

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

SWIFT BEEF COMPANY,)	
)	
Plaintiff,)	
)	
vs.)	VERIFIED COMPLAINT FOR
)	INJUNCTIVE RELIEF AND
ALEX LEE, INC.,)	DAMAGES
)	
Defendant.)	
)	
)	
)	

Plaintiff Swift Beef Company¹ (“Swift”) files this Verified Complaint for Injunctive Relief and Damages against Defendant Alex Lee, Inc. (“Alex Lee”), and states as follows:

Nature of the Action

1. This is a dispute where a sophisticated company, Alex Lee, now wants to back-out of two agreements it negotiated and executed years ago. Because it has no legitimate arguments for terminating the agreements, Alex Lee is fabricating false allegations, misinterpreting the agreements, and refusing to sign and provide documents required under one of the agreements—all in an effort to force Swift out of the deals.

2. In this lawsuit, Swift seeks, among other things, injunctive and declaratory relief arising from Alex Lee’s imminent threat (a) to terminate a ten-year Lease Agreement with Swift relating to a prepared foods facility located in Lenoir,

¹ Swift is often colloquially referred to as “JBS,” because JBS is Swift’s parent company.

Caldwell County, North Carolina (“Lenoir Plant”), (b) to evict Swift from the Lenoir Plant, and (c) to simultaneously terminate a Purchase Agreement wherein Alex Lee agreed to purchase some of the meat products Swift prepares in the Lenoir Plant for both Alex Lee and other Swift customers.

3. If Alex Lee terminates the agreements and evicts Swift from the Lenoir Plant, Swift will suffer immediate and irreparable harm for which there is no adequate remedy at law. The irreparable harm includes, but is not limited to, denying Swift its leasehold rights during the remaining six-and-a-half years under the Lease Agreement, disruption and disturbances of Swift’s relationships with its customers served out of the Lenoir Plant, loss of valuable customers, loss of business opportunities, loss of good will, and loss of sales. It will be difficult to determine or calculate with exact certainty the full monetary value of the damages caused by Alex Lee’s imminent threat of irreparable harm to Swift.

4. The balance of equities weighs in favor of (i) enjoining Alex Lee from terminating the agreements and evicting Swift from the Lenoir Plant and (ii) compelling Alex Lee to sign and return documents to Swift as required under the Lease Agreement. On the one hand, by restraining and compelling Alex Lee accordingly, the Court would merely be requiring Alex Lee to comply with the agreements which it voluntarily executed. On the other hand, Swift is likely to suffer irreparable harm in the absence of injunctive relief.

5. Granting a temporary restraining order and preliminary injunction restraining Alex Lee from terminating the agreements and evicting Swift from the

Lenoir Plant would in no way damage the public interest. In fact, granting injunctive relief will further the public policy of North Carolina by respecting contracts and ensuring the efficient production of food available to North Carolinians and others.

6. A judicial declaration of the parties' rights and obligations under the Lease Agreement is also requested because Alex Lee is now claiming that Swift's right of first refusal and its option to purchase the Lenoir Plant beginning approximately October 2018 were waived when Swift recently refused to accept Alex Lee's proposed sale offer of \$50 million for the Lenoir Plant. Because Alex Lee's position is tethered to a misinterpretation of the Lease Agreement, declaratory relief under 28 U.S.C. § 2201 is sought.

7. But there is more. In its effort to force Swift out of the Lenoir Plant, Alex Lee is also shirking its contractual promises under the Lease Agreement by refusing to execute and return the original copy of a Memorandum of Lease, Right of First Refusal and Option to Purchase ("Memorandum of Lease") so that it may be filed in the public records of Caldwell County. Alex Lee is also materially breaching its contractual obligations by unreasonably withholding and/or delaying its written consent to improvements to the Lenoir Plant that Swift seeks to perform solely at Swift's expense. These improvements are necessary to make the Lenoir Plant operate more efficiently (thus benefitting Alex Lee) and to satisfy the business expectations of Swift's major national customers who pay scores of millions of dollars to purchase product prepared, packaged, and shipped from the Lenoir Plant. Consequently, Swift requests relief in the form of specific performance.

8. Finally, if (a) threatening to immediately terminate the agreements and commence eviction proceedings, (b) disavowing Swift's contractual right of first refusal and option to purchase, and (c) refusing to execute and return documents to Swift as required under the Lease Agreement were not enough, Alex Lee has compounded its illegal conduct by refusing to pay Swift for approximately \$272,877.81 (as of October 2, 2017) in fresh meat that Swift prepared and packaged in the Lenoir Plant and supplied to Alex Lee in accordance with the Purchase Agreement.

Parties, Jurisdiction and Venue

9. Plaintiff Swift Beef Company is a Delaware corporation with a principal place of business located at 1770 Promontory Circle, Weld County, Greeley, Colorado 80634.

10. Defendant Alex Lee is a North Carolina corporation with a principal place of business located at 120 4th Street SW, Hickory, Catawba County, NC 28602-2947. Alex Lee may be served with process by serving its registered agent Boyd L. George, at 120 4th Street SW, Hickory, NC 28602-2947.

11. This Court has subject matter jurisdiction under 28 U.S.C. § 1332, in that the matter in controversy is between citizens of different states, and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

12. Venue is proper in the United States District Court for the Western District of North Carolina pursuant to 28 U.S.C. § 1381, because Alex Lee's principal place of business is in this judicial district and because a substantial part of the events giving rise to this action occurred in this district.

13. Venue is also proper in this Court per the agreements' forum selection clause, which states that, "[a]ny legal actions, suits or proceedings arising out of" the agreements "shall be brought exclusively in the courts of Catawba County, North Carolina or the United States District Court for the Western District of North Carolina" and that the parties "hereby accept and submit to the personal jurisdiction of these North Carolina courts with respect to any legal actions, suits or proceedings arising out of" the agreements. (Lease Agreement at § 30; Purchase Agreement at §24.)

Factual Allegations

I. Swift's operations.

14. Swift is a meat company offering a wide range of premium brands and programs designed to meet the unique needs of its customers. Swift provides a comprehensive offering of quality, consistency, and value. Swift backs each of its meat products with reliable, responsive service and expert support.

15. Swift upholds strict standards for quality, food safety and animal care. For instance, all of Swift's facilities are certified by the Global Food Safety Initiative and utilize video monitoring technology to ensure food safety and protect the well-being of the animals under its care.

16. The meat industry is comprised of various lines of business. One of those business lines is known as "Case Ready," which is essentially fresh meat cut and packaged to customer specifications and made ready for placement in meat coolers or freezer cases, such as at a local grocery store.

17. Swift offers its Case Ready customers a wide range of consumer-ready beef, pork, and poultry product options.

II. Alex Lee and the Lenoir Plant.

18. Alex Lee is a privately held diversified company with three primary food distribution and retail operating companies servicing North and South Carolina, Virginia, West Virginia, Georgia, Alabama, Florida, Tennessee, Ohio, Pennsylvania, and Kentucky.

19. The two primary operating companies are Merchants Distributors, which is a wholesale grocery distributor, and Lowes Foods, LLC, which is a grocery retailer with over 100 stores.

20. Alex Lee purportedly owns the Lenoir Plant², which Alex Lee used as a meat further processing and packaging facility to service its operating companies by leasing it and having other entities perform the operations Alex Lee desired. The Lenoir Plant services the Case Ready business line.

21. Upon information and belief, before April 14, 2014, Alex Lee began looking for another entity to lease and run the meat further processing and packaging operations at the Lenoir Plant because the former operator—Vantage Foods NC, LP—was unsuccessful in performing these operations efficiently and cost-effectively.

² Swift alleges that “Alex Lee purportedly owns the Lenoir Plant” because Swift has recently discovered that the property owner is actually Merchant Distributors, Inc. (“MDI”), as opposed to Alex Lee. MDI is an affiliate of Alex Lee.

III. Swift and Alex Lee enter the Lease Agreement and the Purchase Agreement.

22. On April 21, 2014, Alex Lee and Swift entered into the Lease Agreement³ and the Purchase Agreement⁴ (collectively, “Agreements”). By entering into the Agreements, Swift assumed full management and operation of the Lenoir Plant. Each of the Agreements will be addressed in turn.

A. The Lease Agreement.

23. The Lease Agreement, which is governed by North Carolina law, has a ten-year term and includes both the Lenoir Plant and a portion of the surrounding land. (Ex. A at §§ 1-2.) During the ten-year lease, Swift agreed to use and occupy the leased premises for the operation of the processing and packaging of meat products. (*Id.* at § 10.) Meanwhile, Alex Lee reserved the right to have its personnel at the Lenoir Plant “at all times.” (*Id.*)

24. Section 18 of the Lease Agreement sets forth the events of default and the rights of Alex Lee in the event of a default by Swift and states, in relevant part:

18. EVENTS OF DEFAULT; RIGHTS OF LANDLORD UPON DEFAULT.

18.1 Tenant [*i.e.*, Swift] shall be in default of this Lease (each, a “Tenant Event of Default”) if Tenant (i) fails or omits to make payment of the Base Rent or any other item specified in this Lease that Tenant is required to make for fifteen (15) days or more after the same becomes due and owing; (ii) breaches any of the obligations or covenants provided in this Lease or the Purchase Agreement or fails to fully and promptly perform any act required of it in the performance of either agreement; (iii) abandons the Property; or (iv) becomes insolvent, makes an assignment for the benefit of creditors, is adjudicated bankrupt, has a receiver or trustee appointed for its property as a result of its insolvency, or is subjected to a levy of execution or attachments or other taking of its property or its assets or its leasehold interest in the

³ A true, correct, and authentic copy of the Lease Agreement is attached as Exhibit (“Ex.”) A.

⁴ A true, correct, and authentic copy of the Purchase Agreement is attached as Ex. B.

Property by process of law or otherwise in satisfaction of any judgment or debt or claim.

- 18.2 In the event of a Tenant Event of Default, Landlord [*i.e.*, Alex Lee], at its option, may, ***unless the Tenant Event of Default is cured within thirty (30) days after written notice of the Tenant Event of Default is delivered to Tenant***, immediately terminate this Lease and all of the rights of occupancy of Tenant under this Lease, and then Landlord shall have the right to enter the Property and remove all persons and property from the Property.
- 18.3 Notwithstanding anything to the contrary contained herein, if Tenant fails, refuses, or is unable to produce Products for Landlord 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.

* * *

(*Id.* at § 18) (emphasis added.)

25. The other material terms of the Lease Agreement include, but are not limited to, the following:

Rent. Swift agrees to pay rent to Alex Lee determined by (i) the weekly average volume of meat products produced by Swift in the Lenoir Plant during the month, and (ii) the total volume of meat products produced during the month based on a grid agreed to by the parties. (*Id.* at § 4.)

Improvements. Swift has the right to, at its sole cost and expense, make improvements or alterations to the leased premises, including, but not limited to, the addition of buildings, equipment, machinery or hardware. (*Id.* at § 8.) Before making any new improvements, Swift must provide Alex Lee with twenty-one days written notice. (*Id.*) Additionally, Swift must provide Alex Lee with an opportunity to remove existing equipment, machinery, or hardware existing on the leased property after

providing written notice. (*Id.*) However, to the extent any new improvements are expected to cost in excess of \$40,000.00 or could result in Swift providing Alex Lee with written notice and an opportunity to remove existing equipment, machinery, or hardware, Swift must obtain Alex Lee's prior written consent, which Alex Lee ***shall not unreasonably withhold, delay*** or condition upon Alex Lee's receipt of written notice. (*Id.* (emphasis added).)

Right of First Refusal. Swift has a right of first refusal "with respect to any offering for sale ***or*** accepting of an offer to purchase the lease premises or any portion thereof." (*Id.* at § 31 (emphasis added).) Additionally, Alex Lee agrees to provide Swift "with notice of such proposed sale including the materials [sic] terms of the offer" (*Id.*) Upon receiving the requisite notice, Swift has ten days to provide written notice to Alex Lee of Swift's intent to purchase the Lenoir Plant on the terms set forth in the notice. (*Id.*) However, if Swift does not deliver written notice of its intent to purchase the Lenoir Plant within 10 days, Swift is "deemed to have waived" its right of first refusal and Alex Lee may sell the leased premises to a third party "on such terms as set forth in the Offer Notice." (*Id.*)

Option to Purchase. Beginning on approximately October 21, 2018, Swift has a six-month window of opportunity to purchase the Lenoir Property for \$35 million if the Lease Agreement is still in full force in effect. (*Id.* at § 32.)

Memorandum of Lease. The parties agreed to execute and record, at Swift's expense, in the Caldwell County land records a Memorandum of Lease. (*Id.* at § 34.)

Notice. “Any notice required or permitted to be given” under the Lease Agreement must be in writing. (*Id.* at § 22.) And “[a]ny notice” from Alex Lee to Swift must be issued to “Swift Beef Company, 1770 Promontory Circle, Greeley, Colorado 80634, Attn: Chief Financial Officer, Telephone: (970) 506-8114.” (*Id.*)

26. As is customary and in accordance with the law, the parties agreed that the “terms, conditions and covenants” of the Lease Agreement are “binding upon and shall inure to the benefit of” of the parties, as well as their “heirs, personal representatives, successors, or permitted assigns, and shall run with the land, . . .” (*Id.* at § 26.)

B. The Purchase Agreement.

27. As a condition for Alex Lee agreeing to enter into the Lease Agreement, Swift also had to enter into the Purchase Agreement. In the Purchase Agreement, Alex Lee agreed to purchase, and Swift agreed to supply, certain Case Ready meat products that would be prepared and packaged in the Lenoir Plant.⁵

28. The term of the Purchase Agreement is ten years (concurrent with the Lease Agreement), and Swift is permitted to sell Case Ready fresh meats processed and packaged in the Lenoir Plant to third-parties as well as Alex Lee. (Ex. B at § 1; *see generally id.*)

29. The Purchase Agreement, which is governed by North Carolina law, includes the parties’ agreements regarding such issues as products, pricing,

⁵ The Purchase Agreement is structured so that as Alex Lee increases volume of purchases of Case Ready fresh meat products from Swift, Alex Lee’s cost per pound for the product decreases. Since entering into the Agreements, the volume of product ordered by Alex Lee has decreased. Consequently, Alex Lee’s cost per pound for meat products have increased, thereby motivating Alex Lee to terminate the Agreements.

responsibilities for delivery and shipment, product specifications, payment, warranties and guaranty, and indemnification obligations. (*Id.* at §§ 2-6, 8-9.)

30. The termination clause is in Section 12 and states:

12. Termination. Unless otherwise provided herein, this Agreement may be terminated by a Party immediately by written notice to the other Party upon the occurrence of any event of default by such other Party as provided for in Section 20 of this Agreement. Upon termination of this Agreement, the Lease shall also terminate immediately according to Section 18.3 of the Lease; if Company [*i.e.*, Swift] fails, refuses, or is unable to produce Products for Customer [*i.e.*, Alex Lee] in accordance with Section 3 hereof.

(*Id.* at § 12.)

31. Section 20 discusses default and remedies and states, in relevant part:

20. DEFAULT AND REMEDIES. A party shall be in default if any of the following conditions or events occurs:

20.1 Any material default by a Party under any of the terms and conditions of this Agreement or the Lease Agreement;

* * *

20.3 A Party defaults in the performance of any of the covenants or agreements to be kept, done or performed by and under the requirements of this Agreement, *the non-defaulting Party gives the defaulting Party 15 days written notice of such default, and the defaulting Party fails, neglects or refuses for a period of more than 15 days thereafter to make good or perform the default.* For the avoidance of doubt, all terms and conditions of this Agreement are considered material.

* * *

(*Id.* at § 20) (emphasis added.)

32. Finally, “[a]ny notice required or permitted” to be issued to Swift must be issued to William Rupp, the President and Chief Operating Officer for the North America and Australia Beef Division of Swift. (*Id.* at § 15.)

IV. The strategic importance of the Agreements to Swift.

33. By entering into both contracts, Swift obtained a foothold in the Carolinas, which allowed Swift to expand its Case Ready offering not only to Alex Lee, but to other customers along the Atlantic seaboard and the southeast. Obtaining this geographical foothold is important because Swift's customers are increasingly requesting Case Ready meat products that are immediately ready for consumers in the meat case.

34. By leasing, managing, and operating the Lenoir Plant, Swift could expand on its record of service and offering customized products to meet the needs of its existing and growing diverse customer base along the East Coast and the southeastern region of the United States.

35. Additionally, by expanding on its already successful Case Ready program by leasing, managing, and operating the Lenoir Plant, Swift could bring additional value to its customers and their consumers.

36. Currently, Swift serves two major national customers from Lenoir Plant, which results in scores of millions of dollars in yearly revenue for Swift.

V. Swift performs under the Agreements.

37. After entering into the Agreements, Swift took over the management and operations of the Lenoir Plant.

38. Since taking over the management and operation of the Lenoir Plant, Swift has used commercially reasonable efforts to produce Case Ready fresh meat products supplied to Alex Lee. Swift has also never failed, refused, or been unable to produce Case Ready fresh meat products for Alex Lee.

39. To the extent Alex Lee raised concerns relating to Swift's performance under the Agreements, Swift has investigated and cured any of the concerns that had merit. And to the extent Alex Lee's concerns may have arisen from misunderstandings or misinformation provided by former disgruntled employees, Swift presented information demonstrating why those concerns were unjustified or otherwise unsupported by the facts.

40. Additionally, Swift has voluntarily incurred substantial costs caused by Alex Lee's various significant program changes related to the meat products Alex Lee orders and purchases from the Lenoir Plant. Swift incurred these added costs in order to foster a good business relationship with Alex Lee under the Agreements.

41. Alex Lee has *never* issued any notices under the Agreements claiming that Swift was in default.

VI. Unlike Swift, Alex Lee has materially breached and continues to materially breach the Agreements.

42. While Swift has performed under the Agreements, Alex Lee has not.

43. Despite its obligation under Section 34 of the Lease Agreement to "promptly execute and record" a Memorandum of Lease in the land records of Caldwell County, Alex Lee continues to ignore Swift's many requests to sign and return the original Memorandum of Lease so that it may be filed in the public records.

44. Additionally, despite its obligation under Section 8.1 of the Lease Agreement to consent to Swift's proposed new improvements to the Lenoir Plant, Alex Lee continues to unreasonably withhold and/or delay providing its written consent to approximately \$9.03 million in proposed improvements, which will enhance the

operations of and improve efficiencies at the Lenoir Plant.⁶ These improvements include enlarging work areas, removing and replacing old equipment, upgrading production lines and equipment, and improving the work environment with additions to the cafeteria and employee locker areas. Finally, these improvements are necessary to satisfy the business expectations of Swift's two major national customers who purchase product from the Lenoir Plant.

45. Further, Alex Lee has also failed to pay Swift approximately \$272,877.81 (as of October 2, 2017) for Case Ready fresh meat products supplied to Alex Lee in accordance with the Purchase Agreement.

VII. In addition to materially breaching the Agreements, Alex Lee has recently commenced an illegal campaign to terminate the Agreements and eject Swift from the Lenoir Plant.

46. Although Swift has performed under the Agreements and Alex Lee has never issued any default notices to Swift, Alex Lee commenced a campaign beginning in July 2017 to terminate the Agreements and force Swift out of the Lenoir Plant.

47. On July 3, 2017, Alex Lee's President and CEO, Brian George, issued an email to Swift stating that "it will be best for our respective companies to end the case

⁶ A true, correct, and authentic copy of Swift's Notice of New Improvements issued to Alex Lee, Inc. is attached as Ex. C (the attachments to Ex. C have not been attached to the exhibit because they include confidential proprietary information and there is no confidentiality order entered in this case. However, upon the Court's request, Swift will provide the attachments to the Court under seal). Alex Lee's unreasonable withholding or delay of consent is reflected in Ex. K, in which Alex Lee tethers its consent to Swift either terminating the Lease Agreement or meeting Alex Lee's demand that Swift pay \$50 million for the Lenoir Plant. Alex Lee's conditions essentially render Section 8.1 of the Lease Agreement nugatory.

ready plant relationship by terminating the lease.”⁷ Nowhere in the email does Mr. George claim that Swift has defaulted under the Agreements in any manner.

48. Four days later on July 7, 2017, Swift responded by offering to purchase the Lenoir Plant and equipment from Alex Lee for \$30 million.⁸

49. Instead of accepting Swift’s offer, Alex Lee’s Senior Vice President, General Counsel, and Secretary, John B. Orgain, issued an “Offer Notice”⁹ to Swift.¹⁰ In the “Offer Notice,” dated July 18, 2017, Mr. Orgain mistakenly refers to Swift’s Right of First Refusal under Section 31 of the Lease Agreement as a “right of first offer (‘ROFO’)” and asserts that “this letter shall serve as a notice of such proposed sale offer.” Attached to the “Offer Notice” is an exhibit offering to sell the Lenoir Plant for \$50 million.

50. The “Offer Notice” does not state that Alex Lee received an offer to purchase the Lenoir Plant from a third-party,¹¹ but does assert that “Alex Lee believes” that Swift “is in breach of the Lease and the Purchase Agreement.” Alex Lee, however, fails to provide any details supporting this belief.

⁷ A true, correct, and authentic copy of the Mr. George’s July 3, 2017 email is attached as Ex. D.

⁸ A true, correct, and authentic copy of Swift’s response is attached as Ex. D.

⁹ A true, correct, and authentic copy of the “Offer Notice” is attached as Ex. E.

¹⁰ Notably, the “Offer Notice” was sent to the attention of Swift’s chief financial officer at the address for serving “any notices” as required under Section 22 of the Lease Agreement. By issuing this Offer Notice, Alex Lee knew how to issue a notice of default to Swift assuming a default ever occurred (which it did not).

¹¹ If Alex Lee has received an offer to purchase the Lenoir Plant from a third-party, which is not reflected in the “Offer Notice,” then the “Offer Notice” fails to state whether the offer to purchase recognizes Swift’s possessory interest in the Lenoir Plant under the Lease Agreement.

51. On July 26, 2017, eight days after receiving the “Offer Notice,” Swift responded by declining to accept Alex Lee’s offer to sell the Lenoir Plant for \$50 million.¹² Swift also requested further information supporting Alex Lee’s vague and ambiguous allegations accusing Swift of breaching the Agreements. Swift’s response letter also, among other things, questions Alex Lee’s motives behind issuing the “Offer Notice.” The letter states, in relevant part, the following:

Moreover, the timing of these allegations calls into question [Alex Lee’s] motives. I am concerned that the Fifty-Million-Dollar Notice and its vague claims of default, sent days after [Swift] made a bona-fide, fair, and solicited offer to purchase the facility, has been delivered in an effort to wrongfully threaten [Swift’s] right of occupancy. I presume this is to preserve negotiating leverage; however, in the event these threats are real, they signal an intent to subvert [Swift’s] rights under the Lease. Be advised [Swift] is prepared to immediately take any steps necessary, including commencing litigation to obtain injunctive relief in North Carolina, to protect its right to occupy the premises and conduct its lawful business in [sic] for the full duration of the Lease term.

As you know, the Lease runs with the land and is binding on any successors, assigns, or purchasers or [sic] the property. As a related item, Section 34 of the Lease requires that the Parties promptly record, at [Swift’s] cost, the Memorandum of Lease. Our review indicates that no such document has ever been signed by [Alex Lee] or recorded. I have a Memorandum of Lease signed by [Swift] for your immediate counter-signature and return for filing. Again, should you refuse or delay taking this required action, [Alex Lee] will be in default, and [Swift] will be required to take action necessary to protect its possessory interest, including recording *lis pendens* encumbering the property against any proposed sale. Please return a fully executed Memorandum of Lease to me no later than Wednesday, August 2, 2017.

52. Alex Lee never signed and returned the original of the Memorandum of Lease to Swift as requested. Moreover, Alex Lee did not seasonably respond to Swift’s

¹² A true, correct, and authentic copy of Swift’s response is attached as Ex. F.

request for further details supporting Alex Lee's belief that Swift was in default under the Agreements. In fact, nearly a month elapsed before Alex Lee responded.

53. On August 23, 2017, Alex Lee's outside legal counsel issued a letter accusing Swift of "permanently waiving its ROFO and its Option to Purchase the Property" by declining the \$50 million "right of first offer."¹³ However, counsel's accusation contradicts Section 31 of the Lease Agreement, which affords Swift a right of first refusal with "respect to *any* offering for sale *or* accepting of an offer to purchase" the Lenoir Plant. (Ex. A at § 31 (emphasis added).) Consequently, Swift has a right of first refusal with respect to each instance that Alex Lee offers the Lenoir Plant for sale or decides it is willing to accept an offer to purchase the Lenoir Plant.

54. Alex Lee's attorney's correspondence also vaguely refers to "numerous issues [that] have arisen in the past several years," but fails to provide details regarding any of the alleged "[n]umerous issues" or when they purportedly occurred. Additionally, the letter fails to identify when Alex Lee provided written notice of default to Swift relating to the "numerous issues" as required under Section 18.2 of the Lease Agreement. The letter also fails to attach any evidence that Alex Lee actually provided written notice of default to Swift.

¹³ A true, correct, and authentic copy of Alex Lee's lawyer's August 23, 2017 correspondence is attached as Ex. G.

55. On September 5, 2017, Swift again issued a written demand for Alex Lee to execute and return the original Memorandum of Lease so that it could be filed in the public land records of Caldwell County.¹⁴

56. Instead of performing its contractual obligations by signing and returning the original Memorandum of Lease to Swift, Alex Lee's legal counsel sent an email the following day essentially demanding that Swift either accede to Alex Lee's demand to pay \$50 million for the Lenoir Plant or else Alex Lee will "terminate the lease immediately" and "commence eviction proceedings" in order to eject Swift from the Lenoir Property.¹⁵

57. On September 12, 2017, Swift responded to Alex Lee's lawyer's September 6, 2017 correspondence and demonstrated that Alex Lee's arguments were factually and legally untenable and based on a misinterpretation of the Agreements.¹⁶ Swift concluded the letter by requesting "Alex Lee to issue a letter by 5:00 p.m. Central, Thursday, September 14, 2017, retracting Alex Lee's threat 'to terminate the lease immediately' and 'commence eviction proceedings.'" Swift also represented that "[b]y providing the retraction, the parties will be able to continue their business discussions in an effort to reach an amicable resolution relating to the [Lenoir] Plant and the Agreements."

¹⁴ A true, correct, and authentic copy of Swift's September 5, 2017 correspondence is attached as Ex. H

¹⁵ A true, correct, and authentic copy of Alex Lee's counsel's September 6, 2017 correspondence is attached as Ex. I.

¹⁶ A true, correct, and authentic copy of Swift's counsel's letter dated September 12, 2017 is attached as Ex. J.

58. At 3:55 p.m. Central on September 14, 2017, Alex Lee responded by stating that it was evaluating Swift's September 12, 2017 email and that it was unable to respond by the deadline "[b]ecause some key Alex Lee personnel were not available over the last couple of days."¹⁷ Alex Lee's correspondence did not retract its threat to immediately terminate the Agreement and commence eviction proceedings.

59. In light of Alex Lee's omission, Swift issued an email at 4:14 p.m. Central on September 14, 2017, requesting that Alex Lee confirm that it was not going to immediately terminate the Agreements and commence eviction proceedings.¹⁸

60. Thirty-five minutes later, Alex Lee's counsel responded stating "I cannot provide you any assurances as to what might happen in the future, but I do not have instructions to terminate the agreements or commence eviction proceedings at this time."¹⁹

61. In an effort to resolve this dispute before filing suit, representatives of both companies met on Thursday, September 28, 2017, to discuss a resolution. Unfortunately, the parties' discussions failed to result in an agreement. Because Alex Lee has made it abundantly clear through the language and tone in its communications that its next step will be to terminate the Agreements and commence

¹⁷ A true, correct, and authentic copy of Alex Lee's attorney's email at 3:55 p.m. Central on September 14, 2017 is attached as Ex. K.

¹⁸ A true, correct, and authentic copy of Swift's counsel's email at 4:14 p.m. Central on September 14, 2017 is attached as Ex. K.

¹⁹ A true, correct, and authentic copy of Alex Lee's counsel's email at 4:49 p.m. Central on September 14, 2017 is attached as Ex. K.

eviction proceedings against Swift, this lawsuit is filed seeking, among other things, injunctive relief, specific performance, declaratory relief, and money damages.

62. All conditions precedent to instituting legal action and/or obtaining relief have been performed.

COUNT I

Breach of Contract

63. Swift re-asserts and re-alleges the preceding paragraphs of this Complaint as if fully set forth herein verbatim.

64. The parties entered into the Agreements, which are enforceable. Swift has performed under the Agreements. Indeed, Alex Lee has not issued any default notices to Swift in accordance with the Agreements.

65. Alex Lee has breached the Agreements by: (1) failing to execute and return the original Memorandum of Lease as required under Section 34 of the Lease Agreement; (2) unreasonably withholding and/or delaying consent to Swift's proposed new improvements to the Lenoir Plant as required under Section 8.1 of the Lease Agreement; and (3) failing to pay Swift at least \$272,877.81 (as of October 2, 2017) for Case Ready fresh meat products supplied to Alex Lee in accordance with the Purchase Agreement.

66. Additionally, Alex Lee contends that Swift has waived its Right of First Refusal and Option to Purchase under Sections 31 and 32 of the Lease Agreement because Swift rejected Alex Lee's offer to sell the Lenoir Plant for \$50 million. By

asserting that Swift has waived its contractual rights under Sections 31 and 32 of the Lease Agreement, Alex Lee has materially breached the Lease Agreement.

67. Alex Lee's failure to pay Swift \$272,877.81 (as of October 2, 2017) for Case Ready fresh meat products supplied to Alex Lee has caused Swift to incur monetary damages.

68. Alex's Lee's breaches of its obligations under Sections 34 and 8.1 of the Agreements entitle Swift to specific performance—that is, an order, in the form of extraordinary relief or otherwise—instructing Alex Lee to sign and return the original Memorandum of Lease to Swift and for Alex Lee to provide Swift with written consent of Swift's proposed new improvements at the Lenoir Plant.

COUNT II

Anticipatory Repudiation or Breach of Contract

69. Swift re-asserts and re-alleges the preceding paragraphs of this Complaint as if fully set forth herein verbatim.

70. The parties entered into the Agreements, which are enforceable. Swift has performed under the Agreements. Indeed, Alex Lee has not issued any default notices to Swift in accordance with the Agreements.

71. Alex Lee has positively stated to Swift that it will not substantially perform its obligations under the ten-year Agreements because Alex Lee intends to immediately terminate the Agreements and commence eviction proceedings to evict Swift from the Lenoir Property. By terminating the Agreements and commencing eviction proceedings, Alex Lee would materially breach the Agreements because

Swift has not defaulted under Section 18 of the Lease Agreement or Sections 12 or 20 of the Purchase Agreement.

72. Further, even if Swift's act(s) and/or omission(s) constituted a default under either of the Agreements, which Swift denies, Swift is entitled to notice of default and an opportunity to cure under, at a minimum, Section 18.2 of the Lease Agreement and Section 20.3 of the Purchase Agreement. Because Alex Lee has never provided a default notice to Swift as required under the Agreements, terminating the Agreements as Alex Lee intends would result in a material breach of the Agreements.

73. Additionally, and pleading in the alternative, Alex Lee's positive assertions that Swift has waived its Right of First Refusal and Option to Purchase under Sections 31 and 32 of the Lease Agreement because Swift rejected Alex Lee's offer to sell the Lenoir Plant for \$50 million constitutes an anticipatory breach or repudiation of Sections 31 and 32 of the Lease Agreement.

74. As the above demonstrates, Alex Lee's distinct, unequivocal, and absolute refusal to perform under the Agreements has been treated as such by Swift.

75. Alex Lee's anticipatory breaches of the Agreements will result in irreparable harm to Swift since Swift will be denied its right to use the leased premises throughout the remainder of the ten-year term, resulting in the disruption and disturbances of Swift's relationships with its customers served out of the Lenoir Plant, loss of valuable customers, loss of business opportunities, loss of good will, and loss of sales. Alex Lee's anticipatory breaches of the Agreements will also irreparably harm Swift by, among other things, denying Swift the opportunity to acquire the

Lenoir Property by matching any bona fide offer that Alex Lee accepts from a third-party on or before October 21, 2018 and/or acquiring the Lenoir Plant for \$35 million beginning on approximately October 21, 2018 through April 21, 2019.

76. Swift has no adequate remedy at law as a result of Alex Lee's anticipatory breaches of the Agreements.

77. Because Alex Lee has repudiated the Agreements based on its positive statements, Swift filed this lawsuit immediately after quickly attempting to resolve the dispute without judicial intervention.

COUNT III

Declaratory Judgment

78. Swift re-asserts and re-alleges the preceding paragraphs of this Complaint as if fully set forth herein verbatim.

79. Swift has performed under the enforceable Lease Agreement.

80. Sections 31 and 32 of the Lease Agreement grant Swift a Right of First Refusal and an Option to Purchase the Lenoir Plant.

81. Alex Lee contends that Swift's rights under Sections 31 and 32 of the Lease Agreement were waived when Swift refused to accept Alex Lee's proposed sale offer of \$50 million for the Lenoir Plant. But Alex Lee's position is based on a misinterpretation of the Lease Agreement.

82. In Section 31 of the Lease Agreement, Swift has a right of first refusal with "respect to **any** offering for sale **or** accepting of an offer to purchase" the Plant. (Emphasis added). Said another way, Swift has a right of first refusal with respect

to each instance that Alex Lee offers the Lenoir Plant for sale or decides it is willing to accept an offer to purchase the Plant. Consequently, Swift's decision not to provide Alex Lee with written notice of an intent to purchase the Lenoir Plant on the terms set forth in Alex Lee's July 18, 2017 "Offer Notice" has no effect on Swift's right to exercise a right of first refusal as to any bona fide offer to purchase the Lenoir Plant that Alex Lee intends to accept, let alone its option to purchase the Plant under Section 32. To conclude otherwise not only contradicts the express language and purpose of Sections 31 and 32, but would also render these provisions illusory.

83. For these reasons, Swift is entitled to a declaration under 28 U.S.C. § 2201 that Swift's contractual rights under Sections 31 and 32 of the Lease Agreement have not been waived or otherwise extinguished by Swift's rejection of the terms set forth in Alex Lee's July 18, 2017 "Offer Notice," that Swift is still entitled to notice and the right to exercise a right of first refusal as to any offer of sale or bona fide offer to purchase the Lenoir Plant that Alex Lee intends to accept, and that Swift may exercise its right to purchase the Lenoir Plant, as provided in the Lease Agreement and its accompanying Exhibit B (Form of Purchase Agreement) beginning approximately October 21, 2018 through and including April 21, 2019.

COUNT IV

Injunctive Relief

84. Swift re-asserts and re-alleges the preceding paragraphs of this Complaint as if fully set forth herein verbatim.

85. Pursuant to Federal Rule of Civil Procedure 65, Swift requests a temporary restraining order and preliminary injunction because Alex Lee is threatening to immediately terminate the Agreements and commence eviction proceedings in order to eject Swift from the Lenoir Plant.

86. Additionally, Swift requests the temporary restraining order and the preliminary injunction to grant affirmative relief by instructing Alex Lee to immediately execute and return the original executed Memorandum of Lease to Swift and to provide Swift with written consent to the \$9.03 million in improvements that Swift seeks to perform at the Lenoir Plant.

87. Swift is likely to succeed on the merits, as reflected by the exhibits attached to the Complaint.

88. Without injunctive relief and ordering specific performance, Swift has no adequate remedy at law.

89. If Alex Lee terminates the Agreements and evicts Swift from the Lenoir Plant, Swift will suffer immediate and irreparable harm. The irreparable harm includes, but is not limited to, denying Swift its leasehold rights during the remaining six-and-a-half years of the ten-year Lease Agreement, disruption and disturbances of Swift's relationships with its customers served out of the Lenoir Plant, loss of valuable customers, loss of business opportunities, loss of good will, and loss of sales. It will be difficult to determine or calculate with exact certainty the full monetary value of the damages caused by Alex Lee's imminent threat of irreparable harm to Swift.

90. Swift requests the Court enter a temporary restraining order enjoining Alex Lee from terminating the Agreements and commencing eviction proceedings and maintaining the status quo until such time as Swift may be heard on its request for a preliminary injunction.

91. Swift is also entitled to an order instructing Alex Lee to specifically perform its contractual obligations under Section 34 of the Lease Agreement by immediately providing Swift with the original executed Memorandum of Lease. In the absence of a Memorandum of Lease filed in the county records where the Lenoir Plant is located, any potential purchaser of the facility could be misled into believing that any acquisition of the Lenoir Plant would be without a tenant when Swift still has approximately six-and-a-half years remaining on the ten-year Lease Agreement. This is particularly important since Alex Lee is apparently currently trying to find a buyer for the Lenoir Plant.

92. Swift is also entitled to an order instructing Alex Lee to specifically perform its contractual obligations under Section 8.1 of the Lease Agreement by immediately providing Swift with written consent to the \$9.03 million in improvements. Without the improvements, Swift's operations in the Lenoir Plant will be less efficient and cost-effective than they could be if the improvements were performed. Additionally, Alex Lee's continued failure to comply with Section 8.1 of the Lease Agreement will continue to frustrate Swift's ability to satisfy the business expectations of two major national customers and thus Swift will, at a minimum, suffer loss of good will and its reputation will be harmed.

93. The balance of equities weighs in favor of granting a temporary restraining order (“TRO”) that restrains Alex Lee from terminating the Agreements and evicting Swift from the Lenoir Plant and that also compels Alex Lee to sign and return documents to Swift as required under the Lease Agreement. On the one hand, entering the TRO would merely require Alex Lee to comply with the Agreements which it voluntarily executed. On the other hand, Swift is likely to suffer irreparable harm in the absence of injunctive relief.

94. Entering a TRO would in no way damage the public interest. In fact, granting injunctive relief will further the public policy of North Carolina by respecting contracts and ensuring the efficient production of food available to North Carolinians and others.

PRAYER OF RELIEF

WHEREFORE, Plaintiff Swift Beef Company prays for relief as follows:

1. that the Court issue a temporary restraining order:
 - a. enjoining Alex Lee from terminating the Agreements and commencing eviction proceedings and maintaining the status quo; and
 - b. compelling Alex Lee: (i) to specifically perform its obligations under Section 34 of the Lease Agreement by providing Swift with the original executed Memorandum of Lease within twenty-four hours of the Court’s order; and (ii) to specifically perform its obligations under Section 8.1 of the Lease Agreement by

providing Swift with written consent to the \$9.03 million in improvements within twenty-four hours of the Court's order.

2. upon a hearing on Swift's request for a preliminary injunction, the Court issue a preliminary injunction enjoining Alex Lee from terminating the Agreements and commencing eviction proceedings;

3. that the Court enter a declaratory judgment pursuant to 28 U.S.C. § 2201, that Swift's contractual rights under Sections 31 and 32 of the Lease Agreement have not been extinguished by Swift's rejection of the terms set forth in Alex Lee's July 18, 2017 "Offer Notice," that Swift is still entitled to notice and the right to exercise a right of first refusal as to any bona fide offer to purchase the Lenoir Plant that Alex Lee intends to accept, and that Swift may exercise its right to purchase the Lenoir Plant, as provided in the Lease Agreement and its accompanying Exhibit B (Form of Purchase Agreement), beginning approximately October 21, 2018 through and including April 21, 2019;

4. that judgment be entered for Swift and against Alex Lee for compensatory damages in an amount to be ascertained and established at trial;

5. that judgment be entered for Swift and against Alex Lee for attorneys' fees and other expenses incurred by Swift in the enforcement of the Agreements;

6. that Swift be awarded prejudgment and post-judgment interest as allowed by law;

7. that Swift be awarded its costs; and

8. that Swift have such other and further relief as the Court may deem proper.

Respectfully submitted, this 2nd day of October, 2017.

NELSON MULLINS RILEY &
SCARBOROUGH LLP

By: /s/ Thomas G. Hooper

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

Civil Action No. _____

SWIFT BEEF COMPANY,)
)
Plaintiff,)
)
vs.)
)
ALEX LEE, INC.,)
)
Defendant.)
)
)

VERIFICATION

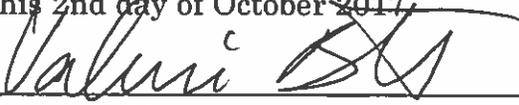
Personally appeared before me, an officer duly authorized to administer oaths in the State of Colorado, the undersigned, Adam Bode, who under penalty of perjury, did solemnly swear and affirm that all the statements contained in the Verified Complaint for Injunctive Relief and Damages are true and correct to the best of his personal knowledge, information, and belief.

So affirmed this 2nd day of October 2017.



Adam Bode
Swift Beef Company

Sworn to and subscribed before me
This 2nd day of October 2017.



Notary Public

My commission expires: 1-8-20

