IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ISLA DRINKWALTER, individually and as Personal Representative for the Estate of George Drinkwalter, **Plaintiff,** **vs.** **FRONTERA PRODUCE LTD, a foreign corporation; PRIMUS GROUP, INC., a foreign corporation; WALMART STORES, INC., a foreign corporation; and JOHN DOES 1-10,** **Defendants.**	**CASE NO. 7:13CV5006** **MEMORANDUM AND ORDER**

This matter is before the Court on Defendant Primus Group, Inc.'s ("Primus") Motion to Dismiss Frontera's Cross-claim (Filing No. 47) and Primus's Motion to Dismiss Isla Drinkwalter's First Amended Complaint (Filing No. 74). For the reasons that follow, Primus's motions will be denied.

FACTS

For diversity purposes, Plaintiff Isla Drinkwalter ("Plaintiff"), individually and in her capacity as Personal Representative for the Estate of George Drinkwalter ("Decedent"), is a citizen of the state of Nebraska;[1] Defendant Frontera Produce Ltd. ("Frontera") is a citizen of Texas; Primus is a citizen of California; and Defendant Walmart Stores, Inc. is a citizen of Delaware. For purposes of the pending motion, all well-pled facts alleged in

[1] For purposes of diversity jurisdiction "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . . ." Plaintiff has not specifically alleged that Decedent was a citizen of the state of Nebraska. For purposes of this motion, the Court has inferred that Decedent was a citizen of Nebraska because Plaintiff was appointed the personal representative of the estate by a Nebraska Court, Decedent's wife was a citizen of Nebraska at all relevant times, and the Decedent died in a Nebraska hospital.

the First Amended Complaint ("FAC") (Filing No. 69) are accepted as true, though the Court need not accept Plaintiff's conclusions of law. The following is a summary of those factual allegations.

I. The Outbreak

On September 2, 2011, the Colorado Department of Public Health and the Environment ("CDPHE") announced its investigation of an outbreak of the disease listeriosis. On September 12, 2011, the CDPHE announced that *Listeria* bacteria leading to the outbreak were linked to cantaloupe from the Rocky Ford, Colorado, growing region. It was later determined that contaminated cantaloupes were grown by Jensen Farms, a Colorado company, and distributed by Frontera. The outbreak of *Listeria monocytogenes* infected 147 people from 28 states.

On or about September 19, 2011, the Food and Drug Administration ("FDA") announced that it found *Listeria monocytogenes* in samples of Rocky Ford brand cantaloupe at the Jensen Farms packing facility. Tests confirmed that the *Listeria monocytogenes* found in the samples matched one of the strains associated with the multi-state outbreak.

II. Decedent's Illness

On one or more occasions in August and early September 2011 the Decedent purchased a cantaloupe that was grown by Jensen Farms. His purchase or purchases were made through a Walmart store located in Chadron, Nebraska. Thereafter, Decedent consumed the fruit, contaminated with *Listeria monocytogenes*.

On or about September 8, 2011, Decedent experienced an onset of symptoms caused by the *Listeria* infection he acquired form the cantaloupe. On or about

September 9, 2011, Decedent was taken by ambulance to Cherry County Hospital. A blood sample collected from Decedent on September 12, 2011, tested positive for *Listeria monocytogenes*. The Nebraska Public Health Laboratory ("NPHL") confirmed this result on September 23, 2011. The NPHL conducted Pulsed Field Gel Electrophoresis ("PFGE") on Decedent's isolate and determined that the strain of *Listeria monocytogenes* that infected Decedent was a genetic match to one of the strains found at Jensen Farms. On September 14, 2011, Decedent died as a result of his severe listeriosis illness.

III. Primus's Audit of Jensen Farms

Frontera was the primary distributor of Jensen Farms cantaloupes, distributing almost 100 percent of cantaloupe produced by Jensen Farms during the growing season, including 2011. Frontera required Jensen Farms to undergo and pass a third-party food safety audit before it would distribute Jensen Farms cantaloupes to retailers.

Frontera represented to the public generally, and specifically to the retail sellers of its produce, that its various products were "Primus Certified." This certification meant that Jensen Farms was required to pass a Primus audit of its ranchlands and packinghouse, before Frontera would distribute and sell Jensen Farms cantaloupes.

Prior to Decedent's purchase of the contaminated cantaloupe, Jensen Farms or Frontera, or both, entered into an agreement with Primus (the "Contract") to conduct an audit of Jensen Farms ranchlands and packinghouse[2] (the "Audit"). After the formation

[2] "'Packinghouse' is industry terminology for the location at which, once harvested, cantaloupes are processed, including washed and other measures intended to ready an agricultural product for human consumption for shipment to distributors and retailers and, ultimately, sale to consumers." (Pl.'s Br., Filing No. 92 at 2, n. 1.)

of the Contract, Primus selected and hired Bio Food Safety, a Texas-based auditing company, to conduct the Audit.

Prior to the Audit, Primus was aware that if the Audit was completed successfully, with a sufficiently high point score, then Primus would issue Jensen Farms a Primus Audit Certificate, stating the Audit's passing score. Primus was aware that the Jensen Farms facility had to have a passing Primus Audit Certificate in order for Jensen Farms to sell its cantaloupes to Frontera.

As a part of the Contract, Primus agreed, pursuant to its own guidelines, to assess and determine if the Jensen Farms packinghouse facilities, premises, and food safety procedures met or exceeded the applicable good agricultural and manufacturing practices, industry standards, and relevant FDA industry guidance standards of care incumbent upon Jensen Farms as a manufacturer of cantaloupes for human consumption. As a part of the Contract, Primus had the unilateral capability to determine whether the Jensen Farms facility failed to meet critical food safety requirements, and, if so, Jensen Farms would automatically fail the Audit and Primus would immediately inform Jensen Farms of the failure.

Bio Food Safety auditor James Dilorio ("Dilorio") conducted the Audit on or about July 25, 2011. This was roughly one week before the CDC identified the first victim of the cantaloupe *Listeria* outbreak. Dilorio, as an agent of Primus, gave the Jensen Farms packing house a "superior" rating, and a score of 96%. During the Audit, Dilorio failed to observe, properly down-score, or consider multiple conditions or practices that were in violation of Primus's audit standards applicable to cantaloupe packing houses, industry standards, and applicable FDA industry guidance.

On or about September 10, 2011, officials from both FDA and the state of Colorado conducted an inspection at Jensen Farms. During the inspection, FDA collected a number of samples, including whole cantaloupes and environmental (non-product) samples from within the facility, for purposes of laboratory testing. Of the 39 environmental samples collected from within the facility, 13 were confirmed positive for *Listeria monocytogenes* with PFGE pattern combinations that were indistinguishable from at least three of the five outbreak strains collected from outbreak cases. Cantaloupe collected from cold storage during the inspection also tested positive for *Listeria monocytogenes* with PFGE pattern combinations that were indistinguishable from at least two of the five outbreak strains.

On September 22-23, 2011, after isolating at least three of the five outbreak strains of *Listeria monocytogenes* from the Jensen Farms packing house and whole cantaloupes collected from cold storage, the FDA initiated an environmental assessment at Jensen Farms. Colorado state and local officials assisted in the assessment. Findings set forth in the FDA's report dated October 19, 2011, included, but were not limited to, significant deficiencies in facility design, equipment design, and post-harvest practices.

In October and December 2011, FDA officials participated in briefings with the House Committee on Energy and Commerce, to explore likely causes of the *Listeria* outbreak. At these briefings, FDA officials cited multiple failures at Jensen Farms, which, according to a report issued by the Committee, "reflected a general lack of awareness of food safety principles." (FAC, Filing No. 69 at ¶48.)

According to James R. Gorny, Ph.D. and former Senior Advisor for Produce Safety, Center for Food Safety & Applied Nutrition at the FDA, Jensen Farms deviated from industry standards by failing to use an anti-microbial, such as chlorine, in the packing of their cantaloupes during the summer of 2011. Dr. Gorny opined that the Primus subcontractor that conducted the pre-harvest inspection of Jensen Farms, and provided a "superior" score of 96% for the Audit upon which Jensen Farms relied, was seriously deficient in its inspection and findings.

Primus at all material times had detailed criteria, standards, and requirements governing its third-party auditors. Primus failed to ensure that Bio-Food Safety, at the time of the Audit, met those criteria, standards, and requirements. Primus also had detailed criteria and standards for reviewing and assessing the quality of audits performed by its third-party auditors, but failed to ensure that such standards for reviewing and assessing the quality of the Audit were met.

If Dilorio had "down-scored" or properly considered Jensen Farms' deficient facility conditions or practices, standing alone or in combination, Jensen Farms would have received a failing audit score; Jensen Farms would not have received a passing Primus Audit Certificate; Jensen Farms cantaloupe products would not have been distributed by Frontera; and the Decedent would not have purchased and consumed the contaminated cantaloupe.

STANDARD OF REVIEW

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[A]lthough a complaint need not include detailed factual allegations, 'a plaintiff's obligation to provide the grounds of

his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *C.N. v. Willmar Pub. Sch., Indep. Sch. Dist. No. 347*, 591 F.3d 624, 629—30 (8th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Instead, the complaint must set forth 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* at 630 (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ritchie v. St. Louis Jewish Light*, 630 F.3d 713, 716 (8th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). "Courts must accept . . . specific factual allegations as true but are not required to accept . . . legal conclusions." *Outdoor Cent., Inc. v. GreatLodge.com*, Inc., 643 F.3d 1115, 1120 (8th Cir. 2011) (quoting *Brown v. Medtronic*, Inc., 628 F.3d 451, 459 (8th Cir. 2010)) (internal quotation marks omitted). "A pleading that merely pleads 'labels and conclusions,' or a 'formulaic recitation' of the elements of a cause of action, or 'naked assertions' devoid of factual enhancement will not suffice." *Hamilton v. Palm*, 621 F.3d 816, 817—18 (8th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 678). The complaint's factual allegations must be "sufficient to 'raise a right to relief above the speculative level.'" *Williams v. Hobbs*, 658 F.3d 842, 848 (8th Cir. 2011) (quoting *Parhurst v. Tabor*, 569 F.3d 861, 865 (8th Cir. 2009)).

When ruling on a defendant's motion to dismiss, a judge must rule "on the assumption that all the allegations in the complaint are true," and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at

555, 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). The complaint, however, must still "include sufficient factual allegations to provide the grounds on which the claim rests." *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009).

"Two working principles underlie . . . *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679 (citing *Twombly*, 550 U.S. at 556). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

DISCUSSION

"[F]ederal courts sitting in diversity apply state substantive law and federal procedural law." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 437 (2010) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996)) (internal quotation marks omitted). "[A] federal district court sitting in Nebraska must follow Nebraska's conflict of laws rules." *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 858 F.2d 1339, 1342 (8th Cir. 1988) (citing *Klaxon Co. v. Stentor Electric Manufacturing Co.,* 313 U.S. 487, 496 (1941)). The parties do not dispute that Nebraska law applies in this case.[3]

[3] Nebraska has adopted Restatement (Second) of Conflicts of Law § 146 (1971), *Malena v. Marriott Int'l, Inc.*, 651 N.W.2d 850, 856 (Neb. 2002), which provides:

I. Motion to Dismiss Plaintiff's FAC

Under Nebraska law, to recover in a negligence action "a plaintiff must show [1] a legal duty owed by the defendant to the plaintiff, [2] a breach of such duty, [3] causation, and [4] damages." *Martensen v. Rejda Bros., Inc.*, 808 N.W.2d 855, 861—62 (Neb. 2012).

A. Duty

In a negligence action, whether a legal duty exists is a threshold question that is a "question of law dependent on the facts in a particular situation." *Durre v. Wilkinson Dev., Inc.*, 830 N.W.2d 72, 80 (Neb. 2013). Nebraska law defines legal duty as "an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another. If there is no duty owed, there can be no negligence." *Id.* (internal citations omitted).

With respect to legal duty in negligence cases, the Nebraska Supreme Court has adopted the analysis of the Restatement (Third) of Torts: Phys. & Emot. Harm ("Restatement (Third)"). *A.W. v. Lancaster Cnty. Sch. Dist. 0001*, 784 N.W.2d 907, 918 (Neb. 2010); *Olson v. Wrenshall*, 822 N.W.2d 336, 342-43 (Neb. 2012). Under § 7 of the Restatement (Third) ("§ 7"), ordinarily, an actor has a "duty to exercise reasonable

---

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Plaintiff's injury occurred in Nebraska, and the parties have not argued that some other state has a more significant relationship to the occurrence.

care when the actor's conduct creates a risk of physical harm." Restatement (Third) of Torts: Phys. & Emot. Harm § 7 (2010).[4] Generally, the inverse of § 7 is also true, "an actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other." *Olson*, 822 N.W.2d at 343 (citing the Restatement (Third) § 37, Proposed Final Draft No. 1, 2005 (published in 2012)). Nonetheless, in special circumstances, a court may determine that an affirmative duty applies even when the actor's conduct did not create a risk of harm. *See* Restatement (Third) § 37 ("An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38—44 is applicable."); *see also Prof'l Mgmt. Midwest, Inc. v. Lund Co.*, 826 N.W.2d 225, 232 (Neb. 2012) (applying portions of Restatement (Third) § 38); *Martensen*, 808 N.W.2d at 862 (applying Restatement (Third) § 40); *Ginapp v. City of Bellevue*, 809 N.W.2d 487, 493 (2012) (applying portions of Restatement (Third) § 41).

In a similar case involving the same *Listeria* outbreak, *Braddock v. Primus Group, Inc.*, 8:13cv258 ("*Braddock*"), this Court denied Primus's motion to dismiss the plaintiff's negligence claim against Primus. (Memorandum and Order, Case No. 8:13cv258, Filing No. 13., February 5, 2014). In *Braddock*, this Court initially determined that the complaint did not allege sufficient facts to support a finding that Primus owed the plaintiff a duty under § 7, however the complaint did allege sufficient facts to support a finding that Primus owed an affirmative duty to the plaintiff under Nebraska law.

[4] *A.W.*, 784 N.W.2d at 915, 918 (expressly adopting §7 of the Restatement (Third)).

In *Braddock*, the complaint emphasized Primus's alleged negligent omissions in conducting the food safety inspection at Jensen Farms. Here, the FAC alleges that Primus's course of conduct *created* a risk of harm. Plaintiff alleges that because Primus awarded Jensen Farms a passing Audit score, despite multiple unsafe conditions at the Jensen Farms facilities, Jensen Farms cantaloupes were "Primus Certified." Plaintiff also alleges that Primus's conduct, certifying Jensen Farms cantaloupes, *created* the risk that Frontera would distribute and sell Jensen Farms cantaloupe that had been processed in a facility operated under unsafe conditions. In other words, Primus's certification of the Jensen Farms cantaloupes *created* a risk that cantaloupes unfit for human consumption would be distributed to retail stores and sold to consumers.

Plaintiff has sufficiently alleged that Primus's conduct, negligently certifying Jensen Farms cantaloupes, created a risk of harm; and the FAC alleges sufficient facts to support a finding that Primus owed a duty to Plaintiff under § 7.[5]

B. Breach

An actor acts negligently or breaches a duty, if "the [actor] does not exercise reasonable care under all the circumstances." *A.W.*, 784 N.W.2d at 918 (quoting Restatement (Third) § 3). "Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm." *Id.* Generally, "it is

[5] Even if Primus did not owe Plaintiff a duty under § 7, the Court's duty analysis in *Braddock* would also apply here. See Memorandum and Order, Case No. 8:13cv258, Filing No. 13., February 5, 2014.

for the fact finder to determine, on the facts of each individual case, whether or not the evidence establishes a breach of [a] duty." *Id.* at 913.

Plaintiff alleges that Primus breached its duty of care when it negligently certified Jensen Farms cantaloupes for distribution to retailers and consumers. In support of this claim, Plaintiff points to the significant deficiencies in facility design, equipment design, and post-harvest practices at Jensen Farms that were cited by the FDA. With regard to breach, therefore, Plaintiff has asserted sufficient facts to support a negligence claim.

C. Causation

Under Nebraska law, "[t]here are three basic requirements that must be met to establish causation: (1) that 'but for' the defendant's negligence, the injury would not have occurred; (2) that the injury is the natural and probable result of the negligence; and (3) that there is no efficient intervening cause." *World RadioLab., Inc. v. Coopers & Lybrand,* 557 N.W.2d 1, 11 (Neb. 1996).

Causation is "ordinarily a question for the trier of fact." *Heatherly v. Alexander*, 421 F.3d 638, 642 (8th Cir. 2005) (quoting *Tapp v. Blackmore Ranch, Inc.*, 575 N.W.2d 341, 348 (Neb. 1998) (internal quotation marks omitted). "Only where the evidence is such that 'only one inference can be drawn' is it 'for the court to decide whether a given act or series of acts is the proximate cause of the injury.'" *Id.* at 642 (quoting *Tapp*, 575 N.W.2d at 348).

Plaintiff claims that if Primus had not certified Jensen Farms cantaloupes, the contaminated cantaloupe would not have been distributed to the Chadron Walmart store, Decedent would not have eaten the cantaloupe and contracted a *Listeria*-related illness, and Decedent would not have died from listeriosis. Plaintiff has alleged

sufficient facts to support a plausible claim that Primus's alleged negligence in certifying Jensen Farms cantaloupes was the "but for" cause of the Plaintiff's injuries.

Plaintiff also alleged sufficient facts to support a plausible claim that Decedent's death was a natural and probable result of Primus's alleged failure to use reasonable care in certifying Jensen Farms cantaloupes. Plaintiff has pled sufficient facts to establish that Primus knew or should have known its allegedly negligent certification of Jensen Farms cantaloupe might result in physical harm or death to consumers of cantaloupe distributed from the Jensen Farms packinghouse.

Plaintiff has pled a claim for negligence,[6] and Primus's motion to dismiss Plaintiff's negligence claim will be denied.

II. Motion to Dismiss Frontera's Cross-claim

Frontera filed a cross-claim against Primus for equitable indemnity and contribution should Frontera be found liable for damages. Primus moved to dismiss Frontera's claims against Primus on the grounds that they are based on Plaintiff's negligence claim against Primus,[7] which Primus argues should be dismissed under Fed. R. Civ. P. 12(b)(6). As stated above, the Court will not dismiss Plaintiff's negligence claim against Primus, therefore, the Court will not address this argument.

Primus makes two additional arguments. First, it argues that Frontera failed to allege that it is merely a passive tortfeasor, therefore, Frontera's indemnity claim against

---

[6] Primus has not challenged the FAC on the basis of failure to establish damages, therefore the Court will not address that element.

[7] Primus filed its Motion to Dismiss Frontera's Cross-claim (Filing No. 47) before Plaintiff filed the FAC. The Court considered the Plaintiff's allegations in the FAC when ruling on Filing No. 47 because the FAC is now the operative document.

Primus should be dismissed. Second, Primus argues that because the Plaintiff alleges that Frontera is strictly liable for Plaintiff's injuries, Primus cannot indemnify Frontera because neither the Plaintiff nor Frontera has alleged that Primus manufactured or distributed the defective cantaloupes that caused the Plaintiff's injury.

A. Frontera's Failure to Allege Passive Tortfeasor

Primus cites *Kuhn v. Wells Fargo Bank of Nebraska, N.A.,* 771 N.W.2d 103, 112 (Neb. 2009), and *Warner v. Reagan Buick, Inc.*, 483 N.W.2d 764, 771 (Neb. 1992), for the principle that indemnity is only available to a party that engaged in passive neglect. However, Primus did not cite any Nebraska law stating that parties pleading indemnity claims are required to assert expressly that they were merely passive tortfeasors. The Court concludes that Primus's position regarding pleading requirements for indemnity claims is too narrow, and it will not dismiss Frontera's indemnity claims against Primus for failure to state expressly that it was a passive tortfeasor.

"Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay or has agreed to pay." *Kuhn*, 771 N.W.2d at 112. In Nebraska, "[t]hree types of indemnity are generally recognized: express (or contractual), implied contractual (also known as 'implied-in-fact' indemnity), and equitable (also known as 'implied-in-law' indemnity)." *Madden v. Antonov*, 966 F. Supp. 2d 851, 856 (D. Neb. 2013) (citing *Kuhn*, 771 N.W.2d at 119–20; *Warner*, 483 N.W.2d at 770; and *Schneider Nat'l., Inc. v. Holland Hitch Co.*, 843 P.2d 561, 573 (Wyo.1992).). "Generally, the party seeking indemnification must have been free of any wrongdoing, and its liability is vicariously imposed." *Downey v. W. Cmty Coll. Area*, 808 N.W.2d 839, 854 (Neb. 2012). Here, only an equitable indemnity claim is at issue.

This Court has previously analyzed Nebraska law with regard to equitable indemnity,

> Nebraska recognizes what other jurisdictions have termed the "active-passive" theory of equitable indemnity. This variety of equitable indemnity rests upon a difference between the "primary" (or active) and "secondary" (or passive) liability of two parties, each of whom is made responsible by law to an injured party. Such a situation may arise where one tortfeasor, by active conduct, has created a danger to the plaintiff, and the other, passive tortfeasor, has merely failed to discover or remedy the dangerous condition. So, equitable indemnity is available to a party who, without active fault on its own part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which the first is only secondarily liable. Secondary liability is that which rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law . . . .

Madden, 966 F. Supp. 2d at 856 (internal marks and citations omitted).

To survive a motion to dismiss, Frontera is not required to assert expressly that it was merely a passive tortfeasor in order to maintain its indemnity claim. Instead, Frontera must "include sufficient factual allegations to provide the grounds" on which its claim for indemnity rests. *See Drobnak*, 561 F.3d at 783 (8th Cir. 2009). Here, Frontera has denied having any fault with regard to Plaintiff's damages. Pending claims asserted against Frontera potentially could lead to secondary liability for Plaintiff's damages. Frontera has alleged facts regarding Primus's alleged negligence which support its claims that Primus is primarily liable for Plaintiff's damages.

Assuming, for purposes of this motion, that all the facts alleged by Frontera are true, Frontera's allegations are sufficient to raise a right to indemnity above the speculative level. Accordingly, the Court will not dismiss Frontera's claims against Primus for failure to allege expressly that they were passive tortfeasors.

B. Frontera's Failure to Allege that Primus Placed the Defective Product on the Market

Primus argues that Frontera's claims against it should be dismissed because Plaintiff bases its claim against Frontera on strict liability, and Frontera failed to allege an element of strict liability in its cross-claim against Primus, namely that Primus placed the defective product on the market. Primus's argument is without merit because Frontera has not asserted a strict liability claim against Primus. Therefore, Frontera does not need to allege facts supporting such a claim.

CONCLUSION

Plaintiff and Frontera have alleged sufficient facts to support their claims against Primus. Accordingly,

IT IS ORDERED:

1. Primus's Motion to Dismiss Plaintiff's FAC (Filing No. 74) is denied;
2. Primus's Motion to Dismiss Frontera's Cross-claim (Filing No. 47) is denied; and
3. Primus's requests for oral argument are denied.

Dated this 24th day of June, 2014.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge