Opinion issued August 16, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00641-CV

THE STATE OF TEXAS, Appellant

V.

CAL-MAINE FOODS, INC. D/B/A WHARTON AND WHARTON COUNTY FOODS, LLC, Appellees

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On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2020-25427

O P I N I O N

This interlocutory appeal concerns the sale of eggs to grocery stores and other distributors during the beginning of the Covid-19 pandemic. The State alleges that Cal-Maine Foods, Inc. and Wharton County Foods, LLC sold eggs for an excessive or exorbitant price during March and April 2020 in violation of the

Texas Deceptive Trade Practices Act ("DTPA").[1] The State also alleges that the appellees made deceptive statements about their ability to dictate their own pricing.

The appellees moved to dismiss the lawsuit under Texas Rule of Civil Procedure 91a. They argued that one particular section of the DTPA was unconstitutional and that the State's claims were baseless in fact and in law. The trial court granted the motion and dismissed the suit with prejudice. The State appeals. We reverse and remand for further proceedings consistent with this opinion.

Background

Cal-Maine Foods, Inc. is the largest producer and marketer of shell eggs in the United States. The company is a conglomerate comprised of its own operations as well as those of its subsidiaries, including Wharton County Foods, LLC (all appellees hereinafter "Cal-Maine"). Cal-Maine maintains chicken flocks and processes conventional fresh shell eggs for sale to wholesale purchasers, such as national and regional grocery-store chains, club stores, and food-service distributors. Cal-Maine produces most of the conventional shell eggs that it sells on its own farms. It purchases about 16% of the shell eggs it sells on the open market. The company sells two categories of shell eggs: specialty and non-specialty or generic. Specialty eggs include cage-free, organic, and nationally branded eggs.

[1] *See* TEX. BUS. & COM. CODE §§ 17.001–17.955.

Non-specialty eggs are generic, commodity, or store-branded eggs. This case concerns only Cal-Maine's generic shell eggs business.

On March 13, 2020, Governor Greg Abbott issued a statewide disaster proclamation due to Covid-19. The governor renewed the disaster proclamation on April 12, 2020. Texans, along with most people in the United States, were ordered to stay home and shelter in place for an extended period of time. As a result, demand for groceries increased dramatically. Egg producers, who had shrunk their chicken flocks in the months preceding March 2020, could not respond immediately to the increased demand because it takes months to raise hens to egg-laying age.

The parties agree that during March and April 2020, the industry's commodity egg prices increased quickly due to a spike in demand. The spike in demand also corresponded with the Easter holiday, when fresh shell egg prices are typically at their highest each year. The State alleged that the price increase was "squeezing consumers" and small and large businesses because the price of eggs being sold to stores rose to $3.01 a dozen, compared to 94 cents earlier in March 2020. Cal-Maine's prices also increased. The State alleged that Cal-Maine's prices in Texas exceeded the national trend. In April 2020, Cal-Maine delivered generic eggs, charging $3.32 for a dozen generic jumbo eggs and $3.44 for a dozen generic large brown eggs.

The United States Food and Drug Administration responded to the increased demand for eggs by instituting a temporary policy in April 2020 that permitted shell eggs, which were originally destined to be used in food service, to be sold to retail customers instead. This temporary policy helped meet increased demand for home consumption. Prices for generic eggs decreased to and below pre-Covid-19 levels.

On April 23, 2020, the State filed a Petition and Application for Temporary and Permanent Injunctions, alleging that Cal-Maine violated the Texas Deceptive Trade Practices Act. The petition claimed that Cal-Maine had impermissibly raised prices on "non-specialty" or "generic" shell eggs during a declared disaster and that Cal-Maine's pricing and public statements about its pricing also violated the DTPA.

The State alleged that because Cal-Maine is an integrated producer, controlling the entire production process from raising the flocks of chickens who produce eggs to selling the eggs to stores, Cal-Maine could choose the price at which it sold eggs to the grocery stores. According to the State, because neither production costs nor contractual obligations force Cal-Maine to charge a specific price for eggs, it should have and could have charged a lower price. The State alleged that Cal-Maine's egg supply remained stable and that because Cal-Maine stated that its facilities were fully operational without supply chain and delivery

disruptions, its pandemic egg pricing was not due to any increase in Cal-Maine's costs.

The State's petition explains the egg market in general. It states that grocers, food distributors, and food-service companies buy eggs on the spot market, at a market price. Urner Barry, a company that publishes an industry newsletter and maintains an accompanying website where it publishes various price indexes for commodity foods, generates price indexes for the egg industry. During periods when supply declines or demand increases, the spot price for eggs also increases due to the inelasticity of supply. The State alleged that Cal-Maine's average egg prices aligned with the wholesale egg market pricing. According to the State, Cal-Maine's egg pricing is normally about $1 per dozen. During the early pandemic, Cal-Maine's pricing increased to over $3 per dozen.

Cal-Maine moved to dismiss under Texas Rule of Civil Procedure 91a.[2] Cal-Maine argued the affirmative defenses that the DTPA's ban on excessive or exorbitant pricing during a declared disaster is unconstitutional for three reasons: (1) it is unconstitutionally vague; (2) it violates the Dormant Commerce Clause; and (3) it constitutes a regulatory taking. Cal-Maine also argued that the State's pleadings were baseless in fact and in law because the State admitted that Cal-

[2] 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

Maine merely charged or offered market prices, which could not be excessive or exorbitant as a matter of law.

According to Cal-Maine, the State was required to prove both that it took advantage of a disaster and that it charged excessive or exorbitant prices during a disaster. Because it followed industry pricing and did not change its practices or pricing structure, Cal-Maine argued that the State could not prove that it took advantage of the disaster, as required by the DTPA. Cal-Maine also argued that the State's misrepresentation claims were based on true statements. Finally, Cal-Maine asserted that the transactions on which the State based its claims are exempt from the DTPA because they exceed $500,000.

The trial court granted Cal-Maine's motion and dismissed the State's petition with prejudice. The court did not articulate its reasoning. The State appeals.

Applicable Law and Standard of Review

The DTPA's underlying purposes "are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." TEX. BUS. & COM. CODE § 17.44(a). While one of the DTPA's primary purposes was to encourage consumers themselves to file complaints, the statute also allows the attorney general to bring consumer protection actions. *PPG Indus.*,

Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship, 146 S.W.3d 79, 84 (Tex. 2004). Section 17.46(a) of the DTPA declares that "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division [of the Attorney General's office] under section[] 17.47 . . . of this code." TEX. BUS. & COM. CODE § 17.46(a).

Texas Rule of Civil Procedure 91a authorizes a defendant to move for dismissal of a cause of action that "has no basis in law or fact." TEX. R. CIV. P. 91a.1; *see City of Dall. v. Sanchez*, 494 S.W.3d 722, 724–25 (Tex. 2016). The motion must state that it is made pursuant to Rule 91a, identify each cause of action to which it is addressed, and state specifically the reasons the cause of action has no basis in law, 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 inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* 91a.1. Courts have concluded that a cause of action has no basis in law under Rule 91a in at least two situations: (1) the petition alleges too few facts to demonstrate a viable, legally cognizable right to relief or (2) the petition alleges additional facts that, if true, bar recovery. *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) ("In short, the plaintiff must plead sufficient facts to supply a legal basis for his claim

but not so much that he affirmatively negates his right to relief."); *see, e.g.*, *DeVoll v. Demonbreun*, No. 04-14-00116-CV, 2014 WL 7440314, at *3 (Tex. App.—San Antonio Dec. 31, 2014, no. pet.) ("Because [plaintiff] did not allege facts demonstrating reliance or harm, his fraud claim has no basis in law."); *Drake v. Chase Bank*, No. 02-13-00340-CV, 2014 WL 6493411, at *1 (Tex. App.—Fort Worth Nov. 20, 2014, no. pet.) (mem. op.) ("[Plaintiff] pleaded no underlying claim or facts that would support an award of damages for harm to his credit . . . . Thus, [plaintiff's] harm-to-credit claim has no basis in law . . . ."); *Dailey v. Thorpe*, 445 S.W.3d 785, 789 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (holding that breach-of-fiduciary-duty claim had no basis in law because pleaded facts affirmatively demonstrated that alleged breach occurred after fiduciary relationship ceased).

A cause of action has no basis in fact if "no reasonable person could believe the facts pleaded." TEX. R. CIV. P. 91a.1; *see, e.g.*, *Salazar v. HEB Grocery Co., LP*, No. 04-16-00734-CV, 2018 WL 1610942, at *5 (Tex. App.—San Antonio Apr. 4, 2018, pet. denied) (mem. op.) (holding that plaintiff's civil-conspiracy claim had no basis in fact because no reasonable person could believe that grocery stores and retailers conspired together to harm plaintiff); *Drake*, 2014 WL 6493411, at *2 (holding that plaintiff's claim for intentional infliction of emotional distress had no basis in fact because "no reasonable person could believe that

[defendant] engaged in extreme and outrageous conduct by merely reporting information on [plaintiff's] credit . . . .").

We review a trial court's decision on a Rule 91a motion de novo. *City of Dall.*, 494 S.W.3d at 724. We construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact. *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). We look solely to the pleadings and any attachments to determine whether the dismissal standard is satisfied. *Cooper v. Trent*, 551 S.W.3d 325, 329 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). A court may consider the defendant's pleadings if doing so is necessary to make the legal determination of whether an affirmative defense is properly before the court. *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020).

Discussion

On appeal, the State contends that the trial court erred by granting the motion to dismiss under Rule 91a. We agree that the trial court erred because it cannot be said that the State's claims are completely baseless in fact or in law. We also hold that Cal-Maine asserted colorable constitutional claims as affirmative defenses. The trial court erred in dismissing the case at this stage of the litigation.

A. Disaster price gouging claim

The State argues that the trial court erred in dismissing its claims because the State alleged sufficient facts to show that Cal-Maine's pricing was excessive or exorbitant during a disaster because it charged more for eggs during the disaster when it had no need to do so. Cal-Maine argues that the State's claims under DTPA section 17.46(b)(27) have no basis in fact or law because compared to average egg pricing at the time, its prices were not exorbitant or excessive. Cal-Maine also argues that the State's allegations are baseless because the facts do not show that it took advantage of the disaster declaration.

The DTPA prohibits false, misleading, or deceptive acts in the conduct of trade or commerce. TEX. BUS. & COM. CODE § 17.46(a). The DTPA includes a disaster price-gouging provision. *See id.* § 17.46(b)(27). That section prohibits

> (27) subject to Section 17.4625, taking advantage of a disaster declared by the governor under Chapter 418, Government Code, or by the president of the United States by:
>
> (A) selling or leasing fuel, food, medicine, lodging, building materials, construction tools, or another necessity at an exorbitant or excessive price; or
>
> (B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, lodging, building materials, construction tools, or another necessity.

TEX. BUS. & COM. CODE § 17.46(b)(27). To establish a cause of action against Cal-Maine for violation of the DTPA's disaster price gouging statute, the State was required to allege that Cal-Maine took advantage of a disaster declared by the governor by selling food at an "exorbitant or excessive price" or "demanding an exorbitant or excessive price" in connection with the sale of food. *See id.*

Our review finds no prior cases interpreting section 17.46(b)(27) of the DTPA. This is a case of first impression. We must interpret the contours of section 17.46(b)(27)'s prohibition of exorbitant or excessive pricing during a declared disaster. In order to determine if the pleading alleges facts to show that exorbitant or excessive prices were charged for eggs, we must determine what "exorbitant" and "excessive" mean.

We review statutory construction de novo. *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 389 (Tex. 2014). If the statute is clear and unambiguous, we must read the language according to its common meaning "without resort to rules of construction or extrinsic aids." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). We rely on the plain meaning as an expression of legislative intent unless a different meaning is supplied or is apparent from the context, or the plain meaning leads to absurd results. *Crosstex*, 430 S.W.3d at 389–90 (citing *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010)). Words and phrases "shall be read in context and construed

according to the rules of grammar and common usage." TEX. GOV'T CODE § 311.011. We presume the Legislature chose statutory language deliberately and purposefully. *See Tex. Lottery Comm'n*, 325 S.W.3d at 635. We must not interpret the statute "in a manner that renders any part of the statute meaningless or superfluous." *Crosstex*, 430 S.W.3d at 390 (citing *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008)).

The parties agree that in order to determine an "exorbitant" or "excessive" price, a comparison must be made to "what is usual, proper, necessary, or normal" or to what is "customary." The parties disagree on the time period for defining the necessary, normal, or customary price.

The State argues that the eggs were exorbitantly priced because they were priced higher than the time period immediately preceding the disaster. Cal-Maine argues that the claim is baseless because the State did not allege that Cal-Maine charged prices in excess of the normal, customary price for shell eggs during the disaster. Cal-Maine also argues that the State failed to allege facts to show that Cal-Maine took advantage of a disaster. Cal-Maine maintains that it charged industry pricing, and many of its prices were dictated by existing contractual obligations. These contractual obligations are not in the record.

At this stage of the litigation, we need not fully decide the merits of the underlying claim. Under either interpretation of section 17.46(b)(27), we cannot

say that there is "no basis in law or fact" for the State's DTPA price-gouging claim against Cal-Maine. *See* TEX. R. CIV. P. 91(a). In its live pleading, the State alleged that Cal-Maine's prices were excessive or exorbitant because (1) the cost of generic eggs was more than $2 higher than the cost during the 2015 avian flu pandemic; (2) the cost of generic eggs exceeded the cost of specialty eggs; and (3) Cal-Maine did not experience any supply chain difficulties that would justify increasing prices. Cal-Maine responds that its pricing was governed by existing contracts related to the Urner Barry index and that its prices were not exorbitant or excessive because the prices aligned with increased industry-standard pricing at the time.

Without the benefit of further discovery, and construing the pleadings liberally in favor of the State, as we must, we cannot say that the State's allegations have no basis in law or that no reasonable person could believe the facts as pleaded. *Contra Malik v. GEICO Adv. Ins. Co., Inc.*, No. 01-19-00489-CV, 2021 WL 1414275, at *8 (Tex. App.—Houston [1st Dist.] Apr. 15, 2021, pet. denied) (mem. op.) (stating that DTPA unconscionable action claim was without factual basis because no reasonable person could believe an insurer would overpay claim to secure higher future premiums from insured); *Guillory*, 470 S.W.3d at 241–42, (holding that contract did not provide legal basis for negligent-undertaking claim

arising from services rendered). We conclude that the trial court erred to the extent it dismissed this cause of action.

B. Misrepresentation claims

The State argues that the trial court erred in dismissing its DTPA claims for misrepresentation of goods under sections 17.46(b)(5) and 17.46(b)(24). Section 17.46(b)(5) prohibits "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities, which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which the person does not." TEX. BUS. & COM. CODE § 17.46(b)(5). Section 17.46(b)(24) prohibits "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed." *Id.* § 17.46(b)(24).

The State asserts that Cal-Maine misled customers by stating on its website that "wholesale shell egg market prices . . . are outside of our control." The State alleges that Cal-Maine's statement is misleading because, as a vertically integrated company, Cal-Maine controlled its own pricing. The State also alleges that Cal-Maine misled its customers by stating in financial documents that pricing is based on "independently quoted wholesale market prices" and "market quotations."

According to the State, these statements imply there is a regulated "market" like the stock market, where one can observe actual prices paid by commodity purchasers.

In its response to Cal-Maine's Rule 91a motion, the State alleges that Cal-Maine violated this section of the DTPA by intentionally not disclosing that when it used the term "market," it was not referring to a regulated market but instead a price report. The State alleges that Cal-Maine referred to a market price without disclosing that it was referring to the Urner Barry price report or data.

Without further discovery, we cannot say that the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the State to the relief sought. *See* TEX. R. CIV. P. 91a. At this stage of the litigation, we do not have full information regarding Cal-Maine's business, costs, margins, or other information that could explain its pricing structure as a vertically integrated operation. Similarly, while it is possible that Cal-Maine will be able to show that it did not fail to disclose information to the public, or if it did, that it was not done to induce and did not induce a consumer into a transaction he otherwise would not have completed, we cannot say that this claim is wholly without basis in law or fact. *Contra Salazar*, 2018 WL 1610942, at *5 (holding that plaintiff's civil conspiracy claim had no basis in fact because no reasonable person could believe that grocery stores and retailers conspired together to harm plaintiff); *Drake*, 2014

WL 6493411, at *1 ("[Plaintiff] pleaded no underlying claim or facts that would support an award of damages for harm to his credit . . . . Thus, [plaintiff's] harm-to-credit claim has no basis in law . . . .").

The trial court erred in dismissing the State's DTPA misrepresentation claims against Cal-Maine under Rule 91a.

C. Affirmative defenses

Cal-Maine asserts three constitutional grounds as affirmative defenses.[3] Cal-Maine argues that section 17.46(b)(27) is void for vagueness both facially and as applied because it prohibits "exorbitant or excessive" pricing without any guidance as to what the terms mean. Cal-Maine also asserts that section 17.46(b)(27) violates the Dormant Commerce Clause because the section's extraterritorial effects unreasonably interfere with interstate commerce. And finally, Cal-Maine argues that the State's theories would result in unconstitutional takings from Cal-Maine. We hold that the trial court erred to the extent it granted the Rule 91a motion based on these affirmative defenses.

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[3] We address the affirmative defenses because the trial court did not specify the grounds on which it dismissed the State's petition.

"Rule 91a permits motions to dismiss based on affirmative defenses 'if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought.'" *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020) (quoting TEX. R. CIV. P. 91a).

1. Vagueness challenge

Cal-Maine asserts that section 17.46(b)(27), the price gouging provision, is unconstitutionally vague on its face and as applied to Cal-Maine's conduct. It is a basic principle of due process that a statute is void for vagueness if "it fails to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited." *Ex parte Wheeler*, 478 S.W.3d 89, 94 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). Although the vagueness standard applies most frequently to penal statutes, a civil statute may also be so vague that it violates due process. *See A. B. Small Co. v. Am. Sugar Refin. Co.*, 267 U.S. 233, 239–40 (1925). The degree of vagueness that the Constitution tolerates, as well as the relative importance of fair notice and fair enforcement, depends in part on the nature of the enactment. *Vill. of Hoffman Ests. v. The Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). "Perfect clarity" and "precise guidance" are not required, and "[a] statute is not unconstitutionally vague merely because the words or terms used are not specifically defined." *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018) (internal quotations and citations removed).

While Cal-Maine may have a colorable claim against the constitutionality of the statute, we do not reach that decision yet. "[S]ome affirmative defenses will not be conclusively established by the facts in a plaintiff's petition. Because Rule 91a does not allow consideration of evidence, such defenses are not a proper basis for a

motion to dismiss." *Bethel*, 595 S.W.3d at 656. Reviewing only the pleadings and attached documents, as we must in reviewing a Rule 91a motion, we cannot conclusively hold that the statute, by not defining "exorbitant or excessive" pricing, is unconstitutionally vague either facially or as applied. TEX. R. CIV. P. 91a.6. The trial court erred to the extent it granted the Rule 91a motion based on this affirmative defense.

2. Commerce Clause challenge

Cal-Maine also asserts the affirmative defense that the price gouging provision violates the Dormant Commerce Clause of the United States Constitution by unduly burdening interstate commerce. *See* U.S. CONST. art. I, § 8. Cal-Maine argues that Texas's price gouging statute would require executing contracts differently in Texas than in other states.

The Supreme Court of the United States established a balancing test to determine whether the burden on interstate commerce imposed by a regulation is excessive in relation to putative local benefits. *Ex parte Wheeler*, 478 S.W.3d at 97; *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Wheeler*, 478 S.W.3d at 97. If a legitimate local purpose is found,

then the question becomes one of degree. *Id.* The extent of the burden that will be tolerated depends on the nature of the local interest involved and whether it could be promoted as well with a lesser impact on interstate activities. *Id.*

Cal-Maine may have a colorable claim that DTPA section 17.46(b)(27) imposes an impermissible burden on interstate commerce. Relying only on the pleadings at this stage of the litigation, we cannot conclusively balance the extraterritorial effects with the local interest involved in the statute. TEX. R. CIV. P. 91a.6; *Bethel*, 595 S.W.3d at 656 (stating that some affirmative defenses are not conclusively established by facts in petition and cannot be proper basis for Rule 91a motion to dismiss). The trial court erred to the extent it granted the Rule 91a motion based on this affirmative defense.

3. Takings challenge

Finally, Cal-Maine argues that section 17.46(b)(27) constitutes a regulatory taking. Cal-Maine asserts that the State's enforcement against it is an impermissible attempt to force Cal-Maine to sell eggs (1) below their fair market value or the value Cal-Maine contracted to sell them to stores and (2) for a lower price than Cal-Maine paid on the open spot market. In effect, Cal-Maine argues that the State seeks to take property without just compensation in violation of the Takings Clause of the Fifth Amendment.

The Takings Clause of the Fifth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, prohibits "private property" from being "taken for public use, without just compensation." U.S. CONST. amend. V, XIV; *see also* TEX. CONST. art. I, § 17. The clause prohibits both physical takings and regulatory takings. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537–38 (2005).

Cal-Maine alleges that section 17.46(b)(27) constitutes a regulatory taking, which occurs when the government imposes restrictions that either deny a person all economically viable use of his property or unreasonably interferes with the person's right to use and enjoy the property. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998); *City of Hous. v. Commons at Lake Hous., Ltd.*, 587 S.W.3d 494, 499 (Tex. App.—Houston [14th Dist.] 2019, no pet.). There is insufficient information at this stage of the litigation to determine the extent of the alleged interference into Cal-Maine's business ventures. While Cal-Maine may have a colorable constitutional argument, we cannot appropriately weigh the validity of the constitutional challenge at this stage of the proceedings.

Without further discovery, we cannot decide whether the State's action constitutes a regulatory taking. The trial court erred to the extent it granted the Rule 91a motion based on this affirmative defense.

Conclusion

We cannot hold that there is absolutely no basis in law or fact for the State's claims or Cal-Maine's affirmative defenses. *See* TEX. R. CIV. P. 91.a.1. The trial court erred in dismissing the cause with prejudice under Rule 91a.

We reverse the judgment of the trial court and remand for further proceedings.

Peter Kelly
Justice

Panel consists of Justices Kelly, Goodman, and Guerra.