following advance payments received by Seller for periods after closing: prepaid expenses, advance rental payments, and other advance payments paid by tenants. Rents prorated to one party but received by the other party will be remitted by the recipient to the party to whom it was prorated within 5 days after the rent is received. This Paragraph 14C survives closing.

**15. DEFAULT:**

- A. If Buyer fails to comply with this contract, Buyer is in default and Seller, as Seller's sole remedy(ies), may terminate this contract and receive the earnest money, as liquidated damages for Buyer's failure except for any damages resulting from Buyer's inspections, studies or assessments in accordance with Paragraph 7C(4) which Seller may pursue, or  
(Check if applicable)  
 enforce specific performance, or seek such other relief as may be provided by law.
- B. If, without fault, Seller is unable within the time allowed to deliver the estoppel certificates, survey or the commitment, Buyer may:
  - (1) terminate this contract and receive the earnest money, less any independent consideration under Paragraph 7B(1), as liquidated damages and as Buyer's sole remedy; or
  - (2) extend the time for performance up to 15 days and the closing will be extended as necessary.
- C. Except as provided in Paragraph 15B, if Seller fails to comply with this contract, Seller is in default and Buyer may:
  - (1) terminate this contract and receive the earnest money, less any independent consideration under Paragraph 7B(1), as liquidated damages and as Buyer's sole remedy; or
  - (2) enforce specific performance, or seek such other relief as may be provided by law, or both.

**16. CASUALTY LOSS AND CONDEMNATION:**

- A. If any part of the Property is damaged or destroyed by fire or other casualty after the effective date, Seller must restore the Property to its previous condition as soon as reasonably possible and not later than the closing date. If, without fault, Seller is unable to do so, Buyer may:
  - (1) terminate this contract and the earnest money, less any independent consideration under Paragraph 7B(1), will be refunded to Buyer;
  - (2) extend the time for performance up to 15 days and closing will be extended as necessary; or
  - (3) accept at closing: (i) the Property in its damaged condition; (ii) an assignment of any insurance proceeds Seller is entitled to receive along with the insurer's consent to the assignment; and (iii) a credit to the sales price in the amount of any unpaid deductible under the policy for the loss.

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- (3) any environmental hazards or conditions that materially affect the Property;
- (4) whether the Property is or has been used for the storage or disposal of hazardous materials or toxic waste, a dump site or landfill, or any underground tanks or containers;
- (5) whether radon, asbestos containing materials, urea-formaldehyde foam insulation, lead-based paint, toxic mold (to the extent that it adversely affects the health of ordinary occupants), or other pollutants or contaminants of any nature now exist or ever existed on the Property;
- (6) any wetlands, as defined by federal or state law or regulation, on the Property;
- (7) any threatened or endangered species or their habitat on the Property;
- (8) any present or past infestation of wood-destroying insects in the Property's improvements;
- (9) any contemplated material changes to the Property or surrounding area that would materially and detrimentally affect the ordinary use of the Property;
- (10) any material physical defects in the improvements on the Property; or
- (11) any condition on the Property that violates any law or ordinance.

(Describe any exceptions to (1)-(11) in Paragraph 12 or an addendum.)

20. **NOTICES:** All notices between the parties under this contract must be in writing and are effective when hand-delivered, mailed by certified mail return receipt requested, or sent by facsimile transmission to the parties addresses or facsimile numbers stated in Paragraph 1. The parties will send copies of any notices to the broker representing the party to whom the notices are sent.

- A. Seller also consents to receive any notices by e-mail at Seller's e-mail address stated in Paragraph 1.
- B. Buyer also consents to receive any notices by e-mail at Buyer's e-mail address stated in Paragraph 1.

21. **DISPUTE RESOLUTION:** The parties agree to negotiate in good faith in an effort to resolve any dispute related to this contract that may arise. If the dispute cannot be resolved by negotiation, the parties will submit the dispute to mediation before resorting to arbitration or litigation and will equally share the costs of a mutually acceptable mediator. This paragraph survives termination of this contract. This paragraph does not preclude a party from seeking equitable relief from a court of competent jurisdiction.

22. **AGREEMENT OF THE PARTIES:**

- A. This contract is binding on the parties, their heirs, executors, representatives, successors, and permitted assigns. This contract is to be construed in accordance with the laws of the State of Texas. If any term or condition of this contract shall be held to be invalid or unenforceable, the remainder of this contract shall not be affected thereby.
- B. This contract contains the entire agreement of the parties and may not be changed except in writing.
- C. If this contract is executed in a number of identical counterparts, each counterpart is an original and all counterparts, collectively, constitute one agreement.
- D. Addenda which are part of this contract are: (Check all that apply.)
  - (1) Property Description Exhibit identified in Paragraph 2;
  - (2) Commercial Contract Condominium Addendum (TXR-1930) or (TXR-1946);
  - (3) Commercial Contract Financing Addendum (TXR-1931);
  - (4) Commercial Property Condition Statement (TXR-1408);
  - (5) Commercial Contract Addendum for Special Provisions (TXR-1940);
  - (6) Addendum for Seller's Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (TXR-1906);
  - (7) Notice to Purchaser of Real Property in a Water District (MUD);
  - (8) Addendum for Coastal Area Property (TXR-1915);
  - (9) Addendum for Property Located Seaward of the Gulf Intracoastal Waterway (TXR-1916);
  - (10) Information About Brokerage Services (TXR-2501);
  - (11) Information About Mineral Clauses in Contract Forms (TXR-2509);
  - (12) Notice of Obligation to Pay Improvement District Assessment (TXR-1955, PID);

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- B. If before closing, condemnation proceedings are commenced against any part of the Property, Buyer may:
  - (1) terminate this contract by providing written notice to Seller within 15 days after Buyer is advised of the condemnation proceedings and the earnest money, less any independent consideration under Paragraph 7B(1), will be refunded to Buyer; or
  - (2) appear and defend the condemnation proceedings and any award will, at Buyer's election, belong to: (a) Seller and the sales price will be reduced by the same amount; or (b) Buyer and the sales price will not be reduced.

**17. ATTORNEY'S FEES:** If Buyer, Seller, any broker, or the title company is a prevailing party in any legal proceeding brought under or with relation to this contract or this transaction, such party is entitled to recover from the non-prevailing parties all costs of such proceeding and reasonable attorney's fees. This Paragraph 17 survives termination of this contract.

**18. ESCROW:**

- A. At closing, the earnest money will be applied first to any cash down payment, then to Buyer's closing costs, and any excess will be refunded to Buyer. If no closing occurs, the title company may require payment of unpaid expenses incurred on behalf of the parties and a written release of liability of the title company from all parties.
- B. If one party makes written demand for the earnest money, the title company will give notice of the demand by providing to the other party a copy of the demand. If the title company does not receive written objection to the demand from the other party within 15 days after the date the title company sent the demand to the other party, the title company may disburse the earnest money to the party making demand, reduced by the amount of unpaid expenses incurred on behalf of the party receiving the earnest money and the title company may pay the same to the creditors.
- C. The title company will deduct any independent consideration under Paragraph 7B(1) before disbursing any earnest money to Buyer and will pay the independent consideration to Seller.
- D. If the title company complies with this Paragraph 18, each party hereby releases the title company from all claims related to the disbursement of the earnest money.
- E. Notices under this Paragraph 18 must be sent by certified mail, return receipt requested. Notices to the title company are effective upon receipt by the title company.
- F. Any party who wrongfully fails or refuses to sign a release acceptable to the title company within 7 days after receipt of the request will be liable to the other party for: (i) damages; (ii) the earnest money; (iii) reasonable attorney's fees; and (iv) all costs of suit.
- G.  Seller  Buyer intend(s) to complete this transaction as a part of an exchange of like-kind properties in accordance with Section 1031 of the Internal Revenue Code, as amended. All expenses in connection with the contemplated exchange will be paid by the exchanging party. The other party will not incur any expense or liability with respect to the exchange. The parties agree to cooperate fully and in good faith to arrange and consummate the exchange so as to comply to the maximum extent feasible with the provisions of Section 1031 of the Internal Revenue Code. The other provisions of this contract will not be affected in the event the contemplated exchange fails to occur.

**19. MATERIAL FACTS:** To the best of Seller's knowledge and belief: *(Check only one box.)*

- A. Seller is not aware of any material defects to the Property except as stated in the attached Commercial Property Condition Statement (TXR-1408).
- B. Except as otherwise provided in this contract, Seller is not aware of:
  - (1) any subsurface: structures, pits, waste, springs, or improvements;
  - (2) any pending or threatened litigation, condemnation, or assessment affecting the Property;

(TXR-1801) 09-01-21

Initialed for Identification by Seller [Signature] and Buyer [Signature]

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Page 10 of 10

8008 Abbeville

Doc Prod 1-10-23 - # 0015



Commercial Contract - Improved Property concerning 8008 ABBEVILLE AVE. LUBBOCK, TX 79424

(13) \_\_\_\_\_

(Note: Counsel for Texas REALTORS® has determined that any of the foregoing addenda which are promulgated by the Texas Real Estate Commission (TREC) or published by Texas REALTORS® are appropriate for use with this form.)

E. Buyer  may  may not assign this contract. If Buyer assigns this contract, Buyer will be relieved of any future liability under this contract only if the assignee assumes, in writing, all of Buyer's obligations under this contract.

23. **TIME:** Time is of the essence in this contract. The parties require strict compliance with the times for performance. If the last day to perform under a provision of this contract falls on a Saturday, Sunday, or legal holiday, the time for performance is extended until the end of the next day which is not a Saturday, Sunday, or legal holiday.

24. **EFFECTIVE DATE:** The effective date of this contract for the purpose of performance of all obligations is the date the title company receipts this contract after all parties execute this contract.

25. **ADDITIONAL NOTICES:**

A. Buyer should have an abstract covering the Property examined by an attorney of Buyer's selection, or Buyer should be furnished with or obtain a title policy.

B. If the Property is situated in a utility or other statutorily created district providing water, sewer, drainage, or flood control facilities and services, Chapter 49, Texas Water Code, requires Seller to deliver and Buyer to sign the statutory notice relating to the tax rate, bonded indebtedness, or standby fees of the district before final execution of this contract.

C. Notice Required by §13.257, Water Code: "The real property, described below, that you are about to purchase may be located in a certificated water or sewer service area, which is authorized by law to provide water or sewer service to the properties in the certificated area. If your property is located in a certificated area there may be special costs or charges that you will be required to pay before you can receive water or sewer service. There may be a period required to construct lines or other facilities necessary to provide water or sewer service to your property. You are advised to determine if the property is in a certificated area and contact the utility service provider to determine the cost that you will be required to pay and the period, if any, that is required to provide water or sewer service to your property. The undersigned purchaser hereby acknowledges receipt of the foregoing notice at or before the execution of a binding contract for the purchase of the real property described in the notice or at closing of purchase of the real property." The real property is described in Paragraph 2 of this contract.

D. If the Property adjoins or shares a common boundary with the tidally influenced submerged lands of the state, §33.135, Texas Natural Resources Code, requires a notice regarding coastal area property to be included as part of this contract (*the Addendum for Coastal Area Property (TXR-1915) may be used*).

E. If the Property is located seaward of the Gulf Intracoastal Waterway, §61.025, Texas Natural Resources Code, requires a notice regarding the seaward location of the Property to be included as part of this contract (*the Addendum for Property Located Seaward of the Gulf Intracoastal Waterway (TXR-1916) may be used*).

F. If the Property is located outside the limits of a municipality, the Property may now or later be included in the extra-territorial jurisdiction (ETJ) of a municipality and may now or later be subject to annexation by the municipality. Each municipality maintains a map that depicts its boundaries and ETJ. To determine if the Property is located within a municipality's ETJ, Buyer should contact all municipalities located in the general proximity of the Property for further information.

(TXR-1801) 09-01-21

Initialed for Identification by Seller TW and Buyer S

Page 12 of

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8008 Abbeville

Doc Prod 1-10-23 - # 001



Commercial Contract - Improved Property concerning 2008 ABBEVILLE AVE, LUBBOCK, TX 79424

- G. If apartments or other residential units are on the Property and the units were built before 1978, federal law requires a lead-based paint and hazard disclosure statement to be made part of this contract (*the Addendum for Seller's Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (TXR-1906) may be used*).
- H. Section 1958.154, Occupations Code requires Seller to provide Buyer a copy of any mold remediation certificate issued for the Property during the 5 years preceding the date the Seller sells the Property.
- I. Brokers are not qualified to perform property inspections, surveys, engineering studies, environmental assessments, or inspections to determine compliance with zoning, governmental regulations, or laws. Buyer should seek experts to perform such services. Buyer should review local building codes, ordinances and other applicable laws to determine their effect on the Property. Selection of experts, inspectors, and repairmen is the responsibility of Buyer and not the brokers. Brokers are not qualified to determine the credit worthiness of the parties.
- J. NOTICE OF WATER LEVEL FLUCTUATIONS: If the Property adjoins an impoundment of water, including a reservoir or lake, constructed and maintained under Chapter 11, Water Code, that has a storage capacity of at least 5,000 acre-feet at the impoundment's normal operating level, Seller hereby notifies Buyer: "The water level of the impoundment of water adjoining the Property fluctuates for various reasons, including as a result of: (1) an entity lawfully exercising its right to use the water stored in the impoundment; or (2) drought or flood conditions."
- K. LICENSE HOLDER DISCLOSURE: Texas law requires a real estate license holder who is a party to a transaction or acting on behalf of a spouse, parent, child, business entity in which the license holder owns more than 10%, or a trust for which the license holder acts as a trustee or of which the license holder or the license holder's spouse, parent or child is a beneficiary, to notify the other party in writing before entering into a contract of sale. Disclose if applicable: \_\_\_\_\_.
- L. PUBLIC IMPROVEMENT DISTRICTS: If the Property is in a public improvement district, Seller must give Buyer written notice as required by §5.014, Property Code. An addendum containing the required notice shall be attached to this contract.
26. **CONTRACT AS OFFER:** The execution of this contract by the first party constitutes an offer to buy or sell the Property. Unless the other party accepts the offer by 5:00 p.m., in the time zone in which the Property is located, on \_\_\_\_\_, the offer will lapse and become null and void.



**READ THIS CONTRACT CAREFULLY.** The brokers and agents make no representation or recommendation as to the legal sufficiency, legal effect, or tax consequences of this document or transaction. **CONSULT** your attorney **BEFORE** signing.

Seller: SK&H PROPERTIES LLC

Buyer: Totomaza, Inc

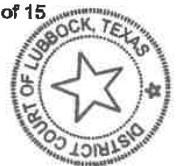
*Sal Mazzamuto*

By: Tracy Wilson DocuSigned by:  
By (signature): *Tracy Wilson*  
Printed Name: Tracy Wilson  
Title: ceo

By: Sal Mazzamuto  
By (signature): \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
By (signature): \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
By (signature): \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_



Commercial Contract - Improved Property concerning 8008 ABBEVILLE AVE, LUBBOCK, TX 79424

**AGREEMENT BETWEEN BROKERS**  
*(use only if Paragraph 9B(1) is effective)*

Principal Broker agrees to pay Caprock Realty Group (Cooperating Broker) a fee when the Principal Broker's fee is received. The fee to be paid to Cooperating Broker will be:

\$ \_\_\_\_\_, or  
 3.000 % of the sales price, or  
 \_\_\_\_\_ % of the Principal Broker's fee.

The title company is authorized and directed to pay Cooperating Broker from Principal Broker's fee at closing. This Agreement Between Brokers supersedes any prior offers and agreements for compensation between brokers.

Principal Broker: \_\_\_\_\_ Cooperating Broker: Caprock Realty Group  
 \_\_\_\_\_  
 By: \_\_\_\_\_ By: Joseph Ghandour

**ATTORNEYS**

Seller's attorney: \_\_\_\_\_ Buyer's attorney: \_\_\_\_\_  
 Address: \_\_\_\_\_ Address: \_\_\_\_\_  
 Phone & Fax: \_\_\_\_\_ Phone & Fax: \_\_\_\_\_  
 E-mail: \_\_\_\_\_ E-mail: \_\_\_\_\_

Seller's attorney requests copies of documents, notices, and other information:  
 the title company sends to Seller.  
 Buyer sends to Seller.

Buyer's attorney requests copies of documents, notices, and other information:  
 the title company sends to Buyer.  
 Seller sends to Buyer.

**ESCROW RECEIPT**

The title company acknowledges receipt of:  
 A. the contract on this day April 28, 2022 (effective date);  
 B. earnest money in the amount of \$ 3000.00 in the form of Check # 1009  
 on April 28, 2022.

Title company: Joy Title Address: Joy Title  
4021 112th  
Lubbock, TX 79423  
 By: [Signature] Heather Cooper P: 806.300.0083  
 Joy Title F: 806.300.0037  
 heather@jtitleco.com  
 E-mail: \_\_\_\_\_

Assigned file number (GF#): 22-1378





APPROVED BY THE TEXAS REAL ESTATE COMMISSION (TREC)  
FOR VOLUNTARY USE

10-10-11

**NON-REALTY ITEMS ADDENDUM**

TO CONTRACT CONCERNING THE PROPERTY AT

**8008 Abbeville Ave, Lubbock, TX 79424-2806**

(Address of Property)

A. For an additional sum of \$ \_\_\_\_\_ and other and good valuable consideration, Seller shall convey to Buyer at closing the following personal property (specify each item carefully, include description, model numbers, serial numbers, location, and other information):

All : refrigeration , Freezers , Sandwich Tables , Prep tables ,tables ,chairs , Sinks ,Patio tables and Chairs ,shelves .

B. Seller represents and warrants that Seller owns the personal property described in Paragraph A free and clear of all encumbrances.

C. Seller does not warrant or guarantee the condition or future performance of the personal property conveyed by this document.

  
Buyer

DocuSigned by:  
  
Seller

Buyer

Seller

This form has been approved by the Texas Real Estate Commission for voluntary use by its licensees. Copies of TREC rules governing real estate brokers, salesperson and real estate inspectors are available at nominal cost from TREC. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, 512-936-3000 (<http://www.trec.texas.gov>)

(TXR-1924) 10-10-11

TREC NO. OP-M



**Automated Certificate of eService**

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Amy Dobberstein on behalf of Fernando Bustos  
 Bar No. 24001819  
 adobberstein@bustoslawfirm.com  
 Envelope ID: 78192671  
 Filing Code Description: APLD - Amended Pleading  
 Filing Description: Plaintiff's First Amended Petition and Application for Temporary and Permanent Injunctions  
 Status as of 8/4/2023 10:09 AM CST

Associated Case Party: GabeVitela Enterprise LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Fernando M.Bustos		fbustos@bustoslawfirm.com	8/3/2023 4:57:49 PM	SENT
Deirdre Trotter		dtrotter@bustoslawfirm.com	8/3/2023 4:57:49 PM	SENT
Amy Dobberstein		adobberstein@bustoslawfirm.com	8/3/2023 4:57:49 PM	SENT
Elizabeth Seeley-Verkamp		eseeley-verkamp@bustoslawfirm.com	8/3/2023 4:57:49 PM	SENT
Zebbe Dee AnnHernandez		zhernandez@bustoslawfirm.com	8/3/2023 4:57:49 PM	SENT

Associated Case Party: Salvatore Mazzamuto

Name	BarNumber	Email	TimestampSubmitted	Status
Lesley ACooper		lescoop@bdfllawfirm.com	8/3/2023 4:57:49 PM	SENT
Susanna Mason		smason@bdfllawfirm.com	8/3/2023 4:57:49 PM	SENT
Tiffanie Perkins		tperkins@bdfllawfirm.com	8/3/2023 4:57:49 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Orion Hutchin	24122288	ohutchin@bdfllawfirm.com	8/3/2023 4:57:49 PM	SENT
Don Dennis		dcdennis@bdfllawfirm.com	8/3/2023 4:57:49 PM	SENT



I, Sara L. Smith, District Clerk, in and for Lubbock County, Texas, do hereby certify this to be a true and correct copy of a like instrument now on file in this office.

This 11th day of October 2023 [Signature] Deputy Clerk of District Court, Lubbock County, Texas pg 46 of 46





MP

CAUSE NO. DC-2023-CV-0668

GABEVITELA ENTERPRISE LLC,

*Plaintiff,*

v.

SALVATORE MAZZAMUTO and  
GIROLAMO MAZZAMUTO,

*Defendants.*

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IN THE 237TH DISTRICT COURT

OF

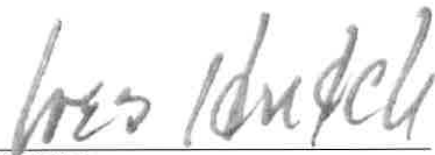
LUBBOCK COUNTY, TEXAS

**ORDER DENYING DEFENDANT’S 91A MOTION TO DISMISS**

On the 10th day of August, 2023, came on to be heard Defendant’s 91a Motion to Dismiss (the “Motion”). The Court, after reviewing the Motion, the Response of Plaintiff, the evidence, and arguments of counsel, finds that the Motion should be in all things DENIED.

IT IS THEREFORE ORDERED that the Motion is hereby DENIED, with each party bearing their own attorneys’ fees.

SIGNED this 16th day of August, 2023.



\_\_\_\_\_  
JUDGE PRESIDING



### Automated Certificate of eService

This automated certificate of service was created by the e filing system. The filer served this document via email generated by the e filing system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Amy Dobberstein on behalf of Fernando Bustos

Bar No. 24001819

adobberstein@bustoslawfirm.com

Envelope ID: 78610480

Filing Code Description: ORDM - Order To Deny Motion

Filing Description: Order Denying Defendant's 91a Motion to Dismiss

Status as of 8/17/2023 8:33 AM CST

Associated Case Party: GabeVitela Enterprise LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Fernando M.Bustos		fbustos@bustoslawfirm.com	8/16/2023 4:31:16 PM	SENT
Deirdre Trotter		dtrotter@bustoslawfirm.com	8/16/2023 4:31:16 PM	SENT
Amy Dobberstein		adobberstein@bustoslawfirm.com	8/16/2023 4:31:16 PM	SENT
Elizabeth Seeley-Verkamp		eseeley-verkamp@bustoslawfirm.com	8/16/2023 4:31:16 PM	SENT
Zebbe Dee AnnHernandez		zhernandez@bustoslawfirm.com	8/16/2023 4:31:16 PM	SENT

Associated Case Party: Salvatore Mazzamuto

Name	BarNumber	Email	TimestampSubmitted	Status
Lesley ACooper		lescoop@bdfllawfirm.com	8/16/2023 4:31:16 PM	SENT
Susanna Mason		smason@bdfllawfirm.com	8/16/2023 4:31:16 PM	SENT
Tiffanie Perkins		tperkins@bdfllawfirm.com	8/16/2023 4:31:16 PM	SENT

Case Contacts


Name	BarNumber	Email	TimestampSubmitted	Status
Orion Hutchin	24122288	ohutchin@bdfllawfirm.com	8/16/2023 4:31:16 PM	SENT
Don Dennis		dcdennis@bdfllawfirm.com	8/16/2023 4:31:16 PM	SENT



I, Sara L. Smith, District Clerk, in and for Lubbock County, Texas, do hereby certify this to be a true and correct copy of a like instrument now on file in this office.

This 17th day of October 2023 Sara L. Smith Deputy  
Clerk of District Court, Lubbock County, Texas pg. 2 of 2



 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated  
Business and Commerce Code (Refs & Annos)  
Title 2. Competition and Trade Practices  
Chapter 15. Monopolies, Trusts and Conspiracies in Restraint of Trade (Refs & Annos)  
Subchapter E. Covenants Not to Compete (Refs & Annos)

V.T.C.A., Bus. & C. § 15.50

§ 15.50. Criteria for Enforceability of Covenants Not to Compete

Effective: September 1, 2009  
Currentness

(a) Notwithstanding [Section 15.05](#) of this code, and subject to any applicable provision of Subsection (b), a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

(b) A covenant not to compete relating to the practice of medicine is enforceable against a person licensed as a physician by the Texas Medical Board if such covenant complies with the following requirements:

(1) the covenant must:

(A) not deny the physician access to a list of his patients whom he had seen or treated within one year of termination of the contract or employment;

(B) provide access to medical records of the physician's patients upon authorization of the patient and any copies of medical records for a reasonable fee as established by the Texas Medical Board under [Section 159.008, Occupations Code](#); and

(C) provide that any access to a list of patients or to patients' medical records after termination of the contract or employment shall not require such list or records to be provided in a format different than that by which such records are maintained except by mutual consent of the parties to the contract;

(2) the covenant must provide for a buy out of the covenant by the physician at a reasonable price or, at the option of either party, as determined by a mutually agreed upon arbitrator or, in the case of an inability to agree, an arbitrator of the court whose decision shall be binding on the parties; and

(3) the covenant must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after the contract or employment has been terminated.

(c) Subsection (b) does not apply to a physician's business ownership interest in a licensed hospital or licensed ambulatory surgical center.

### **Credits**

Added by Acts 1989, 71st Leg., ch. 1193, § 1, eff. Aug. 28, 1989. Amended by Acts 1993, 73rd Leg., ch. 965, § 1, eff. Sept. 1, 1993; Acts 1999, 76th Leg., ch. 1574, § 1, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 1420, § 14.729, eff. Sept. 1, 2001; Acts 2009, 81st Leg., ch. 971, § 1, eff. Sept. 1, 2009.

Vernon's Texas Statutes and Codes Annotated  
Business and Commerce Code (Refs & Annos)  
Title 2. Competition and Trade Practices  
Chapter 15. Monopolies, Trusts and Conspiracies in Restraint of Trade (Refs & Annos)  
Subchapter E. Covenants Not to Compete (Refs & Annos)

V.T.C.A., Bus. & C. § 15.51

§ 15.51. Procedures and Remedies in Actions to Enforce Covenants Not to Compete

Currentness

(a) Except as provided in Subsection (c) of this section, a court may award the promisee under a covenant not to compete damages, injunctive relief, or both damages and injunctive relief for a breach by the promisor of the covenant.

(b) If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, for a term or at will, the promisee has the burden of establishing that the covenant meets the criteria specified by [Section 15.50](#) of this code. If the agreement has a different primary purpose, the promisor has the burden of establishing that the covenant does not meet those criteria. For the purposes of this subsection, the “burden of establishing” a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(c) If the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not contain limitations as to time, geographical

area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest of the promisee, and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.

### **Credits**

Added by Acts 1989, 71st Leg., ch. 1193, § 1, eff. Aug. 28, 1989. Amended by Acts 1993, 73rd Leg., ch. 965, § 2, eff. Sept. 1, 1993.

Vernon's Texas Rules Annotated  
Texas Rules of Civil Procedure  
Part II. Rules of Practice in District and County Courts  
Section 4. Pleading  
C. Pleadings of Defendant

TX Rules of Civil Procedure, Rule 91a

Rule 91a. Dismissal of Baseless Causes of Action

Currentness

**91a.1 Motion and Grounds.** Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a **cause of action** on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

**91a.2 Contents of Motion.** A motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.

**91a.3 Time for Motion and Ruling.** A motion to dismiss must be:

- (a) filed within 60 days after the first pleading containing the challenged cause of action is served on the movant;
- (b) filed at least 21 days before the motion is heard; and
- (c) granted or denied within 45 days after the motion is filed.

**91a.4 Time for Response.** Any response to the motion must be filed no later than 7 days before the date of the hearing.

**91a.5 Effect of Nonsuit or Amendment; Withdrawal of Motion.**

(a) The court may not rule on a motion to dismiss if, at least 3 days before the date of the hearing, the respondent files a nonsuit of the challenged cause of action, or the movant files a withdrawal of the motion.

(b) If the respondent amends the challenged cause of action at least 3 days before the date of the hearing, the movant may, before the date of the hearing, file a withdrawal of the motion or an amended motion directed to the amended cause of action.

(c) Except by agreement of the parties, the court must rule on a motion unless it has been withdrawn or the cause of action has been nonsuited in accordance with (a) or (b). In ruling on the motion, the court must not consider a nonsuit or amendment not filed as permitted by paragraphs (a) or (b).

(d) An amended motion filed in accordance with (b) restarts the time periods in this rule.

**91a.6 Hearing; No Evidence Considered.** Each party is entitled to at least 14 days' notice of the hearing on the motion to dismiss. The court may, but is not required to, conduct an oral hearing on the motion. Except as required by 91a.7, the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by [Rule 59](#).

**91a.7 Award of Costs and Attorney Fees.** Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court may award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. Any award of costs or fees must be based on evidence.

**91a.8 Effect on Venue and Personal Jurisdiction.** This rule is not an exception to the pleading requirements of [Rules 86](#) and [120a](#), but a party does not, by filing a motion to dismiss pursuant to this rule or obtaining a ruling on it, waive a special appearance or a motion to transfer venue. By filing a motion to dismiss, a party submits to the court's jurisdiction only in proceedings on the



motion and is bound by the court's ruling, including an award of attorney fees and costs against the party.

**91a.9 Dismissal Procedure Cumulative.** This rule is in addition to, and does not supersede or affect, other procedures that authorize dismissal.

### **Credits**

Adopted by order of Feb. 12, 2013, eff. March 1, 2013. Amended by order of July 11, 2019, eff. Sept. 1, 2019.

### Automated Certificate of eService

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Don Dennis on behalf of Don Dennis

Bar No. 5749400

dcdennis@bdfllawfirm.com

Envelope ID: 80493012

Filing Code Description: Original Proceeding Petition

Filing Description: Petition for Writ of Mandamus

Status as of 10/12/2023 9:28 AM CST

#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Don Dennis		dcdennis@bdfllawfirm.com	10/11/2023 3:40:10 PM	SENT
Deirdre KellyTrotter		dtrotter@bustoslawfirm.com	10/11/2023 3:40:10 PM	SENT
Fernando Bustos		bustos@bustoslawfirm.com	10/11/2023 3:40:10 PM	ERROR