UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Architectural busSTRUT Corporation d/b/a busSTRUT, Plaintiff, v. Target Corporation, Defendant.	Case No. 19-CV-00968 (DSD/ECW) **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This case is about Target Corporation's ("Target") decision to renege on a requirements contract it had with—and promise it made to—plaintiff Architectural Busstrut Corporation ("busSTRUT"). In that contract, Target had promised to award its heavy-duty track-lighting program to busSTRUT for three years, and busSTRUT, in turn, promised to sell Target all of the heavy-duty track lighting it needed during those three years at pre-negotiated prices. In reliance on this agreement—and in order to keep up its end of the bargain with Target—busSTRUT completely revamped its business model and invested millions in equipment, product tooling, warehouse space, inventory, and new employees.

But Target breached the contract and began sourcing heavy-duty track lighting from busSTRUT's competitor. That decision cost busSTRUT millions of dollars in both lost-profits and reliance damages and left the company on life support. Target's motion for summary judgment is an attempt to escape accountability for this wrongdoing. Target argues that busSTRUT's breach-of-contract claim fails because the parties' contract was

an option contract, not a requirements contract; that busSTRUT's good-faith-and-fair-dealing claim fails because the contract claim fails; and that busSTRUT's remaining claims fail because the existence of a contract precludes them. All these arguments are meritless.

The "option contract" argument is the core of Target's brief, but it is a nonstarter. That argument ignores the fact that the parties' written contract includes, *by its explicit terms*, a number of documents showing that the agreement was a requirements contract, and it ignores Target's own internal communications—and the parties' 16-month course of performance—reinforcing the fact that Target was required to purchase heavy-duty track exclusively from busSTRUT. Target's "option contract" argument also conflates the concepts of "firm offer" and "option contract" and ignores the fact that the contract here cannot be classified as *either*. Firm offers are limited to 90 days. And no Minnesota court has *ever* recognized an option contract for the sale of goods in any context, let alone in a context like this. Indeed, Target relies solely on out-of-state, out-of-circuit precedent in support of its ill-begotten "option contract" theory, but even there, the cases it relies upon actually support *busSTRUT's* position. Target also fails to explain not only how, but *why*, busSTRUT would enter into a unilateral contract binding it to reduced prices for three years in exchange for *nothing* in return. And Target fails to mention that it declined to include a non-exclusivity provision in the parties' contract, though it has a track record of including such a provision with other vendors (where, unlike here, the agreement at issue was *not* exclusive). For all these reasons and more, Target's motion for summary judgment on busSTRUT's breach-of-contract claim must fail.

Target's motion fares no better with respect to busSTRUT's other claims. Target's only basis for knocking out the good-faith-and-fair-dealing claim is the assertion that the claim rises or falls with the contract claim. Therefore, because the contract claim survives summary judgment, the good-faith claim should too. A jury could readily conclude on these facts that Target's conduct was the antithesis of good faith.

BusSTRUT's remaining claims—for promissory estoppel, implied-in-fact contract, and unjust enrichment—are pled in the alternative, and summary judgment is unavailable to Target as to them unless this Court finds as a matter of law that the parties' contract was in fact an exclusive requirements contract. Among these claims, busSTRUT's promissory-estoppel claim is particularly robust. Target's corporate representative admitted at his deposition that Target promised busSTRUT a three-year deal and, shockingly, admitted that that promise was a brazen [redacted] to induce busSTRUT to lower its prices. There is thus strong evidence that Target made a clear and definite promise to busSTRUT and intended to induce busSTRUT's reliance. And from the millions invested and lost by busSTRUT, there is likewise strong evidence that busSTRUT relied on that promise to its detriment and that injustice will result if Target is not held to account for its intentional [redacted] In short, genuine issues of material fact remain outstanding with respect to the promissory estoppel claim (and with respect to the other alternative claims as well).

For all these reasons, and as discussed more fully below, the Court should deny Target's motion in its entirety.

STATEMENT OF FACTS

A. BusSTRUT and Its Early Relationship with Target

BusSTRUT is a small company owned by husband-and-wife Larry Gellert and Ellen Robinson. (Ex. 31 ("L. Gellert Dep.") at 18.)[1] After decades working in the lighting and marketing businesses, Larry invented the eponymous busSTRUT—a heavy-duty track-lighting system—in 2004. (L. Gellert Dep. at 16.) He quit his job that year and "put [his] foot in the water to become an entrepreneur with the idea [he] had for busSTRUT." (*Id.*) Larry worked out of the family home while the business got off the ground. (*Id.*) BusSTRUT's heavy-duty track ("Track") system was—and remains—unique in the lighting industry, and Larry holds several patents protecting it. (*Id.* at 17.) By 2014—ten years after Larry and Ellen founded the company—busSTRUT's annual revenue had grown to $4 million. (*Id.* at 21.) Retailers and institutions—including famous names like Staples, L.L. Bean, and Yale University—became busSTRUT clients. (ECF 1 ¶24.) Larry and Ellen's sons—Greg and Michael—joined the growing family business. (Ex. 30 ("G. Gellert Dep.") at 36; Ex. 32 ("M. Gellert Dep.") at 11.)

BusSTRUT's relationship with Target began in early 2015, when Target purchased busSTRUT Track through a lighting industry representative to install in a "mock up" at its Minneapolis headquarters. (Ex. 3.) A few months later, Target again purchased

[1] All "Ex." references refer either to the exhibits to the previously filed Declaration of Emmett E. Robinson, ECF No. 114, or to the exhibits to the Second Declaration of Emmett E. Robinson, filed concurrently herewith.

busSTRUT Track through a third party for installation in a single store in Minnetonka. (Ex. 2 at 97.) In both locations, the product was a hit.

B. The Initial Document—the Supplier Qualification Agreement

Target wanted to start doing business directly with busSTRUT, but, as a condition of entering into a direct relationship, required that busSTRUT first execute a "Supplier Qualification Agreement for Goods and Services" ("SQA"). (Ex. 4, ¶1.1.) The "Supplier Qualification Agreement for Goods and Services" was a form document that Target required all vendors to sign. (*Id.*; Ex. 34 ("Trankel Dep.") at 106; Ex. 33 ("Graham Dep.") at 20.) In the words of Target witness Kalen Graham, [redacted]"[2] (Graham Dep. at 19.)

The SQA went into effect in September 2015, and set certain parameters concerning product warranties, use of Target and busSTRUT's intellectual property, insurance requirements, and the like. (*See* Ex. 4 at 1, *et seq.*) Though first chronologically, the SQA is only one of the multiple written components of the parties' ultimate requirements contract. Among other things, the SQA provided that any ultimate [redacted] to be provided by busSTRUT. (*Id.*, ¶1.1 (emphasis added).)

[2] As such, Target's assertion that Michael Gellert failed to "negotiate" the terms of the SQA (ECF 87 at 3) is not only of no substantive consequence to this case, it is also deeply misleading.

C. The Parties Execute the Program Agreement, and Target Begins Direct Purchases from busSTRUT

Several weeks after executing the SQA, the parties also executed a "Program Agreement for Goods and Services" ("Program Agreement"), effective November 19, 2015. (Ex. 5.) The Program Agreement contained certain terms concerning busSTRUT and Target's burgeoning vendor-vendee relationship and also included a "Fee Schedule" setting the price that busSTRUT had agreed to charge Target for each component of busSTRUT's Track system. (*See generally id.*) During this same time period, Target agreed to purchase busSTRUT's system directly from busSTRUT for installation in 25 of its Los Angeles-area retail locations. (Ex. 2 at 99.) Target was "really happy with the [busSTRUT] product." (*Id.* at 171.)

D. The RFP, Meeting, and Requirements Contract

In fall 2016, Target issued a request for proposals ("RFP"[3]) seeking vendor bids for the supply of both light- and heavy-duty track-lighting on a far larger scale, as part of Target's ambitious plan to remodel over 1,500 stores. (*Id.* at 212-13; Ex. 6.) Target asked busSTRUT to participate in the RFP and, on September 28, 2016, emailed busSTRUT an invitation. (Ex. 6.) The RFP documents Target sent noted that Target was [redacted]

[redacted]"[4]

[3] Target used the acronyms "RFP" and "EIP" interchangeably. (Trankel Dep. at 557.)

[4] Note that Target did *not* reserve the right to award the heavy-duty track program to multiple bidders.

(Ex. 35 at 2.) BusSTRUT does not supply light-duty track, and thus busSTRUT bid on Target's heavy-duty track needs only.[5] (*See id.*)

At the close of the RFP process, Target selected busSTRUT as the heavy-duty track supplier it wanted to work with. Accordingly, on November 2, 2016, Target emailed busSTRUT, inviting busSTRUT executives to Target headquarters on November 10, 2016, to hammer out details concerning [redacted] (Trankel Dep. at 210; *see also* Ex. 37.) Larry, Greg, and Michael Gellert all attended the in-person meeting at Target HQ. (M. Gellert Dep. at 63.) Upon arrival, Target's Graham—who, along with Target's Doyle Trankel, was leading the heavy-duty-track procurement process—met the Gellerts in the lobby "and told [them] how it was a really important day for [their] company[] and that…the stakes were high." (*Id.*)

At the meeting, Target reiterated, consistent with its statements in the RFP documents, that the agreement it wanted to reach with busSTRUT would be an exclusive one. (L. Gellert Dep. at 40-41, 51, 57; M. Gellert Dep. at 63; G. Gellert Dep. at 170-71.) Indeed, the PowerPoint presentation that Target gave at the November 10 meeting explicitly stated that [redacted]

[5] The document attached to the RFP invitation Target sent included instructions for bidding as well as an explanation of the RFP process. (*Id.* at 2-5.) It cautioned bidders: [redacted] (Ex. 36 at 3 (underline added).) The RFP thus explicitly stated that the winning bidder would be responsible for supplying all of the at-issue product (*i.e.*, light-duty or heavy-duty track) necessary to fulfill Target's "requirements" for the duration of the contract term.

[redacted] (Ex. 38[6] at 2; G. Gellert Dep. at 160, 171; Trankel Dep. at 218, 223 (confirming this was one [redacted] of the deal Target struck with busSTRUT at the November 10 meeting).) In other words, if the parties reached an agreement on pricing, the business would be busSTRUT's for the duration of the deal. (*E.g.*, L. Gellert Dep. at 51, 57.)

The bid busSTRUT had previously submitted to Target was for a two-year supply contract, in line with Target's statement in its RFP materials that it was [redacted] (Ex. 35 at 2.) But at the meeting, Target was "all excited about telling [busSTRUT] about this dramatically improved opportunity of adding a third year if [busSTRUT] would lower [its] pricing" even further. (L. Gellert Dep. at 38; Trankel Dep. at 196 ("We asked for a discount if we went from two to three years.").) Thus, the Target PowerPoint presentation to busSTRUT also stated that, if busSTRUT agreed to Target's more aggressive pricing demands (and agreed to terms concerning shipping, etc.), Target would [redacted] (Ex. 38 at 6; Trankel Dep. at 231 ([redacted].)

[6] The only version of the PowerPoint presentation that Target actually produced during discovery is a draft dated one week before the November 10 meeting. But Target's Graham confirmed that the draft tracked what was actually presented at the meeting. (Graham Dep. at 82.)

BusSTRUT acquiesced to Target's pricing pressure in exchange for Target's agreement to [redacted] the heavy-duty [redacted] for an additional year, for a total of [redacted] (Ex. 38 at 6 (capitalization altered); Graham Dep. at 93 ("[T]hey lowered their price to get an agreement…for the three years.").) The parties agree that they struck this deal in person at the November 10 meeting. (Trankel Dep. at 234 ([redacted]); L. Gellert Dep. at 57 ("I'm going based on the meeting I had with Target what was agreed upon. To me, that was…a verbal contract.").)

Thus, "[redacted]" (Trankel Dep. at 196.) When later asked to characterize the nature of the deal busSTRUT and Target struck at the November 10 meeting, Target's Graham described a requirements contract. The deal was "[redacted]" (Graham at 163 (emphasis added).) At the conclusion of the meeting, Graham congratulated Larry on reaching a deal. (M. Gellert Dep. at 69.) Larry was less than enthusiastic as he shook hands with Graham, prompting Graham to ask, "Why do you look so sad?" (*Id.*) Larry responded, "Well, it's because you pushed me down on price, but thank God you gave me the third year, and I'm going to work on value engineering my system." (*Id.*)

Later that same day, after the meeting had concluded, Graham emailed Larry, Greg, and Michael Gellert to "[redacted]" (Ex. 7.) Graham copied Trankel and other Target officials too. (*Id.*) In the email, Graham "[redacted]" busSTRUT "[redacted]" (*Id.*) In his "[redacted]" Graham wrote as follows: "[redacted]

[redacted]" (*Id.*; Graham Dep. at 90 (confirming that the November 10 email he sent was "[redacted]").) Target's Trankel confirmed at his deposition that "[redacted]" to busSTRUT. (Trankel Dep. at 237.)

E. The Parties Execute the Amendment, and busSTRUT Is Installed in Every New Target Requiring Track and in Every Existing Store Receiving a Grocery Department or Entryway Lighting Remodel

On November 11, 2016—the day following the parties' meeting—busSTRUT and Target executed "Amendment Number 1 to Program Agreement for Goods and Services" (the "Amendment"). (Ex. 8, at 1, 5.) That short document was not, and did not purport to be, a comprehensive, integrated formalization of the parties' agreement memorialized the day before in Graham's email. (*See generally* Ex. 8.) Rather, the Amendment was essentially little more than an updated price list, listing the per-unit prices that the parties had agreed to at their in-person meeting.[7] (*Id.* ¶1.3.) The Amendment also provided—as agreed by the parties the day before—that it would be effective for just over three years, until December 31, 2019. (*Id.* ¶1.2.) Notably, though Target's sophisticated in-house

[7] Amendment ¶ 1.1, which discusses freight terms, lead time, packaging, and other logistical and background issues, is, with a few minor exceptions, identical to Exhibit A to the previously executed Program Agreement. (*Compare* Ex. 8, Amendment ¶1.1, *with* Ex. 5, Program Amendment, at 6-9.)

counsel has insisted on such language when contracting with others,[8] Target deliberately *omitted* language disclaiming exclusivity from the Amendment.

From the November 10, 2016 meeting forward, Target purchased and installed busSTRUT's Track in every new store it built that required track and in every lighting remodel of an existing grocery department or entryway. (Declaration of Gregory Gellert dated May 13, 2021 ("Gellert Decl.") ¶2; Ex. 16 (cataloging every Target purchase of busSTRUT Track components); Ex. 39 ("I don't know of any Grocery scope stores that are NOT introducing busSTRUT.").) Emails from Target to busSTRUT as well as internal Target emails during this period confirmed that the parties' agreement was exclusive. (Ex. 40 ("we have negotiated with BusStrut to purchase thousands of feet of strut for all of our stores, new and remodel"); Ex. 41 (confirming busSTRUT would be "[redacted]" new or remodeled store because busSTRUT would be "[redacted]" in all of them (emphasis added).) Cumulatively, from November 2016 through spring 2018, Target, per the parties' agreement, bought millions of dollars of busSTRUT Track. (Ex. 16.)

[8] Target had a contract with Braiform Enterprises, Inc., for the supply of clothing hangers. *Infra* at p. 32. Substantively identical to the agreement here with respect to many other provisions, the Target-Braiform agreement explicitly stated that Braiform "d[id] not have any kind of exclusive relationship with Target" and provided that Target could "purchase or acquire" hangers "from multiple sources, at Target's sole and absolute discretion." *Id.*

F. Target Stops Buying busSTRUT, Defying Its Contractual Obligation and Promise.

In March 2018, roughly 16 months after entering into its November 2016 three-year requirements contract with busSTRUT, Target signed a secret agreement with a busSTRUT competitor to supply an alternative Track, called Luxbeam, for installation in those sections of new and remodeled Target stores that were previously receiving installations of busSTRUT pursuant to busSTRUT and Target's exclusive agreement. (*Compare* Ex. 26 at 1, 2 (March 21, 2018 agreement between Target and busSTRUT's competitor adding "[redacted]" to the parties' contract), *with* Ex. 27 at 1-6 (prior iteration of that agreement, which did not include [redacted]); *see* Ex. 42 at 1.) Luxbeam is made by busSTRUT competitor Contech and sold by busSTRUT competitor Villa Lighting ("Villa"). In April 2018—secret agreement in hand—Target blindsided busSTRUT, informing busSTRUT that, despite its contract and promise to use busSTRUT as its exclusive supplier for three years, Target had decided, in the words of its new contracting partner, Villa, to "[redacted]" (Ex. 43; *see also, e.g.*, Trankel Dep. at 442; Gellert Decl. ¶2.)

Even during their negotiations, Target and Villa/Contech knew that the plan they were hatching violated Target's contract with, and promise to, busSTRUT. Early on, Target apparently *told Villa* that it was contractually bound to stick with busSTRUT for the entire three-year term; [redacted]" (Ex. 44 at 1 (emphasis added).) And Graham emailed fellow Target employees on

March 6, 2018, informing them of ongoing covert discussions with Villa/Contech and warning them to keep the search "for an alternative to Busstrut [sic]" a secret. (Ex. 42 at 1.)

G. BusSTRUT Sustains Extensive Damages.

Target's brazen breach of its contract with, and promise to, busSTRUT cost busSTRUT many millions of dollars in lost profits. (*E.g.*, Ex. 45 at 9 (estimating busSTRUT's lost-profits damages at $10.1 million).) As Target knew, busSTRUT was only able to agree to the reduced pricing it gave Target because busSTRUT intended to "value engineer" its system over the course of the three-year contract period. (*E.g.*, M. Gellert Dep. at 69.) In other words, Target knew that busSTRUT would earn the bulk of its profits during the second half of the three-year deal. (*Id.*) But Target cut busSTRUT off at the knees, depriving it of the most lucrative years of the contract. (*Id.*; Ex. 45 at 6-7.)

BusSTRUT also suffered extensive reliance damages. In reliance on Target's three-year commitment, busSTRUT changed its entire business model. (G. Gellert Dep. at 252-53.) From the company's founding in 2004 up until securing the Target requirements contract in 2016, busSTRUT had relied on third parties to manufacture its proprietary product and drop-ship it to customers. (*Id.*) This allowed busSTRUT to operate with very low fixed costs. (*Id.*) Specifically, the company did not maintain any surplus product inventory, owned no product tooling, and operated from a small, economical office space. (*Id.*) But Target's three-year promise to busSTRUT changed everything. Relying on that commitment—and mindful of its own obligations—busSTRUT started manufacturing and

warehousing in-house. (*Id.* at 194, 252-53, 269-70; Ex. 45 at 9-11.) Accordingly, it invested in manufacturing equipment, invested in inventory and product tooling, moved into a much larger facility with warehousing in order to accommodate that additional inventory (*id.*), and roughly tripled the size of its payroll (M. Gellert Dep. at 24). But when Target reneged, busSTRUT was left holding bag, stuck with equipment, tooling, materials, and warehouse space that were suddenly either useless or dramatically devalued. (G. Gellert Dep. at 194, 253-54; Ex. 45 at 9-11 & Schedules 7, 10-11.) And busSTRUT had charged Target artificially low prices for its Track during the first 16 months of the contract, too, in reliance on the promised "extra" year of exclusivity, which would have been busSTRUT's most profitable.[9] (*Supra* at pp. 8-9; Ex. 45 at 10-11 & Schedule 16.)

STANDARD OF REVIEW

A motion for summary judgment should be granted only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *e.g.*, *Soo Line R.R. v. Werner Enters.*, 8 F.Supp.3d 1130, 1139 (D. Minn. 2014) (Doty, J.). A "material" fact is one that "might affect the outcome of the suit under…governing law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A "genuine" issue exists where the evidence indicates "a reasonable jury could return a verdict for the nonmoving party." *See id.* "When the evidence would support conflicting

[9] Target was also unjustly enriched by the 134 schematics that busSTRUT provided to Target for upcoming store projects that Target ultimately took from busSTRUT. (M. Gellert Dep. at 84-85.) Target retained those drawings without compensating busSTRUT for them. (*Id.*)

conclusions, summary judgment should be denied." *Kells v. Sinclair Buick-GMC Corp. Truck*, 210 F.3d 827, 830 (8th Cir. 2000). "All the evidence must point one way and be susceptible of no reasonable inferences sustaining the position of the nonmoving party" before summary judgment is appropriate. *Johnson v. Minn. Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991).

Here, not only do questions of material fact remain outstanding, but the evidence actually preponderates in busSTRUT's favor. There is more than sufficient evidence that the parties had a requirements contract, that Target promised three years of exclusivity to busSTRUT, and that Target both breached that contract and broke that promise, costing busSTRUT millions. Target's motion should be denied.

ARGUMENT

I. Target's Motion for Summary Judgment on busSTRUT's Breach-of-Contract Claim Should Be Denied

Target is not entitled to summary judgment on busSTRUT's breach-of-contract claim. Both the parties' agreement and course of performance show that their contract was a requirements contract, under which busSTRUT agreed to supply to Target, and Target agreed to exclusively buy from busSTRUT, all of Target's Track needs for three years. Target's arguments to the contrary fall flat. Interpreting the contract to be an "option contract," as Target suggests, would require the Court to ignore fundamental tenets of contract law, a number of contract provisions, and numerous statements and actions of the parties.

A. The Parties' Contract Is a Requirements Contract

"A requirements contract is generally defined as a contract in which the seller promises to supply all the specific goods or services which the buyer may need during a certain period at an agreed price in exchange for the promise of the buyer to obtain his required goods or services exclusively from the seller." *Upsher-Smith Labs. v. Mylan Labs.*, 944 F. Supp. 1411, 1426 (D.Minn. 1996) (internal quotation marks omitted). Though this exclusivity is the *sine qua non* of a requirements contract, the use of "particular words" to express the exclusivity element is not necessary. *Essco Geometric v. Harvard Indus.*, 46 F.3d 718, 728 (8th Cir. 1995); *see also Koch Hydrocarbon v. MDU Res. Grp.*, 988 F.2d 1529, 1541 (8th Cir. 1993) (a contract need not contain "buzz words" pertaining to exclusivity or requirements in order to render it a requirements contract); *Porous Media v. Midland Brake*, 220 F.3d 954, 960 (8th Cir. 2000) ("no special language is necessary to create a requirement contract"). Indeed, the exclusive, requirements nature of a contract need not be expressly stated *at all*; rather, "the promise to buy exclusively from the seller can be implied from the contract." *Upsher-Smith Labs.*, 944 F. Supp. at 1427; *see also Porous Media*, 220 F.3d at 959 (affirming conclusion that agreement was a requirements contract though "[t]he written terms of the agreement d[id] not expressly require [buyer] to buy all its canisters or filters from [seller]"); *see also* ECF 87 at 11 (quoting *Minn. Solvents & Chems. v. Stivers*, 1995 WL 565065 (Minn. Ct. App. Sept. 26, 1995) and citing *Harvey v. Fearless Farris*, 589 F.2d 451, 461 (9th Cir. 1979) for proposition that "in a requirements contract a buyer promises explicitly *or implicitly* to purchase exclusively from the seller'" (emphasis added)).

1. The Parties' Written Agreement Expressly Includes Documents and Communications from Target that Show the Agreement Was a Requirements Contract

Here, the terms of the parties' written agreement show it is a requirements contract. That contract consists of a number of documents, including not only the SQA, Program Agreement, and Amendment, but also "[redacted]. We know this because SQA ¶ 1.1states that the "[redacted] (Emphasis added.) And Paragraph 24 likewise provides that the [redacted] (Emphasis added.)

The specific [redacted] at issue here show that the parties' contract was indeed a requirements contract that obligated Target to buy its Track requirements exclusively from busSTRUT.[10]

[10] Of course, though the documents do show that the relationship was exclusive, it is not busSTRUT's burden in opposing summary judgment to *prove* exclusivity but, rather, to simply muster enough evidence to create a "genuine dispute of material fact" related to exclusivity for trial.

Start with the PowerPoint presentation that Target gave at the November 10, 2016 meeting. That PowerPoint was indisputably a "[redacted] from Target that was part of the parties' written contract. In the PowerPoint, Target told busSTRUT that it was giving busSTRUT "[redacted] (Ex. 38 at 2; G. Gellert Dep. at 160, 171; Trankel Dep. at 218, 223.) And Target also stated in this communication that if—as ultimately proved to be the case—the parties finalized a deal that day, Target would [redacted] (Ex. 38 at 6; Trankel Dep. at 231 ("[redacted]).)

Likewise, the email Target sent later that same day "r[redacted]" (Ex. 7) was yet another "[redacted] from Target to busSTRUT that was included in the parties' agreement pursuant to the terms of the SQA. The email [redacted] and confirmed as follows: [redacted] (Ex. 7; Graham Dep. at 90 (confirming that the November 10 email he sent was [redacted].) Target's Trankel

confirmed that [redacted] to busSTRUT.[11] (Trankel Dep. at 237.)

Any one of these agreement documents by itself is sufficient to create a genuine issue of material fact that the parties entered into an exclusive requirements contract. By Target's own words, (1) busSTRUT was required to fulfill all of Target's Track "[redacted] (Ex. 36 at 3), (2) Target would "[redacted]" if busSTRUT made an agreement with Target (Ex. 38 at 2), and (3) Target "[redacted]" (*id.* at 6; Ex. 7 at 1). Target even "[redacted]" (*Id.*)

The absence of the word "exclusivity" from these documents is of no consequence. As previously discussed, not only are "magic words" unnecessary to create a requirements contract, but the requirements nature of the contract need not even be explicit. *Supra* at p. 16. busSTRUT submits that these communications by Target did amount to an explicit exclusivity agreement, but even if that were not the case, at minimum the communications created an implicit promise of exclusivity. Indeed, Target's communications would make

[11] The very document that kicked off the RFP process—itself a "[redacted] from Target to busSTRUT concerning Track—fits this same mold. That document explicitly told busSTRUT that the "[redacted]" (Ex. 36 at 3 (capitalization altered; underline added.) This communication, too, was part of the parties' agreement, and it stated that the winning Track bidder (ultimately busSTRUT) would be responsible for supplying all of the Track necessary to fulfill Target's "requirements" for the duration of the contract term.

no sense if the parties' relationship were not exclusive. The bidding process would not have been "competitive" and there would have been no purpose for Target to "stop" the process if, regardless of the winner, Target was going to retain the right to buy from any supplier. Likewise, busSTRUT's "award" for being the winning bidder would be meaningless if Target intended to grant the same "award" (*i.e.*, a non-exclusive ability to sell products to Target) to losing bidders and non-participants. And the "three year" term would be illusory if Target had no obligation to busSTRUT for those three years. Target "granted" busSTRUT the third year in order to convince busSTRUT to lower its prices. Logically, busSTRUT only benefits from this deal if Target buys Track exclusively from busSTRUT. Removing exclusivity would create an absurd result, where busSTRUT lowered its prices for three years and received effectively nothing in return. Simply put, exclusivity is the only way to make sense of the agreement.

The Eighth Circuit, as well as this Court, have readily concluded that contracts like the one here are requirements contracts (or, at minimum, are not amenable to pre-trial disposition on the issue). In *Universal Power Systems v. Godfather's Pizza*, 818 F.2d 667, 675 (8th Cir. 1987), the Eighth Circuit affirmed a judgment concluding that the parties' contract for the supply of pizza dishes was a requirements contract. This was so even though the letter memorializing the agreement "did not state that [the seller] was to be [the buyer's] exclusive supplier." *Id.* at 670. Instead, it simply stated an "intention to purchase" pizza dishes, noted that the buyer "*plan[ned]* to use the pizza dishes in all company units providing the concept…reaches final approval," and further noted that "price

competitiveness and consumer acceptability w[ould] be monitored." *Id.* at 269 (emphasis added).

In *Williams v. Medalist Golf*, 910 F.3d 1041 (8th Cir. 2018), the Eighth Circuit concluded that a jury "could reasonably infer" a requirements contract in the absence of explicit "exclusivity" language where the buyer "discontinued its discussions with" the seller's competitor "[a]fter receiving [the competitor's]…bid," asked the seller to "reserve" goods for the buyer, and subsequently signed an agreement with the seller setting per-unit prices and specifying that "[e]stimated [q]uantities [were] a target and not a guaranteed amount." *Id.* at 1043-44, 1046; *see also, e.g.*, *Taylor Corp. v. Georgia-Pacific Consumer Prods.*, No. 19-CV-1918, 2020 WL 473627, at *3 (D.Minn. Jan. 29, 2020) (finding agreement ambiguous as to exclusivity where document stated that "[t]he purchase obligations…under this agreement are nonexclusive" but also stated that the buyer would "exercise commercially reasonable efforts to purchase the Products from" the seller).

As in those cases, the evidence of the parties' agreement here shows that they entered into an exclusive requirements contract. That alone is reason enough to deny Target's summary judgment motion.

2. Extrinsic Evidence Shows that the Parties' Agreement Was a Requirements Contract

Extrinsic evidence, including internal Target and Villa emails, as well as the parties' course of performance, confirms that the bargain busSTRUT and Target struck was a requirements contract. All this evidence creates a genuine dispute of material fact and is admissible for the reasons set forth below.

Regarding internal emails, most damning are two briefly mentioned in the fact section above. In the first, Target's Lead Engineer for Electrical Engineering, Thomas Monahan, emailed two other Target employees, including Target's Lead Design Project Architect, nearly nine months after the November 10, 2016 meeting with busSTRUT, summarizing the agreement between busSTRUT and Target: "[W]e [*i.e.*, Target] have negotiated with BusStrut to purchase thousands of feet of strut for all of our stores, new and remodel…." (Ex. 40.) In the second, [redacted] informed a group of Leviton and Villa employees (recall that Leviton and Villa were jointly plotting to steal Target's Track business from busSTRUT) that Target "[redacted]" (Ex. 44 (emphasis added).)

This evidence plainly shows that Target knew that the agreement it concluded with busSTRUT was an exclusive requirements contract. Target's Monahan explicitly stated that Target had agreed to purchase busSTRUT Track "for all of our stores, new and remodel." (Ex. 40.) And the clear implication of [redacted] Track requirements from busSTRUT. (Ex. 44.) *See Zou v. Am. Modern Home Ins.*, 86 F. Supp. 3d 1050, 1053 (D.Minn. 2015) (Doty, J.) ("On a motion for summary judgment, the court views all evidence and inferences in a light most favorable to the nonmoving party.").

As to course of performance more broadly, for *16 months* following the parties' November 10, 2016 meeting, Target purchased busSTRUT Track for use in every single new-build that required Track and in every grocery and entryway lighting remodel that it undertook. The fact that Target bought Track exclusively from busSTRUT for these new

stores and remodeled sections for almost half the term of the agreement is evidence that the agreement obligated Target to buy these products exclusively from busSTRUT. (*Supra* at p. 11; *cf. Cent. Valley Ag Coop. v. Leonard*, 986 F.3d 1082, 1088 (8th Cir. 2021) ("course of performance between the parties" supported levying of disputed 12.5% fee where the payor "repeatedly made payments of 12.5%...during the [contract] year").)

This collection of evidence—the internal emails and Target's 16 months of consistent performance—are admissible via several avenues. First, all this evidence pertains to course of performance, and this Court may consider such evidence to understand the parties' contract. "A course of performance…is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement." Minn. Stat. §336.1-303(d). "[T]he express terms of an agreement and any applicable course of performance…must be construed whenever reasonable as consistent with each other." *Id.* §336.1-303(e). Even "[t]erms…set forth in a writing intended by the parties as a final expression of their agreement…may be explained *or supplemented*…by course of performance." *Id.* §336.2-202 (emphasis added). And the parties' "conduct during the course of performance" of a written contract is properly relied upon to fill "gaps or omissions in the contract." *J.J. Brooksbank v. Budget Rent-A-Car*, 337 N.W.2d 372, 376 (Minn. 1983) (citation and internal quotation marks omitted).

Second, all of this evidence post-dates any signed agreements here. "The practice of admitting parol testimony of events occurring subsequent to the signing of a contract is" well established. *Nord v. Herreid*, 305 N.W.2d 337, 339 n.1 (Minn. 1981).

Third, review of parol evidence is proper when inquiring into the nature of the consideration supporting the parties' agreement. The SQA, Program Agreement, and Amendment contain the boilerplate statement that [redacted] without specifying the consideration each party provided. (Ex. 4 at 15; Ex. 5 at 4; Ex. 8 at 5.) A court may "recei[ve]…parol evidence to show the consideration for a contractual obligation stated in an instrument that makes a 'mere recital' that value was received." *Lund v. Southam*, 617 N.W.2d 623, 625 (Minn. Ct. App. 2000). The parol evidence here shows that the consideration for the agreement included Target's promise of exclusivity. Otherwise, it is unclear what consideration Target exchanged for busSTRUT's promises (including busSTRUT's lower prices).

Although the SQA has an integration clause, it trumps only promises and agreements made before the SQA. (Ex. 4, ¶24 (SQA "[redacted]"). It says nothing about promises and agreements made after the SQA. (*See id.*; *see also, e.g.*, *Apple Valley Red-E-Mix v. Mills-Winfield Eng'g Sales*, 436 N.W.2d 121, 123 (Minn. Ct. App. 1989) ("the terms of a final and integrated written expression may not be contradicted by parol evidence of *previous* 'understandings and negotiations' (emphasis added) (quoting 3 A. Corbin, *Corbin on Contracts* § 573 (1960)).) The SQA was executed September 30, 2015, and thus all of the extrinsic evidence here post-dates, and is not barred by, the SQA integration clause. Moreover, under Minnesota law, an integration clause does not prevent the use of course-of-performance and other extrinsic evidence to explain or supplement the parties' agreement or identify the consideration supporting the agreement. *See* §336.2-202

(extrinsic course-of-dealing evidence is admissible to "explain[] or supplement[]" a "writing intended…as a final expression of…agreement"); *Lund*, 617 N.W.2d at 625-26 (parol evidence admissible to show nature of consideration despite presence of integration clause).

For all these reasons, the internal emails and Target's unbroken 16-month course of performance are properly before the Court and are not barred by the parol evidence, or any other, rule. And these sources show that, consistent with the written-agreement documents discussed in part I.A.1,[12] Target agreed to an exclusive requirements contract with busSTRUT.

B. The Parties' Requirements Contract Was Not an "Option Contract"

Target's only argument in support of its motion for summary judgment on busSTRUT's breach-of-contract claim is that the parties' contract was an "option contract," not a requirements contract. (ECF 87 at 10-14.) As set forth above, that interpretation of the parties' agreement is contrary to the text of the agreement, to *Target's* and Villa's internal emails, and to *Target's* own course of performance. But the problems with Target's position do not stop there. Target also fails to cite *any* Minnesota case law in favor of its option-contract theory, despite the parties' agreement that Minnesota law governs. (Ex. 4, ¶18.) Target instead relies entirely on out-of-circuit case law that actually supports busSTRUT's position. In addition to being unsupported by Minnesota law,

[12] If the Court were to conclude that the documents and communications referenced in part I.A.1 are not part of the parties' written agreement, those documents are still admissible as extrinsic evidence for the reasons set forth in this section.

Target's "option contract" theory contradicts numerous provisions of the SQA, Program Agreement, and Amendment, and flies in the face of common sense. At the very least, genuine issues of material fact remain concerning the nature of the parties' agreement.

1. Target Cites *No* Minnesota or Eighth-Circuit Case Law in Support of Its "Option Contract" Theory

Target fails to cite—and busSTRUT has been unable to find—a single Minnesota case or statute in support of Target's position that the parties' agreement was an option contract. Instead, Target leans heavily on cases from elsewhere that use the term "buyer's option" to refer to a "firm offer." *E.g.*, *Brooklyn Bagel Boys v. Earthgrains Refrigerated Dough Prods.*, 212 F.3d 373, 378 (7th Cir. 2000). Although Minnesota law allows for firm offers under the UCC, the parties' agreement here was not a firm offer. To constitute a firm offer, a seller's offer to sell at a certain price must be revocable after a period of "three months" or shorter. Minn. Stat. §336.2-205. The statute does not provide for "long term options." *Id.*, cmt. 3.

Here, busSTRUT agreed to sell its Track to Target at the agreed-upon prices for a period of more than *three years*, and, [redacted] (Ex. 4, ¶2.) The parties' agreement thus exists far outside the bounds of a §336.2-205 firm offer. Therefore, if the parties' agreement were, as Target asserts, an option contract, it would have to be grounded in judicial precedent and the common law. *See Aminter, LLC v. MacDermid Printing Sols.*, No. 1:09-CV-2, 2009 WL 10698642, at *2 (N.D. Ga. Aug. 10, 2009) (UCC 2-205 "does not displace the common

law option contract"; analyzing whether agreement could be properly categorized as an option contract after concluding it was *not* a firm offer "because it clearly contemplate[d] an initial period of more than three months"). But busSTRUT is unaware of a single case in which a Minnesota court—State or Federal—has *ever* enforced an option contract for the sale of goods, let alone a three-year "option contract" that required no consideration from the party obtaining the option. Target is basically asking the Court to create new law in Minnesota.

2. The Out-of-Circuit Case Law Target Relies Upon Actually Supports busSTRUT's Position

Unable to find support for its position in the precedents of Minnesota and the Eighth Circuit, Target instead turns exclusively to *Illinois* case law. (ECF 87 at 12-14.) In particular, Target relies primarily on the Seventh Circuit's decision in *Brooklyn Bagel Boys* for the proposition that its agreement with busSTRUT was not a requirements contract but, rather, a "buyer's option contract" (ECF 87 at 12). The Seventh Circuit did indeed conclude in *Brooklyn Bagel* that the parties' bagel supply agreement was a "buyer's option" rather than a requirements contract. *Id.*, 212 F.3d at 379. But *Brooklyn Bagel* was worlds apart from this case. Unlike this case, *Brooklyn Bagel* did not include clear course-of-performance and other extrinsic evidence showing that the agreement was a requirement's contract, nor did the contract there include components similar to the RFP document, PowerPoint presentation, and the November 10, 2016 deal "recap." (*See supra* at pp. 6-11.)

But perhaps the most telling difference between *Brooklyn Bagel* and this case can be found in the corresponding agreements' terms concerning duration and termination. The Track requirements contract here was for a fixed, three-year term (Ex. 7 at 1; Ex. 8 at 1) and, [redacted] (*See* Ex. 4, ¶2.2). By contrast, the agreement in *Brooklyn Bagel* was for an indefinite term and, crucially, provided that either party could "terminate[] it upon ninety (90) days[']' prior written notice." *Brooklyn Bagel*, 212 F.3d at 376. This 90-day termination right placed the agreement within the UCC firm-offer provision's[13] three-month cap. *Id.* at 379 & n.3. Given this crucial fact and the absence of any other evidence that the agreement was a requirements contract, the *Brooklyn Bagel* court held that the agreement there was in fact a "buyer's option" (aka, a firm offer). The court's analysis and holding do not apply here, because busSTRUT and Target's agreement does not grant busSTRUT a 90-day revocation right necessary to make it a firm offer, and the evidence shows that the parties' instead agreed to a requirements contract.[14]

[13] The firm-offer provision, UCC §2-205, is, as previously discussed, codified in Minnesota as Minn. Stat. §336.2-205. It is codified in Illinois at 810 Ill. Comp. Stat. §5/2-205. *Brooklyn Bagel*, 212 F.3d at 379.

[14] The other two Illinois cases that Target relies upon are similarly of no help to Target. In *In re Modern Dairy*, 171 F.3d 1106 (7th Cir. 1999), the moving parties asserted that the at-issue agreements *were* requirements contracts as a matter of law. *Id.* at 1107. Summary judgment for the moving parties was reversed because they presented *no* evidence—either intrinsic or extrinsic—showing that they were obligated to buy all of their milk requirements from the defendant. *Id.* at 1110. And in *City of Cuba v. City of Canton*, No. 3-11-66, 2011 WL 10468392, (Ill. Ct. App. Oct. 18, 2011), the court held that the at-issue agreement *was* a requirements contract despite the buyer's argument that "there was no

3. The SQA, Program Agreement, and Amendment Also Refute Target's Position

Target's remaining option-contract arguments are similarly ineffective and, at bottom, actually reinforce the fact that the parties' agreement was a requirements contract. Target argues, for example, that the deal the parties struck in November 2016 was not a requirements contract because the Program Agreement states that "'[redacted]" busSTRUT. (ECF 87 at 13 (quoting Program Agreement ¶10).) Indeed, Target's brief quotes this provision and/or flags this "specific quantity" issue *six* times. (*Id.* at 1, 5, 6 (twice), 13, 16.) But *of course* Target was not obligated to purchase "any specific quantity" of Track from busSTRUT. "[R]equirements contracts are, by definition, usually ambiguous as to quantity." *Essco Geometric v. Harvard Indus.*, 46 F.3d 718, 729 (8th Cir. 1995); *see also* Minn. Stat. §336.2-306, cmt. 2 ("a contract for…requirements [rather than for a specific quantity of goods] is not too indefinite since it is held to mean the actual good faith…requirements of the…party"). Target was obligated to purchase all of its requirements from busSTRUT, whatever those requirements might turn out to be. The absence of an obligation to purchase a "specific quantity" weighs in *favor* of the conclusion that the parties' agreement was a requirements contract.

Similarly, Target argues that the parties' agreement isn't a requirements contract because the Program Agreement says that [redacted]

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language in [the agreement] to indicate that [buyer] must purchase all, or even any, of its water from [seller]." *Id.* at *2.

a [redacted]" (ECF 87 at 13-14 (citing Program Agreement ¶10) (emphasis added).) But this, too, in a nonstarter. This provision, found in a paragraph whose purpose is to disclaim any obligation to adhere strictly to [redacted] (*id.*), simply stands for the innocuous proposition that Target was not obligated to make any "specific purchase" of Track—*i.e.*, to purchase a specific quantity or specific lot—without a purchase order. It does *not* allow Target to, *e.g.*, submit Track orders to non-busSTRUT suppliers. In short, it has nothing to do with whether the parties' agreement is a requirements contract. The essence of Target's obligation under the requirements contract was that, if and when Target needed Track, it would order that Track from busSTRUT. Thus, while the obligation to purchase a given quantity or lot of Track arose only after Target placed an order, if Target needed Track during the term of the agreement, it was obligated to place its Track orders—and thus make its Track purchases—exclusively with busSTRUT.

Target repeatedly admits the parties have an enforceable contract, (*see* ECF 87 at 1, 10, 18, 19), but Target fails to explain how the contract can possibly be enforceable if it is not an exclusive requirements contract. It is blackletter law that courts "will not enforce a contract absent mutual consideration." *Halvorson v. Harmer*, 1997 WL 328064, at *1 (Minn. Ct. App. June 17, 1997); *see also Family Snacks of N.C. v. Prepared Prods.*, 295 F.3d 864, 867 (8th Cir. 2002) (contracts "fail[]" in the absence of "mutual consideration"). If, as Target claims (*e.g.*, ECF 87 at 10), Target was not bound to purchase its Track requirements from busSTRUT, then what consideration did Target provide to make the parties' agreement enforceable? Target offers no answer to this question. Indeed, Target

has no satisfactory answer. Target did not commit to purchase a specific quantity of Track and did not provide anything else of value to busSTRUT—other than an exclusive three-year term. Target's commitment to purchase Track exclusively from busSTRUT *must* be the consideration Target provided for the parties' agreement. There is no other plausible explanation that would make the parties' contract enforceable, as everyone agrees it is.[15]

4. Target's Position Defies Common Sense and Conflicts with Provisions of the Program Agreement and Amendment

In addition to the manifold flaws already catalogued, Target's theory of the case—that the parties' agreement was a one-sided, enforceable, long-term option contract for which Target provided no consideration—defies common sense. Target's view, essentially, is that busSTRUT bargained *against itself*. After all, given Target's assertion that it has always remained free to buy Track from any vendor it might choose, Target would have the Court believe busSTRUT, in its initial RFP proposal, offered to guarantee deeply discounted prices to Target for two years in exchange for *nothing*, and then doubled

[15] The Court should give no credence to any attempt by Target in its reply to walk back its unequivocal admission that the contract was enforceable. Not only would such an about-face be disingenuous opportunism, it would also fly in the face of the principle that "a contract is to be construed as meaningful and not illusory." *Lieberman v. A&W Rests.*, No. 02-2930, 2003 WL 21252008, at *3 (D. Minn. May 28, 2003); *see also Eagle Fuels v. Perrin*, No. 10-CV-811, 2014 WL 12601079, at *5, *7 (W.D.Mo. Sep. 12, 2014) ("The tendency of the law…is to uphold the contract by finding the promise was not illusory when it appears that the parties intended a contract"; "Defendants' efforts to interpret the contracts in a way that would render them illusory or unenforceable must be rejected."); *Boswell v. Panera Bread*, 879 F.3d 296, 304 (8th Cir. 2018) ("we should construe a contract to avoid rendering terms meaningless or illusory").

down by agreeing to drop those prices even further for an entire additional year in exchange for—*nothing*.

Not only does that position defy reason, it also is incompatible with provisions of the Program Agreement and Amendment showing that the parties had agreed to do a substantial quantity (though not a *specific* quantity) of business. The Program Agreement and Amendment required busSTRUT to "[redacted]" (Ex. 5 at Ex. A, p. 3; Ex. 8 at 3.) And Target also required busSTRUT to "[redacted]" (Ex. 5 at Ex. A, p. 2; Ex. 8 at 2.) [redacted] (*Id.*) It would be absurd for busSTRUT to promise to warehouse extra inventory—a promise which required busSTRUT to *acquire a warehouse* (*supra* at p. 13)—and to promise to assign a *dedicated* employee to provide "[redacted]" to Target without a substantial commitment from Target in return.

5. Target Knows How to Make Non-Exclusive Deals When It Wants to

There is yet another reason why the Court should disbelieve Target's claim that the agreement was not exclusive: Target's contract with another supplier shows that it knows how to make an agreement non-exclusive when it wants to. Braiform Enterprises supplied clothing hangers to Target.[16] Target and Braiform's relationship ultimately broke down,

[16] In an occurrence that hits close to home for busSTRUT, Target's dishonest dealings with Braiform ultimately forced that company into bankruptcy. *See Target v. Braiform*

and they ended up in court. As part of that litigation, Target filed a heavily redacted version of the parties' program agreement. Setting the hanger-specific provisions aside, *all* the unredacted terms of Target's agreement with Braiform are substantively identical to the terms of the Target-busSTRUT Program Agreement, with one glaring exception. *See Target v. Braiform Enterprises*, No. 19-CV-2179 (D.Minn. Jan. 3, 2020), ECF No. 44-2. The Target-Braiform agreement includes the following language appended to the end of that agreement's counterpart to paragraph 10 of the Target-busSTRUT Program Agreement:

> Supplier agrees and acknowledges that (i) [Braiform] does not have any kind of exclusive relationship with Target, and (ii) Target may purchase or acquire (or direct an affiliate of Target to purchase or acquire) Goods or Services from multiple sources, at Targets' sole and absolute discretion.

Id. at 7 (emphasis added) (Ex. 47).[17] Target deliberately included this language in its agreement with Braiform. And, indeed, Greg Gellert testified, as busSTRUT's corporate representative, that busSTRUT's contracts with other purchasers frequently include non-exclusivity provisions like the one Target used with Braiform. (G. Gellert Dep. at 124.) Yet Target chose not to include an exclusivity disclaimer in the Target-busSTRUT

Enterprises, No. 19-CV-2179 (D. Minn. Apr. 2, 2020), ECF No. 68 at 1 (Ex. 46) ("due to actions taken by…Target…coupled with recent events, Braiform intends to file for bankruptcy"); Docket, *In re Braiform Enterprises*, No. 20-BK-10275 (Bankr. W.D.N.C.).

[17] It is well established that courts may take judicial notice of their own dockets and filings, as well as of the dockets and filings of other courts. *E.g.*, *Iverson v. Wells Fargo Bank*, No. 11-2225, 2012 WL 611196, at *3 (D.Minn. Feb. 6, 2012) ("To the extent that the exhibits consist of case opinions and court filings the court takes judicial notice of the materials."); *Moallin v. Cangemi*, 427 F.Supp.2d 908, 917 n.5 (D.Minn. 2006); *United States v. Davis*, 825 F.3d 359, 362 (8th Cir. 2016).

agreement, which is further compelling evidence that busSTRUT and Target intended their agreement to be exclusive.

6. Target Waived its Non-Exclusivity Defense by Failing to Plead it

Finally, Target's motion for summary judgment on busSTRUT's breach-of-contract claim should be denied because Target has failed to preserve the exclusivity issue. Target's opening brief cites *Structural Polymer Group v. Zoltek Corp.*, No. 05-CV-321, 2006 WL 8445567 (E.D.Mo. Oct. 17, 2006), and urges reliance upon the same. (ECF 87 at 12.) But the court in *Structural Polymer* held that the defendant was barred from arguing lack of exclusivity (and thus absence of a requirements contract) because the defendant had failed to raise that defense—a permutation of "failure of consideration"—in its answer, in violation of Rule 8(c)(1). *Structural Polymer Grp., LTD. v. Zoltek Corp.*, No. 4:05-CV-321, 2007 U.S. Dist. LEXIS 26817, at *5-8 (E.D. Mo. Apr. 11, 2007). Target likewise failed to plead failure of consideration as an affirmative defense here. (*See* ECF 16 at 22-23.) Like the defendants in *Structural Polymer*, then, Target too should be barred from raising lack of exclusivity at this late hour.

II. Target Is Not Entitled to Summary Judgment on busSTRUT's Good-Faith-and-Fair-Dealing Claim

BusSTRUT and Target agree that busSTRUT's good-faith-and-fair-dealing claim rises or falls with busSTRUT's breach-of-contract claim. Target asserts that it is entitled to summary judgment on this claim because "'the implied covenant of good faith and fair dealing does not extend to actions beyond the scope of the underlying contract'" (ECF 87 at 15 (quoting *In re Hennepin County Recycling*, 540 N.W.2d 494, 503 (Minn. 1995)) and

because the covenant "'serves only to enforce existing contractual duties, and not to create new ones'" (*id.* (quoting *Watkins Inc. v. Chilkoot Distributing*, 719 F.3d 987, 994 (8th Cir. 2013)). But this is precisely why the good-faith-and-fair-dealing claims *survives*. BusSTRUT alleges with respect to this claim that Target "arbitrarily, unreasonably, and without notice refus[ed] to continue to use busSTRUT to source its [Track] requirements." (ECF 1 ¶84.) Relying on the above cases, Target reasons that "because there is no term in the Agreement that requires Target to purchase all, or any, of its [Track] from busSTRUT, busSTRUT's claim for breach of the duty of good faith and fair dealing fails as a matter of law." (ECF 87 at 16.) But as shown in part I, above, the parties' agreement *did* include the requirement that Target purchase its Track needs exclusively from busSTRUT. And questions of fact certainly remain outstanding regarding, *e.g.*, whether Target acted in good faith when it plotted with Villa to reach a secret deal to purchase Luxbeam, disregard its requirements contract with busSTRUT, and [redacted][18] (Ex. 43; *see also, e.g.*, Trankel Dep. at 442; Gellert Decl., ¶2.) For these reasons, summary judgment on the good-faith-and-fair-dealing claim is improper.

III. Target Is Not Entitled to Summary Judgment on busSTRUT's Promissory-Estoppel Claim

A promissory estoppel claim has three elements: First, "the promise must be clear and definite." *Cohen v. Cowles Media*, 479 N.W.2d 387, 391 (Minn. 1992). "Secondly, the promisor must have intended to induce reliance on the part of the promisee, and such

[18] In this vein, consider also Target's admitted "negotiation ploy." *Infra* at p. 36.

reliance must have occurred to the promisee's detriment." *Id.* Third and finally, the court asks, "Must the promise be enforced to prevent injustice?" *Id.*

There is strong evidence here that all three elements have been satisfied, and thus, at minimum, genuine issues of material fact remain as to all three and must be submitted to a jury. As discussed in the fact section above, Target clearly promised that it would [redacted] and that it would "[redacted]" *Supra* at pp. 7-10. Second, there can be no doubt but that Target intended to induce reliance. Indeed, in a moment of surprising—and troubling—frankness, Target's corporate representative, Doyle Trankel, testified at his deposition that these promises were [redacted] from busSTRUT:

[redacted]

* * *

[redacted]

(Trankel Dep. at 232 (emphasis added).) And that testimony was no one-off misstatement:

[redacted]

***

[redacted]

***

[redacted]

(*Id.* at 320-21(emphasis added).) And again:

[redacted]

(*Id.* at 360-61 (emphasis added).)

Likewise, busSTRUT did rely on Target's promises to its detriment: As discussed in the fact section above, busSTRUT lowered its already discounted prices and completely changed its business model—buying manufacturing equipment, acquiring a warehouse, and going from maintaining no inventory to maintaining millions of dollars of inventory—to accommodate the volume of orders it anticipated from Target, all in reliance on the three-year exclusivity promise. *Supra* at pp. 13-14.

This leaves only the third element: Whether Target's promise must be enforced to prevent injustice. The answer to this question depends on this Court's decision with respect to Target's breach-of-contract claim. If the Court determines, as a matter of law and for the numerous reasons explained in part I, above, that the three-year exclusive commitment was, as a matter of law, an enforceable component of the parties' contract, then contract law will provide an adequate remedy to prevent injustice here. But should the Court conclude that fact issues remain as to whether the three-year exclusivity commitment was

a term of the contract,[19] then enforcement of Target's promises via promissory estoppel may well be necessary to prevent injustice here, and accordingly summary judgment in Target's favor would be error.

This leads directly to Target's sole argument for summary judgment in its favor on this claim: Target asserts that the presence of an enforceable contract necessarily guts the promissory-estoppel claim. (ECF 87 at 18.) But as the case law Target cites states, "'an express contract…will preclude the application of promissory estoppel'" only if that contract "'*cover[s] the same subject matter*'" as the at-issue promise. (*Id.* (emphasis added) (quoting *Greuling v. Wells Fargo Home Mortg.*, 690 N.W.2d 757, 761 (Minn. Ct. App. 2004)); *id.* ("'Minnesota courts routinely bar promissory estoppel claims as a matter of law *when there is no dispute that a written contract governs the at-issue conduct*.'" (emphasis added) (quoting *HomeStar Prop. Sols. v. Safeguard Properties*, 370 F.Supp.3d 1020, 1028 (D.Minn. 2019)).) If the Court concludes as a matter of law that the exclusivity term is part of the contract, then indeed the contract covers "the same subject matter" as the estoppel claim, and thus the estoppel claim would be rendered redundant. But if the Court concludes that the exclusivity term is not part of the contract[20]—*i.e.*, that the subject matter of exclusivity or non-exclusivity is not addressed by the contract—then necessarily

[19] Or, if the Court were to conclude (wrongly, busSTRUT submits) that as a matter of law the three-year exclusivity commitment was not a component of the contract.

[20] Or if the Court concludes that factual questions remain as to that issue.

the contract does *not* cover the "subject matter" of the promise—exclusivity—and thus the promissory estoppel claim must proceed.

On this point, Judge Schiltz's decision in *Grandoe Corporation v. Gander Mountain*, No. 11-CV-947, 2013 WL 3353927 (D. Minn. July 3, 2013), *aff'd* 761 F.3d 876 (8th Cir. 2014), is instructive. The parties in *Grandoe* agreed they had a contract for the sale of gloves but disagreed as to the quantity of gloves defendant Gander Mountain was required to buy. Plaintiff Grandoe claimed Gander Mountain was contractually obligated to buy the full quantity Grandoe had manufactured and claimed, in the alternative, that if the contract did not cover the entire quantity, then Gander Mountain nevertheless was obligated to the full quantity via promissory estoppel. Gander Mountain argued that the Court was wrong to send both the contract and the promissory estoppel claim to the jury because "the existence of [the] contract preclude[d] recovery under promissory estoppel." *Id.* at *15. Judge Schiltz rejected Gander Mountain's argument:

> Grandoe's promissory-estoppel claim was submitted as an *alternative* to its breach-of-contract claim. This means that promissory estoppel is relevant only if Gander Mountain is correct that the parties [contract covered only a portion of the gloves Grandoe had produced]. If the parties contracted only for [that portion of the gloves], then, by definition, the parties did *not* have a contract for the remaining gloves, and Grandoe's promissory-estoppel claim is not precluded as to those gloves.

Id.

Thus, Target's argument that the presence of the contract forecloses the promissory-estoppel claim is meritless. Likewise, its argument that the SQA and Program Agreement cover the same subject matter as the three-year exclusivity promise because the SQA "[redacted]

[redacted]'" (ECF 87 at 18-19 (quoting SQA ¶1.1)) and because the Program Agreement "'[redacted]'" (*id.* at 19 (quoting Program Agreement ¶1)) is also, per *Grandoe*, unavailing. General provisions concerning "qualifi[cations]" and "business terms" have nothing to do with the subject matter of whether a later-in-time supply agreement is exclusive. *See Grandoe* at *36 (Gander Mountain's "RAC"—a document akin to the SQA—did not cover the "subject matter" of glove-purchase volume).

Judge Schiltz also spoke to the propriety of the promissory estoppel claim in *Grandoe* more generally, in terms directly applicable to this case:

> Gander Mountain…strung Grandoe along with promises that it did not intend to keep. Despite knowing full well that Grandoe believed that Gander Mountain had promised to buy $3.05 million worth of gloves, and despite knowing full well that Grandoe was acting in reliance on that promise by investing significant resources in manufacturing gloves that only Gander Mountain could sell, Gander Mountain never…suggested that it was not committed to buy anything….
>
> Gander Mountain exploited a smaller company and then, when the smaller company complained of being exploited, Gander Mountain unleashed its lawyers to find a loophole—any loophole—through which Gander Mountain could escape. The doctrine of promissory estoppel was made to prevent injustices of precisely the type that Gander Mountain seeks to inflict on Grandoe.

Id. at *49-50.

Just as in *Grandoe*, the promissory estoppel claim here should proceed.

IV. Target Is Not Entitled to Summary Judgment on busSTRUT's Implied-in-Fact Contract Claim

As with its treatment of busSTRUT's promissory estoppel claim, Target does not argue that the evidence here fails to establish any of the elements of an implied-in-fact

contract claim. Rather, as with promissory estoppel, Target only argues that it is entitled to summary judgment because "where there is a written contract between the parties, there can be no implied in fact contract with respect to the same subject matter." (ECF 87 at 17 (citation omitted).) But here again, Target ignores the key qualifier—*with respect to the same subject matter*. (*Id.* ("'Where an express contract exists, there can be no implied contract with respect to the same subject matter.'" (quoting *Reese Design v. I-94*, 428 N.W.2d 441, 446 (Minn. Ct. App. 1988))); *id.* at 17-18 ("'where there is an express contract, there can be no contract implied in fact…with respect to the same subject matter'" (quoting *Schimmelpfennig v. Gaedke*, 27 N.W.2d 416, 420 (Minn. 1947))).) Thus the same reasoning from part III applies here. If the Court concludes, as a matter of law, that the exclusivity term is part of the contract, then indeed the contract covers "the same subject matter" as the implied-in-fact contract claim, and thus the estoppel claim would be rendered redundant. But if the Court concludes that the exclusivity term is not part of the contract[21]—*i.e.*, that the subject matter of exclusivity or non-exclusivity is not addressed by the contract—then necessarily the contract does *not* cover the "subject" of exclusivity, and thus the implied-in-fact contract claim survives summary judgment proceed.[22]

[21] Or if the Court concludes that factual questions remain as to that issue.

[22] The Court should likewise be reticent to grant summary judgment to Target on busSTRUT's implied-in-fact contract claim because "[t]he question of whether there is a contract to be implied in fact usually is to be determined by the trier of facts." *Roberge v. Cambridge Coop. Creamery*, 79 N.W.2d 142, 146 (Minn. 1956).

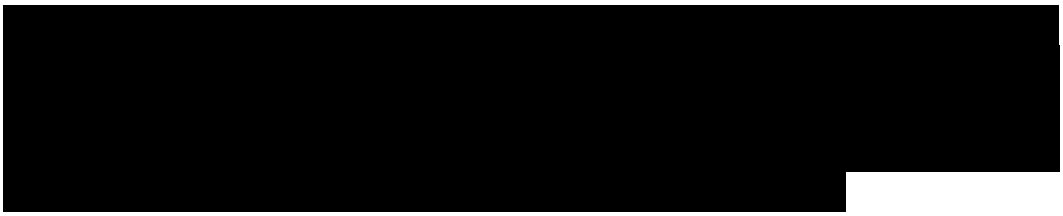
V. Target Is Not Entitled to Summary Judgment on busSTRUT's Unjust Enrichment Claim

Here again, Target does not argue that any element of an unjust enrichment claim is lacking but instead argues only that the claim is barred because the parties had an enforceable contract. (ECF No. 87 at 18.) And yet again Target fails to grapple with the "subject matter" issue. *E.g.*, *Schimmelpfenning*, 27 N.W.2d at 420 ("where there is an express contract, there can be no…quasi-contractual liability with respect to the same subject matter"); *Aspen Builders & Remodelers v. Raisch*, No. 27-CV-19-4208, 2020 Minn. Dist. LEXIS 430, *18 (Dec. 23, 2020) ("Only if there is no express contract, *or if there is no express language on a particular implied term*, can a party be entitled to recover upon a quantum meruit." (emphasis added; internal quotation marks omitted)). For the reasons explained in part III and IV, then, this claim too should proceed unless the Court finds as a matter of law that exclusivity was indeed a term of the parties' contract.

VI. BusSTRUT, Not Target, Is Entitled to Summary Judgment on Target's Bogus Counterclaim

Target's argument for summary judgment in its favor on its expedited-fixture counterclaim is meritless for the reasons explained in busSTRUT's own opening brief in support of summary judgment on that same claim. (*See* ECF 112.) As explained more fully there, among other things, the Amendment price list did not govern *expedited* fixtures, the parties' contract, properly understood, permitted busSTRUT to charge $138 per expedited fixture, and the parties' course of performance shows consistent acceptance of the $138 price by Target.

Target's claim that it is entitled to attorney's fees—relegated in the argument section of Target's brief to a single sentence—is just as specious. (ECF 87 at 20 n.3.) Target relies solely on paragraph 7.1 of the SQA in support of its position. That paragraph states:



It is well established that such a generalized indemnification provision applies only to claims brought against the indemnitee by third parties and does not, as a matter of law, apply to claims between the parties to the contract. "Where an indemnification clause is present, Minnesota case law ordinarily contemplates that the indemnitee is liable to a third party, and that indemnitor is then called upon to satisfy that liability." *Ansar v. American Bd. of Internal Medicine*, No. 08-CV-5351, 2009 WL 10678872, *5 (D.Minn. Dec. 17, 2009). "Unless an indemnification clause unambiguously requires a party to indemnify the other for the costs of litigation between the parties, indemnification is limited to third-party liability." *Id.* Indeed, Your Honor had already addressed this issue prior to the decision in *Ansar* and reached the same result: Generic indemnification language "does not expressly cover claims between the parties. [Where] the language is not 'unmistakably clear' that the plaintiff can recover attorney fees from defendants,…the indemnification provision applies only to third-party claims." *FleetBoston Robertson Stephens v. Innovex*, 172 F.Supp.2d 1190, 1200 (D.Minn. 2001) (Doty, J.).

Far from expressly calling for indemnification for claims between the parties in "unmistakably clear" language, nothing in the indemnification provision here even

suggests that that result is intended. To the contrary, the indemnification section of the SQA goes on to state, "[redacted]" (Ex. 4, ¶7.3.) Application of the indemnification provision to claims between the parties would render paragraph 7.3 nonsensical, as it would require Target to provide "[redacted]" *brought against Target by busSTRUT* and likewise would require Target to "[redacted]" *brought against it by busSTRUT*.

Clearly, then, the SQA does not operate to indemnify Target against claims by busSTRUT. Target's argument to the contrary is meritless.

CONCLUSION

The evidence of Target's egregious, intentional misconduct is abundant and compelling. At a minimum, genuine disputes of material fact remain outstanding and require jury resolution. For all the reasons set forth above, busSTRUT respectfully asks that this Court deny Target's motion for summary judgment *in toto*.

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