IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

LYDIA CORSI, as personal representative of the ESTATE OF JACK CORSI, Plaintiff(s), vs. JENSEN FARM, a trade name; FRONTERA PRODUCE LTD.; PRIMUS GROUP, INC. d/b/a PRIMUS LABS; WALMART STORES, INC., a corporation; THE KROGER CO., d/b/a SMITH'S; and DOES 1-20, Defendant(s).	)	Case No. 2:12-CV-052-SWS

ORDER GRANTING DEFENDANT PRIMUS GROUP INC.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

This matter comes before the Court on *Primus Group Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint* (ECF No. 65). The Court, having considered the briefs submitted in support of the motion and Plaintiff's opposition thereto,[1] having heard oral argument of counsel and being otherwise fully advised, FINDS and ORDERS as follows:

[1] On September 11, 2013, the Court set a hearing on Defendant's motion to dismiss. Thereafter, on September 25, 2013, Defendant Primus Group Inc. filed a Reply Brief in support of its motion. (ECF No. 73.) This Court's local rules prohibit the filing of reply briefs for any motion set for oral hearing. U.S.D.C.L.R. 7.1(b)(2)(C). Even so, the Defendant's reply brief was filed outside the required time when such briefs are allowed. *Id.* Accordingly, as stated at the outset of the hearing, Defendant's Reply Brief is STRICKEN.

BACKGROUND

This case arises out of a *Listeria* outbreak which occurred toward the end of the summer in 2011. The outbreak was ultimately linked to contaminated cantaloupe from the Rocky Ford (Colorado) growing region. (Second Am. Compl. ¶ 14) (ECF No. 54). Defendant Jensen Farms, a Colorado business, was a manufacturer, distributor and seller of agricultural products, including cantaloupe, in Colorado, Utah, Idaho and Wyoming. (*Id.* ¶ 3.) Defendant Frontera Produce, Ltd. ("Frontera") is a Texas corporation and a distributor and seller of agricultural products in Wyoming, Utah, and Idaho, including cantaloupes from Jensen Farms. (*Id.* ¶¶ 6-7.) Defendant The Kroger Co. ("Kroger") is an Ohio corporation which operates Smith's Supermarket in Jackson, Wyoming. (*Id.* ¶¶ 4-5.) Defendant Wal-Mart Stores, Inc. ("Wal-Mart") is a Delaware corporation and operates a retail facility in Blackfoot, Idaho. (*Id.* ¶ 10.)

Movant, Defendant Primus Group, Inc., d/b/a Primus Labs ("Primus"), is a California corporation that, among other things, "provided auditing services for agricultural and other businesses involved in the manufacture and sale of food products." (*Id.* ¶ 8.) Primus retained the services of certain subcontractors, including Bio Food Safety, to provide food safety auditing services. *Id.* Plaintiff alleges that, on or about July 25, 2011, Primus, by and through its agents Bio Food Safety and auditor James Dilorio, performed an audit at a cantaloupe packinghouse owned by Defendant Jensen Farms in Colorado. (*Id.* ¶ 9.) Mr. Dilorio allegedly "found many aspects of Jensen Farms' facility, equipment, and procedures" to be in "total compliance." (*Id.* ¶ 18.)

Plaintiff further alleges that, during the July 2011 audit, "Mr. Dilorio failed to observe, or properly downscore or consider, multiple conditions or practices that were in violation of Primus' audit standards applicable to cantaloupe packing houses, industry standards, and applicable FDA industry guidance." (*Id.* ¶ 19.) Plaintiff alleges the presence of various conditions and practices at the Jensen Farms packinghouse which were inconsistent with the "superior" rating Mr. Dilorio ultimately gave Jensen Farms and should have caused the packinghouse to fail the audit. (*Id.* ¶¶ 19-20.)

Although healthy persons may consume contaminated foods without becoming ill, those at increased risk for infection may become ill with Listeriosis after eating food contaminated with even a few of the *Listeria* bacteria. (*Id.* ¶ 16.) Plaintiff alleges she and her husband, on or about July and August 2011, purchased and consumed several whole cantaloupes which had been manufactured, distributed and sold by the Defendants. (*Id.* ¶ 23.) Mr. Corsi fell ill in September 2011. A subsequent blood culture confirmed Mr. Corsi was infected with the bacterium *Listeria monocytogenes*. His condition quickly worsened and he ultimately died on November 8, 2011. (*Id.* ¶ 24.) Plaintiff alleges Mr. Corsi's *Listeria* infection resulted directly from his consumption of contaminated cantaloupe manufactured, distributed and sold by the Defendants. (*Id.* ¶ 25.) Plaintiff concludes, "Had the Jensen Farms' packing house failed the July 25, 2011 audit, the cantaloupe that caused the Plaintiffs' Listeriosis illness would not have been distributed by Jensen Farms and Frontera." (*Id.* ¶ 22.)

By this action, Plaintiff brings claims for strict liability, breach of warranty, negligence and negligence per se against those Defendants allegedly involved in the manufacture, distribution and sale of the contaminated cantaloupe: Jensen Farms, Frontera, Kroger, and Wal-Mart. Plaintiff brings separate claims against Defendant Primus for negligence and breach of contract. Primus has moved to dismiss both claims against it, arguing Plaintiff cannot establish Primus owed the decedent a duty of care in conducting its audit and the complaint contains no facts to establish decedent was a third-party beneficiary to the contract for auditing services with Jensen Farms. Defendant's motion to dismiss for failure to state a claim is brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(6) provides for dismissal when a plaintiff's complaint fails to state a claim upon which relief can be granted. In reviewing a motion to dismiss under Rule 12(b)(6), this Court must accept as true "all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). In order to survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face."[2] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The "plausibility standard" is not a probability requirement, but requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A

[2] The Court will not consider the numerous factual assertions Plaintiff makes in her opposition brief that are not contained in the Second Amended Complaint.

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." *Id.* Accordingly, complaints that "offer[] labels and conclusions[,] a formulaic recitation of the elements of a cause of action" or "naked assertions devoid of further factual enhancement," will not survive a motion to dismiss. *Id.* (quoting *Twombly*, 550 U.S. at 555, 557) (internal quotations omitted).

In the Tenth Circuit, this "plausibility requirement" has been recognized as requiring the plaintiff's factual allegations to be enough that, if accepted as true, the plaintiff plausibly (not just speculatively) has a claim for relief. *See Gee v. Pacheco*, 627 F.3d 1178, 1183-84 (10th Cir. 2010). "This requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them." *Robbins v. Okla. ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1249 (10th Cir. 2008). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011).

DISCUSSION

A. Negligence

Plaintiff alleges Defendant Primus was negligent in conducting the food safety audit of Jensen Farms' packinghouse. Generally, "[n]egligence occurs when one fails to act as would a reasonable person of ordinary prudence under like circumstances." *Lucero*

v. Holbrook, 288 P.3d 1228, 1232 (Wyo. 2012). Under Wyoming law, the elements of negligence are: "(1) The defendant owed the plaintiff a duty to conform to a specified standard of care, (2) the defendant breached the duty of care, (3) the defendant's breach of the duty of care proximately caused injury to the plaintiff, and (4) the injury sustained by the plaintiff is compensable by money damages." *Id.* "The existence and scope of a duty are questions of law for the court. . . . A duty of care may arise by contract, statute, common law, or when the relationship of the parties is such that the law imposes an obligation on the defendant to act reasonably for the protection of the plaintiff." *Rice v. Collins Commc'n, Inc.*, 236 P.3d 1009, 1014 (Wyo. 2010) (internal quotations omitted).

Without citation to any Wyoming law, Plaintiff argues Primus owed a duty of reasonable care to "the consumers of Jensen Farms/Frontera cantaloupes" (Second Am. Compl. ¶ 56) as such persons are in the "zone of foreseeable risk" (*Id.* ¶ 57). However, Plaintiff's complaint contains no factual allegations from which the Court can infer a duty arising by statute. Nor has Plaintiff alleged a relationship between the decedent and Primus such that Wyoming law imposes an obligation on Primus to act reasonably for the protection of the decedent. *See Lucero*, 288 P.3d at 1232 (being a member of the public in itself is insufficient to establish relationship required for imposition of legal duty). Although Plaintiff suggests the purpose of the contracted audit was to assess the packinghouse for compliance with "industry standards, and applicable FDA industry guidance" (*Id.* ¶ 19), Plaintiff fails to allege or identify the nature of these standards.

Thus, the Court is further left to speculate as to the specific standard of care under which Primus allegedly was to conduct the food safety audit.

A balancing of the factors relied upon by the Wyoming Supreme Court in determining whether the common law creates a duty of care also weighs against the imposition of a duty here.

> Some of the key policy factors to be considered are: (1) the foreseeability of harm to the plaintiff, (2) the closeness of the connection between the defendant's conduct and the injury suffered, (3) the degree of certainty that the plaintiff suffered injury, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden upon the defendant, (7) the consequences to the community and the court system, and (8) the availability, cost and prevalence of insurance for the risk involved.

Lucero, 288 P.3d at 1233. "It is not sufficient to say that merely because something did happen, the result was foreseeable." *Id.* Plaintiff's factual allegations are insufficient for the Court to assess foreseeability or connect the actions of Primus to the harm suffered by decedent. Specifically, the complaint fails to set forth facts to support its speculative and conclusory allegation that the contaminated cantaloupe would not have been distributed but for the positive audit results. Likewise, the Court cannot attach moral blame to Primus' conduct without facts establishing the intended scope or purpose of the audit (as required by industry standards, FDA regulations, contract, or otherwise) or that the manufacture, distribution and sale of the cantaloupe was in any way dependent on the

results of the audit.[3] The complaint contains no factual allegations to demonstrate Primus was in a position to prevent the harm eventually caused to the decedent. Therefore, imposing a duty on Primus under these circumstances would be a significant burden on it and similarly situated auditors.[4] "Absent a duty, there is no actionable claim of negligence."[5] *Rice*, 236 P.3d at 1014.

The closeness of the connection between the injury and the conduct is related to causation. *Lucero*, 288 P.3d at 1234. Accordingly, even if the Court recognized the existence of a duty, there is no proximate cause connection alleged between the Primus audit and the harm to decedent. The Wyoming Supreme Court has rejected a "but for" rule of causation, requiring conduct to be a substantial factor in bringing about the injuries identified in the complaint. *Id.* at 1234-35. Again the Court is left to speculate, in this case, as to the consequence of a negligently conducted "food safety audit" with respect to the manufacture, distribution and sale of the cantaloupe.[6] The complaint contains no facts suggesting Primus had any control over whether Jensen Farms' cantaloupes were distributed or that the "superior" rating allowed the cantaloupes to be

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[3] "Moral blame results from misconduct more extreme than ordinary negligence. Such culpability may result where the alleged tortfeasor is the party best in the position to prevent injury." *Lucero*, 288 P.3d at 1234 (internal quotations and citations omitted).

[4] Such a finding does not leave Plaintiff without a remedy, however; Plaintiff can rightly pursue her claims against those parties directly involved in the stream of commerce.

[5] Plaintiff also contends Primus owed the decedent a duty under Restatement (Second) of Torts § 311, which recognizes a claim for negligent misrepresentation resulting in physical harm. However, even assuming such a claim is applicable under these circumstances, Wyoming has not adopted this definition for the generic tort of negligent misrepresentation. *See Willis v. Bender*, 596 F.3d 1244, 1259 n.9 (10th Cir. 2010).

[6] In her opposition brief, Plaintiff is slightly more specific by asserting Defendant Frontera required that its suppliers be "Primus Certified" and would not have distributed the cantaloupes if Jensen Farm had failed the audit. (ECF No. 68 at 9-10). Although coming closer to establishing the requisite duty and/or causation, these factual assertions are not contained in the Plaintiff's complaint nor has Plaintiff sought leave to amend.

distributed. Moreover, the complaint's allegations do not definitively establish that the cantaloupes purchased by Plaintiff and the decedent "on or about July and August, 2011" (Second Am. Compl. ¶ 23) were distributed *after* the July 25, 2011 Primus audit. There is simply not enough factual content in the complaint for the Court to infer the allegedly negligent audit was a substantial factor in decedent's *Listeria*-related illness. "Liability for a negligence claim cannot be established by conjecture, speculation, or guess." *Anderson v. Duncan*, 968 P.2d 440, 443 (Wyo. 1998).

Wyoming has not addressed the issue of whether an auditor of agricultural ranches and packinghouses owes a duty to the general public who consumes the food manufactured and packaged therein, nor does it appear this specific issue has been addressed in other jurisdictions. In an effort to establish the existence of a duty here, Plaintiff cites to case law, including a case from New York, addressing the duty of a *supplier or manufacturer* of a product that causes harm regardless of privity or special relationship. *See MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) ("If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.").

The Court finds the case of *Stiver v. Good & Fair Carting & Moving, Inc.*, 822 N.Y.S.2d 178 (N.Y. App. Div. 2006), to be more analogous and instructive. In *Stiver*, a motorist injured in an automobile accident brought a negligence action against the company that performed a vehicle inspection of the other automobile involved in the

collision. *Id.* at 179-80. Although the vehicle passed the inspection, plaintiff alleged that transmission components in the inspected vehicle malfunctioned, rendering the vehicle inoperable and causing the collision. *Id.* at 180. In support of their negligence claim, the plaintiffs alleged the defendant failed to use reasonable care when performing the inspection of the vehicle. In concluding the defendant owed no duty of care to plaintiffs in that case, the New York court stated any duty of defendant to plaintiffs there must arise from its contractual agreement to perform the inspection because it had no pre-existing duty imposed by law to inspect the vehicle. *Id.* "As a general rule, recovery for negligent performance of a contractual duty is limited to an action for breach of contract, and a party to a contract is not liable in tort to noncontracting third parties." *Id.* Nevertheless, plaintiffs contended an exception to the general rule applied, i.e. a contracting party may be liable to those foreseeably injured if it creates an unreasonable risk of harm. The New York Court rejected plaintiffs' contention, reasoning that the defendant did not make the vehicle any less safe than it was before the inspection so that exception did not apply. *Id.* The *Stiver* court further rejected plaintiffs' contention that they detrimentally relied upon the inspection because there was no evidence in the record that plaintiffs knew prior to the accident that the vehicle had been inspected. *Id.*

Similarly, Plaintiff here has not demonstrated that imposition of a duty on Defendant Primus, which is not a manufacturer, distributor or seller of the contaminated cantaloupe, is appropriate under the circumstances alleged. Thus, the Court finds Plaintiff has failed to state a plausible claim for negligence against Defendant Primus.

B. Breach of Contract

Plaintiff alleges Defendants Jensen Farms and Primus entered into a contract whereby Primus Labs would conduct a food safety audit at the Jensen Farms' packinghouse. (Second Am. Compl. ¶ 66.) Plaintiff further alleges, without reference to specific provisions of the contract or attaching a copy of the contract to the complaint, "[i]t was the intent of these contracting parties . . . 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 . . . [and] to ensure that the food products that Jensen Farms produced would be of high quality for consumers, and would not be contaminated by potentially lethal pathogens like Listeria." (*Id.* ¶ 67.) Plaintiff contends decedent, as a consumer of cantaloupe manufactured by Jensen Farms, was an intended third-party beneficiary of the contract between Jensen Farms and Primus. (*Id.* ¶ 73.)

"It is elemental that unless a contract was entered into for the benefit of a third party, no one but the parties to the contract can be bound by it or obtain rights under it." *Richardson Assoc. v. Lincoln-Devore, Inc.*, 806 P.2d 790, 806 (Wyo. 1991). In *Richardson Assoc.*, the Wyoming Supreme Court looked to Restatement (Second) of Contracts § 302 (1981) for guidance in determining whether an individual is an intended third-party beneficiary:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to

> performance in the beneficiary is appropriate to effectuate the intention of the parties and either
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> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
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> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Id. at 807. No factual allegations in the complaint demonstrate that any of these circumstances exist here. Plaintiff has failed to attach a copy of the contract or even reference any specific language of the agreement whereby the Court could infer Primus undertook the food safety audit for the benefit of decedent who, under the circumstances as alleged, would have been at best an incidental beneficiary. Plaintiff has likewise failed to reference any contract provisions indicating the scope and purpose of the audit had anything to do with detecting the presence of *Listeria* pathogens and/or conditions creating the outbreak of *Listeria* pathogens. *See id.* at 810.

The complaint simply does not adequately allege facts to support an inference that decedent was an intended third-party beneficiary of the contract between Jensen Farms and Primus. To be sure, the Court could reasonably infer the potential for widespread third-party impact inherent in a contractual relationship for food safety auditing services. However, some additional factors must be present if persons from within this broad class can obtain rights under such a contract; otherwise, the distinction between intended and incidental beneficiaries would lose all meaning in this context. *See Mariani v. Price*

Waterhouse, 82 Cal.Rptr.2d 671, 680-81 (Cal.Ct.App. 1999) (finding no intended third-party beneficiaries of an ordinary contract for financial auditing services).

That Primus Labs may have "negligently conducted an audit at Jensen Farms" (Sec. Am. Compl. ¶ 74) does not establish a breach of the contract. To establish a breach of contract, a plaintiff must show: (1) a lawfully enforceable contract; (2) an unjustified failure to timely perform all or any part of what is promised therein; and (3) entitlement to damages. *Schlinger v. McGhee*, 268 P.3d 264, 268 (Wyo. 2012). Plaintiff has failed to identify any promise under the contract which Primus failed to perform. Plaintiff speculates that the parties intended the scope of the contract to include efforts to detect *Listeria* pathogens; however, even if the contract did require such efforts, which cannot be determined from the facts alleged in Plaintiff's complaint, a breach of that provision would be a claim belonging to Jensen Farms. Accordingly, Plaintiff has failed to state a plausible claim against Defendant Primus for breach of contract.

CONCLUSION

Plaintiff has not demonstrated that Defendant Primus owed a legal duty to the decedent with respect to its performance of the food safety audit at Jensen Farms' cantaloupe packinghouse. Nor has Plaintiff alleged sufficient facts from which this Court can infer the decedent's illness was caused by any deficiencies in Primus' performance of the audit. Assuming Primus had discovered Listeria within the packinghouse and notified Jensen Farms of its discovery, Plaintiff has alleged no facts to suggest that the cantaloupe would nonetheless have reached the end consumers, including the decedent.

In other words, there are no allegations to contradict the reasonable inference that the distribution, sale, and consumption of the contaminated cantaloupes were completely outside the control of Primus. The Court finds Plaintiff's factual allegations insufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. THEREFORE, it is hereby

ORDERED that *Primus Group Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint* (ECF No. 65) is GRANTED.

Dated this 11th day of October, 2013.

Scott W. Skavdahl
United States District Judge