IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RONALD D. BRADDOCK and CHARLES W. PETERSON, *Co-Personal Representatives of the Estate of* Dale L. Braddock,

Plaintiffs,

vs.

PRIMUS GROUP, INC. (d/b/a PrimusLabs),

Defendant.

CASE NO. 8:13CV258

MEMORANDUM AND ORDER

This matter is before the Court on Defendant Primus Group, Inc.'s ("Primus") Motion to Dismiss (Filing No. 6) and request for oral argument (Def.'s Br., Filing No. 7 at 24.) For the reasons that follow, Primus's Motion will be granted in part.

FACTS

For diversity purposes, Plaintiffs, as co-representatives of the estate of the decedent, Dale L. Braddock ("Braddock"), are considered citizens of Nebraska, the state of Braddock's citizenship, and Primus is a citizen of California. For purposes of the pending motion, all well-pled facts alleged in the Amended Complaint (Filing No. 3) are accepted as true, though the Court need not accept the Plaintiffs' conclusions of law. The following is a summary of those factual allegations.

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, CDPHE announced that *Listeria* bacteria leading to the outbreak were linked to cantaloupe from the Rocky Ford growing region. The contaminated cantaloupes were grown by Jensen Farms, a Colorado company, and

distributed by Frontera Product, Ltd. ("Frontera"). A total of 147 people from 28 states were infected with outbreak-associated strains of *Listeria monocytogenes*.

On August 20, 2011, at a supermarket in Omaha, Nebraska, Braddock purchased a *Listeria*-contaminated cantaloupe grown by Jensen Farms. Soon after, Braddock consumed the cantaloupe. On or about August 27, 2011, Braddock began experiencing symptoms of a *Listeria*-caused illness. On January 1, 2012, Braddock died as result of the *Listeria* infection he contracted from the cantaloupe.

Among other services provided to the fresh produce industry, Primus verifies "[a]uditing of fresh produce farming and facility food safety practices . . . ." as a part of its commitment to "food safety and minimizing illness and death from fresh produce." (Primus Statement, Filing No. 3-1.) Prior to Braddock'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[1] (the "Audit") to ensure that the facilities, premises, and procedures used by Jensen Farms in the production of cantaloupes met or exceeded applicable standards of care related to the production of cantaloupe. Frontera represented to the public and retail sellers that its various products were "Primus Certified."

Pursuant to the Contract, Primus hired Bio Food Safety to conduct the Audit. James Dilorio ("Dilorio"), of Bio Food Safety, conducted the Audit on July 25, 2011, roughly one week before the Center for Disease Control identified the first victim of the

[1] "'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. 9 at 1, n. 2.)

Listeria outbreak. Primus[2] gave Jensen Farms packinghouse a "superior" rating, and a score of 96%.

On or about September 10, 2011, officials from both the Food and Drug Administration ("FDA") and the state of Colorado, conducted an inspection at Jensen Farms during which the FDA collected multiple samples, including whole cantaloupes and environmental (non-product) samples, within the facility for purposes of laboratory testing. Among other things, the testing revealed that 13 of the 39 samples tested positive for *Listeria monocytogenes*. After the testing, the FDA initiated an environmental assessment at Jensen Farms.

On or about September 19, 2011, the FDA announced it found *Listeria monoctyogenes* in samples of Jensen Farms' Rocky-Ford-brand cantaloupe from a Denver-area store and on samples taken from equipment and cantaloupe at the Jensen Farms packinghouse. Tests confirmed that the *Listeria monocytogenes* found in the samples matched one of several different strains associated with the multi-state outbreak of *Listeriosis*.

In October and December of 2011, as a part of an investigation into the cause of the *Listeriosis* outbreak, FDA officials along with the House Committee on Energy and Commerce (collectively "the Committee") cited Jensen Farms for multiple failures,

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[2] Plaintiff contends that Primus is responsible for certain acts and omissions of Bio Food Safety as Primus's agent. While Primus argues it was not negligent in hiring Bio Food Safety, Primus has not challenged Plaintiffs' claim that Bio Foods Safety and its employees were Primus's agents. Therefore, for purposes of this motion, the Court will consider the acts and omissions of Bio Food Safety and its employees as acts and omissions of Primus. Further references to "Primus" will include Bio Food Safety and its employees.

which, according to a report issued by the Committee, "reflected a general lack of awareness of food safety principles." Those failures included:

> a. Condensation from cooling systems draining directly onto the floor;
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> b. Poor drainage resulting in water pooling around the food processing equipment;
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> c. Inappropriate food processing equipment which was difficult to clean (i.e., *Listeria* found on the felt roller brushes);
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> d. No antimicrobial solution, such as chlorine, in the water used to wash the cantaloupes; and
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> e. No equipment to remove field heat from the cantaloupes before they were placed into cold storage.

(Amended Complaint, Filing No. 3 at 6.)

If the Jensen Farms' packinghouse had failed the Audit, the cantaloupe that caused Braddock's *Listeriosis* illness would not have been distributed by Jensen Farms and Frontera.

On October 9, 2013, Plaintiffs filed their Amended Complaint asserting claims against Primus for negligence and breach of contract. (Filing No. 3.) On December 9, 2013, Primus filed its Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), asserting that the Amended Complaint fails to state claims upon which relief may be granted. With regard to Plaintiffs' negligence claim, Primus contends that Plaintiffs cannot establish that Primus owed a duty to Braddock when conducting the Audit, that Primus breached any such duty, or that any breach of a duty by Primus was the proximate cause of Braddock's injuries. With regard to Plaintiffs' breach-of-contract claim, Primus contends that Plaintiffs are unable to establish that Braddock was an intended third-party beneficiary to the Contract or that Primus breached the Contract.

STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(6)

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 1950 (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.*

ANALYSIS

I. Negligence

Applicable Law

"[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)).

Nebraska has adopted Restatement (Second) of Conflicts of Law § 146 (1971)[3] which provides:

> 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.

Therefore, Nebraska law applies to Plaintiffs' negligence claim because Braddock's injury occurred in Nebraska, and the parties have not argued that some other state has a more significant relationship to the occurrence.

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

[3] *Malena v. Marriott Int'l, Inc.*, 651 N.W.2d 850, 856 (Neb. 2002).

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 this 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 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); *see also Martensen*, 808 N.W.2d at 862 (applying Restatement (Third) § 40); *see also Ginapp v. City of Bellevue*, 809 N.W.2d 487, 493 (2012) (applying portions of Restatement (Third) § 41).

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

Here, Primus merely conducted an audit of the packinghouse. Primus did not create any of the alleged deficiencies reported by the FDA that may have created a risk of harm that caused Braddock's injury. The alleged deficiencies existed independent of Primus's Audit. Thus, the ordinary duty to exercise reasonable care under § 7 does not apply because Primus's conduct did not *create* a risk of harm. Accordingly, under § 7, Primus does not have a duty with regard to the Audit and there can be no negligence on the part of Primus *unless* this is a special circumstance where Nebraska courts have recognized that an affirmative duty applies despite the absence of a duty under § 7.

The Nebraska Supreme Court has indicated repeatedly that its adoption of the Restatement (Third) duty analysis in *A.W.* encompassed the Restatement's entire analysis regarding duty, which now includes §§ 37-44.[5] However, because these sections were not officially published until 2012, after Primus conducted the Audit, the Court will look to the Restatement (Third) to provide a framework and starting point for this discussion, but not as independently binding authority.[6]

The Restatement (Third) § 43 provides in part:

> An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to which a third person is exposed has a duty of reasonable care to the third person in conducting the undertaking if:
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> . . .

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[5] *See Prof'l Mgmt. Midwest, Inc.*, 826 N.W.2d at 232; *see also Martensen*, 808 N.W.2d at 862.

[6] The parties assert that Nebraska courts have not yet considered the duty a packinghouse auditor owes consumers of produce. Primus directs the Court to case law involving duties of accountants to third-parties. The Court does not find these cases persuasive. Here, Plaintiffs' negligence claim involves physical harm, while a negligent financial audit causes only economic harm.

> (b) the actor has undertaken to perform a duty owed by the other to the third person . . . .

Restatement (Third) of Torts: Phys. & Emot. Harm § 43 (2012). This section replaces Restatement (Second) of Torts § 324A, which provides in part:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if . . .
>
> (b) he has undertaken to perform a duty owed by the other to the third person . . . .

Restatement (Second) of Torts § 324A (1965). An illustration in Comment d., expanding on §324A(b), is also enlightening in this case:

> 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.

Restatement (Second) of Torts § 324A, Comment d., Illustration 2. (1965). The Nebraska Supreme Court recognized the Restatement (Second) of Torts § 324A as supporting its decision in *Simon v. Omaha Pub. Power Dist.*, 202 N.W.2d 157 (Neb. 1972).

In *Simon*, the court affirmed a jury verdict finding an architectural firm liable based on its contractual undertaking to perform safety inspections of a construction site. 202 N.W.2d at 170. The court concluded that the architectural firm had a "duty to use reasonable care in the execution of its undertaking and contract so as not to cause any injury to third persons" because the firm "undertook and entered upon the performance

of safety inspection for its principal [Omaha Public Power District], following its written contract to do so." *Id.* at 168.

Here, Plaintiffs allege that Primus undertook a duty to conduct a food safety audit at Jensen Farms' packinghouse. Under § 7, Jensen Farms owed a duty of reasonable care to consumers because its conduct, including placement of contaminated produce for sale in grocery stores, created a risk of harm to consumers. Therefore, Primus undertook a duty Jensen Farms owed to the consumers of Jensen Farms' produce. Like the architectural firm in *Simon*, Primus "undertook and entered upon the performance of a safety inspection for [Jensen Farms], following its . . . contract to do so." *See* 202 N.W.2d at 168. Primus *should have* recognized, and facts alleged by Plaintiffs indicate that Primus *actually recognized*,[7] that the Audit performed by Primus "was necessary for the protection of third persons," in this case consumers. *See* Restatement (Second) § 324A. Primus also knew or should have known that the Audit would "reduce the risk of physical harm to which a third person is exposed." *See* Restatement (Third) § 43.

Thus, with regard to legal duty under Nebraska law, the Restatement (Second), and the Restatement (Third), Primus owed a duty of reasonable care to Braddock in conducting the Audit.[8] This Court, therefore, will not grant Primus's motion to dismiss

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[7]Following the *Listeria* outbreak, Primus allegedly made the following statement to the public, "Primus cannot count the lives saved through the decades of servicing the fresh produce industry." (Primus Statement, Filing No. 3-1.)

[8] The parties' briefs include arguments regarding whether Primus should be held to a heightened standard of care as an expert. For purposes of this motion, the Court will not make any specific findings regarding heightened standard of care as any heightened standard goes to the question of breach, not legal duty. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 12 (2010) ("If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to

on the grounds that Primus did not owe a legal duty to Braddock when it conducted the Audit.

B. Breach

An actor acts negligently or breaches a duty, when "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 for the fact finder to determine, on the facts of each individual case, whether or not the evidence establishes a breach of [a] duty." *A.W.*, 784 N.W.2d at 913.

Plaintiffs allege that Primus breached its duty of care by improperly conducted the Audit. In support of this claim, Plaintiffs point to Jensen Farms' failures cited by the FDA and Plaintiffs claim that a properly conducted Audit would have addressed those failures. With regard to breach, therefore, Plaintiffs have asserted sufficient facts to support a claim.

C. Causation

Under Nebraska law, causation consists of the following three elements: "(1) 'but for' the defendant's negligence, the injury would not have occurred; (2) the injury is the natural and probable result of the negligence; and (3) there is no efficient intervening cause." *World RadioLab., Inc. v. Coopers & Lybrand,* 557 N.W.2d 1, 11 (Neb. 1996).

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be taken into account in determining whether the actor *has behaved* as a reasonably careful person.") (emphasis added).

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).

Plaintiffs claim that if Primus had properly conducted the Audit, Jensen Farms would have failed the Audit, the contaminated cantaloupe would not have been distributed to the Omaha supermarket, Braddock would not have eaten the cantaloupe and contracted a *Listeria*-related illness, and he would not have died. Plaintiffs have alleged sufficient facts to support a plausible claim that Primus's alleged negligence in conducting the Audit was the "but for" cause of Braddock's injury.

Plaintiffs also have alleged sufficient facts to support a plausible claim that Braddock's death was a natural and probable result of Primus's alleged failure to use reasonable care in conducting the Audit. Plaintiffs have pled sufficient facts to establish that Primus knew or should have known its failure to conduct the Audit properly might result in physical harm or death to consumers of cantaloupe distributed from Jensen Farms' packinghouse.

Plaintiffs have pled a claim for negligence,[9] and Primus's motion to dismiss Plaintiffs' negligence claim will be denied.

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

II. Breach of Contract

Plaintiffs contend that Primus breached its contract with Jensen Farms and/or Fontera when it improperly conducted the Audit, and that "[a]s a consumer of cantaloupe manufactured by Jensen Farms, Braddock was an intended third-party beneficiary of the audit conducted by Primus through its agent." (Amended Complaint, Filing No. 3, ¶45.)

Primus argues that Plaintiffs failed to include any factual support or reference to specific contract language supporting their claim that Primus is liable to Plaintiffs for breach of its contract with Jensen Farms pursuant to a third-party beneficiary theory. Primus also asserts that Plaintiffs did not allege that Primus breached any provisions of the Contract.

Sitting in diversity, this Court applies state substantive law. *Shady Grove*, 559 U.S. at 417. As stated above, in determining which state's law applies, this Court must follow Nebraska's conflict of law rules. *Modern Computer*, 858 F.2d at 1342. Generally, Nebraska courts apply choice-of-law provisions in contracts. *See Shull v. Dain, Kalman & Quail Inc.*, 267 N.W.2d 517, 520 (Neb. 1978). In the absence of an effective choice by the parties, Nebraska courts apply the Restatement (Second) of Conflict of Laws § 188,[10] which provides in part:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

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[10] *Mertz v. Pharmacists Mut. Ins. Co.*, 625 N.W.2d 197, 202 (Neb. 2001).

> (2) In the absence of an effective choice of law by the parties ... the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
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> (a) the place of contracting,
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> (b) the place of negotiation of the contract,
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> (c) the place of performance,
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> (d) the location of the subject matter of the contract, and
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> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
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> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Laws § 188 (1971). Here, the Amended Complaint does not contain sufficient facts to allow the Court to determine the applicable law. That is, the Plaintiffs failed to attach the purported contract, failed to state whether the parties to the Contract included a choice-of-law provision, failed to state where the contract was executed, failed to state where the contract was negotiated, and failed to state the place of incorporation and/or place of business for Frontera or Jensen Farms. In fact, the Amended Complaint is devoid of description of a single contractual provision. With regard to the Contract itself, the Amended Complaint contains no more than a claim that a Contract existed and bare legal conclusion that the alleged improper Audit constituted a breach of the Contract.

Without discussion as to which state's law applies, Primus directs the Court to cases applying Arkansas, Illinois, and Nebraska law. Plaintiffs' brief is completely devoid of argument regarding their breach of contract claim.

Under Nebraska law, "[i]n order for those not named as parties to recover under a contract as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interest of such unnamed parties were contemplated and that provision was being made for them." *Podraza v. New Century Physicians of Nebraska, LLC*, 789 N.W.2d 260, 267 (Neb. 2010). A plaintiff's right to sue as a third-party beneficiary "must affirmatively appear from the language of the instrument when properly interpreted or construed." *Id.* Here, Plaintiffs have not alleged that Braddock is a named party in the contract nor have they alleged that the Contract contained any such language indicating that the Braddock has any rights under the Contract.

If Primus is correct in its application of Nebraska law, this Court agrees that Plaintiffs have failed to allege sufficient facts to establish that they are entitled to recovery under the Contract on a third-party beneficiary theory, and therefore do not have standing to sue.

With regard to Plaintiff's breach-of-contract claim, the Amended Complaint contains no more than "'naked assertions' devoid of factual enhancement" and is insufficient to "raise a right to relief above the speculative level." *See Hamilton* 621 F.3d at 817-18; *Williams*, 658 F.3d at 848. Because the Amended Complaint contains insufficient factual support for Plaintiffs' breach-of-contract claim, and insufficient information from which the Court can determine governing law, the Court finds the motion to dismiss Plaintiffs' breach of contract claim should be granted.

CONCLUSION

For the reasons stated above, Primus's Motion to Dismiss Plaintiffs' negligence claim will be denied. Primus's Motion to Dismiss Plaintiffs' breach-of-contract claim will be granted. Accordingly,

IT IS ORDERED:

1. Primus's Motion to Dismiss Amended Complaint for Failure to State a Claim (Filing No. 6) is denied in part and granted in part as follows:

    a. Primus's Motion to Dismiss Plaintiffs' negligence claim is denied;

    b. Primus's Motion to Dismiss Plaintiffs' breach of contract claim is granted; and

2. Primus's Request for oral argument is denied.

Dated this 5th day of February, 2014.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge