

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
STATESVILLE DIVISION  
Civil Action No. 5:17-cv-176**

<b>SWIFT BEEF COMPANY,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>ANSWER AND COUNTERCLAIMS</b>
	)	
<b>ALEX LEE, INC.,</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

---

Defendant Alex Lee, Inc. (“Alex Lee”) answers and responds to the allegations in the Verified Complaint filed by Plaintiff Swift Beef Company (“Plaintiff” or “Swift Beef”) as follows:

**Nature of the Action**

1. Denied.
2. The Complaint is a written document that speaks for itself, as do the claims asserted therein. Accordingly, Paragraph 2 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 2.
3. Denied.
4. Denied.
5. Denied.
6. The Complaint is a written document that speaks for itself. Accordingly, the first sentence of Paragraph 6 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in the first sentence of Paragraph 6. Alex Lee denies the allegations in the second sentence of Paragraph 6.

7. Denied.
8. Denied.
9. Admitted on information and belief.
10. Admitted.
11. Admitted.
12. Admitted.
13. Admitted.

14. Alex Lee lacks knowledge and information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 14, and those allegations are therefore denied. Alex Lee denies the allegations in the second and third sentences of Paragraph 14.

15. Alex Lee denies the allegations in the first sentence of Paragraph 15. Alex Lee lacks knowledge and information sufficient to form a belief as to the truth of the allegations in the second sentence of Paragraph 15, and those allegations are therefore denied.

16. Admitted.

17. Alex Lee lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 17, and those allegations are therefore denied.

18. Alex Lee admits that it is a privately held corporation, that it owns subsidiaries Merchants Distributors, LLC (“MDI”) and Lowes Foods, LLC (“Lowes”), and that one or both of its subsidiaries operate in the states listed in Paragraph 18. Except as admitted, Alex Lee denies the allegations in Paragraph 18.

19. Alex Lee admits that MDI is a wholesale grocery distributor and that Lowes is a grocery retailer, but denies that Lowes currently operates over 100 stores. Except as admitted, Alex Lee denies the allegations in Paragraph 19.

20. Alex Lee admits that MDI owns the Lenoir Plant, that the Lenoir Plant is used for meat processing and packaging, and that case ready meat products are produced at the Lenoir Plant. Except as admitted, Alex Lee denies the allegations in Paragraph 20.

21. Alex Lee admits that before April 21, 2014, Alex Lee began looking for another entity to run the Lenoir Plant. Except as admitted, Alex Lee denies the allegations in Paragraph 21.

22. The Lease and Purchase Agreement are written contracts that speak for themselves. Accordingly, Paragraph 22 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 22.

23. The Lease is a written contract that speaks for itself. Accordingly, Paragraph 23 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 23.

24. The Lease is a written contract that speaks for itself. Accordingly, Paragraph 24 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 24.

25. The Lease is a written contract that speaks for itself. Accordingly, Paragraph 25 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 25.

26. The Lease is a written contract that speaks for itself. Accordingly, Paragraph 26 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 26.

27. The Purchase Agreement is a written contract that speaks for itself. Accordingly, Paragraph 27 contains no allegations to which Alex Lee is required to respond. To the extent a

response is required, Alex Lee denies the allegations in Paragraph 27. With respect to footnote 5, Alex Lee admits that the volume of product it has ordered under the Purchase Agreement has declined as a result of Plaintiff's inability to provide product that meets Alex Lee's quality requirements timely, efficiently, and at competitive cost. Except as admitted, Alex Lee denies the allegations in the second sentence of footnote 5. Alex Lee denies the allegations in the first sentence and the third sentences of footnote 5.

28. The Purchase Agreement is a written contract that speaks for itself. Accordingly, Paragraph 28 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 28.

29. The Purchase Agreement is a written contract that speaks for itself. Accordingly, Paragraph 29 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 29. Moreover, Alex Lee denies the allegations in Paragraph 29 to the extent they suggest that all of the parties' agreements with respect to the Purchase Agreement are reflected in the four corners of the agreement, as that is not consistent with the language of the agreement. For example, Section 4 of the Purchase Agreement requires that products be shipped in a form and manner consistent with the specifications in Exhibit A, "or as otherwise agreed by the parties." Likewise, Section 5 requires Swift Beef to use its best efforts to produce product consistent with the specifications set forth in Exhibit A "or as otherwise agreed by the Parties." Thus, the parties may have agreements relating to production of product under the Purchase Agreement that are not expressly stated in the agreement itself.

30. The Purchase Agreement is a written contract that speaks for itself. Accordingly, Paragraph 30 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 30.

31. The Purchase Agreement is a written contract that speaks for itself. Accordingly, Paragraph 31 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 31.

32. The Purchase Agreement is a written contract that speaks for itself. Accordingly, Paragraph 32 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 32.

33. Alex Lee lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 33, and those allegations are therefore denied.

34. Alex Lee lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 34, and those allegations are therefore denied.

35. Alex Lee lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 35, and those allegations are therefore denied.

36. Alex Lee lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 36, and those allegations are therefore denied.

37. Admitted.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

47. The email referenced in Paragraph 47 and attached to the Complaint as Exhibit D is a writing that speaks for itself. Accordingly, Paragraph 47 contains no allegations to which Alex Lee is required to respond.

48. The email referenced in Paragraph 48 and attached to the Complaint as Exhibit D is a writing that speaks for itself. Accordingly, Paragraph 48 contains no allegations to which Alex Lee is required to respond.

49. The document referenced in Paragraph 49 and attached to the Complaint as Exhibit E is a writing that speaks for itself. Accordingly, Paragraph 49 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 49. Moreover, Alex Lee denies that its characterization of Plaintiff's rights under Section 31 of the Lease as a "right of first offer" was "mistaken." Indeed, Plaintiff's rights under Section 31 were expressly described as a right of first offer in the memorandum of lease attached as an exhibit to the Lease. Additionally, Alex Lee specifically denies the allegations in the second sentence of footnote 10.

50. The document referenced in Paragraph 50 and footnote 11 and attached to the Complaint as Exhibit E is a writing that speaks for itself. Accordingly, the first sentence of Paragraph 50 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in the first sentence of Paragraph 50. Alex Lee denies the allegations in the second sentence of Paragraph 50.

51. The document referenced in Paragraph 51 and attached to the Complaint as Exhibit F is a writing that speaks for itself. Accordingly, Paragraph 51 contains no allegations to which

Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 51.

52. Denied.

53. The document referenced in Paragraph 53 and attached to the Complaint as Exhibit G is a writing that speaks for itself. Accordingly, the first sentence of Paragraph 53 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in the first sentence of Paragraph 53. Alex Lee denies the allegation in the second and third sentences of Paragraph 53.

54. Denied.

55. The document referenced in Paragraph 55 and attached to the Complaint as Exhibit H is a writing that speaks for itself. Accordingly, Paragraph 55 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 55.

56. Denied.

57. The document referenced in Paragraph 57 and attached to the Complaint as Exhibit J is a writing that speaks for itself. Accordingly, Paragraph 57 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 57. Moreover, Alex Lee specifically denies that the document referenced in Paragraph 57 “demonstrated that Alex Lee’s arguments were factually and legally untenable and based on a misinterpretation of the Agreements.”

58. The document referenced in Paragraph 58 and attached to the Complaint as Exhibit K is a writing that speaks for itself. Accordingly, Paragraph 58 contains no allegations to which

Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 58.

59. The document referenced in Paragraph 59 and attached to the Complaint as Exhibit K is a writing that speaks for itself. Accordingly, Paragraph 59 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 59.

60. The document referenced in Paragraph 60 and attached to the Complaint as Exhibit K is a writing that speaks for itself. Accordingly, Paragraph 60 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 60.

61. Alex Lee admits the first and second sentences in Paragraph 61 and denies the third sentence in Paragraph 61.

62. Denied.

63. Alex Lee re-asserts its responses to the preceding paragraphs of the Complaint.

64. Alex Lee admits that the parties entered into the Agreements and that Alex Lee has the right to enforce them. Except as admitted, Alex Lee denies the allegations in Paragraph 64.

65. Denied.

66. Alex Lee admits that Swift Beef's rights under Sections 31 and 32 of the Lease were waived when Swift Beef declined to exercise its right of first refusal to purchase the Lenoir Plant. Except as admitted, Alex Lee denies the second sentence in Paragraph 66.

67. Denied.

68. Denied.

69. Alex Lee re-asserts its responses to the preceding paragraphs of the Complaint.



70. Alex Lee admits that the parties entered into the Agreements and that Alex Lee has the right to enforce them. Except as admitted, Alex Lee denies the allegations in Paragraph 70.

71. Denied.

72. Denied.

73. Denied.

74. Denied.

75. Denied.

76. Denied.

77. Denied.

78. Alex Lee re-asserts its responses to the preceding paragraphs of the Complaint.

79. Denied.

80. The Lease Agreement is a written contract that speaks for itself. Accordingly, Paragraph 80 contains no allegations to which Alex Lee is required to respond. To the extent a response is required, Alex Lee denies the allegations in Paragraph 80. Moreover, Alex Lee denies Paragraph 80 to the extent it suggests that Plaintiff's rights under Sections 31 and 32 of the Lease Agreement are still enforceable, as those rights have been waived.

81. Alex Lee admits that Swift Beef's rights under Sections 31 and 32 of the Lease were waived when Swift Beef declined to exercise its right of first refusal to purchase the Lenoir Plant. Except as admitted, Alex Lee denies the allegations in Paragraph 81.

82. Denied.

83. Denied.

84. Alex Lee re-asserts its responses to the preceding paragraphs of the Complaint.

85. Paragraph 85 reflects Plaintiff's request to the Court and therefore does not require a response by Alex Lee. To the extent a response is required, Alex Lee denies the allegations in Paragraph 85. Moreover, Alex Lee requests that the relief sought by Plaintiff be denied.

86. Paragraph 85 reflects Plaintiff's request to the Court and therefore does not require a response by Alex Lee. To the extent a response is required, Alex Lee denies the allegations in Paragraph 85. Moreover, Alex Lee notes that the issues raised by Paragraph 86 were (a) resolved by agreement of the parties prior to the filing of this lawsuit, and (b) completed pursuant to the parties' pre-litigation agreement within days of the filing of this lawsuit. Thus, Plaintiff's request in Paragraph 86 is now moot.

87. Denied.

88. Denied.

89. Denied.

90. Denied.

91. Denied.

92. Denied.

93. Denied.

94. Denied.

## **ALEX LEE'S COUNTERCLAIMS AGAINST SWIFT BEEF**

Counterclaim-Plaintiff Alex Lee, Inc. ("Alex Lee"), complaining of Counterclaim-Defendant Swift Beef Company ("Swift Beef"), alleges and says as follows:

### **PARTIES**

1. Alex Lee is a food retail and distribution company with operations across the southeastern United States. Alex Lee is headquartered in Hickory, North Carolina. Alex Lee is duly authorized to assert the counterclaims set forth herein.

2. Alex Lee owns Merchants Distributors, LLC ("MDI"), a wholesale grocery distributor headquartered in Hickory, North Carolina, and Lowes Foods, LLC ("Lowes"), a supermarket chain operating in North Carolina, South Carolina and Virginia. Lowes is also headquartered in North Carolina.

3. Swift Beef is a beef supplier owned by JBS USA Food Company ("JBS USA"), which maintains its headquarters in Greeley, Colorado. JBS USA describes itself as "one of the world's largest beef and pork processing companies," and claims to provide meat products to "customers in over 80 countries on six continents."

4. Swift Beef routinely engages in business in North Carolina and, pertinent to this action, leases a protein product processing plant from Alex Lee in Lenoir, North Carolina (the "Plant"). The address of the Plant is 1450 Vantage Foods Court, Lenoir, North Carolina.

### **JURISDICTION AND VENUE**

5. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332, as the amount in controversy exceeds \$75,000, exclusive of interest and costs, and is between citizens of different states.

6. This Court has jurisdiction over Alex Lee's counterclaims against Swift Beef pursuant to 28 U.S.C. § 1367(a).

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391, as Alex Lee resides in this district, and a substantial part of the events giving rise to this matter occurred in this district.

## FACTS

### **A. The Lease and Purchase Agreement**

8. On or about April 21, 2014, Alex Lee and Swift Beef entered into a Lease Agreement (the “Lease”), by which Swift Beef would lease the Plant from Alex Lee to be used as a protein product processing plant. The Lease term began on the day that Alex Lee delivered possession of the Plant to Swift Beef and, unless terminated earlier, would terminate at 11:59 pm EST on the tenth anniversary of the day the lease term began. A copy of the Lease is attached hereto as **Exhibit A**.

9. On the same day the parties entered into the Lease, they also entered into a Purchase Agreement (the “Purchase Agreement”), by which Alex Lee would purchase certain meat products produced by Swift Beef at the Plant. A copy of the Purchase Agreement is attached hereto as **Exhibit B**.

10. The Lease and the Purchase Agreement are linked in several ways. Most importantly, if the Purchase Agreement terminates, the Lease also terminates automatically.

Likewise, if the Lease terminates, the Purchase Agreement terminates automatically.

11. Critically to this case, Section 3 of the Purchase Agreement provides as follows:

The Company [Swift Beef] shall sell each product to Customer [Alex Lee] hereunder at a price equal to: (i) if such Product is part of the first four hundred thousand (400,000) average pounds per week of Product, calculated monthly, purchased by Customer in any given week, the Company’s cost of production utilizing the methodology described on **Exhibit C** attached hereto (“Cost”) of producing such Product; and thereafter, (ii) the Company’s Cost of producing such Product plus \$0.10/pound. *The Company shall use commercially*

*reasonable efforts to produce the Product efficiently and at competitive cost.*  
(emphasis added).

12. Exhibit C to the Purchase Agreement, referenced in Section 3, sets out ten factors and costs that may be used to determine the cost of goods charged by Swift Beef to Alex Lee. Those ten factors and costs are: (1) Delivered Raw Material Cost (includes any program premiums, trim premiums, inbound freight, if applicable); (2) Trim Credit Value (if any); (3) Agreed Yield %; (4) Yielded Meat Cost; (5) Ingredients (if any); (6) Direct Labor; (7) Total Packaging Cost; (8) Wet Tare (if applicable); (9) Outbound Freight (if any); and (10) Any other direct costs which may be agreed upon from time to time. Swift Beef is not permitted by Section 3 of the Purchase Agreement to charge or pass along to Alex Lee any factors or costs other than the ten listed in Exhibit C.

13. Section 3 of the Purchase Agreement is so integral to Swift Beef's obligations under the agreement that the parties agreed to a special process by which Swift Beef's violations of Section 3 could be remedied. That special process, set out in Section 18.3 of the Lease, provides as follows:

Notwithstanding anything to the contrary contained herein, if Tenant [Swift Beef] fails, refuses, or is unable to produce Products for Landlord [Alex Lee] in accordance with Section 3 of the Purchase Agreement, the Landlord may, in its sole discretion, immediately terminate this Lease and all of the rights of occupancy of Tenant under this Lease effective immediately upon the delivery of written notice (or effective at such time as otherwise set forth in the written notice) to Tenant.

14. Furthermore, consistent with the parties' intent to link the Lease and the Purchase Agreement, if the Lease is terminated for any reason, Section 21 of the Purchase Agreement provides that the Purchase Agreement automatically terminates as well.

15. In addition to the requirements in Section 3 of the Purchase Agreement, Swift Beef is required by Section 4 of the Purchase Agreement to ship product to Alex Lee on the

terms set forth in Exhibit A of the Purchase Agreement. Swift Beef agrees in Section 4 “to use its best efforts to fill all timely orders as requested by the Customer.”

16. Swift Beef is also required by Section 5 of the Purchase Agreement to “use its best efforts to produce Product consistent with the specifications set forth in Exhibit A or as otherwise agreed by the Parties.” Moreover, “all Product shall be processed, tested, stored, handled, transported and delivered in accordance with the standards that meet or exceed the following: [1] U.S. Agricultural Marketing services regulations governing the sale of meat; [2] [Swift Beef’s] validated and verified Hazard Analysis and Critical Control Point plan; [3] USDA Food Safety and Inspection Service sanitation and microbial testing regulations; and [4] Current Good Manufacturing Process standards.”

17. Exhibit A of the Purchase Agreement requires, in turn, that “[a]ll Products . . . meet the British Retail Consortium Global Standard for Food Safety, and good manufacturing practices.”

18. Swift Beef’s failure to meet its obligations under Sections 4 or 5 or Exhibit A of the Purchase Agreement gives Alex Lee the right to terminate the agreement. However, unlike with violations of Section 3, for which Alex Lee may terminate the Lease immediately, Alex Lee is required by Section 20.3 of the Purchase Agreement to give Swift Beef “15 days written notice of its default” of Sections 4 or 5 or other sections of the Purchase Agreement, and may only terminate the agreement if Swift Beef “fails, neglects or refuses for a period of more than 15 days thereafter to make good or perform the default.”

**B. Swift Beef’s Deficient Performance Under the Purchase Agreement**

19. The core obligations Swift Beef must meet in order to comply with the Purchase Agreement can be summarized as this: Swift Beef must (1) provide the meat products ordered

by Alex Lee in an efficient, timely manner; (2) charge Alex Lee no more than the costs authorized by the Purchase Agreement and keep those costs competitive; and (3) provide meat products that meet contractual and commercial standards for quality and safety.

20. Here, Swift Beef has consistently failed to satisfy any of these core obligations.

**1. *Swift Beef's Failure to Meet Industry Service Level Standards***

21. It is critically important to Alex Lee that product ordered under the Purchase Agreement be delivered efficiently and timely. That core requirement is explicitly built into the Purchase Agreement, which requires that Swift Beef “use commercially reasonable efforts to produce the Product *efficiently*,” and to “use its best efforts to fill *timely* all orders as requested by [Alex Lee].”

22. In the meat production industry, the efficiency of a supplier’s production is generally measured by the amount of product delivered by the supplier compared to the amount of product ordered by the customer. This is referred to as the supplier’s “service level.” For example, if Alex Lee orders 100 pounds of meat from Swift Beef but only receives 50 pounds, Swift Beef’s service level for that order would be 50 percent.

23. Service levels in the meat production industry are generally expected to exceed 98 percent on a daily basis.

24. Swift Beef has consistently failed to meet industry service level standards for its operations at the Plant.

25. Swift Beef’s service levels at the Plant have almost never reached 98 percent and dipped as low as 32.4 percent in June 2017.

26. Swift Beef’s service level on July 3, 2017, one of the most important days of the year for Alex Lee’s case ready meat business, was 42.5 percent. This means that the day before

a major national holiday, Alex Lee did not receive 57.5 percent of the products it ordered from Swift Beef.

27. At the low point of Swift Beef's service levels in the summer of 2017, Alex Lee did not receive 67.6 percent of the products it ordered from Swift Beef.

28. The impact of Swift Beef's extremely substandard service levels was readily apparent from the limited amount of meat in stock at Lowes retail stores on critical shopping days. The financial impact of Swift Beef's substandard service levels in June and July of 2017 is conservatively estimated as \$800,000.

29. Swift Beef's inability to meet—or even approach—industry service level standards amounts to a breach of Swift Beef's core obligations under Sections 3 and 4 of the Purchase Agreement to “use commercially reasonable efforts to produce the Product efficiently,” and to “use its best efforts to fill timely all orders as requested by [Alex Lee].”

***2. Swift Beef's Failure to Meet its Contractual Obligations Regarding Cost of Goods***

30. In addition to Swift Beef's unacceptable service levels, Swift Beef has consistently employed practices that increased the cost of goods to Alex Lee in ways that are inconsistent with the requirements of the Purchase Agreement, and some of which are outright fraudulent.

31. Swift Beef knowingly and improperly allocated labor costs to Alex Lee that should have been allocated to Food Lion, another customer serviced by Swift Beef from the Plant. Food Lion operates a chain of grocery stores that competes directly with Lowes and customers of MDI.

32. After receiving unsolicited information from former Swift Beef employees that Swift Beef was passing along labor costs to Alex Lee that should have been allocated to Food



Lion, Alex Lee initiated an internal investigation (the “Investigation”). A report summarizing the findings of the Investigation is attached hereto as **Exhibit C**.

33. In sum, former Swift Beef employees informed Alex Lee that Swift Beef did not have the proper equipment to meet service level commitments to Food Lion, and Swift Beef’s products were priced too low for its relationship with Food Lion to be profitable. As a result, the former Swift Beef employees were instructed to falsify labor records in order to meet the predetermined service level standards for Swift Beef’s relationship with Food Lion. Alex Lee was also informed that Swift Beef did not charge Food Lion for its share of shipping or receiving labor and passed these costs improperly to Alex Lee.

34. Labor costs that should have been charged to Food Lion were thus improperly passed to Alex Lee.

35. The Investigation revealed an atypical negative variance in Alex Lee’s labor costs for product produced at the Plant from June 2015 through December 2015. This time period coincided directly with the beginning of Swift Beef’s relationship with Food Lion.

36. In the months preceding the June 2015 through December 2015 time period, Alex Lee had typically experienced a positive variance in its labor costs. Alex Lee could not identify any independent reason for the substantial shift in its labor cost variance from positive to significantly negative, as the work performed for Alex Lee at the Plant did not vary materially over the relevant time period.

37. After conducting the Investigation, Alex Lee contacted Swift Beef to express its concerns regarding the information learned from Swift Beef’s former employees and the inexplicable negative variances in labor costs allocated to Alex Lee. Alex Lee did not receive a satisfactory response to the issues it raised with Swift Beef.

38. Swift Beef's fraudulent charging of Food Lion's labor costs to Alex Lee had a direct and substantial impact on Alex Lee's costs of goods.

39. Food Lion's labor costs are also outside the scope of costs that Swift Beef is permitted to charge Alex Lee under the Purchase Agreement, and Swift Beef's practices are therefore a direct violation of Section 3 and Exhibit C of the Purchase Agreement.

40. In addition to Swift Beef's fraudulent allocation of labor costs, Alex Lee also learned from former Swift Beef employees that they were instructed by Swift Beef to give the business relationship with Food Lion priority over the relationship with Alex Lee. Specifically, Alex Lee was informed that Food Lion's orders would take precedence over Alex Lee's orders, and Swift Beef employees were instructed to ensure that one hundred percent of Food Lion's orders were filled, even if it meant disregarding Alex Lee's orders.

41. Swift Beef's preferential treatment of Food Lion, to the detriment of Alex Lee, is a violation of Swift Beef's duty of good faith and fair dealing under the Purchase Agreement.

42. Swift Beef has improperly charged Alex Lee with other labor costs in addition to those related to Food Lion. Recently, Alex Lee was charged by Swift Beef with the cost of labor for training new workers hired by Swift Beef. That is not a cost permitted to be passed along to Alex Lee under Section 3 and Exhibit C of the Purchase Agreement.

43. Swift Beef has also improperly increased Alex Lee's cost of goods by mismanaging inventory and supplies.

44. For example, in January 2016, Alex Lee noticed that Swift Beef, without prior notice, increased the accrual balance owed by Alex Lee by \$45,916.26.

45. The accrual balance owed by Alex Lee is the net amount owed by Alex Lee to Swift Beef at any point in time, and it generally rises when problems with Swift Beef's product

quality or control of costs causes the value of the product delivered by Swift Beef under the Purchase Agreement to be less than the amounts chargeable to Alex Lee.

46. When Alex Lee confronted Swift Beef about the unauthorized and unanticipated \$45,916.26 charge, Swift Beef explained that it had written off \$45,916.26 in supply inventory that Swift Beef deemed to be obsolete. Swift Beef did not consult with Alex Lee before writing off the supply inventory in question, despite Alex Lee's prior efforts to explain to Swift Beef its mitigation strategy with respect to aged supplies, and its request that the parties work together to effectuate the sale of those supplies.

47. Furthermore, the only reason the supply inventory was ostensibly obsolete was that Swift Beef had allowed the equipment for which the inventory was designed to fall into disrepair. Had Swift Beef maintained the equipment properly, the inventory would not have been obsolete and Swift Beef would have had no reason to write it off. Thus, the \$45,916.26 charge to Alex Lee was entirely attributable to Swift Beef's failure to maintain its equipment and properly manage inventory.

48. Moreover, Alex Lee learned that, without providing notice to Alex Lee, Swift Beef had actually *sold* some of Alex Lee's ostensibly obsolete supplies, but did not credit Alex Lee with the amount received from that sale. Swift Beef thus profited from the sale of Alex Lee's aged supplies, but still charged Alex Lee the full amount—\$45,916.26—for the ostensibly obsolete supplies.

49. This \$45,916.26 charge had a direct impact on Alex Lee's costs of goods. The Purchase Agreement does not authorize Swift Beef to pass along such charges to Alex Lee in these circumstances.

50. More recently, Swift Beef improperly charged Alex Lee for excessive supplies

because a problem with Swift Beef's equipment required that certain product be rewrapped. Swift Beef charged Alex Lee for the labor down time associated with this equipment failure, as well as for the supplies required to rewrap the product. Inasmuch as the equipment failure was entirely Swift Beef's responsibility, neither of these costs should have been charged to Alex Lee under the terms of the Purchase Agreement.

51. In addition, Swift Beef's inefficient management of the Plant increased the cost of meat products produced in the Plant to the point that they became uncompetitive, and Alex Lee was required to begin sourcing product that should have been produced at the Plant in Lenoir from other parts of the country.

52. For example, after working unsuccessfully with Swift Beef for months to control the cost of certain grinds of meat at the Plant, Alex Lee began obtaining those same products from Swift Beef's Souderton, Pennsylvania plant (the "Souderton Plant"). The Souderton Plant sourced the grinds for 20 to 30 cents less per pound than the Plant, despite being significantly further from Lowes' retail stores and MDI's distribution center in Hickory, North Carolina.

53. Alex Lee costs were reduced by approximately \$107,000 per year by sourcing certain products out of the Souderton Plant rather than from the Plant in Lenoir. In sum, Swift Beef was able to provide the same product to Alex Lee more efficiently and at substantially less cost from a plant in Souderton, Pennsylvania than from the Plant, which is located just down the road from Alex Lee.

54. Alex Lee has also been forced to source many of its sausage products, previously produced by Swift Beef at the Plant, from a supplier in Chicago, Illinois. Again, Alex Lee found that a supplier several states away was able to provide sausage more efficiently and at less cost to Alex Lee than the Plant, which is located just down the road from Alex Lee.

55. By improperly increasing Alex Lee's cost of goods, Swift Beef has violated Section 3 and Exhibit C of the Purchase Agreement, which set out the costs that Swift Beef is legally permitted to charge Alex Lee and require Swift Beef to use "commercially reasonable efforts to produce the Product efficiently and at competitive cost."

**3. *Swift Beef's Failure to Meet Quality and Safety Requirements***

56. In addition to the substantial impact on Alex Lee's cost of goods caused by Swift Beef's inefficient and uncompetitive management of the Plant, Swift Beef has also failed to deliver product to Alex Lee meeting the quality and safety requirements set out in the Purchase Agreement.

57. Meat products produced at the Plant pursuant to the Purchase Agreement are considered "case ready." That means that at the time the products leave the Plant, they should be ready to be loaded into refrigerated sales cases and sold to customers without any additional packaging on the part of Alex Lee.

58. The specialized packaging and sealing of case ready meat, if done properly, should generally result in a product that has a shelf life of 18 to 21 days.

59. Before shifting its ground beef orders to Swift Beef's plant in Souderton, Pennsylvania, Alex Lee received approximately 30 complaints per week from stores that the vacuum seal on packages of ground beef prepared by Swift Beef at the Plant had failed, causing the meat to turn brown within 24 hours. The unacceptably short shelf life for the ground beef supplied by Swift Beef has a direct and substantial impact on Alex Lee's ability to sell the product and threatens its reputation with its customers.

60. Swift Beef was not able to resolve the persistent issues with the failure of its vacuum seals, despite Alex Lee's best efforts over many months to have the issues addressed.

As a result, Alex Lee now obtains ground beef from the Souderton Plant, which produces case ready ground beef that does not experience such extreme vacuum seal failures.

61. In addition, Alex Lee received at least eleven complaints from customers who found bone fragments in sausage produced by Swift Beef at the Plant. Swift Beef was not able to resolve these concerns despite Alex Lee's persistent efforts over many months to have the issue addressed. As a result, Alex Lee now obtains sausage products from a supplier in Chicago, and has received no complaints about bone fragments in sausage products after making that switch.

62. Swift Beef also breached the Purchase Agreement by delivering injected pork to Lowes retail stores. Lowes promises its customers natural products without any injections. While Lowes caught the injected pork supplied by Swift Beef through its quality control processes, Swift Beef's noncompliance with Lowes' requirements poses a direct and substantial threat to Lowes' reputation with its customers and subjects Lowes to serious economic risk.

63. The persistent issues with the quality and safety of product produced by Swift Beef at the Plant amount to a breach of Swift Beef's obligations under Section 5 of the Purchase Agreement to "use its best efforts to product Product consistent with the specifications set out in Exhibit A or as otherwise agreed by the Parties," and to "meet or exceed . . . U.S. Agricultural Marketing Services regulations governing the sale of meat" and "Current Good Manufacturing Process standards."

64. The product provided by Swift Beef also fails to satisfy Swift Beef's obligation under Section 3 of the Purchase Agreement to "use commercially reasonable efforts to produce the Product efficiently and at competitive cost."

**C. Alex Lee Attempts to Resolve Problems with Swift Beef Without Litigation**

65. Despite Swift Beef's numerous breaches of the Lease and the Purchase Agreement, Alex Lee did not immediately move to terminate either agreement.

66. Rather, Alex Lee worked diligently with Swift Beef in an effort to improve the issues related to service level standards, cost of goods, and quality of product. For example, Alex Lee provided Swift Beef with guidance that led to the development of key performance indicators for the Swift Beef relationship, which allowed Alex Lee to track the cost of labor over time so that Swift Beef would have a harder time passing off unauthorized costs to Alex Lee.

67. Unfortunately, even with Alex Lee's persistent efforts to remedy the problems, none of Swift Beef's issues have been resolved to Alex Lee's satisfaction.

68. Even now, Swift Beef is not producing product at the Plant at the levels of efficiency expected in this industry.

69. Moreover, the cost of Swift Beef's product is simply not competitive in the market, as evidenced by Alex Lee's ability to reduce its costs substantially and improve the quality of its product by sourcing ground beef and sausage from suppliers in Pennsylvania and Illinois respectively.

70. After years of fruitless dialogue, and with Swift Beef's daily service levels cratering to new lows at a critical time of the year for Alex Lee, the dispute between the parties came to a head in July 2017. Alex Lee's president and CEO notified Swift Beef in writing that the time had come to sever the parties' contractual relationship.

71. The parties then entered into several weeks of discussions in an attempt, from Alex Lee's perspective, to avoid the time-consuming litigation that Swift Beef has now commenced.

72. Rather than terminating the Lease and Purchase Agreement immediately, as Alex Lee had the right to do, the parties discussed either (a) Swift Beef purchasing the Lenoir plant, in which case Swift Beef could continue its operations unabated, or (b) the parties negotiating a mutual agreement to end Swift Beef's tenancy.

73. On August 23, 2017, Alex Lee wrote to Swift Beef listing sixteen different ways in which Swift Beef has violated Section 3 or other sections in the Purchase Agreement by failing to use commercially reasonable efforts to produce product efficiently and at competitive cost. A copy of Alex Lee's August 23 letter is attached hereto as **Exhibit D**.

74. More than 30 days have elapsed since Alex Lee sent its August 23 letter and Swift Beef has done nothing to remedy the defaults identified in the letter. Thus, to the extent Swift Beef would have the right under the contracts to cure its defaults, the time to do so has long-since expired.

75. Notwithstanding Swift Beef's continuing breaches, Alex Lee, still determined to seek a non-judicial resolution of the dispute, traveled to Colorado (even though the Plant is located in North Carolina) to meet with Swift Beef on September 28, 2017.

76. Although the parties did not resolve all of their issues at the September 28 meeting, they did agree to resolve certain matters, such as the memorandum of lease and consent to improvements regarding which the parties had been corresponding.

77. Unfortunately, rather than coordinating with Alex Lee to complete the agreements reached at the September 28 meeting, Swift Beef filed this lawsuit five days later, alleging, among other things, that Alex Lee breached the Lease by failing to return the memorandum of lease and consent to Swift Beef's requested improvements—the very things that the Alex Lee had just agreed to do.



78. While Alex Lee has maintained that the August 23 letter attached hereto as **Exhibit D** is sufficient to meet any applicable requirements in the Lease and Purchase Agreement to provide Swift Beef with notice of its defaults, in response to Swift Beef's contention in this lawsuit that the August 23 letter is not sufficient notice, Alex Lee sent a supplemental notice of default to Swift Beef on October 23, 2017. A copy of the October 23 supplemental notice is attached as **Exhibit E**. Swift Beef has responded in writing to the October 23 supplemental notice but, as of the date of the filing of these counterclaims, has not remedied the numerous defaults identified therein.

**D. JBS Encounters Legal Problems**

79. At the same time in 2017 that Swift Beef's performance at the Plant was reaching new lows, a bribery and collusion scandal was enveloping the highest-level executives of JBS SA, the parent company of JBS USA, which owns Swift Beef.

80. JBS SA is headquartered in Brazil. JBS SA's CEO is Brazilian billionaire Wesley Batista and its chairman is Wesley's brother, Joesley Batista. Until recently, Wesley was also the CEO of JBS USA.

81. In May 2017, Brazilian authorities announced that they were investigating whether JBS SA and the Batistas had engaged in a massive fraud in collusion with Brazilian state-owned bank BNDES.

82. As part of a leniency agreement, the Batistas admitted to paying bribes in excess of \$123 million to hundreds of Brazilian politicians, including three presidents.

83. A Bloomberg article from May 26, 2017 summarizes the matter this way: "The meteoric rise of the Batistas' JBS SA, the global meat powerhouse that seemed to come out of nowhere a decade ago, wouldn't have been possible without a top politician on the take,

hundreds of millions of dollars in bribes and a series of sweetheart deals with Brazil's state development bank." A copy of the Bloomberg article is attached as **Exhibit F**.

84. The Batistas, through the holding company for JBS SA, agreed to pay a fine of \$3.2 billion, payable over 25 years. In addition, on information and belief, both Wesley and Joesley Batista are also currently incarcerated.

85. According to Bloomberg, "The revelations raise questions about unfair competition abroad as the company gobbled up more than 40 rivals on four continents between 2007 and 2017."

86. The CEO of a U.S.-based cattle industry group quoted in the Bloomberg article observed: "Through ill-gotten means, JBS has been able to gain control of a large portion of the U.S. cattle industry."

**FIRST CLAIM FOR RELIEF**  
**(Breach of Contract – Purchase Agreement)**

87. Alex Lee incorporates and realleges the preceding paragraphs as if fully set forth herein.

88. The Purchase Agreement is a valid and binding contract.

89. Swift Beef breached its contractual obligations under the Purchase Agreement by, among other things:

- a. Failing to use commercially reasonable efforts to produce product for Alex Lee efficiently and at competitive cost, as required by Section 3 of the Purchase Agreement;
- b. Charging costs to Alex Lee and/or, through mismanagement of the Plant, causing Alex Lee to incur costs beyond those authorized by Section 3 or Exhibit C of the Purchase Agreement;
- c. Failing to use its best efforts to fill timely all orders as requested by Alex Lee, as is required by Section 4 of the Purchase Agreement;

- d. Failing to meet the product specifications required by Section 5 and Exhibit A of the Purchase Agreement;
- e. Fraudulently billing over one hundred thousand dollars in labor costs incurred in producing product for another customer to Alex Lee;
- f. Operating the plant inefficiently so that the cost for ground beef was no longer competitive;
- g. Operating the plant inefficiently so that the cost for sausage was no longer competitive;
- h. Failing to meet industry service level standards, with service levels dipping as low as 32.4 percent in June 2017 and 42.5 percent on July 3, 2017;
- i. Prioritizing service levels for other customers over Alex Lee;
- j. Failing to make the capital investments necessary to enable the plant to operate efficiently and at competitive cost;
- k. Failing to properly manage inventory;
- l. Operating the Plant with high employee turnover, resulting in higher labor costs stemming from continually hiring and training new workers;
- m. Failing to make claims back against suppliers for nonconforming product and passing the remediation costs through to Alex Lee in the form of additional labor costs;
- n. Shipping the wrong product;
- o. Shipping contaminated product;
- p. Shipping product with excessive trim;
- q. Shipping product with failed seals on the packaging;
- r. Delivering injected pork;
- s. Delivering discolored product; and
- t. Employing unsanitary meat handling practices.

90. Swift Beef further breached the duty of good faith and fair dealing implied in the Purchase Agreement by, among other things, prioritizing service levels for other customers over Alex Lee.

91. Alex Lee has satisfied all of its contractual obligations under the Purchase Agreement, including the obligation to provide Swift Beef with notice of its defaults pursuant to Section 20 of the Purchase Agreement, to the extent notice is required.

92. Swift Beef has failed to remedy any of its defaults within 15 days of its receipt of notice of the defaults, as would be required by Section 20.3 of the Purchase Agreement, to the extent that section applies.

93. Alex Lee has been substantially and materially damaged by Swift Beef's breach of the Purchase Agreement in an amount in excess of \$75,000.

**SECOND CLAIM FOR RELIEF**  
**(Breach of Contract – Lease)**

94. Alex Lee incorporates and realleges the preceding paragraphs as if fully set forth herein.

95. The Lease is a valid and binding contract.

96. Swift Beef breached its contractual obligations under the Lease by, among other things, failing, refusing, or being unable to produce products for Alex Lee in accordance with Section 3 of the Purchase Agreement.

97. Lowes has satisfied all of its contractual obligations under the Lease, including the obligation to provide Swift Beef with notice of its defaults pursuant to Section 18 of the Lease, to the extent notice is required.

98. Swift Beef has failed to remedy any of its defaults within 15 days of its receipt of notice of the defaults, as would be required by Section 18.2 of the Lease, to the extent that section applies.

99. Alex Lee has been substantially and materially damaged by Swift Beef's breach of the Lease in an amount in excess of \$75,000.

**THIRD CLAIM FOR RELIEF**  
**(Conversion)**

100. Alex Lee incorporates and realleges the preceding paragraphs as if fully set forth herein.

101. Alex Lee is the rightful owner of supply inventory used for the packaging of meat products produced by Swift Beef for Alex Lee pursuant to the Purchase Agreement.

102. By selling supply inventory belonging to Alex Lee and failing to disburse or provide Alex Lee with a credit for the proceeds of the sale, Swift Beef has assumed and exercised ownership over property belonging to Alex Lee.

103. Alex Lee did not authorize Swift Beef's assumption and exercise of ownership over its property.

104. Alex Lee's rights to its property have been excluded by Swift Beef's assumption and ownership over the property.

105. Alex Lee has been substantially and materially damaged by Swift Beef's conversion of its property in an amount in excess of \$75,000.

**FOURTH CLAIM FOR RELIEF**  
**(Fraud)**

106. Alex Lee incorporates and realleges the preceding paragraphs as if fully set forth herein.

107. As set forth in the report attached hereto as **Exhibit C**, Swift Beef intentionally and knowingly carried out a fraudulent scheme against Alex Lee, by which labor costs that should have been allocated to Food Lion were instead charged to Alex Lee.

108. Swift Beef's scheme was intended to allow Swift Beef to avoid a loss on its contractual relationship with Food Lion.

109. By charging Alex Lee with costs that should have been charged to Food Lion, Swift Beef repeatedly falsely represented and/or concealed material facts from Alex Lee, including:

- a. That Swift Beef was passing along costs to Alex Lee that were not permitted by the Purchase Agreement;
- b. That Alex Lee was improperly subsidizing Swift Beef's performance under its contract with Food Lion, a direct competitor of Alex Lee's; and
- c. That Swift Beef was prioritizing its service levels for Food Lion, as well as other aspects of its relationship with Food Lion, over Swift Beef's relationship with Alex Lee.

110. Each of the representations and/or omissions listed above, as well as the other false representations and omissions made by Swift Beef, was material to Alex Lee.

111. Swift Beef knew of the falsity or had reckless disregard of the truth or falsity of each of the representations and/or omissions listed above, as well as the other false representations and omissions made by Swift Beef.

112. Swift Beef intended that Alex Lee act or refrain from acting upon each of the representations and/or omissions listed above, as well as the other false representations and omissions made by Swift Beef.

113. Alex Lee did not know of the falsity of the representations and/or omissions listed above or the other false representations and omissions made by Swift Beef.

114. Alex Lee relied on the truth of the representations and/or omissions listed above and the other false representations and omissions made by Swift Beef in continuing its contractual relationship with Swift Beef.

115. Alex Lee had a right to rely on the truth of the representations and/or omissions listed above and the other false representations and omissions made by Swift Beef in making its decision to continue its contractual relationship with Swift Beef.

116. Alex Lee has suffered and will continue to suffer consequent and proximate injury as a result of the misrepresentations and/or omissions listed above and the other misrepresentations and omissions made by Swift Beef.

**FIFTH CLAIM FOR RELIEF**  
**(Unfair and Deceptive Trade Practices – N.C.G.S. § 75-1.1, *et seq.*)**

117. Alex Lee incorporates and realleges the preceding paragraphs as if fully set forth herein.

118. As alleged herein, and consistently with the culture of unfair competition established by its corporate parents, Swift Beef has engaged in unfair and deceptive acts or practices with respect to Alex Lee, including: (a) knowingly and intentionally passing along labor costs to Alex Lee that should have been allocated to other customers; (b) obfuscating and deceiving Alex Lee when asked for information about the unauthorized and illegal labor charges; and (c) mismanaging the Plant so as to render Alex Lee's supply inventory as obsolete, and then selling a portion of Alex Lee's supply inventory without notifying Alex Lee of the sale or crediting Alex Lee with the proceeds of the sale.

119. Swift Beef's unfair and deceptive acts and practices amount to an inequitable assertion of its power and position, as Swift Beef controlled the operations of the Plant and, in that

capacity, had the ability to hide from Alex Lee its mismanagement of the Plant and the illegal and unauthorized fees that Swift Beef was passing on to Alex Lee.

120. Swift Beef's unfair and deceptive acts and practices amount to aggravating circumstances, which elevate Swift Beef's breaches of the Purchase Agreement and Lease from mere breaches of contract to violations of N.C.G.S. § 75-1.1, *et seq.*

121. Swift Beef's unfair and deceptive acts and practices affect commerce, as they took place in the context of a commercial relationship and illegally increased the cost to Alex Lee of the goods purchased from Swift Beef, which goods were intended for sale or distribution by Alex Lee and/or its affiliated companies.

122. Swift Beef's unfair and deceptive acts and practices have caused substantial injury to Alex Lee in the form of higher costs for the goods purchased from Swift Beef and an artificial, improper increase in the amounts allegedly owed by Alex Lee under the Purchase Agreement.

### **REQUEST FOR JURY TRIAL**

123. Alex Lee respectfully requests a jury trial of the claims presented herein.

**WHEREFORE**, having set forth its claims, Alex Lee prays as follows:

1. That the Court enter judgment in favor of Alex Lee on its counterclaims against Swift Beef for the full extent of damages that Alex Lee has suffered as a result of the allegations set forth herein, and that Alex Lee have and recover the full amount of its actual damages, a trebling of those actual damages, and reasonable attorneys' fees and costs;

2. That the Court vacate the Preliminary Injunction (Dkt. #18) and any other injunctive relief that may be entered in Swift Beef's favor in this action;

3. That the Court enter judgment against Swift Beef on its claims against Alex Lee as



set forth in the Verified Complaint and that Swift Beef take nothing from Alex Lee on account of those claims; and

4. That the Court award to Alex Lee such other and further relief as it deems just and proper.

This the 21<sup>st</sup> day of November, 2017.

/s/ Mark W. Kinghorn

Mark W. Kinghorn (N.C. Bar No. 28623)

MCGUIREWOODS LLP

201 North Tryon Street, Suite 3000

Charlotte, North Carolina 28202

704.343.2102 (telephone)

704.343.2300 (facsimile)

mkinghorn@mcguirewoods.com

*Counsel for Defendant Alex Lee, Inc.*

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
STATESVILLE DIVISION**

**Civil Action No. 5:17-cv-176**

<b>SWIFT BEEF COMPANY,</b>	)
	)
<b>Plaintiff,</b>	)
	)
<b>vs.</b>	)
	)
<b>ALEX LEE, INC.,</b>	)
	)
<b>Defendant.</b>	)
	)

---

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing **ANSWER AND COUNTERCLAIMS** with the Clerk of the Court using the CM/ECF system.

This the 21<sup>st</sup> day of November, 2017.

/s/ Mark W. Kinghorn  
\_\_\_\_\_  
Mark W. Kinghorn (N.C. Bar No. 28623)