

**No. 07-23-00376-CV**

**IN THE COURT OF APPEALS  
FOR THE SEVENTH DISTRICT OF TEXAS**

FILED IN  
7th COURT OF APPEALS  
AMARILLO, TEXAS

10/30/2023 2:42:16 PM

BOBBY RAMIREZ  
Clerk

**IN RE SALVATORE MAZZAMUTO, RELATOR**

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Original Proceeding from the 37th Judicial District, Lubbock County, Texas  
Cause No. DC-2023-CV-0668, the Honorable Les Hatch, Presiding

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**REAL PARTY IN INTEREST GABEVITELA ENTERPRISE, LLC'S  
RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

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**TO THE HONORABLE COURT:**

Pursuant to Texas Rule of Appellate Procedure 52.10(a), Real Party in Interest, GabeVitela Enterprises, LLC (“Vitela”) files this Response to Relators’ Petition for Writ of Mandamus (the “Petition”) and respectfully asks that this Court deny the Petition.

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## STATEMENT OF THE CASE

Real Party in Interest GabeVitela Enterprises, LLC disputes the following portions of Relator's Statement of the Case:

Nature of the Case: This is a dispute between a retired restaurateur (Relator) and the purchaser (Real Party in Interest) of said restaurateur's intellectual property regarding the Relator's breach of the parties' non-compete agreement.<sup>1</sup>

## STATEMENT ON ORAL ARGUMENT

Real Party in Interest's live pleading is detailed with attached evidence, and the record is brief and clear. Thus, oral argument is not needed to help the Court in disposition of Realtor's Petition. However, if the Court decides to grant oral argument, Real Party in Interest requests the opportunity to argue.

## ISSUE PRESENTED

Whether the Trial Court acted within its discretion by denying Relator's Rule 91a motion to dismiss.

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<sup>1</sup> Relator's Petition complains that Real Party in Interest's fraud and conspiracy claims should be dismissed, but did no briefing to elaborate on that argument at all; Relator's Petition only focused on the breach of contract claim. Therefore, those arguments are waived on appeal. *See* TEX. R. APP. P. 38.1(i) (appellant's brief must contain clear and concise argument for contentions made, with appropriate citations to authorities and the record); *Approximately \$23,606.00 U.S. Currency v. State*, No. 07-19-00297-CV, 2020 WL 1500073, at \*3, 2020 (Tex. App.—Amarillo Mar. 27, 2020, no pet.) (mem. op.) (stating that an appellant's failure to cite legal authority or provide substantive analysis supporting the issues asserted constitutes inadequate briefing and waives the complaint).

## I. STATEMENT OF FACTS

This dispute is between Relator Salvatore Mazzamuto (“Sal”), a retired restaurant owner, and Real Party in Interest GabeVitela Enterprise, LLC (“Vitela”), the entity that purchased Sal’s intellectual property. The following facts are taken verbatim from Vitela’s First Amended Petition:

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

On May 19, 2022, Totomazza Inc. (Sal’s entity) 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]. 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.

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.

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.



In October 2022, Papa V Pizza opened at the Abbeville location, operated by Sal's brother, Girolamo (Jerry) Mazzamuto. 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. 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. Sal represented himself as retired upon the sale of the One Guy from Italy located on 50th 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.

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.

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>2</sup> Black's Law Dictionary defines "open" as "manifest; apparent; notorious."<sup>3</sup> Merriam-Webster defines open as "being in operation, especially, ready for business, patronage, or use."<sup>4</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>5</sup> Given the definitions of "open" and "food business," Sal opened a food business in Lubbock County, Texas, in violation of the non-compete agreement contained within the IP Agreement. 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

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<sup>2</sup> Black's Law Dictionary, p. 239, 10th Ed. (2010).

<sup>3</sup> *Id.* at 1263.

<sup>4</sup> <https://www.merriam-webster.com/dictionary/open> (accessed Oct. 20, 2023).

<sup>5</sup> <https://www.lawinsider.com/dictionary/food-business> (accessed Oct. 20, 2023).

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.

Appx. 031 ¶ 8–035 ¶ 21.

## II. SUMMARY OF THE ARGUMENT

Relator improperly attempts to argue enforceability of non-compete, which is not before the Court in this mandamus proceeding. The only issue before the Court is the propriety of the Rule 91a order.

Sal's Petition alleges that Vitela, "in conclusory fashion," pleads that "without Sal's assistance, Papa V Pizza could not have opened." Relator's Pet. for Writ of Mandamus 2. Taking this one allegation in isolation and arguing that the whole petition fails as being conclusory is absurd, given that Vitela's First Amended Petition provides Sal's own words under oath to plead facts that entitle Vitela to the relief sought. For example, Sal purchased the real estate, which was previously a restaurant location. Sal specifically sought restaurant property. Sal, at his own expense, made expensive improvements and bought additional valuable fixtures, which were only to be used for the restaurant business of Papa V Pizza. 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.

There is no evidence that the trial court clearly abused its discretion when denying Sal's Rule 91a motion to dismiss. Sal engaged in conduct that can and should be construed as opening a food business in Lubbock County. The key phrase "open a food business" was not defined in the IP Agreement because it was intended

to be broad, not narrow. The IP Agreement was negotiated and drafted by Vitela and Sal with the help of their counsel, who are also counsel of record in this mandamus action and in the trial court below. Vitela has not only pleaded sufficient facts to allege a cause of action under Rule 91a, but has also quoted and attached evidence to show a fact issue on this question. Doing so more than met his pleading burden, as Vitela wanted to make clear early in the case that the evidence supports its causes of action. Therefore, Sal's Petition is a waste of this Court's time, and should be denied.

### **III. ARGUMENT**

#### **A. Standard of Review**

##### **1. Standard of Mandamus Relief**

“Mandamus is an extraordinary remedy granted only when a relator shows that the trial court clearly abused its discretion and that no adequate appellate remedy exists.” *In re Becker*, 554 S.W.3d 780, 781 (Tex. App.—Amarillo 2018, no pet.) (citing *In re H.E.B. Grocery Co., L.P.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam)). The relator bears the burden of proving these requirements. *Id.* Additionally, a relator must “show that 1) the trial court had a legal duty to perform, 2) performance was demanded of the court, and 3) it refused.” *Id.*

An abuse of discretion is “a clear failure by the trial court to analyze or apply the law correctly.” *In re H.E.B. Grocery Co., L.P.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam) (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)). The trial court’s decision will only be disturbed “if it amounts to a clear and prejudicial error of law, or if it fails to correctly analyze or apply the law to the facts.” *Id.* The relator bears the burden of showing that “the trial court could have reasonably reached only one conclusion.” *Id.*

##### **2. Tex. R. Civ. P. 91a**

“Rule 91a provides a procedure for dismissal of a case that has no basis in law or fact.” *Raider Ranch, LP v. Lugano, Ltd.*, 579 S.W.3d 131, 134 (Tex. App.—

Amarillo 2019, no pet.) (citing TEX. R. CIV. P. 91a). “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.” 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*, No. 05-18-00555, 2018 WL 2773262, at \*1 (Tex. App.—Dallas 2018, original proceeding).

A cause of action has a basis in fact if a reasonable person could believe the facts pleaded. TEX. R. CIV. P. 91a.1. “If a petition provides sufficient facts to give fair notice of the claim, then a motion seeking dismissal based on lack of a basis in fact should be denied.” *In re RNDC Texas, LLC*, 2018 WL 2773262, at \*1. Courts “must decide the motion based solely on the pleading of the cause of action, together with any [permitted] pleading exhibits.” TEX. R. CIV. P. 91a.6. Court may also draw reasonable inferences from the factual allegations. *Vasquez v. Legend Nat. Gas III, L.P.*, 492 S.W.3d 448, 45 (Tex. App.—San Antonio 2016, pet. denied).

A ruling under Rule 91a is reviewed *de novo*; a defendant’s entitlement to dismissal under the alleged facts is a legal question. *In re Farmers Tex. Cty. Mut. Ins. Co.*, 621 S.W.3d 261, 266 (Tex. 2021) (citing *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam)). A reviewing court “construe[s] the pleadings liberally in the plaintiff’s favor, look[s] to the plaintiff’s intent, and accept[s] as true the factual allegations in the pleadings to determine if the cause of

action has a basis in law or fact.” *Livingston v. Erlandson*, No. 07-22-00315-CV, 2023 WL 3125368, at \*1 (Tex. App.—Amarillo Apr. 27, 2023, no pet.).

**B. Denial of Relator’s Rule 91a Motion Was Not an Abuse of the Trial Court’s Discretion**

Relator argues that the trial court improperly denied the Rule 91a motion because none of the pleaded facts, even if true, entitle Vitela to succeed on its claims. To the contrary, Vitela’s claims have a basis in law or fact for the following reasons.

**1. Relator’s “Interpretation” Argument is Invalid and Ignores That the Phrase was Deliberately Drafted Broadly Through Negotiation**

The issue before this Court is the trial court’s denial of Relator’s Rule 91a Motion to Dismiss. Yet, Relator improperly attempts to argue enforceability of the non-complete agreement, which is not before the Court in this mandamus proceeding.<sup>6</sup> This is particularly curious, given that Relator’s own counsel had a hand in drafting the non-compete agreement at issue.

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<sup>6</sup> Relator alleges that Vitela’s claims are unenforceable because the non-compete is not limited to a reasonable time or a reasonable scope of activity. *See* Appx. 019 ¶ 2.05; Relator’s Pet. for Writ of Mandamus, p. 9, n.3. This issue should not be considered in this mandamus proceeding. As an aside, “[c]ourts have been more inclined to enforce a long or limitless period barring competition after a sale of a business.” *Heritage Operating, L.P. v. Rhine Brothers, LLC*, No. 02-10-00474-CV, 2012 WL 2344864, \*6 (Tex. App.—Fort Worth June 21, 2012); *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 a sale of the business noncompete unreasonable as a matter of law); *Randolph v. Graham*, 254 S.W. 402, 403–04 (Tex. App.—San Antonio 1923, writ ref’d n.r.e.) (court upheld validity of covenant by physician, who sold his practice, not to practice in a town or within a 20-mile surrounding radius for an unlimited period of time).

The majority of Relator’s argument focuses on interpretation of the non-compete agreement. However, missing from Relator’s discussion is any reference to the fact that the key phrase “open a food business” was freely negotiated by Sal and Vitela with the assistance of their counsel. “Judicial interpretations of contracts are ‘governed by what [the parties] said in [their] contract, not by what one side or the other alleges they intended to say but did not.’” *Perthuis v. Baylor Miraca Genetics Lab'ys, LLC*, 645 S.W.3d 228, 236 (Tex. 2022) (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010)).

The phrase “open a food business” was deliberately drafted broadly to encompass all manner of activities relating to the opening of a food business, including the very acts Sal engaged in with his admitted “investment” in Jerry’s restaurant. To the extent that this phrase is ambiguous, and if the Court finds it necessary to engage in this level of analysis, the Court should apply the doctrine of *contra proferentem*. See 11 R. Lord, *Williston on Contracts* § 32:12, pp. 788–792 (4th ed. 2012) (stating that application of the rule may vary based on “the degree of sophistication of the contracting parties or the degree to which the contract was negotiated”); *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 267 S.W.3d 454, 469 (Tex. App.—Houston [14th Dist.] 2008), rev'd, 352 S.W.3d 445 (Tex. 2011) (noting that the rule of *contra proferentem* is a tie-breaking rule of last resort).



Because it is undisputed that Sal and Vitela had the assistance of counsel in negotiating and drafting the non-compete agreement, and the parties were sophisticated, the rule of *contra proferentem* should be applied to construe any ambiguity in that phrase against Sal, as co-drafter of the Agreement. Sal and Vitela negotiated an agreement that was intended to be broad, not narrow. A reviewing court “construe[s] the pleadings liberally in the plaintiff’s favor, look[s] to the plaintiff’s intent, and accept[s] as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact.” *Livingston v. Erlandson*, No. 07-22-00315-CV, 2023 WL 3125368, at \*1 (Tex. App.—Amarillo Apr. 27, 2023, no pet.). Given how the Court must construe Vitela’s pleading, Relator’s argument that the non-compete agreement is unenforceable does not support a Rule 91a dismissal, and Relator cannot show that the trial court clearly abused its discretion in denying the Rule 91a Motion to Dismiss.

## **2. Vitela Pleaded Sufficient Facts to Allege a Cause of Action to Which Vitela is Entitled to the Relief Sought**

“If a petition provides sufficient facts to give fair notice of the claim, then a motion seeking dismissal based on lack of a basis in fact should be denied.” *In re RNDC Texas, LLC*, 2018 WL 2773262, at \*1. Vitela alleged that Sal engaged in conduct that can and should be construed as opening a food business in Lubbock County. Vitela’s burden was to plead facts that Sal opened a food business in

Lubbock County in violation of the non-compete agreement within the IP Agreement, *not* that Sal “opened, own[ed], operate[d], or control[led]” Papa V Pizza.

The basic facts are set forth in Vitela’s First Amended Petition. Vitela provided fair notice of the nature of its claims against Sal. Sal entered into a non-compete agreement as part of the IP Agreement and the sale of his business. As confirmed by Sal in his Motion to Dismiss, Sal agreed not to open a food business in Lubbock County, Texas. *See* Appx. 017 ¶ 1.01. However, within two years and two months of executing the Agreement, Sal opened a food business in Lubbock County, Texas. Sal admitted that he opened a food business. *See* Appx. 031 ¶ 9, even though Defendant represented himself as retired after the sale of *One Guy From Italy* located on 50th Street in 2017. *See* Appx. 034 ¶ 17. He 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 in connection with a sale of a business is not unreasonable given these facts. *See* Appx. 034 ¶ 17, 036-37 ¶ 31; *Oliver*, 976 S.W.2d at 801 (holding that a lack of a time limitation did not render noncompete unreasonable as a matter of law).

Further, Sal did not purchase property that could be readily used for *any* purpose; Defendant specifically purchased *restaurant property*. The property came with restaurant equipment, and Sal made a specific agreement to purchase the

existing restaurant equipment with the real property. *See* Appx. 032-033 ¶ 11. On top of that, Sal paid \$20,000 to \$30,000 for additional restaurant equipment to get Papa V Pizza open. *See* Appx. 033 ¶ 12. Sal also paid for other costs related to remodeling the property for a restaurant, which is not the normal course of business of a disinterested commercial landlord. *See* Appx. 033 ¶ 13.

These facts clearly put Relator on notice of, and provide support for, Vitela's claims that Sal breached the non-compete agreement within the IP Agreement. These facts, taken as true, properly allege that Sal breached the non-compete agreement, and Vitela is entitled to relief for the breach. As such, Relator has failed to show that the trial court clearly abused its discretion by denying Relator's Rule 91a motion to dismiss.

### **3. Vitela's Pleading Does Not Trigger a Clear Legal Bar to Its Claims**

Relator failed to provide evidence that anything in Vitela's pleading triggers a clear legal bar to Vitela's claims. "[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*, 2018 WL 2773262, at \*1. Relator alleges that Vitela's pleading "consists of conclusory statements that do not sufficiently allege a cause of action under Rule 91a standards." *See* Appx. 019 ¶ 2.06. Specifically, Relator alleges that Vitela claims, in "conclusory fashion," that without Sal's assistance, Papa V. Pizza could not have opened. *See* Relator's Pet. for Writ of Mandamus 2.

As shown above, this argument lacks merit, as does Relator's contention that the non-compete agreement within the IP Agreement is unenforceable. Vitela has not only pleaded sufficient facts to allege a cause of action under Rule 91a, but Vitela went beyond its requirements by also quoting and attaching evidence to create a fact issue on this question which could even defeat summary judgment. Vitela was not required to present any other evidence to meet its pleading burden, but did so to make clear, as early as possible, that the evidence supports Vitela's claims. Therefore, there is no evidence that the trial court clearly abused its discretion when denying Relator's Rule 91a motion to dismiss.

### **CONCLUSION AND PRAYER**

The trial court properly applied the law to the facts, and thus cannot be said to have clearly abused its discretion. Consequently, Vitela respectfully requests that the Court deny Relator's Petition.

Respectfully submitted,

By: /s/ Fernando M. Bustos

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### **CERTIFICATE OF COMPLIANCE**

I certify that this Response complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 3,563 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(l).

DATED: October 30, 2023

CERTIFIED BY:

/s/ Fernando M. Bustos

Fernando M. Bustos

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on all counsel of record through the electronic Texas file and serve system on this the 30th day of October, 2023.

*/s/ Fernando M. Bustos*

\_\_\_\_\_  
Fernando M. Bustos

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Response to Petition for Writ of Mandamus

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