



**The Business Court of Texas,
Third Division**

FSTI, INC.,

Plaintiff,

v.

PVS MINIBULK, INC., et al.,

Defendants.

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Cause No. 26-BC03A-0010

Memorandum Opinion

¶1 On September 25, 2026, the Court issued an order that, among other things, **DENIED** Plaintiff’s Traditional Motion for Summary Judgment on DPC’s Claims (FSTI’s MSJ) and **GRANTED** Defendants’ Amended Motion for Summary Judgment on FSTI’s Termination Defense (Defendants’ Termination MSJ).¹ The Court now issues this related opinion.

¹ Additional summary-judgment briefing cited herein includes: Defendants’ Response to FSTI’s MSJ (Def. Resp.); FSTI’s Reply in Support of FSTI’s MSJ (FSTI Reply); FSTI’s Response to Defendants’ Termination MSJ (FSTI’s Term. Resp.); Defendants’ Reply in Support of Defendants’ MSJ (Def. Term. Reply); Defendants’ Motion for Summary Judgment on FSTI’s Claim that DPC Breached its Obligation to Buy Bleach (Defs.’ MSJ); FSTI’s Response to Defendants’ MSJ (FSTI Resp.); and Defendants’ Reply in support of Defendants’ MSJ (Def. Reply).

Introduction

¶2 In Count II of Defendants' Counterclaims, DPC asserts that FSTI repudiated and breached the Bulk Contract when it sold its bleach-production facility to a third party. In FSTI's MSJ, FSTI argues that claim fails as a matter of law because DPC breached Section 3 of the Bulk Contract by failing to send FSTI shipping instructions each month, and DPC's breach gave FSTI the right to cancel the contract under Section 19 of the Bulk Contract (FSTI's "termination defense"). In Defendants' Termination MSJ, Defendants argue that FSTI's termination defense fails as a matter of law because Section 3 did not apply, and even if FSTI had been entitled to cancel the contract, it failed to do so. Thus, both motions turn on the same two issues: whether DPC breached Section 3 and whether FSTI timely cancelled the contract. The Court holds that DPC did not breach Section 3 of the Bulk Contract and therefore does not reach the second issue. Specifically, the Court holds that Section 3 of the Bulk Contract's general terms and conditions, which were cut and pasted from another contract, cannot reasonably be construed to require DPC to send monthly shipping instructions to FSTI when the front page of the contract, containing the contract-specific terms negotiated by the parties, unambiguously required DPC to pick up the goods at the production facility and placed all shipping responsibility on DPC. Under the contract, FSTI had no duty to provide shipping, and DPC had no duty (or right) to instruct FSTI to do so.

Background

¶3 **The Bulk Contract.** In October 2021, FSTI, Inc. (FSTI) and PVS DX, Inc. (DPC), entered into a ten-year supply agreement (the Bulk Contract) under which DPC agreed to buy 100% of the bleach FSTI produced at its Greenville facility, excluding amounts used for retail and minibulk sales—i.e., 100% of the “bulk” bleach.² The parties agree that the Bulk Contract is an “output contract” governed by Chapter 2 of the Texas Business & Commerce Code (the UCC).³

¶4 The Bulk Contract is composed of three pages. The first page identifies FSTI and DPC as the seller and buyer, has the contract-specific terms, and is signed by the parties.⁴ It sets out the product sold under the contract, the purchase quantity, the contract price, and the contract term, as well as several shipping provisions:

F.O.B. Point: Seller’s facility in Greenville TX

Freight Terms: Buyer’s account

Mode: Bulk truckload

Additional Provisions: Buyer may park up to 3 tractor/trailers for delivering [bleach] on the Seller plant site. ...

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² Def. MSJ Exh. A, Greenville Supply Agreement (Bulk Contract) at 1. The term “bulk bleach,” as used in this opinion, refers to the bleach that qualifies for sale under the terms of the Bulk Contract.

³ Def. MSJ Exh. H, Plaintiff’s First Amended Petition, Original Answer to Counterclaims, and Affirmative Defenses (First Am. Pet.) at ¶¶ 18, 39; Def. MSJ at 5; *see also* TEX. BUS. & COM. CODE § 2.306(a); *Lenape Res. Corp. v. Tenn. Gas Pipeline Co.*, 925 S.W.2d 565, 569 (Tex. 1996) (“An output contract is one in which the buyer agrees to buy the seller’s entire output of production.”).

⁴ Bulk Contract at 1.

⁵ *Id.*

¶5 The signed page one is followed by two pages of preprinted terms and conditions (§§ 1–19) that were “cut and paste[d]” from an existing form used by an affiliated entity.⁶ Of these, Sections 3 and 19 are relevant here. They provide:

3. SHIPPING INSTRUCTIONS: On or before the 20th day of each month, Buyer shall furnish written shipping instructions for the quantity required during the next succeeding month. Seller shall have no obligation for any quantities for which Buyer has not given such shipping instructions.

19. DEFAULT: BANKRUPTCY: Upon failure of Buyer to make any payment required hereunder, without deduction, set off or counterclaim, within ten (10) days after the same becomes due, or if Buyer defaults in the performance of any other obligation, term or condition of this Contract, or if Buyer shall make an assignment for the benefit of creditors, or in the event of a commencement of proceedings by or against Buyer involving bankruptcy, insolvency, reorganization or arrangement, Seller, without demand or notice of any kind and without prejudice to any other remedy of Seller, may cancel this and any other contracts with Buyer (Buyer remaining liable for damages) or Seller may defer further deliveries until the default is remedied (in which event, if Seller elects, this Contract shall be deemed extended for a period of time equal to that during which deliveries are deferred).

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¶6 **The Parties’ Performance.** The parties operated under the Bulk Contract for over two years, with DPC purchasing millions of gallons of bleach from

⁶ Def. Resp. Exh. 18; Def. MSJ Exh. A; FSTI MSJ Exh. 1, Kurt Filer Deposition (Filer Depo.), at 69–70, 72; *see generally* Bulk Contract.

⁷ Bulk Contract at §§ 3, 19.

FSTI.⁸ At the outset of the Bulk Contract, FSTI sent DPC an email stating, “we need to have communication daily that tells you [DPC] what we [FSTI] have so it can be moved and the plant can maintain its operating rate.”⁹ Consistently, throughout their performance under the Bulk Contract, the parties communicated on a day-to-day basis about FSTI’s bleach production and inventory and DPC’s order pickups.¹⁰ Both parties understood the Bulk Contract to require DPC to pick up the bleach at the Greenville facility, which DPC did.¹¹ There were a few occasions on which the bleach was transported by FSTI’s two trailers, but DPC arranged and paid for this transportation under a separate carrier agreement between DPC and FSTI.¹² Witnesses from both sides testified that DPC purchased all of the bulk bleach FSTI actually produced at the Greenville facility during the contract term.¹³

¶7 **The HASA sale.** In February 2024, FSTI sold the Greenville facility to a third party, HASA, Inc., but excluded from the sale the Bulk Contract and another

⁸ See Def. MSJ Exh. F; Def. Resp. Exh. 24.

⁹ Def. Resp. Exh. 7.

¹⁰ See, e.g., FSTI MSJ Exh. 12, Nicole Chambers Deposition (Chambers Depo.), at 109; FSTI MSJ Exh. 3, DPC Corporate Representative Deposition (DPC Corp. Rep. Depo.), at 134–35.

¹¹ Def. Resp. Exh. 3, Stoney Barton Deposition (Stoney Depo.), at 150; Filer Depo. at 36; Defendants’ Termination MSJ Exh. 16 at 201; Defendants’ Termination MSJ Exh. 29; Chambers Depo. at 120; Def. Resp. Exh. 30, David Byrd Deposition (PVS Byrd Depo.), at 40–41.

¹² DPC Corp. Rep. Depo. at 80:6–9; Def. Resp. Exh. 15, April 20, 2026 Temporary Injunction Hearing Transcript (4.20.26 TI Trans.), at 312–14; *see also* Def. Resp. Exh. 16.

¹³ Chambers Depo. at 61; DPC Corp. Rep. Depo. at 222–23; Filer Depo. at 77–78, 102.

contract also at issue in this lawsuit, the Minibulk Contract.¹⁴ Effectively, FSTI retained the Bulk and Minibulk Contracts without any means for performing under the contracts. According to Defendants, the exclusion of these contracts enabled FSTI to increase the sale price of the Greenville facility by more than \$15 million.¹⁵ The HASA sale agreement is dated February 15, and parties disagree about whether the sale closed on the same day or the next day, February 16.

¶8 FSTI made the decision not to inform Defendants about the HASA sale beforehand.¹⁶ On February 16, representatives of HASA and FSTI called John Cannon, the president of Defendant PVS Minibulk, Inc. (PVS), an affiliate of DPC.¹⁷ Cannon testified that in this call he was informed of the HASA sale and reassured that “everything was going to stay the same,” “nothing was going to change, and it was going to be business as usual.”¹⁸ HASA and FSTI did not contact anyone from DPC directly.¹⁹ But after they called Cannon, Cannon called Kurt Filer, the president

¹⁴ Defendants’ Termination MSJ Exh. 11, Asset Purchase Agreement (HASA Agmt.) at 1, Exh. 12, Schedule 2.02(c).

¹⁵ Defendants’ Second Amended Answer and Counterclaims (Second Am. Counterclaims) at ¶ 44.

¹⁶ Def. Termination MSJ Exh. 18, Stormey Barton Deposition (Stormey Depo.), at 150.

¹⁷ Def. Termination MSJ Exh. 13, John Cannon Deposition (Cannon Depo.), at 110–11.

¹⁸ *Id.* at 111, 112.

¹⁹ Def. Termination MSJ Exh. 7, Scott Trussell Deposition (Trussell Depo.), at 203.

of DPC, and informed him of the HASA sale.²⁰ At that time, no one informed DPC that its Bulk Contract had been excluded from the sale.²¹

¶9 For the first month after the HASA sale, DPC continued to make arrangements for bleach purchases through FSTI at the contract price—“business as usual.”²² Then on March 15, DPC received a response to an order email stating that “HASA, Inc. is your vendor for this delivery” and instructing that further orders be sent to a new point of contact at HASA.²³ DPC then began placing its Greenville facility bulk bleach orders with HASA instead of FSTI, and for several more months, HASA supplied that bleach at the Bulk Contract price.²⁴ But HASA eventually refused to honor the contract price, informing DPC that the Bulk Contract had been excluded from the HASA sale.²⁵

²⁰ Filer Depo. at 175.

²¹ 4.20.26 TI Trans., at 234–35. FSTI asserts that, on February 16, 2024, “DPC understood that FSTI was no longer selling bleach from the Plant and that ‘Hasa owned the plant and was selling the bleach.’ And DPC was told that same day that ‘the contracts were not assigned to Hasa as part of the sale.’” FSTI MSJ at 14 (citing Exh. 8 to FSTI’s ELI Br., John Cannon’s deposition as PVS’s corporate representative (PVS Corp. Rep. Depo.) at 21:5-20, 24:3-25). But the deposition testimony FSTI cites is Cannon’s testimony about what PVS was told, not what Cannon subsequently conveyed to Filer at DPC. Filer’s testimony about what was conveyed to him by Cannon in their subsequent phone call does not include this information. *See* 4.20.26 TI Trans. at 234–35; Filer Depo. at 175. FSTI has not pointed to any evidence contradicting Filer’s testimony that this information was not conveyed to him by Cannon. It is undisputed that FSTI did not directly inform DPC of the HASA sale at that time.

²² Trussell Depo. at 200; *see also* Def. Termination MSJ Exh. 16, Staci Barton Deposition (Staci Depo.), at 200–201; Cannon Depo. at 113.

²³ Def. Termination MSJ Exh. 17; Cannon Depo. at 113; Trussell Depo. at 202–04.

²⁴ Trussell Depo. at 200-01; Stormey Depo. at 151; 4.20.26 TI Trans., at 200–02.

²⁵ Second Am. Counterclaims at ¶ 43; 4.20.26 TI Trans. at 235.

¶10 **This Lawsuit.** On March 11, 2024—about a month after the HASA sale and days before FSTI stopped handling DPC’s Bulk Contract orders—FSTI initiated this lawsuit seeking a declaratory judgment that (among other things) its sale of the Greenville facility to HASA was not a breach of the Bulk Contract because it “sold the plant in good faith and thus no longer has any output at the Greenville Facility to sell under the [Bulk Contract].”²⁶ FSTI alleged that the Bulk Contract was “an output contract under Texas Business & Commerce Code section 2.306(a),” such that FSTI was not obligated to sell any bleach to DPC if it did not actually produce any bleach, so long as FSTI acted in good faith.²⁷

¶11 In April 2024, DPC answered and brought counterclaims alleging that (among other things) FSTI repudiated and breached the Bulk Contract by selling the Greenville facility to HASA while excluding the Bulk Contract from the sale.²⁸ According to DPC, the Bulk Contract pricing was so favorable to DPC that FSTI was able to inflate the purchase price of the Greenville facility by millions of dollars by excluding the Bulk Contract from the HASA sale—even though FSTI knew it would

²⁶ Def. MSJ Exh. G, Plaintiff’s Original Petition (Orig. Pet.) at ¶ 36; First Am. Pet. at ¶ 41. Suit was originally filed in the 98th District Court; the parties later agreed to transfer the action to this Court on March 25, 2026.

²⁷ Orig. Pet. at ¶¶ 34–37; First Am. Pet. at ¶ 39.

²⁸ Second Am. Counterclaims at ¶¶ 61–70.

be unable to perform under the Bulk Contract once it sold the facility.²⁹ DPC alleged that FSTI's conduct was not in good faith or in accordance with commercial standards of fair dealing.³⁰ In May 2024, FSTI amended its pleadings to add a claim that DPC breached the Bulk Contract by failing to purchase all of the Greenville facility's bulk-bleach output.³¹ In December 2024, FSTI further amended to allege that DPC "breached and/or was in default under [the Bulk Contract], permitting FSTI to cancel or terminate the agreement pursuant to its terms."³²

¶12 The parties have now filed competing motions for summary judgment on their claims for breach of the Bulk Contract, and DPC also seeks summary judgment on FSTI's right-to-terminate defense. At issue here is DPC's claim against FSTI for breach of the Bulk Contract and FSTI's termination defense to that claim.

Legal Standards

¶13 FSTI's MSJ and Defendants' Termination MSJ are motions for traditional summary judgment on which the movant bears the burden of showing that "there is no genuine issue as to any material fact and the movant is entitled to

²⁹ Defendants' First Amended Answer and Counterclaims (First Am. Counterclaims) at ¶¶ 17, 44, 69; Second Am. Counterclaims at ¶¶ 17, 44, 69.

³⁰ First Am. Counterclaims at ¶ 69; Second Am. Counterclaims at ¶ 69.

³¹ First. Am. Pet. at ¶¶ 21-25, 43-48.

³² Def. Termination MSJ, Exh. 2, Plaintiff/Counter-Defendant FSTI's First Amended Answer and Affirmative Defenses to Defendants/Counter-Plaintiffs' Counterclaims (First Am. Answer to Counterclaims), at 2.

judgment as a matter of law on the issues expressly set out in the motion.”³³ If the movant satisfies this burden, the burden shifts to the nonmovant to present evidence that creates a genuine issue of material fact in order to defeat the motion.³⁴

¶14 The motions require the Court to construe the Bulk Contract. The meaning of an unambiguous contract is a question of law for the courts.³⁵ The Court has laid out Texas’s general rules of contract construction in its prior opinions.³⁶ In short, the Court holds parties to what they said in the contract and interprets what the contract says to mean what an ordinary reader would think it means under the circumstances, based on the contract’s plain language.³⁷ What an ordinary reader understands words to mean can be influenced by the context in which the words are written, so courts read the contract as a whole and consider things like the contract’s structure, the text surrounding the disputed language, the nature of the contract, the purpose reflected in the contract, word usage, grammar, and punctuation.³⁸

³³ TEX. R. CIV. P. 166a(h)(2).

³⁴ *E.g.*, *Mosaic Baybrook One, L.P. v. Simien*, 674 S.W.3d 234, 252 (Tex. 2023); *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014); *Tex. Dep’t of Pub. Safety v. Tex. Tribune*, 731 S.W.3d 772, 783 (Tex. App. [15th Dist.] 2026); *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996) (citing “*Moore*” *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936 (Tex. 1972)).

³⁵ *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 763 (Tex. 2018). The parties did not argue ambiguity here.

³⁶ *See, e.g.*, *Marathon Oil Co. v. Mercuria Energy Am., LLC*, 2025 Tex. Bus. 36, ¶ 6, 722 S.W.3d at 729-730 (3rd Div.).

³⁷ *Id.* And, of course, if the contract defines terms or otherwise shows that its words are intended to mean something different than usual, a reasonable reader would accept that. *Id.* at ¶ 8, 731.

³⁸ *Id.* at ¶ 6, 729-730 (citing authority addressing each such consideration).

The Parties' Arguments

¶15 **Section 3 arguments.** According to FSTI, Section 3 of the Bulk Contract obligated DPC to provide shipping instructions to FSTI on the twentieth day of each month.³⁹ DPC undisputedly never did so. FSTI asserts that this monthly breach throughout the term of the Bulk Contract gave FSTI a right to cancel the contract under Section 19, which FSTI did when it sold the Greenville facility to HASA.⁴⁰ FSTI expressly relies only on Section 19 of the Bulk Contract and not the affirmative defense of “prior material breach,”⁴¹ asserting that it could cancel under Section 19 without telling DPC the contract was cancelled and regardless of whether DPC’s breaches were material or caused any damages to FSTI.

¶16 DPC responds that Section 3 required shipping instructions only if FSTI shipped the bulk bleach to DPC, which was not the case; instead, DPC was the shipper, required to pick up the bulk bleach at the Greenville facility. DPC argues that FSTI’s theory that DPC was required to provide it shipping instructions was manufactured for this litigation; during the years in which the parties performed under the contract, no one ever expected DPC to provide monthly shipping

³⁹ FSTI also asserts that DPC breached the Bulk Contract by failing to satisfy its purchase obligations. The Court has separately granted summary judgment in favor of DPC on that issue, leaving only the shipping-instruction breach at issue. *See FSTI, Inc. v. PVS Minibulk, Inc.*, 2026 Tex. Bus. 69, 2026 WL 2949440, (3rd Div.). Accordingly, the Court addresses only the remaining issue here.

⁴⁰ FSTI MSJ at 5.

⁴¹ *Id.* at 29.

instructions or asserted that it should do so; and it would make no sense for DPC to provide shipping instructions to FSTI when DPC was the shipper, not FSTI. Under the Bulk Contract's express terms, DPC was required to and did pick up the bulk bleach at FSTI's Greenville facility.

¶17 DPC recognizes that there were a few occasions over the years when FSTI transported the bulk bleach, but DPC says FSTI did so at DPC's behest and cost, under a separate carrier agreement between them.

¶18 FSTI interprets Section 3 to require the shipping instructions to specify the quantity of bulk bleach to be shipped in the next month and posits that, under that interpretation, the instructions would still have a purpose even though DPC was the shipper: it would notify FSTI how much bulk bleach to produce in the following month. DPC disagrees that Section 3 required DPC to tell FSTI the quantity of bleach to produce, noting that this is an output contract, such that the seller, FSTI, is the party with the right to determine how much bleach is produced and sold under the contract, not DPC. FSTI agrees that the Bulk Contract is an output contract and that FSTI should have the right to control the quantity under it but argues that the factual circumstances impinged on FSTI's ability to do so.

¶19 **Cancellation arguments.** DPC argues that the summary judgment evidence conclusively establishes that FSTI did not cancel the Bulk Contract prior to its repudiation and breach of the contract. According to DPC, FSTI repudiated the

Bulk Contract on February 15, 2024, the date of the HASA agreement, whereas the earliest date on which FSTI alleges it cancelled the Bulk Contract is February 16. DPC also argues that, although FSTI claims it breached the Bulk Contract every single month since its inception, FSTI performed under the contract for years and even continued performing for a month after the HASA sale by continuing to receive, fulfill, and accept payment for DPC's bleach orders for the Greenville facility at the contract price.

¶20 DPC also points out that, at least until several months into this lawsuit, FSTI consistently took the position that the Bulk Contract was in effect. In the HASA sale agreement, FSTI represented that the Bulk Contract was “in effect as of the date” of the HASA sale agreement and FSTI was bound by it.⁴² And when it initiated this lawsuit, FSTI did not allege that it had cancelled the Bulk Contract; rather, FSTI sought a declaration that FSTI did not breach the Bulk Contract by selling the Greenville facility because “FSTI sold the plant in good faith and thus no longer has any output at the Greenville Facility to sell under the [Bulk Contract].”⁴³ DPC also asserts that even after FSTI stopped handling its bleach purchases under the Bulk Contract, DPC did not know that the Bulk Contract had not been assigned

⁴² HASA Agmt. at § 3.19(a); Defendants' Termination MSJ Exh. 12, Sellers Disclosure Schedules, 3.19(a).

⁴³ Orig. Pet. at ¶¶ 33–37.

to HASA with the Greenville facility's other contracts. DPC points out that, in March 2024, when FSTI and HASA informed DPC that HASA would take over orders from the Greenville facility, DPC was told that HASA and FSTI would "be working together to ensure a seamless transition,"⁴⁴ and HASA continued to honor the Bulk Contract price for several months before informing DPC that the Bulk Contract had been excluded from the sale of the Greenville facility.

¶21 DPC further argues that, under Texas law, when one party's breach of contract gives the other party the right to terminate the contract, the nonbreaching party has an election to make: it may terminate the contract for breach or it may continue performing and accepting benefits under the contract. If the party chooses the former, even when prior notice is not required, the party must still take some action to manifest its election to terminate the contract. If the party chooses the latter, it is still entitled to seek damages for the breach, but it may not lay behind the log, accept the benefits of the contract for years, and then breach the contract at will and evade liability by claiming termination after the fact. DPC asserts that Section 19's authorization of cancellation "without demand or notice of any kind"⁴⁵ relieves FSTI of the duty it would otherwise have to provide reasonable advance notice of cancellation but does not mean that FSTI can simply decide afterward that the Bulk

⁴⁴ Def. Term. MSJ Exhs. 17 & 34.

⁴⁵ Bulk Contract at § 19.

Contract was cancelled without ever saying or doing anything to cancel the contract or that it could both cancel the contract and continue enforcing it.

¶22 FSTI does not argue that it ever told DPC that the Bulk Contract was cancelled outside of this lawsuit. Instead, FSTI argues that because Section 3 allowed it to cancel the contract without notice, it was not required to inform DPC the contract was cancelled. According to FSTI, it cancelled the contract by no longer selling bleach to DPC from the Greenville facility after the HASA sale. FSTI concedes that it continued to fulfill DPC's orders and accept DPC's contract-price payments for bulk bleach from the Greenville facility after the HASA sale but argues that it did so on behalf of HASA, the facility's new owner. FSTI also argues that its phone call informing PVS of the HASA sale on February 16, 2024 constituted notice of the sale to DPC, such that DPC should have known FSTI was acting on behalf of HASA for all sales after that date. FSTI also points out that the Bulk Contract requires prior written consent before assignment of the contract to a non-affiliate and argues that, since DPC had not given such consent, DPC should have known that the Bulk Contract was excluded from the HASA sale.

¶23 FSTI further argues that DPC's election of remedies argument is essentially a waiver argument and is therefore barred by the Bulk Contract's non-waiver provision.⁴⁶ FSTI also asserts that DPC breached the contract anew every

⁴⁶ *Id.* at § 17.

month when it failed to provide shipping instructions, such that FSTI's right to cancel the contract restarted each month. Finally, FSTI argues that the UCC rejects the election-of-remedies doctrine, such that FSTI did not have to choose between cancelling the Bulk Contract or continuing under it.

Analysis

¶24 The motions before the Court turn on the same two issues: (1) did DPC breach Section 3 of the Bulk Contract by failing to send FSTI monthly shipping instructions, and if so, (2) did FSTI properly cancel the Bulk Contract under Section 19 before its own alleged breach? If the answer to either question is “no,” the Plaintiff's MSJ fails and Defendants' Termination MSJ succeeds. The Court answers “no” to the first question and thus resolves both motions in favor of DPC without reaching the second question.

¶25 The Court agrees with DPC that Section 3 require DPC to send FSTI shipping instructions only if FSTI acted as the shipper under the Bulk Contract, which did not occur. The first page of the Bulk Contract unambiguously identified DPC the party responsible for all shipping under the contract.⁴⁷ In fact, the provisions regarding DPC's shipping obligations make up approximately half of all

⁴⁷ *Id.* at 1.

the page-one, negotiated terms.⁴⁸ Section 3 may well require the buyer to send monthly shipping instructions in the context of the customer contracts from which these terms and conditions were copied and pasted.⁴⁹ But, within the context of the Bulk Contract, the provision cannot reasonably be construed to require DPC to provide FSTI shipping instructions on the twentieth of each month telling FSTI how much bleach to ship to DPC and how to ship it.

¶26 First, the Bulk Contract repeatedly and unambiguously confirms that DPC was the shipper under the contract, not FSTI. DPC could not instruct FSTI how or where to ship the bleach—or to ship the bleach at all—because the Bulk Contract placed responsibility for shipping on DPC, whom the contract required to pick up the bleach at the Greenville facility.⁵⁰ The Bulk Contract even specified how DPC picked up the bleach: by bulk truckload using up to three trailers that could be parked at the Greenville facility.⁵¹

¶27 FSTI argues that it “shipped” the bulk bleach by loading it onto DPC’s trailers when DPC picked up the bleach at FSTI’s Greenville facility. FSTI points to the negotiated term on page one of the Bulk Contract that states, “F.O.B. Point:

⁴⁸ *Id.* (specifying the Greenville facility as the place where DPC would pick up the bleach, that freight would be on DPC’s account, that the bleach would be picked up by bulk truckload, and how many trailers DPC could park at the facility when picking up the bleach).

⁴⁹ See Def. Resp. Exh. 18; Def. MSJ Exh. B; Filer Depo. at 69–70, 72.

⁵⁰ Bulk Contract at 1.

⁵¹ *Id.*

Seller’s facility in Greenville TX,” noting that “FOB refers to the point in the shipping process at which the title, risk of delivery, and shipping costs of the goods in question pass from the seller to the buyer.”⁵²

¶28 The Court concludes the DPC was the shipper under the Bulk Contract, not FSTI. The meaning of “F.O.B.” proffered by FSTI and the Bulk Contract’s specification of “F.O.B. Point: Seller’s facility in Greenville TX” are both consistent with DPC being the shipper under the Bulk Contract. As Black’s Law Dictionary explains, “FOB” or “Free on Board” is “a mercantile-contract term allocating the rights and duties of the buyer and the seller of goods with respect to delivery, payment, and risk of loss, whereby the seller must clear the goods for export, and the buyer must arrange for transportation.”⁵³ Under this term, “[t]he seller’s delivery is complete (and the risk of loss passes to the buyer) when the goods pass into the transporter’s possession,” and “[t]he buyer is responsible for all costs of carriage.”⁵⁴

¶29 Consistently, the ordinary meaning of the verb “ship” and noun “shipper” contemplates transportation from one place to another.⁵⁵ A reasonable

⁵² FSTI Reply at 5 (quoting *Majorpower Corp. v. Delta Elecs. (USA), Inc.*, No. 05-24-01426-CV, 2026 WL 1613270, at *1, n.1 (Tex. App.—Dallas June 4, 2026) (no pet.), and citing TEX. BUS. & COM. CODE § 2.319).

⁵³ *FOB Shipping & Free on Board*, BLACK’S LAW DICTIONARY (12th ed. 2024).

⁵⁴ *Id.*

⁵⁵ *Ship* (v.), BLACK’S LAW DICTIONARY (12th ed. 2024) (“To send (goods, documents, etc.) from one place to another, esp. by delivery to a carrier for transportation.”); *Shipper*, BLACK’S LAW

reader would understand the shipper to be DPC, the party responsible for transporting the bleach from FSTI's Greenville facility to a secondary destination, not FSTI, the party who loaded its own product onto trailers parked at its own facility, where it produced the bleach.

¶30 Thus, the Bulk Contract's FOB provision and its provision that freight would be on "Buyer's account" placed responsibility for shipping on DPC rather than FSTI.⁵⁶ Even on the few instances in which DPC contracted with FSTI to use FSTI's trailers to transport the bleach, DPC's use of the trailers was governed by a separate carrier agreement between DPC and FSTI, and DPC remained the shipper charged with responsibility for the risk and cost of shipping under the Bulk Contract.⁵⁷

¶31 This is consistent with how the parties understood the Bulk Contract, as reflected in the summary-judgment record. Stoney Barton, who negotiated the Bulk Contract on behalf of FSTI, testified that "the deal ... was that DPC would

DICTIONARY (12th ed. 2024) ("[s]omeone who ships goods to another" or "[s]omeone who contracts with a carrier for the transportation of cargo"); *Ship* (v.), THE COMPACT OXFORD ENGLISH DICTIONARY (2nd Ed. 1989), (including "[t]o transport (goods) by rail or other means of conveyance"); *Shipper* (v.), THE COMPACT OXFORD ENGLISH DICTIONARY (2nd Ed. 1989), (including, "[o]ne who ships goods for transportation" and "[o]ne who transports goods by rail or other means of conveyance"); *Ship* (v), *Merriam-Webster.com Dictionary*, Merriam-Webster, www.merriam-webster.com (accessed Oct. 9, 2026) (including "to cause to be transported"); *Shipper*, *Merriam-Webster.com Dictionary*, Merriam-Webster, www.merriam-webster.com (accessed Oct. 9, 2026) ("one that sends goods by any form of conveyance").

⁵⁶ Bulk Contract at 1.

⁵⁷ See *id.*; see also, e.g., Filer Depo. at 313–14.

come and take the bleach at the plant.”⁵⁸ Nicole Chambers of FSTI explained that “CPU” in the order emails meant that the order was for “customer pick up,” meaning that “the customer will pick up the order.”⁵⁹ DPC never sent monthly shipping instructions to FSTI under the Bulk Contract during the years that the parties performed under the Bulk Contract, and the summary-judgment record shows that FSTI never asked DPC to do so. Chambers testified that she did not recall ever telling DPC they needed to send shipping instructions each month and “never knew that was a thing.”⁶⁰

¶32 Kurt Filer likewise testified that “neither party ever used the 20-day shipping instructions clause in [the Bulk Contract].”⁶¹ He explained that there was no reason for DPC to provide FSTI shipping instructions under the Bulk Contract because DPC was responsible for picking up the bulk bleach at FSTI’s Greenville facility.⁶² He also testified that it would not have been possible for DPC to provide FSTI monthly shipping orders—“the business just doesn’t work that way.”⁶³

⁵⁸ Def. Resp. Exh. 3, Stoney Barton Deposition (Stoney Depo.), at 150.

⁵⁹ Chambers Depo. at 120.

⁶⁰ *Id.*

⁶¹ *Id.* at 102–04.

⁶² 4.2026 TI Trans. at 313–14; *see also* DPC Corp. Rep. Depo. at 144 (Q. “...But on the shipping instructions, DPC never provided shipping instructions on or before the 20th day of each month, correct?” A. “I -- we never -- they never really did ship anything for us, so, no, we didn’t.”).

⁶³ Filer Depo. at 72.

Instead, “the business is conducted on a — more of a daily basis.”⁶⁴ This makes sense logistically, as bleach can only be stored for a few days before it degrades, and FSTI’s storage tanks at the Greenville facility did not have the capacity to hold even a week’s worth of production.⁶⁵

¶33 Second, FSTI’s argument that Section 3’s purpose was to have DPC communicate to FSTI on the twentieth of each month how much bleach it needed for the next month is irreconcilable with the Bulk Contract as a whole. In some contexts, “written shipping instructions for the quantity required during the next succeeding month”⁶⁶ might reasonably be interpreted to mean written shipping instructions for whatever quantity would be required during the next month or to mean written shipping instructions that also state the quantity required for the next month. But in the context of the Bulk Contract, the latter interpretation is not reasonable.

¶34 As both parties agree, and as reflected in the Bulk Contract’s “quantity” term, the Bulk Contract was an output contract. As a result, FSTI was entitled to determine the quantity of bleach produced and sold under the contract, not DPC.⁶⁷ FSTI had direct control over the production facilities and determined things like when production would be down for maintenance or repair work. It was

⁶⁴ *Id.*

⁶⁵ *See generally, FSTI, Inc.*, 2026 Tex. Bus. 69, 2026 WL 2949440.

⁶⁶ Bulk Contract at § 3.

⁶⁷ *See generally, FSTI, Inc.*, 2026 Tex. Bus. 69, 2026 WL 2949440.

FSTI that knew and told DPC how much bleach it had produced, how much of that was carved out for retail and minibulk sales, and when production was down or reduced due to maintenance or repairs—all information necessary to determine how much was available for pickup at any given time.⁶⁸ FSTI did not communicate this information to DPC a month in advance, nor did either of the parties expect it to do so. Instead, these communications were on a day-to-day basis. Additionally, the Bulk Contract capped DPC’s purchase obligation at the amount of its monthly sales to customers, without any carveout for customer sales made after the twentieth day of the preceding month.⁶⁹

¶35 To the extent Section 3 of the Bulk Contract can be reconciled with the shipping terms on page one, it must be construed to apply only if FSTI was or became the shipper under the contract. To the extent Section 3 conflicts with the page-one shipping terms, the deal-specific, negotiated provisions on page one control over the boilerplate general terms and conditions that were cut and paste from earlier contracts.⁷⁰ In either event, the Bulk Contract cannot fairly be interpreted to require

⁶⁸ See, e.g., Chamber’s Depo. at 109–11; Filer Depo. at 72–73; FSTI MSJ Exh. 16, David Byrd Deposition (Byrd Depo.), at 72–74; see also, e.g., FSTI MSJ Exh. 2, Rene Whigham Deposition, at 156–57, 166–69 (explaining how plant maintenance interacts with production capabilities).

⁶⁹ See Bulk Contract at § 4; see also Byrd Depo. at 73–75 (explaining that customer orders were typically received two to three days in advance and almost never more than a week in advance).

⁷⁰ See *Houston Expl. Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 472 n. 50 (Tex. 2011) (“Even though the parties will often begin with a preprinted or standard form contract, they will sometimes make additions to or changes in their printed contract, adopting it to their particular transaction. Typically, such changes or additions will be handwritten but they may also be typed or stamped. In accord with the general rule that all parts of a contract are to be given effect, the courts

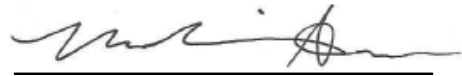
DPC to provide FSTI with shipping instructions when it expressly requires DPC to pick up the bleach at the facility where it is produced and places all shipping responsibility on DPC.

Conclusion

¶36 Because Section 3 of the Bulk Contract did not require DPC to provide FSTI monthly shipping instructions, FSTI’s termination defense fails as a matter of law and FSTI is not entitled to summary judgment on DPC’s breach-of-contract claim based on that defense. Because this determination is dispositive, the Court need not reach DPC’s alternative ground for the same relief: whether FSTI failed to properly cancel the Bulk Contract before its alleged breach and repudiation.

must seek to reconcile inconsistencies between the changed or added terms and the printed matter. Where, however, the printed contract provisions irreconcilably conflict with the provisions added by the parties, the added provisions will control.” (quoting 11 Richard A. Lord, WILLISTON ON CONTRACTS § 32.13); *see also, e.g., McCreary v. Bay Area Bank & Tr.*, 68 S.W.3d 727, 731–32 (Tex. App.—Houston [14th Dist.] 2001, pet. dism’d) (“[T]o the extent that typewritten provisions of a contract conflict with printed provisions, the typewritten provisions must be given effect over the printed provisions. The rationale for the rule is that typewritten provisions are the immediate language and terms selected by the parties themselves as setting forth their intentions, whereas the printed form is intended for general use without reference to particular objects and aims.” (citations omitted)); RESTATEMENT (SECOND) OF CONTRACTS § 203(d) (1981) (stating that, when interpreting a contract, “[s]eparately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated”). Importantly, boilerplate provisions must not be disregarded simply because they are boilerplate: “[B]oilerplate is boilerplate for a reason—because it offers tried-and-true language to ensure a precise and predictable result.” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 235 (2020). But like a more specific term can control over a more general term without rendering the more general term meaningless, *Wal-Mart Stores, Inc. v. Xerox State & Loc. Sols., Inc.*, 663 S.W.3d 569, 587 (Tex. 2023) (quoting example from Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 184 (2012)), a contract-specific term can control over copied-and-pasted boilerplate term without rendering the boilerplate term meaningless. There may be good reason for parties to use general terms and conditions in their contracts with a general expectation of one result while still intending a different result in the context of the specific terms of an individual contract.

Date signed: October 12, 2026

A handwritten signature in dark ink, appearing to read 'Melissa Andrews', written over a horizontal line.

Hon. Melissa Andrews
Judge of the Texas Business Court,
Third Division