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

Civil Action No. 5:17-cv-176

SWIFT BEEF COMPANY,

Plaintiff/Counterclaim-Defendant,

v.

ALEX LEE, INC.,

Defendant/Counterclaim-Plaintiff.

ALEX LEE'S OPPOSITION TO SWIFT BEEF COMPANY'S PARTIAL MOTION TO DISMISS

Defendant/Counterclaim-Plaintiff Alex Lee, Inc. ("Alex Lee") states as follows in Opposition to Plaintiff/Counterclaim Defendant Swift Beef Company's ("Swift Beef") Partial Motion to Dismiss (ECF No. 30):

INTRODUCTION

Alex Lee and Swift Beef entered into an ill-fated commercial relationship during which Swift Beef engaged in systematic deceptive trade practices, unlawfully converted Alex Lee's property, and defrauded Alex Lee. Swift Beef's conduct—which Alex Lee alleged in specific detail—constitutes a violation of North Carolina's Unfair Deceptive Trade Practices Act ("UDTPA"), conversion, and fraud. Yet Swift Beef, in its partial motion to dismiss, suggests that because the parties' relationship was founded on two contractual agreements—which Swift Beef also violated—these claims are somehow duplicative or unwarranted. Not so. Each of these claims is fully warranted and arises directly from Swift Beef's conduct during the parties'

dealings. In arguing otherwise, Swift Beef both misconstrues applicable law and either ignores or distorts the allegations in the Counterclaims.

First, Swift Beef argues that Alex Lee has not pled the "substantial aggravating circumstances" necessary to give rise to a UDTPA claim. But Alex Lee specifically pled multiple instances where Swift Beef engaged in conduct that deceived Alex Lee in the course of the parties' commercial dealings. Swift Beef's unfair and deceptive conduct constitutes precisely the type of "significant aggravating circumstances" that give rise to a UDTPA claim, and courts routinely hold that similarly deceptive conduct supports a UDTPA claim where the parties' dealings arose from contractual arrangements.

Second, Swift Beef claims that it did not commit conversion over supply inventory that Alex Lee owned when it sold that inventory without authorization (and subsequently charged Alex Lee for it anyway) because (i) it was the true owner of the property under the Purchase Agreement, (ii) the conversion was of money that was commingled, and (iii) Alex Lee did not make a specific demand for return of the property that was refused. Each of these arguments fails. The Purchase Agreement governed meat and related products ***produced*** at the Lenoir Plant, ***not*** supply inventory provided by Alex Lee for ***use*** at the Plant. Moreover, Alex Lee's claim is not for conversion of money but for the conversion of its supply inventory. The fact that Swift Beef sold the supply inventory does not transform the claim into one for the conversion of money (or else a party could always escape liability for conversion by selling the property and commingling the proceeds). Finally, demand and refusal is only necessary to bring a claim for conversion where the claim is brought against a party that remains in lawful possession of the property. This requirement has no application—and is obviously superfluous—where the possessor has ***disposed*** of the property without authorization, as Swift Beef did here.

Finally, Swift Beef argues that Alex Lee's fraud claim is not pled with the requisite specificity. But Alex Lee, through its Counterclaims and Exhibit C thereto, specified the "who, what, where, when, and why" of its fraud claim: Plant General Manager Jon Johnson instructed his employees to falsify labor records at the Plant beginning in June of 2015 so as to improperly charge Alex Lee with labor costs that should have been charged to a third party. These specific factual allegations are sufficient to plead fraud and place Swift Beef on notice of the claim against it. Swift Beef also misconstrues Alex Lee's claim as one for promissory fraud, suggesting that Alex Lee is simply alleging that Swift Beef failed to perform its obligations under the Purchase Agreement. This argument fundamentally distorts Alex Lee's core allegation: Swift Beef knowingly engaged in fraud separate and apart from its failure to perform under the contract. Finally, Swift Beef suggests that Alex Lee could not have reasonably relied on its misrepresentations because it did not immediately terminate the parties' relationship upon discovery of evidence that Swift Beef may have defrauded it but instead sought further information and to resolve the parties' dispute without litigation. This allegation distorts the timeline of events, as Alex Lee had ***already*** relied on Swift Beef's misrepresentations and omissions upon initial discovery of evidence of fraud.

In short, Alex Lee pled specific facts demonstrating that Swift Beef engaged in deceptive trade practices, converted Alex Lee's property, and committed fraud. Swift Beef's arguments fail to demonstrate otherwise and accordingly its motion should be denied in full.

STATEMENT OF FACTS

I. Alex Lee and Swift Beef Enter Into Agreements for Lease of the Lenoir Plant and Purchase of Meat Products Produced There.

Alex Lee is a food retail and distribution company headquartered in Hickory, North Carolina. (ECF No. 26) ("Counterclaims" ¶ 1). Alex Lee owns and operates the grocery store

chain Lowes Foods, LLC ("Lowes") and the wholesale grocery distributor Merchants Distributors, LLC ("MDI"). Alex Lee also owns the meat processing and packaging plant in Lenoir, North Carolina (the "Plant") that is the subject of this lawsuit. (*Id.* ¶¶ 2, 4). Because Lowes sells fresh meat, Alex Lee has generally leased the Plant to companies that can process meat at the facility to service Lowes' needs. (Compl. (ECF No. 1) ¶ 20). Swift Beef is a beef supplier owned by JBS USA Food Company ("JBS USA"), which maintains headquarters in Greeley, Colorado. (Counterclaims ¶ 3). JBS SA is the parent company of JBS USA and is headquartered in Brazil. (*Id.* ¶¶ 79-80).

On April 21, 2014, Alex Lee and Swift Beef entered into a set of agreements under which Alex Lee would lease the Plant to Swift Beef and purchase meat Swift Beef produced at the facility. (*Id.*, Ex. A, B). The Lease and Purchase Agreement are interrelated and detail the parties' contractual obligations relating to production and purchase of meat from the Plant. (*Id.* ¶¶ 8-20). Over the course of the relationship, Swift Beef has failed to produce meat according to the terms of the agreements in a variety of ways, including failure to provide meats in an efficient, timely, and cost effective manner. (*Id.* ¶¶ 21-29, 51-55). Swift Beef further repeatedly failed to deliver product to Alex Lee meeting the quality and safety requirements in the parties' agreements. The products provided by Swift Beef had chronic issues such as poor packaging, the presence of bone fragments in sausage, and the delivery of injected pork. (*Id.* ¶¶ 56-64).

II. Swift Beef Defrauds Alex Lee By Falsifying Labor Records to Charge Alex Lee Costs Not Attributable to It.

Swift Beef's deficient performance under the Purchase and Lease Agreements is far from the only problem that has arisen over the course of the parties' relationship. In early 2016, Alex Lee learned from former Swift Beef employees that Swift Beef used practices at the Lenoir Plant that fraudulently increased costs to Alex Lee. (*Id.* ¶¶ 30-50). Unsolicited, former employees of

Swift Beef informed Alex Lee that Swift Beef personnel, realizing that they did not have the proper equipment to meet service level commitments made to another customer (a direct competitor of Alex Lee), decided to allocate service costs associated with servicing that customer to Alex Lee instead. (*Id.* ¶¶ 31-33). The former Swift Beef employees reported that they were instructed by Plant General Manager Jon Johnson to falsify labor records in order to meet the predetermined service level standards for the other customer and improperly pass on costs to Alex Lee instead. (*Id.* ¶ 33); *see also* Ex. C). A subsequent investigation by Alex Lee corroborated the former employees' story, as Alex Lee uncovered a corresponding negative variance in its labor costs under the contract for the relevant time period. (Counterclaims ¶¶ 34-36; *see also* Ex. C). Upon discovering this evidence, Alex Lee contacted Swift Beef to discuss the information learned but did not receive a satisfactory response. (Counterclaims ¶ 37; *see also* Ex. C, at 5 (noting that proffered explanations by Swift Beef were unsupported and did not correspond with the data)).

III. Swift Beef Sells Alex Lee's Supply Inventory Without Authorization and Deceptively Attempts to Conceal Its Conduct.

At about the same time that Alex Lee was tipped regarding Swift Beef's scheme to fraudulently charge it with labor costs attributable to a competitor, Alex Lee noticed that Swift Beef attempted to increase the accrual balance owed by Alex Lee by over $45,000 without prior notice or explanation. (*See id.* ¶ 44). When confronted, Swift Beef claimed that it had written off obsolete supply inventory that belonged to Alex Lee. (*See id.* ¶ 46). Setting aside the fact that the parties had previously discussed a mitigation strategy with respect to aged supplies (*see id.* ¶ 46), and that the only reason the inventory was obsolete was Swift Beef's own negligence and failure to meet its contractual obligations (*see id.* ¶ 47), Alex Lee subsequently learned that

Swift Beef had sold some of the ostensibly obsolete supplies without crediting (or informing) Alex Lee (*see id.* ¶ 48).

At the same time that Alex Lee was experiencing these issues with Swift Beef, a bribery and collusion scandal was enveloping the highest level executives of JBS SA, the parent company of JBS USA, which owns Swift Beef. (*Id.* ¶¶ 79-80). This scandal, which culminated in public admissions of fraudulent conduct from JBS executives, demonstrated that Alex Lee's concerns over Swift Beef's conduct were not without basis; rather, Swift Beef's actions arose from and were clearly influenced by a corporate culture of corruption and fraud.

On or about October 2, 2017, after a drawn-out period of negotiations, Swift Beef instituted this lawsuit against Alex Lee, bringing claims for (1) breach of contract, (2) anticipatory repudiation or breach of contract, (3) declaratory judgment, (4) and injunctive relief, arising out of the contractual relationship between the parties. (*See generally* Compl. (ECF No. 1)). On or about November 21, 2017, Alex Lee filed an Answer and Counterclaims, asserting claims against Swift Beef for (1) breach of contract as to the purchase agreement, (2) breach of contract as to the lease, (3) conversion, (4) fraud, and (5) unfair and deceptive trade practices as set forth in N.C.G.S. § 75-1.1, *et seq*. (*See generally* Counterclaims (ECF No. 26)). Swift Beef then moved to dismiss the Counterclaims in part, and to strike paragraphs 79-86 of the Counterclaims, along with a Bloomberg article attached as Exhibit F, relating to fraudulent activities of Swift Beef's managers. For the reasons set forth below, Swift Beef's partial motion to dismiss should be denied.

ARGUMENT

I. Alex Lee Has Pled Precisely the Type of Deceptive Trade Practices That Support a UDTPA Claim.

North Carolina's UDTPA prohibits "unfair or deceptive acts or practices in or affecting commerce[.]" N.C.G.S. § 75-1.1. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 276 S.E.2d 397, 403 (N.C. 1981). Additionally, "a trade practice is deceptive if it 'possesses the tendency or capacity to mislead, or creates the likelihood of deception.'" *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 507 S.E.2d 56, 63 (N.C. Ct. App. 1998) (quoting *Forsyth Memorial Hospital v. Contreras*, 421 S.E.2d 167, 170 (N.C. Ct. App. 1992)) (internal alterations omitted). To state a claim for a deceptive act under the UDTPA, "it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception[.]" *Chastain v. Wall*, 337 S.E.2d 150, 153-54 (N.C. Ct. App. 1985) (internal quotation marks and citations omitted). Rather, a plaintiff must simply "show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception. Intent of the defendant and good faith are irrelevant." *Id.*; *see also Cameron v. Martin Marietta Corp.*, 729 F. Supp. 1529, 1531 (E.D.N.C. 1990) ("To prevail under the Act, one must show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception.").

Here, Alex Lee has clearly pled that Swift Beef engaged in several acts that unfairly misled and deceived Alex Lee, thus stating a claim under the UDTPA. Swift Beef attempted to pass off labor costs to Alex Lee that should have been attributed to Alex Lee's competitor, Food Lion; ***concealed*** its conduct from Alex Lee, which only learned of Swift Beef's conduct when it received unsolicited tips from former Swift Beef employees; and then failed to provide

satisfactory explanations in response to Alex Lee's inquiries. (*See* Counterclaims ¶¶ 33-37). Additionally, Swift Beef deceived Alex Lee by attempting, without prior notice, to charge Alex Lee for allegedly obsolete supplies (despite the parties' prior discussions on this exact issue) while at the same time profiting off of the sale of those same supplies. (*See id.* ¶ 48). This is precisely the type of deceptive and unfair conduct that the UDTPA renders unlawful. *See County of Harnett v. Rogers*, No. COA16-757, 2017 WL 1056245, at *3 (N.C. Ct. App. March 21, 2017) ("[T]he UDTPA was designed to achieve fairness in dealings between individual market participants") (citing *White v. Thompson*, 691 S.E.2d 676, 679 (N.C. 2010)).[1]

Swift Beef argues that "Alex Lee is trying to transform breach-of-contract allegations into a UDTPA claim" and but failed to plead "substantial aggravating circumstances" in order to bring its claim. (Swift Beef's Mem., at 10-11). This argument simply ignores the allegations in the Counterclaims. Courts interpreting North Carolina law have long held that deceptive conduct in the course of breaching a contract, such as the conduct Alex Lee alleges Swift Beef committed, is absolutely the type of "substantial aggravating circumstance" that gives rise to a UDTPA claim. Indeed, where a party engages in deceptive conduct that ***also*** constitutes a breach of contract, the aggrieved party may bring a UDTPA claim and "[i]t does not matter that the same set of facts also constitutes a breach of contract." *Garlock v. Henson*, 435 S.E.2d 114, 116 (N.C. Ct. App. 1993) (affirming trial court judgment that defendant violated UDTPA where defendant forged a bill of sale in order to deprive plaintiff of money owed under a contract); *see also Foley v. L & L International, Inc.*, 364 S.E.2d 733, 736 (N.C. Ct. App. 1988) (holding that

[1] Indeed, as alleged in the Counterclaims (and detailed further *infra*), Swift Beef's attempt to pass off labor costs constituted fraud. "Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts[.]" *Hardy v. Toler*, 218 S.E.2d 342, 346 (N.C. 1975).

evidence the defendant retained plaintiff's down payment for seven months and continually maintained that the car was on its way even though it had not been ordered constituted evidence of both breach of contract and violation of UDTPA); *Cameron v. Martin Marietta Corp.*, 729 F. Supp. 1529, 1531 (E.D.N.C. 1990) (denying motion to dismiss UDTPA claim where defendant "did not disclose" material facts in land sale, causing plaintiffs to be "deceived").

Swift Beef engaged in a pattern of conduct, including concealing material information regarding labor charges and supply inventory that deceived and harmed Alex Lee. These allegations demonstrate both unfair and deceptive trade practices and precisely the type of "substantial aggravating circumstances" that support a claim for violation of the UDTPA, regardless of whether they occur in the course of a commercial relationship governed by contractual agreements.

II. Swift Beef's Unauthorized Sale of the Supply Inventory, Which Was Alex Lee's Property, Constitutes Conversion.

As Alex Lee explained in its Counterclaims, "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 the sale." (Counterclaims ¶ 48 (second emphasis added); *see also id.* ¶ 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.") (emphasis added)). This is a textbook claim for conversion: the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Peed v. Burleson's, Inc.*, 94 S.E.2d 351, 353 (N.C. 1956) (as quoted in Swift Beef's Mem., at 11-12).

Yet, despite the fact that this is a straightforward claim for conversion—Swift Beef's unauthorized exercise of ownership over supply inventory belonging to Alex Lee—Swift Beef argues that Alex Lee has not stated a claim. In order to do so, Swift Beef distorts the nature of the Purchase Agreement, misstates the law, and ignores the allegations in the Counterclaims.

First, Swift Beef argues that the Purchase Agreement "shows that the property was not owned by Alex Lee." (Swift Beef's Mem., at 12). But the Purchase Agreement plainly governs the supply of ***meat*** produced by Swift Beef at the Lenoir Plant, ***not*** the provision of ***supply inventory*** by Alex Lee for use in operating the machinery at the Plant. The second "Whereas" clause (which Swift Beef quotes) states:

> **WHEREAS,** As a condition for [Alex Lee's] agreement to Lease the Property to the Company, the Company has agreed to supply the products indicated on **Exhibit A** attached hereto and incorporated herein ("Products") which are ***produced by the Company on the Property***[.]

Exhibit B (ECF No. 26-3), at 2 (emphasis added). Exhibit A, in turn, states that the products to be supplied are "Protein and Related Products as may be agreed upon by the parties from time to time." *Id.*, at 9. In short, the Purchase Agreement states that Swift Beef will supply certain protein products to Alex Lee that it produces at the Lenoir Plant. It does ***not***, as Swift Beef suggests, provide that supply inventory for use in machinery at the Lenoir Plant belongs to Swift Beef. Nothing in the Purchase Agreement contradicts, or even speaks to, ownership of supply inventory. Because the Purchase Agreement is silent on this issue, Alex Lee's allegation that the supply inventory belonged to it stands uncontradicted and must be taken as true here. *See Davis v. Trans Union, LLC*, 526 F. Supp. 2d 577, 582 (W.D.N.C. 2007).

Swift Beef also argues that Alex Lee's allegation that Swift Beef exercised unauthorized control over Alex Lee's property does not constitute conversion because "the Counterclaims do not allege facts showing that the funds at issue were to have been segregated from other funds . .

. ." (Swift Beef's Mem., at 13). This proposition simply misstates the law on conversion. As explained by the court in *Alderman v. Inmar Enterprises, Inc.* (the only case Swift Beef cites for this point):

> [I]n general, actions for conversion involve either goods or personal property. . . . [W]hen the property involved is money, such money may be the subject of an action for conversion *only* when it is capable of being identified and described as a specific chattel. In order to be 'identified and described as a specific chattel,' the general rule is that the money must be segregated from other funds or kept in a separate bank account and not commingled with the alleged convertor's other funds.

201 F. Supp. 2d 532, 548 (M.D.N.C. 2002), *aff'd per curium*, 58 F. App'x 47 (4th Cir. 2013) (citations omitted). In *Alderman*, the defendants alleged that the plaintiff had converted money that did not belong to her but had been accidentally deposited in her account. The court denied the defendants' motion for summary judgment on their claim "[b]ecause Defendants have produced no evidence that Plaintiff took any action to identify the funds after they were deposited in her bank account." *Id.*

Here, Alex Lee's conversion claim is ***not*** for the conversion of money (as in *Alderman*) but rather for the conversion of ***goods***: specifically, the supply inventory owned by Alex Lee over which Swift Beef exercised unauthorized control. The fact that Swift Beef exercised unauthorized control by selling the goods is immaterial: it is basic, fundamental tort law that the converter of a good cannot escape liability for conversion by selling it. *See* Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts § 61 (2d ed.) ("White steals Green's watch, worth $500 at the time. He later sells it. White is a converter and liable for the $500").[2] The

[2] The underlying rationale of the "specific identification" rule for conversion of money is that money is a liquid and transferrable asset; if it is not specifically identified and segregated, then it is impossible to determine what money was originally the plaintiff's or the defendant's. *C.f. Alderman*, 201 F. Supp. 2d at 548 (holding that the "specific identification" requirement renders money "capable of being identified and described as a specific chattel"). This rationale has no (*footnote continued*)

rule stated in *Alderman*, that money that is allegedly converted must be capable of specific identification, has no application to an action for the conversion of property. If it did, then every converter of property could escape liability simply by selling it and commingling the proceeds.

Finally, Swift Beef argues that Alex Lee's conversion claim is defective for failure to allege that Alex Lee demanded, and Swift Beef refused, return of the supply inventory. (Swift Beef's Mem., at 13-14). In so arguing, Swift Beef blatantly distorts the actual factual allegations in the Counterclaims. Swift Beef claims that "Alex Lee admits that Swift was permitted to sell the supply inventory" because the parties had previously discussed a mitigation strategy. *Id.* at 14. In point of fact, Alex Lee alleged that it had made a prior "request that the parties ***work together*** to effectuate the sale of those supplies." (Counterclaims ¶ 46 (emphasis added)). This allegation can hardly be construed as an admission—let alone a "fatal" one, as Swift Beef claims—that Swift Beef was permitted to sell the supply inventory that belonged to Alex Lee and ***keep the proceeds*** without so much as informing Alex Lee (and in fact attempting to charge Alex Lee for that same inventory).

Swift Beef also claims that Alex Lee did not allege that it demanded return of the supply inventory because it was "sold sometime around January 2016 without Alex Lee making any demand for possession of the property." (Swift Beef's Mem., at 14). Of course, the reason that Alex Lee did not demand return of the supply inventory at that time is that it was completely

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application in an action for conversion of goods, as actual chattel is capable of specific identification and a determination of original ownership. In any event, the Supreme Court of North Carolina in *Variety Wholesalers, Inc. v. Salem Logistics Traffic Services, LLC*, 723 S.E.2d 744, 750 (N.C. 2012)—*after* the district court's decision in *Alderman*—called into question the continuing viability of the "specific identification of money" rule. *See id.* at 750 ("The requirement that there be earmarked money or specific money capable of identification before there can be a conversion has been complicated as a result of the evolution of our economic system.").

unaware that Swift Beef had, without authorization or even informing Alex Lee, sold the supply inventory. As Alex Lee alleged, it discovered an "unauthorized and unanticipated $45,916.26 charge" from Swift Beef, at which point it "confronted" Swift Beef about the charge and subsequently learned that the inventory had been sold "without providing notice to Alex Lee[.]" (Counterclaims ¶¶ 46-48). Swift Beef thus makes the absurd suggestion that Alex Lee should have demanded return of property it had no knowledge would be sold (and that it would subsequently be charged for while Swift Beef retained the proceeds of the sale).

In any event, Swift Beef's argument that a claim for conversion necessarily fails when the claimant does not specifically plead demand and refusal is wrong. The requirement that a party must demand return of its goods, and be refused, arises only when the possessor is in lawful possession of the goods but refuses to return them (in such a case, possession alone does not *ipso facto* constitute conversion but the refusal to return upon demand creates liability). *See, e.g.*, Restatement (Second) of Torts § 237 (1965) ("One ***in possession of a chattel*** as a bailee or otherwise who, on demand, refuses without proper qualification to surrender it to another . . . is subject to liability for its conversion.") (emphasis added). Where the possessor has unlawfully ***disposed*** of the goods, such as by selling them, then no demand and refusal is needed; indeed, in such cases demand and refusal would be futile. *See id.* § 233 ("[O]ne who as agent or servant of a third person ***disposes of a chattel*** to one not entitled to its immediate possession in consummation of a transaction negotiated by the agent or servant, is subject to liability for conversion . . . .") (emphasis added); *id.* § 237 cmt. a ("[A]n agent who disposes of a chattel by delivery in consummation of a sale . . . is within the rule stated in this Section[.]"); *cf. Hoch v. Young*, 305 S.E.2d 201, 203 (N.C. Ct. App. 1983) ("Where there has been no wrongful taking ***or disposal of goods***, and the defendant has merely come rightfully into possession and then refused

to surrender them, demand and refusal are necessary to the existence of the tort.") (quoting Prosser, *The Law of Torts* 4th, § 15 at pp. 89-90 (1971)) (emphasis added).[3]

III. Alex Lee Has Pled the "Who, What, Where, When and Why" of Swift Beef's Fraud.

Swift Beef argues that Alex Lee's fraud claim lacks the particularity required by Federal Rule of Civil Procedure 9(b) because Alex Lee "do[es] not specifically identify who at Swift made any alleged false representations, the content of those representations, when the representations were made, or where they were made." (Swift Beef's Mem., at 15). Once again, this argument simply ignores the substance of Alex Lee's allegations. The Counterclaims and Exhibit C (which Alex Lee incorporated by reference) set forth in critical detail the elements of the alleged fraud. Exhibit C, an investigative report regarding the fraud, explains that Plant General Manager, Jon Johnson, instructed his employees to falsify labor records at the Plant beginning in June of 2015 so as to charge Alex Lee with labor amounts that should have been charged to Food Lion, a competitor of Alex Lee. (*See generally* Ex. C (ECF No. 26-4); Counterclaims ¶ 107 ("As set forth in the report attached hereto as Exhibit C . . . .")). These allegations constitute the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." (Swift Beef's Mem., at 15 (quoting *U.S. ex rel. Wilson v. Kellog, Brown & Root, Inc.*, 525 F.3d 370,

[3] Swift Beef principally cites *TSC Research, LLC v. Bayer Chems. Corp.*, 552 F. Supp. 2d 534 (M.D.N.C. 2008) for the proposition that Alex Lee has no claim for conversion. In *TSC Research*, the court recognized that because the defendant was in lawful possession of the material in question (business information), the plaintiff was required to make a demand for return of the information and be refused. *Id.* at 542. Thus, *TSC Research* falls squarely within the general rule regarding a defendant in lawful possession that is set forth above. The court did not, as Swift Beef suggests, hold that demand and refusal are necessary in ***every*** case of conversion, including those where—as here—the possessor disposed of the goods without authorization.

379 (4th Cir. 2008))). Alex Lee has thus plainly fulfilled its pleading requirements under the Federal Rules.[4]

Swift Beef also claims that the investigative report negates the fraud claim because it "includes facts showing that at least ten other reasonable explanations exist for any increased negative labor variances at the Lenoir Plant." (Swift Beef's Mem., at 16). However, as the report makes clear, these "explanations" consist of the reasons that Swift Beef provided to Alex Lee for the variances—explanations that Alex Lee does ***not*** find credible or "reasonable." (*See* Ex. C, at 5 (noting that Alex Lee's Internal Audit team was not provided with documentation to support the explanations and that they did not account for negative labor variances in other months)). In any event, the mere possibility that alternative explanations exist for an allegedly fraudulent scheme does not mean that a party ***fails to state a claim*** for fraud. *See Houck v. Substitute Trustee Services, Inc.*, 791 F.3d 473, 484 (4th Cir. 2015) ("To survive a motion to dismiss, a plaintiff need not demonstrate that . . . alternative explanations are less likely; rather, she must merely advance her claim 'across the line from conceivable to plausible'") (internal citations omitted). Having alleged the facts of Swift Beef's fraud with sufficient particularity, Alex Lee is entitled to proceed to discovery and adduce evidence supporting its allegations. *See, e.g. Humana, Inc. v. Ameritox, LLC*, No. 1:16-cv-01006, 2017 WL 3228313, at *5 (M.D.N.C. July 28, 2017) (finding that a fraud claim was pled with sufficient particularity to survive a motion to dismiss when it alleged "the time, place, and contents of the false representations, as

[4] To the extent Swift Beef's argument is that Exhibit C was incorporated by reference (through paragraph 107 of the Counterclaims), rather than reiterated in full in the Counterclaims themselves, this position has no merit. A party may incorporate a document by reference in its pleadings, and a court must consider exhibits in evaluating a dismissal motion. *See Field v. Berman*, 526 F. App'x 287, 289 (4th Cir. 2013) (quoting from *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

well as the identity of the person making the misrepresentation and what he obtained thereby") (internal citations omitted).

Swift Beef also argues that Alex Lee failed to plead facts showing that Swift Beef did not intend to perform under the Purchase Agreement when it was formed. (Swift Beef's Mem., at 16-17). This argument misconstrues the nature of Alex Lee's claim. Alex Lee alleges that Swift Beef—by and through Plant General Manager Jon Johnson, among others—engaged in a fraudulent scheme whereby it passed off labor costs to Alex Lee that should have been charged to Food Lion and then attempted to conceal the fact that it was doing so. (*See* Counterclaims ¶ 31; Ex. C). Swift Beef twists the allegations in the Counterclaims to suggest that this is actually a claim that it charged costs "that were not permitted by the Purchase Agreement" and that Alex Lee must therefore plead that Swift did not intend to comply with the Agreement. (Swift Beef's Mem., at 17). But, while it is true that Swift Beef's conduct was not permitted by the Purchase Agreement, Alex Lee's claim is not for promissory fraud, where a party is alleged to have entered into a contract with no intent to perform. Rather, as set forth above, Swift Beef defrauded Alex Lee in the course of the parties' commercial relationship—including subsidizing its own performance under its contract with Food Lion at the expense of Alex Lee, and in prioritizing service levels for Food Lion to the direct detriment of Alex Lee.[5] Whether Swift Beef ever intended to honor its obligations under the Purchase Agreement has absolutely no

[5] Swift Beef also argues that it was under no duty to disclose the fact that it was falsifying labor records to pass off costs to Alex Lee. (*See* Swift Beef's Mem. at 17, n.3). But it is axiomatic that when a party speaks, they have a duty to speak fully and truthfully. *See La Tortilleria, Inc. v. Nuestro Queso, LLC*, No. 1:12CV408, 2014 WL 1322627, at *5 (M.D.N.C. March 31, 2014) (confirming that, in North Carolina, parties "in the course of [] business" have a duty not to supply "false information for the guidance of others") (internal citations omitted). Swift Beef presented Alex Lee with costs that it represented were labor costs attributable to work it did for

(*footnote continued*)

bearing on the fact that Swift Beef committed fraud by providing false information to Alex Lee so as to cover the fact that it charged Alex Lee with costs that should have been paid by a third party. Moreover, the fact that in the course of committing the fraud, Swift Beef ***also*** breached the Purchase Agreement—by submitting unauthorized charges—does not somehow make it immune to liability for fraud. By the same token, Swift Beef's argument that Alex Lee has not pled fraud because "the Counterclaims do not allege that Swift failed to perform every obligation in the contract" (Swift Beef's Mem., at 18) misses the point entirely. Alex Lee's fraud claim is not predicated on Swift Beef's failure to perform under the Purchase Agreement; rather, it is predicated on Swift Beef's attempt to pass off labor costs to it that were properly attributed to Food Lion.

Finally, Swift Beef argues that Alex Lee could not have reasonably relied on Swift Beef's fraudulent misrepresentations and omissions because it conducted the Internal Audit investigation in early 2016 but did not immediately attempt to end the parties' relationship thereafter.[6] (Swift Beef's Mem., at 18-19). But even if the Internal Audit report produced in early 2016 could be construed as providing Alex Lee with full knowledge of the alleged fraud,

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Alex Lee. Swift Beef concealed that a portion of these costs were in fact improperly attributed to Alex Lee and should have been charged to Food Lion. This is fraud, plain and simple.

[6] Swift Beef appears to argue both that the Audit report does not demonstrate fraud (because it listed certain of Swift Beef's alternative explanations for the labor variance) ***and*** that the Audit report so conclusively demonstrated fraud that it provided Alex Lee with full knowledge of the fraudulent scheme. (*Compare* Swift Beef's Mem. at 15-16 *with id.* at 19). These contradictory arguments demonstrate the inherent weakness in Swift Beef's arguments. Although the Internal Audit investigation revealed that Swift Beef had apparently engaged in a fraudulent scheme to pass off labor costs, it did not give Alex Lee full knowledge of the fraud. Rather, Alex Lee prudently sought further information from Swift Beef but was rebuffed. (Counterclaims ¶ 37). It was not until after Swift Beef refused to provide any plausible explanation for the labor variances (or otherwise meaningfully refute the investigation's findings) and further information came to light in 2017 regarding the culture of corruption and fraud that exists at Swift Beef's parent company (*see id.* ¶¶ 79-86) that Alex Lee determined that Swift Beef in fact defrauded it.

the report concerned negative labor variances that occurred in ***2015.*** (*See* Counterclaims ¶ 36). These costs had already been passed off to Alex Lee, which reasonably relied on the misrepresentations and omissions made by Swift Beef regarding the labor costs it charged. Any knowledge that Alex Lee gained by virtue of the report's findings had no impact on its earlier reliance on Swift Beef's misrepresentations and omissions, and therefore Swift Beef's argument fails.

IV. Alex Lee Requests the Right to Amend its Counterclaims If Needed.

For the reasons set forth above, Alex Lee submits that Swift Beef's partial motion to dismiss should be denied in full. However, should the Court find the allegations in the Counterclaims deficient for any reason, Alex Lee respectfully requests leave to amend its Counterclaims. "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Where a motion to dismiss is premised on failure to allege necessary facts (or provide requisite specificity), courts routinely grant leave to amend so that a party may correct any deficiencies in its pleading. *See Armstrong v. City of Greensboro*, 1:15CV282, 2016 WL 1312037, at *2 (M.D.N.C. March 31, 2016) ("a dismissal under Rule 12(b)(6) generally is not final or on the merits and the court normally will give plaintiff leave to file an amended complaint" so long as such amendment would not be futile) (*quoting Ostrzenski v. Seigel*, 177 F.3d 245, 252-53 (4th Cir. 1999)).

CONCLUSION

For the foregoing reasons, Alex Lee respectfully requests that Swift Beef's Partial Motion to Dismiss be denied in its entirety. In the event that the Partial Motion to Dismiss is granted in full or in part, Alex Lee respectfully requests leave to amend its Counterclaims.

This the 10th day of January, 2018.

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

SWIFT BEEF COMPANY, Plaintiff/Counterclaim-Defendant, v. ALEX LEE, INC., Defendant/Counterclaim-Plaintiff.	Civil Action No. 5:17-CV-00716

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **ALEX LEE'S OPPOSITION TO SWIFT BEEF COMPANY'S PARTIAL MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system.

This the 10th day of January, 2018.

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