IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SHARON ROBERTSON and BRENDA HATHAWAY, as Co-Personal Representatives of THE ESTATE OF WILLIAM T. BEACH, deceased,	)	
Plaintiffs,	)	
vs.	)	**Case No. CIV-11-1321-R**
FRONTERA PRODUCE, LTD., a foreign corporation; PRIMUS GROUP, INC., d/b/a PRIMUS LABS, a foreign corporation; HOMELAND STORES, INC., a domestic corporation; ASSOCIATED WHOLESALE GROCERS, INC., a foreign corporation; and JOHN DOES 1-10,	)	
Defendants.	)	

ORDER

Before the Court is Defendant Primus Group, Inc.'s Motion for Reconsideration. Doc. No. 97. For the following reasons, this motion is DENIED.

This motion stems from an action brought on behalf of Mr. William Beach, whose death was allegedly caused by his consumption of cantaloupe contaminated with listeria monocytogenes. Plaintiffs Sharon Robertson and Brenda Hathaway, daughters of Mr. Beach and co-personal representatives of his estate, have sued several parties for their alleged roles in the production and distribution of this contaminated cantaloupe. One of the defendants, Primus Group, previously filed a motion seeking the dismissal of Plaintiffs' claims against it. *See* Doc. No. 80. In relevant part, Primus Group argued in its

motion that Plaintiffs' Complaint failed to sufficiently allege facts to state a plausible negligence claim against it for its alleged role as a food safety auditor of the packing facility in which the cantaloupe was allegedly processed and contaminated prior to Mr. Beach's alleged consumption of it. On January 23, 2014, after carefully considering the parties' briefs, this Court denied Primus Group's Motion to Dismiss as it related to Plaintiffs' negligence claim against it. *See* Doc. No. 93. Primus Group, unsatisfied with this Court's decision, has now filed the present motion, asking the Court to reconsider its findings that Plaintiffs' Complaint alleged sufficient facts to establish that Primus Group owed a duty of care to Mr. Beach under (1) the common law, (2) the Restatement (Second) of Torts § 324A, and (3) third-party beneficiary theory.[1]

Motions to reconsider are generally disfavored and are not provided for in the Federal Rules of Civil Procedure. *Riverside Farms, LLC v. Greer*, No. CIV-06-1329-F, 2008 WL 336828, at *1 (W.D. Okla. Feb. 5, 2008). Nevertheless, the Court "retains discretion to reconsider and revise interlocutory orders prior to the entry of final judgment." *Lachney v. Target Corp.*, No. CIV-06-1389-HE, 2008 WL 2673342, at *1 (W.D. Okla. June 27, 2008) (citations omitted).

Having once again carefully considered the parties' briefs, as well as the relevant legal authority, the Court is unpersuaded that it clearly erred in its prior Order, meaning there is no need to act to prevent manifest injustice. The Court begins by directing Primus

[1] While the Court previously found that Plaintiffs had stated a good claim against Primus Group for negligence—and in turn, wrongful death and loss of consortium—the Court dismissed Plaintiffs' claim against Primus Group for negligent hiring, selection, and monitoring. In the present motion, although Primus Group only asks the Court to reconsider a small portion of the issues already considered, the effect of granting Primus Group's requests would be the dismissal of the remaining claims against it.

Group to Fed. R. Civ. P. 8(a)(2), which states that a pleading must include "a short and plain statement of the claim showing that the pleader is entitled to relief." This standard still lives despite *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *See Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235-36 (10th Cir. 2013) (quotation omitted). Additionally, *Twombly* itself recognized that "[a]sking for plausible grounds . . . does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence [supporting the claim]." 550 U.S. at 556. Permeating Primus Group's motion is its position that in order to have survived its prior Motion to Dismiss, Plaintiffs should have been required to plead facts in an *incredibly* specific manner—one requiring a showing of a high probability of success. This is incongruous with both the Federal Rules of Civil Procedure and Supreme Court precedent.

Because Primus Group's arguments concerning its common law duty can be boiled down to a mischaracterization of what is required of the pleadings at this stage, the Court will not reconsider its prior finding concerning Primus Group's common law duty. For example, Plaintiffs' Complaint alleged that the food safety audit conducted by Mr. Dilorio was for the express purpose of ensuring both that Jensen Farms' packing facility met applicable standards of care in the production of its food products, and also that the food products produced by Jensen Farms "were of high quality, were fit for human consumption, and were not contaminated by a potentially lethal pathogen, like Listeria." *See* Doc. No. 71, at 5-6. In its present motion, Primus Group contends that because it turns out that listeria can only be detected through microbiological testing, and because

Plaintiffs' above allegation failed to mention microbiological testing, this renders Plaintiffs' above allegation a "mere label or conclusion."[2] As mentioned above, the Court's task at this stage is to extract claims that are not plausible, and if the Court accepted Primus Group's above contention—or any of its contentions regarding its common law duty—then the Court would be imposing a far too rigorous burden on Plaintiffs. As such, Primus Group's arguments concerning its common law duty are baseless.[3]

Additionally, with regard to its duty under the Restatement (Second) of Torts § 324A, Primus Group makes a litany of failing arguments. Although many of these can be lumped in with the above—Primus Group asks this Court to require a nearly impossible standard of Plaintiffs at this beginning stage of the proceedings—the Court will address the remaining few arguments. First, Primus Group asserts that the Court misread *Truitt v. Diggs*, 611 P.2d 633 (Okla. 1980), in finding that Primus Group owed a duty of care under both § 324A(b) and (c). Concerning this, Primus Group argues that Plaintiffs failed to make two different types of factual allegations that the Oklahoma Supreme Court found lacking in the *Truitt* plaintiff's complaint: (1) that Mr. Dilorio's allegedly negligent audit increased the risk of harm to Mr. Beach; and (2) the specific findings by Mr. Dilorio in his audit report or the actions taken by Jensen Farms in reliance on these findings.

[2] Notably, throughout Primus Group's motion, whenever it encounters allegations that contradict its position, it writes off these allegations as mere labels or conclusions.

[3] Primus Group completely misses the mark in arguing that the Court has created a slippery slope with its prior Order. *See* Doc. No. 97, at 9. Primus Group appears to conflate the survival of a motion to dismiss with a finding of ultimate liability—these two things are not one and the same. Additionally, Primus Group's implication that the analysis in the Court's prior Order would render "third-party auditors strictly liable for negligent audits" is patently misguided. The Court's prior Order merely found that the allegations of negligence contained in Plaintiff's Complaint were sufficient to survive a motion to dismiss—this is a far cry from an Order finding Primus Group liable, let alone strictly liable, for its alleged role in this case.

Only § 324A(a) requires that a negligent act increase the risk of harm to a third party, however, and the Court specifically disavowed the possibility of any duty under § 324A(a) in its prior Order. *See* Doc. No. 93, at 11 n.4 (noting that Plaintiffs' Complaint failed to allege facts sufficient to establish a duty under § 324A(a), because the Complaint did not contain any "allegations that the alleged negligent audit increased the risk of harm to Mr. Beach" (citing *Deines v. Vermeer Mfg. Co.*, 752 F.Supp. 989, 995 (D. Kan. 1990))). Because § 324A(b) and (c) do not require that a negligent act increase the risk of harm to a third party, though, Plaintiffs' failure to include this type of allegation has no bearing on the Court's analysis under these subsections.[4] *See* Restatement (Second) of Torts § 324A(b)-(c) & cmts. d.-e.

Moreover, in arguing that Plaintiffs neither alleged any of Mr. Dilorio's findings after he conducted the audit, nor alleged any action taken by Jensen Farms based upon Mr. Dilorio's findings, Primus Group is mistaken. In their Complaint, Plaintiffs clearly alleged facts addressing these purported shortcomings. To begin with, Plaintiffs alleged that Mr. Dilorio assigned a "superior" rating and score of 96% to the packing facility. Plaintiffs further alleged that Mr. Dilorio found that many aspects of the packing facility were in "total compliance" with his audit standards. Plaintiffs also alleged that the purpose of this audit was to ensure both that Jensen Farms' packing facility met

[4] It is worth noting that while the Oklahoma Supreme Court in *Truitt* adopted § 324A as a source for a duty of care under Oklahoma law, its analysis regarding the specifics of § 324A was minuscule. In fact, the Oklahoma Supreme Court did not analyze § 324A(b) or (c) whatsoever in its opinion, which leaves this Court with the impression that the Oklahoma Supreme Court did not rely upon these subsections in its opinion. However, the Court is still charged with predicting what the state's highest court would do if it found itself in the present situation. And given the fact that the Oklahoma Supreme Court in *Truitt* adopted § 324A as a source for a duty of care under Oklahoma law, as well as this Court's interpretation of §324A, its comments, and its illustrations, the Court's prediction that the Oklahoma Supreme Court would find that Plaintiff's factual allegations in this case are sufficient to establish that Primus Group owed a duty of care pursuant to § 324A(b) and (c) is unwavering.

applicable standards of care in the production of its food products, and also that the food products produced by Jensen Farms were of a high quality and were not contaminated by any pathogens. Additionally, Plaintiffs alleged that had Mr. Dilorio properly conducted his audit and failed Jensen Farms' packing facility due to its many deficiencies, "the cantaloupe that caused the Plaintiffs' Listeriosis illness would not have been distributed by Jensen Farms and Frontera," and production would not have continued until Jensen Farms corrected the various problems at its packing facility. Doc. No. 71, at 11. At this early stage, the Court finds these allegations to be adequate.

Further, Primus Group takes issue with the Court's analogizing the present factual situation to Illustration 2 under Comment d. to § 324A(b), which states:

> The A Telephone Company employs B to inspect its telephone poles. B negligently inspects and approves a pole adjoining the public highway. Because of its defective condition the pole falls upon and injures a traveler upon the highway. B is subject to liability to the traveler.

Primus Group contends that the situation described in Illustration 2 might be analogous to the present case had Plaintiffs alleged that the purpose of the food safety audit was to inspect for listeria, rather than Plaintiffs' more general allegation that the purpose of the audit was to ensure that the food products were not contaminated by any pathogens. This is where Primus Group's argument breaks down—the above illustration never states that the inspector was hired to inspect the telephone poles for a specific defect. Instead, the inspector just inspected A Telephone Company's telephone poles, and due to an undetected defective condition, a pole falls and injures a third party, rendering the inspector liable to that third party. Plaintiffs' allegations mirror this illustration: Primus

Group was allegedly hired to audit a packing facility, the audit was allegedly negligently conducted, and the undetected defective condition in the facility allegedly led to Mr. Beach's death. At this stage, the Court is satisfied that Plaintiffs' allegations are sufficient to establish a duty of care under § 324A(b).[5]

Primus Group's arguments concerning § 324A(c) suffer from similar inadequacies. Concerning this subsection, Primus Group asserts that "Oklahoma case law makes clear that a duty of care will not be imposed under § 324A(c) unless the defendant's allegedly negligent actions were relied upon and such reliance increased the risk of harm that resulted in the plaintiff's injuries," citing *Truitt*. Doc. No. 97, at 13. Yet, as previously noted, the Oklahoma Supreme Court did not rely upon § 324A(c) in *Truitt*, as evidenced by the absence of analysis of § 324A(c) in its opinion. And Comment e. under § 324A(c)—something the Court quoted in its entirety in its prior Order—states that an actor is subject to liability to a third person under certain circumstances "*whether or not the negligence of the actor has created any new risk or increased an existing one*." (emphasis added). Therefore, the fact that Plaintiffs did not allege that the food safety audit increased the risk of harm to Mr. Beach has no bearing on whether a duty can be imposed upon Primus Group under § 324A(c). Further, the Court's prior Order considered the requirement of reliance under § 324A(c) at length, and the Court stands by

[5] Primus Group's other argument concerning § 324A(b)—that the Court incorrectly identified Primus Group as a food producer—emanates from Primus Group's misapprehension of the Court's previous Order. Comment d. under § 324A(b) states that "[e]ven where the negligence of the actor does not create any new risk or increase an existing one, he is still subject to liability if, by his undertaking with the other, *he has undertaken a duty which the other owes to the third person*." (emphasis added). In assuming that a food producer owed a duty to the ultimate consumer of its food products, the Court was referring to the only food producer present in this case, Jensen Farms. Further, the Court was simply applying § 324A(b) and Comment d. to the present situation in stating that Plaintiffs' allegations were sufficient to establish that Primus Group undertook the food producer's duty to the third party in contracting to perform the food safety audit. *See* Doc. No. 93, at 11.

its prior finding that Plaintiffs' allegations sufficiently establish that Jensen Farms relied upon the results of the audit in continuing its operations and distributing the contaminated fruit that ultimately was consumed by Mr. Beach.

Finally, in an attempt that can be described as frivolous at best, Primus Group argues that Plaintiffs' Complaint failed to establish a duty under Oklahoma's third-party beneficiary theory due to a lack of supporting evidence. Namely, Primus Group argues that in order for Plaintiffs to have pleaded facts sufficient to establish that the auditing contract was expressly made for the benefit of the third-party consumer, Plaintiffs would have needed to either directly quote language from this contract, or attach a copy of this contract to the Complaint. The Court is unaware of any authority imposing an evidentiary burden on a plaintiff in filing a complaint, and tellingly, Primus Group cites no authority to support its position.[6] At any rate, Plaintiffs' Complaint alleged that the food safety audit contract to which Primus Group was a party was made expressly for the benefit of the consumers of the cantaloupe processed in Jensen Farms' packing facility. And further, Mr. Beach, as a consumer of that cantaloupe, is a member of the class to which enforcement belongs. As the Court found in its prior Order, this is sufficient at this early

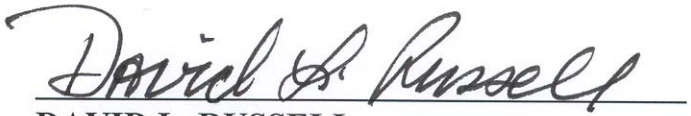
[6] The Court finds this argument peculiar for three reasons. First, at this stage of the proceedings, no evidence has been submitted to establish that any of Plaintiffs' allegations are true. Indeed, if there were an evidentiary requirement at the motion to dismiss stage, the Court should have already dismissed all of Plaintiffs' claims on this ground alone. Second, Primus Group presumably has a copy of the auditing contract to which Plaintiffs allude in their Complaint. Yet Primus Group failed to produce a copy of this contract in support of its argument. *See Waddell v. Bd. of Cnty. Comm'rs of Cleveland Cnty.*, No. CIV-11-1037-D, 2014 WL 1478876, at *3-4 (W.D. Okla. Apr. 15, 2014) (finding that by attaching a copy of the contract in question to their motion to dismiss in an effort to rebut the plaintiff's allegation that she was a third-party beneficiary to a contract, the defendants did not force the Court to convert the motion to dismiss to one for summary judgment). And finally, placing the burden on Plaintiffs at the outset of this litigation to track down a contract to which they were not a party is unjustifiable.

stage to plausibly establish that Primus Group owed a duty of care under Oklahoma's third-party beneficiary theory.

In conclusion, Primus Group's Motion for Reconsideration is fraught with the untenable position that in order to have survived its prior Motion to Dismiss, Plaintiffs should have been required to plead facts in such an elaborate manner that they demonstrated a high probability of success. Additionally, Primus Group goes so far as to point to a lack of evidence in arguing that Plaintiffs failed to allege sufficient facts in their Complaint. Contrary to Primus Group's assertions, in resolving a motion to dismiss, the Court is only charged with determining whether a plaintiff has stated a plausible claim to relief. And in doing so, the Court is to construe all well-pleaded allegations, as well as reasonable inferences therefrom, in the light most favorable to the plaintiff. Here, the Court is satisfied that Plaintiffs have stated a plausible claim for negligence against Primus Group.[7]

Accordingly, Primus Group's Motion for Reconsideration is DENIED.

IT IS SO ORDERED this 15th day of May, 2014.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

[7] Because of this, Plaintiffs' wrongful death and loss of consortium claims against Primus Group remain intact.