Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00085-CV

WHATABURGER, INC.; CA Development LLC; CA Real Estate LLC; Cinco Aguilas LLC; Tres Aguilas Enterprises LLC; Tres Aguilas Management LLC; Whataburger International LLC; Whataburger Real Estate LLC; Whataburger Restaurants LLC; Whataburger Ventures, LLC; Whataburger Supply and Merchandising LLC; and Whatabrands LLC;
Appellants

v.

WHATABURGER OF ALICE, LTD.,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2016-CI-01431
Honorable Gloria Saldana, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: June 21, 2017

AFFIRMED IN PART; REVERSED AND RENDERED IN PART

The underlying dispute arises out of a 1993 settlement agreement between Appellee Whataburger of Alice, Ltd. ("WOA"), and Appellants Whataburger, Inc.; CA Development LLC; CA Real Estate LLC; Cinco Aguilas LLC; Tres Aguilas Enterprises LLC; Tres Aguilas Management LLC; Whataburger International LLC; Whataburger Real Estate LLC; Whataburger Restaurants LLC; Whataburger Ventures, LLC; Whataburger Supply and Merchandising LLC; and Whatabrands LLC (collectively "Whataburger").

WOA filed the underlying petition for declaratory judgment, and Whataburger filed a counterclaim for declaratory judgment. Both parties filed traditional motions for summary judgment, seeking declarations by the trial court. The trial court granted WOA's motion for summary judgment, and denied Whataburger's motion. It then made declarations as requested by WOA's motion. Whataburger appeals, arguing that the trial court erred in

(1) declaring that Whataburger owed WOA duties of "candor, loyalty, and good faith";

(2) declaring that after the franchise agreement for an existing location expires, WOA has a right to re-designate that existing location as a "new" location under the 1993 Settlement Agreement; and

(3) declaring that WOA has the "sole right" to select site locations in Webb and Jim Wells Counties and thus requiring Whataburger to tender standard form franchise agreements for any such selected locations to WOA.

We affirm the trial court's judgment in part, and reverse and render in part.

BACKGROUND

WOA and Whataburger have had a business relationship dating back to 1953 when WOA opened its first Whataburger franchise in Alice, Jim Wells County, Texas. Over the next forty years, WOA opened more Whataburger franchises in Bexar County, Jim Wells County, Bee County, and Webb County. WOA's development of franchises was based on Whataburger's promises of exclusivity in each of those counties. In 1990, WOA arranged to sell to a group of investors its twenty-eight franchises situated in Bexar County, along with its exclusive development rights. In response, Whataburger sued WOA to block the sale of the franchises. During the pendency of the lawsuit, WOA discovered what it labeled a "kickback" scheme. Whataburger required its franchisees to purchase certain food products and supplies from specified vendors. WOA discovered that Whataburger was receiving money from these vendors as a result of these "forced" sales. The case went to trial and while the jury was deliberating, the parties agreed

to settle. The result was the 1993 Settlement Agreement, the interpretation of which is in dispute in this case.

The 1993 Settlement Agreement is titled "Agreement for Acquisition of Assets Between Whataburger, Inc. (a Texas corporation) and Whataburger of Alice, Inc. (a Texas Corporation)." Pursuant to the 1993 Settlement Agreement, Whataburger agreed to buy WOA's twenty-eight franchises located in Bexar County for the purchase price of $4,600,000.00. Additionally, Whataburger gave WOA "the exclusive right to construct, operate or develop Whataburger restaurants in Bee, Jim Wells, and Webb Counties, except as otherwise provided for herein." The 1993 Settlement Agreement stated that WOA and Whataburger "shall enter in [Whataburger]'s standard form of franchise agreement for each new location developed by [WOA] in Bee, Jim Wells, or Webb County." Also pursuant to the 1993 Settlement Agreement, any franchise agreements between Whataburger and WOA entered into after 1993 with respect to Whataburger restaurants located in Bee, Jim Wells, and Webb Counties "shall provide that the amount of each of the royalty and advertising fee payable by [WOA] to [Whataburger] shall be 2% of the gross sales of such restaurants."

In 2013, WOA had twelve franchise restaurants. It had found a location in Laredo, Texas, and wanted to open a new Whataburger restaurant at that location. It informed Whataburger of its intention to open a new franchise restaurant on that site. Whataburger and WOA then argued about whether WOA needed Whataburger's consent to the selected site. Whataburger agreed that WOA had the right of exclusivity in Webb County, but Whataburger argued that it had the right to approve new site locations. According to Whataburger, it could approve or not approve such site locations in its sole discretion for any reason. Whataburger stated that it would not approve this new site location unless WOA renegotiated the franchise agreements regarding its existing locations. Whataburger demanded that (1) WOA relinquish its rights set out in the 1993 Settlement

Agreement to a fixed 2% royalty and advertising fee on future restaurants; (2) all existing WOA franchise locations be transitioned to a new 5% royalty and advertising fee; and (3) WOA formally agree that Whataburger had the right to approve all site locations. Because of the uncertainty surrounding these negotiations, WOA did not move forward on the new location in Laredo.

When Whataburger made it clear that no more franchise agreements would be issued with respect to any site locations designated by WOA until WOA agreed to the new terms, WOA filed the underlying petition for declaratory judgment. Whataburger responded by filing a counterclaim for declaratory judgment. Both WOA and Whataburger then filed traditional motions for summary judgment.

In its motion for summary judgment, WOA requested that the trial court make the following declarations:

> (1) The 1993 Settlement Agreement allows WOA the sole right to select site locations on which restaurants are to be located in the counties of exclusivity.
>
> (2) The right to site selection and the right to receive standard form franchise agreements on sites that WOA selects in areas of exclusivity also exists with respect to sites that WOA has previously selected, has previously received a site specific franchise agreement for and operated a restaurant on, even when that specific franchise agreement may have expired by its terms.
>
> (3) Whataburger must deliver to WOA standard form franchise agreements with royalty and advertising fees of 2% on sites selected by WOA in areas of exclusivity.
>
> (4) Whataburger owes fiduciary duties and special duties of good faith and fair dealing to WOA in the performance of its obligations under the 1993 Settlement Agreement (including duties of candor, loyalty, and good faith) pursuant to sections 5.01 and 6.01 of the 1993 Settlement Agreement. These duties prevent Whataburger from (1) including terms and conditions in a proposed "standard form" franchise agreement that have the purpose and/or effect of limiting the rights of WOA to select locations; (2) limit or curtail WOA's other rights under the 1993 Settlement Agreement; and (3) demanding or conditioning any acts or approvals upon a waiver by WOA of its existing rights.

In its motion for summary judgment, Whataburger argued that the trial court should refuse to grant WOA's request for declaration and should instead make the following declarations:

(1) Neither the 1993 Settlement Agreement nor the franchise agreements signed by WOA compel Whataburger to grant a new Whataburger franchise to WOA. On the contrary, the agreements unambiguously recognize Whataburger's sole discretion to grant or deny future franchise locations.

(2) Neither the 1993 Settlement Agreement nor the franchise agreements signed by WOA compel Whataburger to grant a new franchise agreement to WOA upon the expiration of the franchise agreements governing each of WOA's existing restaurants. On the contrary, the agreements unambiguously recognize Whataburger's sole discretion to grant or deny new franchise agreements for existing locations upon the expiration of these agreements.

(3) Whataburger may issue to WOA a standard form of franchise agreement that includes any obligation, requirement, term, or language Whataburger deems appropriate so long as the standard form of franchise agreement includes the following terms: (i) a 2% cap on the royalty rate; (ii) a 2% cap on the advertising rate; (iii) a reference to exclusivity within Jim Wells County and Webb County, subject to the terms and conditions of the 1993 Settlement Agreement; and (iv) a reference to the transferability provisions within Section 6.03(e) of the 1993 Settlement Agreement. The 1993 Settlement Agreement does not otherwise restrict Whataburger's inclusion of terms within its standard form of franchise agreement offered to WOA.

(4) The 1993 Settlement Agreement includes no covenant of honest and forthright performance and Whataburger has not violated any such covenant.

(5) As a matter of law and based upon the parties' contracts, Whataburger and WOA do not have a formal or informal fiduciary relationship.

After considering the cross-motions for summary judgment, the trial court granted WOA's motion for summary judgment and denied Whataburger's motion. The trial court's order made the following declarations, which it numbered (a) through (f):

a. WOA has the sole right of selecting site locations upon which Whataburger restaurants will be developed in Webb and Jim Wells Counties about which locations Whataburger has no preapproval or veto rights. Whataburger's argument that it has the "sole discretion" to approve or disapprove sites is denied.

b. Upon WOA's designation of those site locations for development of restaurants in Webb and Jim Wells Counties, Whataburger is obligated to tender its standard form franchise agreement for such site locations and Whataburger may

not refuse to enter a standard franchise agreement regarding a site location selected by WOA.

c. Pursuant to Section 6.03(d) of the 1993 Settlement Agreement, such franchise agreements must provide that the amount of royalty and advertising fees shall each be 2% of the gross sales of such restaurants.[1]

d. Given WOA's rights of exclusivity as well as its right of site selection and the right to receive a franchise agreement on locations it selects, when the franchise agreements on any of WOA's existing locations expires by their terms, at that time, should WOA choose, it has the right to re-designate that site as one on which it chooses to conduct a Whataburger operation. At that time, having designated that location as a new location, WOA is entitled to receive a standard franchise agreement for that location such that it could continue to operate;

e. As a result of sections 5.01 and 6.01 of the 1993 Settlement Agreement, Whataburger owes WOA duties of candor, loyalty and good faith. As a result of these duties, among other things, Whataburger is precluded from
   i. including terms and conditions in a proposed "standard form" franchise agreement that have the purpose and/or effect of limiting the rights of WOA to select site locations;
   ii. limiting or curtailing WOA's other rights arising from the 1993 Settlement Agreement; and
   iii. conditioning the performance of its obligations, whether approving any new site locations or franchise agreements or otherwise, on WOA waiving or releasing rights stated in the 1993 Settlement Agreements.

f. The provisions set forth in paragraph 82 hereof,[2] if included in any franchise agreement presented by Whataburger, violate the 1993 Settlement Agreement and thus may not be included in any future standard form franchise agreement.

Whataburger appeals, arguing that the trial court erred in granting WOA's motion for summary judgment. Specifically, Whataburger contends the trial court erred in declaring the following: (1) WOA has the "sole right" to select site locations in Webb and Jim Wells Counties, and Whataburger must tender to WOA standard form franchise agreements for such selected locations; (2) WOA has a right to renew the terms of the 1993 Settlement Agreement after the

[1] Whataburger does not complain about Declaration (c) on appeal.
[2] There is no paragraph 82 in the trial court's order. The order appears to reference paragraph 82 of WOA's motion for summary judgment. Paragraph 82 of WOA's motion for summary judgment refers to language proposed by Whataburger. The proposed language stated Whataburger had the right to select the location sites of the restaurants. Thus, this declaration appears to be stating that Whataburger cannot include such language in any future standard form franchise agreements.

franchise agreement for an existing restaurant expires; and (3) Whataburger owes WOA duties of "candor, loyalty, and good faith." Whataburger also contends the trial court should have made the declarations it requested in its motion for summary judgment.

SUMMARY JUDGMENT STANDARD

To obtain a traditional summary judgment, a party moving for summary judgment must show that no genuine issue of material fact exists and that the party is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In reviewing the grant of a summary judgment, we must indulge every reasonable inference and resolve any doubts in favor of the respondent. *Johnson*, 891 S.W.2d at 644; *Nixon*, 690 S.W.2d at 549. In addition, we must assume all evidence favorable to the respondent is true. *Johnson*, 891 S.W.2d at 644; *Nixon*, 690 S.W.2d at 548-49. Once the movant has established a right to summary judgment, the burden shifts to the respondent to present evidence that would raise a genuine issue of material fact. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

When, as here, both parties move for summary judgment on the same issues and the trial court grants one motion and denies the other, we consider the summary judgment evidence presented by both sides, determine all questions presented, and if we determine that the trial court erred, render the judgment the trial court should have rendered. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

INTERPRETATION OF CONTRACT

The interpretation of an unambiguous contract is a question of law for the court. *Moayedi v. Interstate 35/Chisam Road, L.P.*, 438 S.W.3d 1, 7 (Tex. 2014). In interpreting a contract, a court's "primary concern is to determine the true intent of the parties as expressed by the plain language of the agreement." *N. Shore Energy, LLC v. Harkins*, 501 S.W.3d 598, 602 (Tex. 2016).

"To achieve this objective," we "examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). We "construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served and avoiding unreasonable constructions when possible and proper." *Harkins*, 501 S.W.3d at 602 (citation omitted).

"A contract is not ambiguous if the contract's language can be given a certain or definite meaning." *Id.* (citation omitted). "On the other hand, a contract is ambiguous if it is susceptible to more than one reasonable interpretation." *Id.* (citation omitted). "An ambiguity, however, does not arise merely because parties to an agreement proffer different interpretations of a term." *Id.* (citation omitted). "For ambiguity to exist, both interpretations must be *reasonable*." *Id.* (citation omitted) (emphasis in original). "Deciding whether a contract is ambiguous is a question of law for the court." *Id.*

"When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument is a question of fact for the jury." *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 529 (Tex. 1987). Further, "[p]arol evidence is not admissible for the purpose of creating an ambiguity." *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 465 (Tex. 1998) (citation omitted). "Only where a contract is first determined to be ambiguous may the courts consider the parties' interpretation, and admit extraneous evidence to determine the true meaning of the instrument." *Id.* (citation omitted).

All parties in this case agree the 1993 Settlement Agreement is unambiguous.

THE 1993 SETTLEMENT AGREEMENT

At issue in this appeal are the following provisions from the 1993 Settlement Agreement between WOA and Whataburger:

ARTICLE V

Covenants of Buyer

Buyer [Whataburger] covenants with Seller [WOA] as follows:

5.01 Consummation of Agreement. Buyer [Whataburger] agrees to use its best efforts to cause the consummation of the transactions contemplated by this Agreement in accordance with its terms and conditions.

ARTICLE VI

Joint Covenants

6.01. Further Assurances. Subject to the terms and conditions of this Agreement, each of the parties hereto will use all reasonable efforts to take, or cause to be taken, all action, and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate the transactions contemplated by this Agreement or the Ancillary Documents.

6.02. Consents. As soon as practicable after the execution of this Agreement, but in any event prior to the Closing Date, each of the parties hereto shall use its best efforts to obtain the consents of all persons and governmental authorities necessary to consummate the transactions contemplated by this Agreement and the Ancillary Documents.

6.03. Franchise Agreements

(a) As of the Closing Date, the Franchise Agreements will be terminated in all respects; provided, however, that Seller [WOA] will perform any and all obligations owing to Buyer [Whataburger] under such Franchise Agreements existing as of the Closing Date.

(b) Buyer [Whataburger] and Seller [WOA] agree to execute that certain Addendum substantially in the form of Exhibit "E" attached hereto pursuant to which the existing franchise agreements between Buyer [Whataburger] and Seller [WOA] relating to Whataburger restaurants located in Bee, Jim Wells, and Webb Counties, Texas will be amended as provided in such Addendum, to the extent such franchise agreements contain terms or provisions that conflict with the matters set forth in the Addendum.

(c) Seller [WOA] and Buyer [Whataburger] agree that from and after the date hereof Seller [WOA] shall have the exclusive right to construct, operate or develop Whataburger restaurants in Bee, Jim Wells, and Webb Counties, except as otherwise provided for herein. Buyer [Whataburger] and Seller [WOA] shall enter into Buyer's [Whataburger's] standard form of franchise agreement for each new location developed by Seller [WOA] in Bee, Jim Wells, or Webb County. From time to time after the Closing Date, if in good faith Buyer [Whataburger] determines that Seller [WOA] is not appropriately developing the Webb County territory, Buyer [Whataburger] may submit in writing to Seller [WOA] a proposed site for an additional Whataburger restaurant in Webb County, Texas. Seller [WOA] shall have 90 days after its receipt of such notice to send written notice to Buyer [Whataburger] that it intends to enter into a franchise agreement with Buyer [Whataburger] and to provide adequate assurances to Buyer [Whataburger] that it can fund the costs of construction, operation and development of such additional restaurant location. If Seller [WOA] rejects the additional restaurant site or fails to so notify the Buyer [Whataburger] within the 90-day period referred to herein, then Buyer [Whataburger] may build, open and operate such additional restaurant in Webb County, Texas; provided, however, if Buyer [Whataburger] does not commence construction on such additional restaurant within the 90-day period commencing on Buyer's [Whatburger's] receipt of Seller's [WOA's] notice (or the expiration of such 90-day notice period referred to above, as the case may be), then Buyer [Whataburger] must resubmit such proposed site to Seller [WOA] in accordance with the terms hereof. Notwithstanding the development rights of Buyer [Whataburger] in Webb County, Seller [WOA] may develop Whataburger restaurants in Bee, Jim Wells, and Webb Counties at such locations as Seller [WOA] shall select, subject to the rights of Buyer [Whataburger] as the franchisor under the applicable franchise agreements.

(d) The parties agree that any franchise agreements entered into between Buyer [Whataburger] and Seller [WOA] after the date hereof with respect to Whataburger restaurants located in Bee, Jim Wells and Webb Counties shall provide that the amount of each of the royalty and advertising fee payable by Seller [WOA] to Buyer [Whataburger] shall be 2% of the gross sales of such restaurants.

(e) The parties hereto agree that the rights and obligations provided in this Section 6.03 and the franchise agreements to be entered into from time to time pursuant hereto are personal to Seller [WOA], and Seller [WOA]

> may not sell, assign, transfer, convey, give away, pledge, mortgage, or otherwise encumber such agreements, whether by operation of law or otherwise, and that any transaction or series of transactions which would result in Seller's [WOA's] current shareholders or the members of their immediate family owning less than 51% of the capital stock of Seller [WOA] shall be deemed to be an assignment.

TRIAL COURT'S DECLARATIONS A & B – SITE LOCATION

Whataburger argues that the trial court erred in making Declarations (a) and (b), which relate to the issue of site location of future restaurants. In its Declaration (a), the trial court declared the following:

> WOA has the sole right of selecting site locations upon which Whataburger restaurants will be developed in Webb and Jim Wells Counties about which locations Whataburger has no preapproval or veto rights. Whataburger's argument that it has the "sole discretion" to approve or disapprove sites is denied.

In its Declaration (b), the trial court declared the following with respect to site location:

> Upon WOA's designation of those site locations for development of restaurants in Webb and Jim Wells Counties, Whataburger is obligated to tender its standard form franchise agreement for such site locations and Whataburger may not refuse to enter a standard franchise agreement regarding a site location selected by WOA.

The parties dispute whether the 1993 Settlement Agreement gives WOA the sole right to select a site location for a new restaurant or whether WOA needs Whataburger's consent for such a site location. The applicable language is found in section 6.03(c) of the 1993 Settlement Agreement:

> Seller [WOA] and Buyer [Whataburger] agree that from and after the date hereof *Seller [WOA] shall have the exclusive right to construct, operate or develop Whataburger restaurants in Bee, Jim Wells, and Webb Counties, except as otherwise provided for herein.* Buyer [Whataburger] and Seller [WOA] shall enter into Buyer's [Whataburger's] standard form of franchise agreement for each new location developed by Seller [WOA] in Bee, Jim Wells, or Webb County. From time to time after the Closing Date, if in good faith Buyer [Whataburger] determines that Seller [WOA] is not appropriately developing the Webb County

> territory, Buyer [Whataburger] may submit in writing to Seller [WOA] a proposed site for an additional Whataburger restaurant in Webb County, Texas. Seller [WOA] shall have 90 days after its receipt of such notice to send written notice to Buyer [Whataburger] that it intends to enter into a franchise agreement with Buyer [Whataburger] and to provide adequate assurances to Buyer [Whataburger] that it can fund the costs of construction, operation and development of such additional restaurant location. If Seller [WOA] rejects the additional restaurant site or fails to so notify the Buyer [Whataburger] within the 90-day period referred to herein, then Buyer [Whataburger] may build, open and operate such additional restaurant in Webb County, Texas; provided, however, if Buyer [Whataburger] does not commence construction on such additional restaurant within the 90-day period commencing on Buyer's [Whataburger's] receipt of Seller's [WOA's] notice (or the expiration of such 90-day notice period referred to above, as the case may be), then Buyer [Whataburger] must resubmit such proposed site to Seller [WOA] in accordance with the terms hereof. Notwithstanding the development rights of Buyer [Whataburger] in Webb County, Seller [WOA] may develop Whataburger restaurants in Bee, Jim Wells, and Webb Counties at such locations as Seller [WOA] shall select, subject to the rights of Buyer [Whataburger] as the franchisor under the applicable franchise agreements.

(emphasis added).

Whataburger argues that the above language does not grant WOA the sole right to select sites for future restaurant locations. It contends that although the last sentence of section 6.03(c) gives WOA a right to "develop" Whataburger restaurants at such locations that it shall select, that right is restricted by the language "*subject to* the rights of Buyer [Whataburger] as the franchisor *under the applicable franchise agreements*." (emphasis added). Whataburger then points to section I of the applicable franchise agreement, which states the following:

I. <u>APPOINTMENT AND FEE</u>

> A. Franchisor [Whataburger] hereby grants to Franchisee [WOA] a franchise to operate a Whataburger Restaurant *only at the location described as* _______________ upon the terms and conditions herein contained and a license to use solely in connection therewith Franchisor's Proprietary Marks and the Whataburger System.

B. In consideration of the franchise and license granted to Franchisee [WOA] herein, Franchisee [WOA] shall pay to Franchisor [Whataburger] at Corpus Christi, Texas upon the execution hereof an initial franchise fee of Three Thousand and no/100 Dollars ($3,000.00) which fee shall cover site assessment, plans and engineering services provided by Franchisor [Whataburger]. Said initial franchisee fee shall be fully earned by Franchisor [Whataburger] upon the execution hereof. The parties expressly agree that the grant and the fee provided for in this Paragraph relate *solely to the location described in Paragraph I.A. hereof, and afford Franchisee [WOA] no rights regarding such other franchises, if any, as Franchisor [Whataburger] in its sole discretion may elect to make available to Franchisee [WOA] in the future*.

C. Pursuant to Section 6.03(c) of the [1993 Settlement Agreement], Franchisee [WOA] *has the exclusive right to construct, operate or develop Whataburger restaurants in Bee, Jim Wells, and Webb Counties, except as otherwise provided in Section 6.03(c)*. The parties acknowledge that the rights granted to Franchisee [WOA] in Section 6.03(c) are personal to Franchisee [WOA]; that they may not be sold or transferred by any means to any other party; and that any transaction or series of transactions that would result in Franchisee's [WOA's] current shareholders or the members of their immediate family owning less than 51% of the capital stock of Franchisee [WOA] is deemed to be an assignment. If any event occurs which results in loss or expiration of Franchisee's [WOA's] rights in Webb County under Section 6.03(c), the rights granted hereunder shall become nonexclusive and Franchisor [Whataburger] shall have the right thereafter to establish and/or license others to establish Whataburger restaurants, so long as such restaurant is not within a radius of two (2) miles of the Whataburger restaurant franchised hereunder.

(emphasis added).

According to Whataburger, the above language in the franchise agreement confers sole discretion in site location to Whataburger, not WOA. Whataburger emphasizes that section I above states WOA, as franchisee, has "no rights regarding such other franchises, if any, as [Whataburger] in its sole discretion may elect to make available to Franchisee in the future." Whataburger further argues that the purpose of the business favors keeping discretion of site selection with the franchisor. *See Harkins*, 501 S.W.3d at 602 (stating that a court construes "contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served and

avoiding unreasonable constructions when possible and proper"). It argues that in the industry of franchising, site selection matters not just to the success of an individual franchisee, but also to maintaining the image of the brand. Whataburger claims that there are two different types of site-selection provisions common in most franchise agreements, and that the major distinction between the two is whether the franchisor chooses the site for the franchisee or whether the franchisee chooses the site with the franchisor's approval. According to Whataburger, the industry practice is that a franchisor either selects the site itself or consents to the site location. Whataburger stresses that the industry practice is not for a franchisee to have sole discretion to select a site location.

In contrast, WOA argues that the 1993 Settlement Agreement gives it the sole right to select the site of a future restaurant. It points to the following language in section 6.03(c) of the 1993 Settlement Agreement: "Seller [WOA] *shall* have *the exclusive right* to construct, operate, *or develop* Whataburger restaurants in Bee, Jim Wells, and Webb Counties." (emphasis added). According to WOA, it "would be nonsensical for Whataburger to give WOA exclusive rights not just to an area, but to develop that area and yet for Whataburger to then retain the right in its sole discretion to deny WOA the right to develop by being able to unilaterally veto sites WOA selects."

WOA next points to the last sentence of section 6.03(c): "Notwithstanding the development rights of Buyer [Whataburger] in Webb County, Seller [WOA] may develop Whataburger restaurants in Bee, Jim Wells, and Webb Counties at such locations as *Seller [WOA] shall select*, subject to the rights of Buyer [Whataburger] as the franchisor under the applicable franchise agreements." (emphasis added). WOA contends that if Whataburger had the right to veto (for any reason) site selections selected by WOA, "then it would make no logical sense to include a *mandate* for Whataburger to issue a franchise agreement." (emphasis in original). According to WOA, "[i]n fact, there would be no need to mention issuance of a future franchise agreement at all."

With regard to section 6.03(c)'s phrase "subject to the rights of Whataburger, as the franchisor, under the applicable franchise agreements," WOA cites to this Court's opinion in *Teal Trading & Development, LP v. Champee Springs Ranches Property Owners Ass'n*, 432 S.W.3d 381, 391 (Tex. App.—San Antonio 2014, pet. denied), for the proposition that the intent of a "subject to" clause can be to provide notice. *Teal* dealt with a "subject to" clause found in a deed and explained "the meaning of a 'subject to' clause is somewhat contextual." *Id.* at 392. *Teal* explained that the deed in *Cockrell v. Texas Gulf Co.*, 157 Tex. 10, 299 S.W.2d 672, 676 (1956), had three different "subject to" clauses and that the Texas Supreme Court had recognized that each "subject to" clause might have a different purpose. *See Teal*, 432 S.W.3d at 391. *Teal* also recognized that this Court in *Stout v. Rhodes*, 373 S.W.2d 94 (Tex. Civ. App.—1963, writ ref'd n.r.e), had held "the 'subject to' clause referring to property restrictions were only words of notice fits neatly within the larger framework of the enforcement of restrictive covenants." *Teal*, 432 S.W.3d at 390. *Teal* concluded that *Stout*'s holding that the "subject to" clause "before it was notice and acknowledgement that property restrictions were of record, but not an acknowledgement of their validity, was consistent with the Texas Supreme Court's recognition" in *Cockrell* that "a 'subject to' clause may simply protect a grantor on her warranty." *Teal*, 432 S.W.3d at 391.

According to WOA, reading the "subject to" clause in context,

> the only reasonable reading of the phrase "subject to the rights of Whataburger as the franchisor under the applicable franchise agreements" is that (a) WOA has the right to develop site locations in its sole discretion; (b) following this designation, Whataburger is obligated to deliver its standard form, site-specific franchise agreement, which the parties are to sign; and (c) following execution, Whataburger has rights as the franchisor under that site-specific franchise agreement, just as Whataburger has rights as franchisor under the franchise agreements that were already in existence at the time the 1993 Settlement Agreement was signed.

WOA further argues that its interpretation is consistent with the term "applicable." "The very use of the term 'applicable' itself demonstrates that some franchise agreements would not be 'applicable.'" WOA argues that Whataburger's interpretation renders the term "applicable," as applied to franchise agreements, meaningless.

We agree with WOA. In considering the 1993 Settlement Agreement in its entirety, we conclude WOA does have the sole right to designate site locations for *new* Whataburger restaurants in its exclusive area. Section 6.03(c) of the 1993 Settlement Agreement unambiguously gives WOA the "exclusive right to . . . *develop* Whataburger restaurants" in its exclusive area. (emphasis added). Section 6.03(c) concludes by stating that WOA "may *develop* Whataburger restaurants" in its exclusive area "at such locations as [WOA] *shall select*, subject to the rights of [Whataburger] as the franchisor under the applicable franchise agreements." We agree with WOA that those franchise agreements do not become "applicable" until the site is selected—hence, the need in the franchise agreements to include the address of the new restaurant. While we understand the industry practice may be for a franchisor to select site locations of new restaurant locations, parties can agree to terms different than the industry practice. Here, the unambiguous language of the 1993 Settlement Agreement grants the right to designate site locations of *new* restaurants to the franchisee, not the franchisor.

Similarly, we agree with WOA that pursuant to the 1993 Settlement Agreement, upon WOA's designation of a site location for a *new* Whataburger restaurant in its exclusive area, Whataburger must tender its standard form franchise agreement for the new location and may not refuse to enter into the agreement. Therefore, with respect to *new* locations, we conclude the trial court did not err in making Declarations (a) and (b).

TRIAL COURT DECLARATION – RIGHT TO RE-DESIGNATE

WOA currently has twelve franchise restaurants, each of which is subject to a separate franchise agreement. WOA argued in the trial court that pursuant to the 1993 Settlement Agreement, when the franchise agreements for these existing locations expire, WOA has the right to "re-designate" these existing Whataburger locations as "new" locations. According to WOA, once it "re-designates" such an existing location as a "new" site location, pursuant to the 1993 Settlement Agreement, Whataburger must tender a standard form franchise agreement with the favorable 2% royalty and advertising fee. The trial court agreed with WOA and made the following declaration:

> **Trial Court Declaration (d):** Given WOA's rights of exclusivity as well as its right of site selection and the right to receive a franchise agreement on locations it selects, when the franchise agreements on any of WOA's existing locations expires by their terms, at that time, should WOA choose, it has the right to re-designate that site as one on which it chooses to conduct a Whataburger operation. At that time, having designated that location as a new location, WOA is entitled to receive a standard franchise agreement for that location such that it could continue to operate.

On appeal, Whataburger contends that the parties did not agree in 1993 to have franchise agreements running into perpetuity. It points out that while WOA has the exclusive right to develop new restaurants in Bee, Jim Wells, and Webb Counties, once a new restaurant is developed, the parties sign the standard form franchise agreement. And, Whataburger emphasizes that the standard form franchise agreement explicitly provides that it is the entire agreement between the parties with respect to that location and that it supersedes all previous agreements and understandings between the parties:

> **XX. ENTIRE AGREEMENT**
>
> This Agreement, the documents referred to herein, and the Exhibits attached hereto, if any, constitute the entire, full and complete agreement between Franchisor [Whataburger] and Franchisee [WOA] concerning the subject matter

> hereof, and *supersede all prior agreements*, no other representation having induced Franchisee [WOA] to execute this Agreement, and there are no representations, inducements, promises or agreements, oral or otherwise, between the parties not embodied herein, which are of any force or effect with reference to this Agreement or otherwise. No amendment, change or variance from this Agreement shall be binding on either party unless executed in writing.
>
> *****
>
> **XXIV. SUPERSEDING EFFECT**
>
> The parties hereto agree that this document shall *supersede all previous agreements and understandings* between them.

(emphasis added). Thus, Whataburger contends once the franchise agreement for a specific restaurant is signed by the parties, the franchise agreement supersedes the 1993 Settlement Agreement for that specific restaurant.

Whataburger also points out that the franchise agreements, by their terms, are for a limited duration. The standard form franchise agreement gives an initial term and then gives the franchisee an option to renew the franchise agreement:

> **II. DURATION**
>
> A. Unless sooner terminated as provided in this Agreement, the initial term of this Agreement shall be for a period of _____ years from the date of execution of this Agreement.
>
> B. Franchisee may, at its option, renew this Agreement for three (3) additional periods of five (5) years each, provided that at the end of the primary term, or at the end of the first five year renewal period, whichever applies:
> (1) Franchisee gives Franchisor written notice of such election to renew not less than thirty (30) days nor more than ninety (90) days prior to the end of such term;
> (2) Franchisee executes Franchisor's then-current form of Franchise Agreement, which agreement shall supersede in all respects this Agreement and the terms of which may differ from the terms of this Agreement except for the term granted and any rights of renewal and including, without limitation, a difference percentage royalty fee; provided, however, that Franchisee shall in no way be obligated to again pay the initial fee provided for in Paragraph I.B. hereof, or its equivalent. Subject to Paragraph XII.B.2. below, Franchisor's then current form of Franchise Agreement shall not abrogate or exclude the following personal rights of Franchisee under this

Agreement: (a) the exclusivity of this Agreement under Paragraph I.C.; (b) the 2% monthly royalty under Paragraph IX.A., (c) the 2% monthly advertising fund contribution under Paragraph IX.B.; (d) the 2% monthly advertising expenditure requirement under Paragraph XI.A., and (e) the freedom to transfer up to 49% of the capital stock of Franchisee to persons who are current shareholders of Franchisee or members of their immediate family without the requirement to obtain Franchisor's written approval,

(3) Franchisee is not in default of any provision of this Agreement, any amendment hereof or successor hereto, or any other Agreement between Franchisee and Franchisor, or its subsidiaries and affiliates, and has substantially complied with all the terms and conditions of such agreements during the terms thereof;

(4) Franchisee shall have completed to satisfaction all maintenance, renovating, and remodeling of the franchised restaurant as Franchisor may reasonably require to conform to the then-current Whataburger image; and

(5) Franchisee has satisfied all monetary obligations owed by Franchisee to Franchisor and its subsidiaries and affiliates and has timely met these obligations throughout the term of this Agreement and any renewals thereof.

Because the franchise agreement supersedes the 1993 Settlement Agreement, Whataburger argues that once the franchise agreement expires for a specific restaurant, no contractual agreement would apply to that specific restaurant.

We agree with Whataburger. In considering the 1993 Settlement Agreement in conjunction with the franchise agreement, we conclude that WOA has the right to designate site location for a *new* Whataburger restaurant in its exclusive area. Once a new location is selected, Whataburger, pursuant to the 1993 Settlement Agreement, must tender to WOA its standard form franchise agreement with the favorable 2% advertising and royalty fee. However, at the time WOA and Whataburger sign that standard form franchise agreement relating to that specific new location, the franchise agreement supersedes the 1993 Settlement Agreement *with respect to that specific location*. And, once that franchise agreement expires by its terms, Whataburger and WOA no longer have a contractual relationship with respect to that existing location and must begin negotiations anew.

We therefore hold the trial court erred in making its Declaration (d).

TRIAL COURT DECLARATION –DUTIES OF CANDOR, LOYALTY, AND GOOD FAITH

Whataburger next argues that the trial court erred in declaring that Whataburger owed duties of candor, loyalty and good faith to WOA pursuant to the 1993 Settlement Agreement. The trial court made the following declaration:

> **Trial Court Declaration (e):** As a result of sections 5.01 and 6.01 of the 1993 Settlement Agreement, Whataburger owes WOA duties of candor, loyalty and good faith. As a result of these duties, among other things, Whataburger is precluded from
>
> i. including terms and conditions in a proposed "standard form" franchise agreement that have the purpose and/or effect of limiting the rights of WOA to select site locations;
> ii. limiting or curtailing WOA's other rights arising from the 1993 Agreement; and
> iii. conditioning the performance of its obligations, whether approving any new site locations or franchise agreements or otherwise, on WOA waiving or releasing rights stated in the 1993 Settlement Agreement.

Thus, the trial court declared that Whataburger's duties of candor, loyalty and good faith arise from sections 5.01 and 6.01 of the 1993 Settlement Agreement. Sections 5.01 and 6.01 state the following:

> **ARTICLE V**
> **<u>Covenants of Buyer [Whataburger]</u>**
>
> Buyer [Whataburger] covenants with Seller [WOA] as follows:
>
> 5.01 <u>Consummation of Agreement.</u> Buyer [Whataburger] agrees to use *its best efforts* to cause the consummation of the transactions contemplated by this Agreement in accordance with its terms and conditions.
>
> **ARTICLE VI**
>
> **<u>Joint Covenants</u>**
>
> 6.01. <u>Further Assurances</u>. Subject to the terms and conditions of this Agreement, each of the parties hereto will *use all reasonable efforts* to take, or cause to be taken, all action, and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate the transactions contemplated by this Agreement or the Ancillary Documents.

(emphasis added).

Whataburger argues that the trial court erred in relying on sections 5.01 and 6.01 as a basis for creating heightened duties of "candor, loyalty, and good faith." It points out that the supreme court has expressly rejected the inclusion of a general implied covenant of good faith and fair dealing in Texas contracts. *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983). "There is no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions." *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 52 (Tex. 1998). Further, the supreme court has specifically held that the franchisor-franchisee relationship does not amount to a "special relationship" giving rise to heightened duties. *See Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 595-96 (Tex. 1992); *see also Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225 (Tex. 2002) (recognizing the Texas Legislature has created an exception to this general rule for auto dealers, but declaring this exception does not apply to all franchise agreements). Thus, the nature of the general relationship of franchisor/franchisee does not give rise to heightened duties in this case.

With respect to the 1993 Settlement Agreement, Whataburger urges that the "best efforts" clause in section 5.01 and the "further assurances" clause in section 6.01 do not give rise to heightened duties. Whataburger explains that best efforts and further assurances clauses are very common in asset purchase agreements. *See* Byron F. Egan, *Acquisition Structure Decision Tree*, in STATE BAR OF TEXAS, CHOICE, GOVERNANCE & ACQUISITION OF ENTITIES (2016); ABA BUS. L. SECTION COMM. ON NEGOTIATED ACQUISITIONS, MODEL ASSET PURCHASE AGREEMENT WITH COMMENTARY 167-68 (2001). According to Whataburger, at its heart, the 1993 Settlement Agreement was an asset purchase agreement—Whataburger was purchasing all of WOA's restaurants in Bexar County. Whataburger notes that "asset purchase agreements often contain 'best efforts' and 'further assurances' clauses in which the buyer and seller promise to move the transaction along to closure by tying up loose ends." But, Whataburger emphasizes that these

clauses do not create heightened duties: "They aim merely at seeing that the deal actually goes through."

Whataburger argues that sections 5.01 and 6.01 are "classic examples" of such clauses, pointing out that both sections discuss "consummation of the transaction"—i.e. the sale of the restaurants. Thus, Whataburger argues that the clauses relate specifically to the transaction of selling the restaurants and did not create heightened duties of candor, loyalty, and good faith that would apply to the general relationship between Whataburger and WOA.

In response, WOA first argues that Whataburger has waived this complaint on appeal because it did not argue to the trial court that the "best efforts" and "reasonable assurances" clauses were "boilerplate clauses" and that their inclusion in contracts were merely "part of the corporate lawyer's toolkit for making sure transactions close." WOA argues "these objectionable arguments are after-the-fact efforts to find something more persuasive than [Whataburger] brief in the lower court." According to WOA, "[t]hey may not be raised for the first time on appeal." We disagree with WOA.

Whataburger was not required to bring this specific argument to the trial court. WOA brought a traditional motion for summary judgment. A traditional motion for summary judgment must stand on its own merits. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). "Even if the non-movant fails to respond to the motion, the movant is still not entitled to summary judgment unless he conclusively establishes his right to judgment *as a matter of law on the issues* expressly presented to the trial court by his motion." TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS: PRACTICE, PROCEDURE AND REVIEW § 1.03, at 1-8 (3d ed. 2016) (emphasis added). "The non-movant is not required to file a response to defeat a traditional motion for summary judgment because deficiencies in the movant's own proof *or legal theories* might defeat the movant's right to judgment as a matter of law . . . ." *Id.* § 4.01, at 4-1. "While it would be prudent and helpful to

the trial court for the non-movant always to file an answer or response, the non-movant needs no answer or response to the motion to contend on appeal that the grounds expressly presented to the trial court by the movant's motion are insufficient *as a matter of law* to support summary judgment." *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979) (emphasis in original). Here, WOA argued to the trial court that the language found in sections 5.01 and 6.01 gave rise to heightened duties *as a matter of law*. As noted previously, all parties contend the language found in the 1993 Settlement Agreement is unambiguous and can be interpreted by the court as a matter of law. If, however, the language found in sections 5.01 and 6.01 do *not* give rise to heightened duties as a matter of law, then WOA's motion for summary judgment does not stand on its own merits. There is no waiver here.

With regard to the merits of its summary judgment argument that the "best efforts" and "reasonable assurances" clauses found in sections 5.01 and 6.01 equate to duties of candor, loyalty, and good faith, WOA cites *DaimlerChrylser Motors Co. v. Manuel*, 362 S.W.3d 160, 170-71 (Tex. App.—Fort Worth 2012, no pet.), and *Arabella Petroleum Co. v. Baldwin*, 04-11-00370-CV, 2012 WL 2450803, at *4 (Tex. App.—San Antonio 2012, pet. denied).

In the first case, *Manuel*, 362 S.W.3d at 171, the Fort Worth Court of Appeals explained "[c]ourts construing a best efforts provision that does not specify the performance to be required commonly hold the promisor to the standard of the diligence a reasonable person would use under the circumstances." According to the Fort Worth Court of Appeal, the Dallas Court of Appeals has reasoned that to be enforceable, a best efforts contract must set out some kind of goal or guideline against which best efforts may be measured. *Id.* The Fort Worth Court of Appeals noted that in its case, Chrysler argued that the best efforts clause was unenforceable because it failed to set forth a measurable goal or guideline. *Id.* at 172. The best efforts clause at issue provided, "[Chrysler] will

use its best efforts to litigate or settle the protest or lawsuit in order to allow the establishment of [the South Arlington] dealership." *Id.*

The Fort Worth Court of Appeals concluded that it could not interpret the best efforts provision as placing no deadline at all for Chrysler to litigate or settle the protest because doing so would render the clause meaningless. *Id.* "Rather, the goal or objective of the best efforts provision in the [contract], in light of the agreement as a whole, was for Chrysler to use its best efforts to litigate or settle the Meador protest in such a period of time that Manuel could establish the South Arlington dealership by January 1, 2001." *Id.* The court reasoned that its holding was "in accord with the well-established rule that, where a contract does not fix the time for performance (which is Chrysler's specific complaint about the [contract]), it will be presumed that the agreement is to be performed within a reasonable time." *Id.* Thus, *Manuel* appears to stand for the proposition that a best efforts clause will be judged by reasonableness. It does not appear, however, to stand for the proposition that heightened duties will be imposed. *See id.*

In the second case, *Arabella Petroleum*, 2012 WL 2450803, at *1, this Court considered whether an agreement to pay Appellee Baldwin for an oil and gas lease was enforceable. This Court considered whether the agreement was unenforceable because it lacked mutuality. *Id.* This Court held that the "no liability" clause "is an exculpatory clause that causes the parties' agreement to fail for lack of mutuality." *Id.* at *5.

It is in this context, that WOA points to language from *Arabella*, which it claims "clarified that 'reasonable efforts' equates to a covenant of good faith and fair dealing":

> Although facially appealing, we must disagree with the Eighth Circuit's logic for several reasons. First, the Texas Supreme Court has instructed us that we must construe the lease and the draft together, not as independent documents. *Sun Exp. & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). In addition, because the draft provides conditions precedent to the formation of the parties' overall agreement and given that the "no liability" clause states liability shall not attach to any party for "payment or otherwise," viewing the obligations under the draft

> independent of the lease also appears to be contrary to the contractual language. Furthermore, the draft expressly states that it is drawn "to pay for Oil and Gas Lease dated July 23rd, 2008, and covering" Baldwin's interest in the North Tract. Accordingly, to construe the language in the lease as providing consideration independent of the draft is problematic. Moreover, the Eighth Circuit's effort to distinguish *Spellman* appears to be based on a misreading of the opinion since the Houston court clearly held that the "contract" failed for want of mutuality, not that the "draft" failed for want of mutuality. *Spellman*, 709 S.W.2d at 298. Finally, it is important to note that in the absence of a contractual requirement that a party make a reasonable effort to perform, Texas law will not imply such a requirement because Texas law does not impose a general duty of good faith and fair dealing in contracts, including oil and gas leases. *See City of Midland v. O'Bryant*, 18 S.W.3d 209, 215 (Tex. 2000); *Green v. Gemini Exp. Co.*, No. 03–02–00334–CV, 2003 WL 1986859, *3 (Tex. App.—Austin 2003, pet. denied) (mem. op.); *Prairie Producing Co. v. Angelina Hardwood Lumber Co.*, 882 S.W.2d 640, 645 (Tex. App.—Beaumont 1994, writ denied). *Had the draft or the lease contractually imposed such a good faith or reasonable efforts requirement, the outcome of this case might be different. See Geophysical Micro Computer Applications (Int'l) Ltd. v. Paradigm Geophysical Ltd.*, No. 05–98–021016–CV, 2001 WL 1270795, at *6 (Tex. App.—Dallas 2001, pet. denied) (noting exculpatory clauses conditioned on "good faith" or "reasonable efforts" do not fail for want of mutuality).

Arabella Petroleum, 2012 WL 2450803, at *4 (emphasis added). We do not read *Arabella* to stand for the proposition that "reasonable efforts" "equates to a covenant of good faith and fair dealing." *Arabella*'s statement that "[h]ad the draft or the lease contractually imposed such a good faith or reasonable efforts requirement, the outcome of this case might be different" is, at best, dicta.

We agree with Whataburger that sections 5.01 and 6.01 do not impose heightened duties on Whataburger. In reading the 1993 Settlement Agreement as a whole, it is clear that the purpose of sections 5.01 and 6.01 is to ensure all the obligations under the agreement are performed and the sale of the assets, the restaurants in Bexar County, is completed. Therefore, we hold that as a matter of law sections 5.01 and 6.01 did not create heightened duties of candor, loyalty and good faith.

CONCLUSION

For the reasons stated above, we affirm the trial court's judgment in part and reverse it in part. Because we conclude that pursuant to the 1993 Settlement Agreement WOA has the sole

right to select site locations for new restaurants in its exclusive area, we affirm Trial Court Declarations (a), (b), (c), and (f).[3] However, because we conclude the 1993 Settlement Agreement does not give WOA the right to re-designate existing locations as "new" locations, we reverse Trial Court Declaration (d) and declare the following:

> d. Neither the 1993 Settlement Agreement nor the franchise agreements signed by WOA compel Whataburger (or any other Whataburger entity) to grant a new franchise agreement to WOA upon the expiration of the franchise agreements governing each of WOA's existing restaurants. On the contrary, the agreements unambiguously recognize Whataburger's sole discretion to grant or deny new franchise agreements for existing locations upon the expiration of these agreements.

Finally, because we hold the 1993 Settlement Agreement did not impose heightened duties on Whataburger, we reverse Trial Court Declaration (e) and make the following declaration:

> As a result of sections 5.01 and 6.01 of the 1993 Settlement Agreement, as a matter of law, Whataburger does not owe WOA duties of candor, loyalty, and good faith.

Karen Angelini, Justice

[3] We note that Trial Court Declaration (c) is not challenged on appeal.