IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

BETTE ONSAGER, as Personal Representative of the Estate of Jerome Onsager, and personally, Plaintiff, vs. FRONTERA PRODUCE LTD., a foreign corporation; PRIMUS GROUP, INC., a foreign corporation, d/b/a "Primus Labs"; WALMART STORES, INC., a foreign corporation; JOHN DOES 1-10 and companies XYZ, Defendants.	CV 13-66-BU-DWM-JCL FINDINGS & RECOMMENDATION

Plaintiff Bette Onsager ("Onsager") brings this personal injury action to recover damages allegedly sustained by the decedent, Jerome Onsager, as a result of consuming cantaloupe contaminated with Listeria monocytogenes ("Listeria"). Defendant Primus Group, Inc. ("Primus") has moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Primus's motion should be granted in part and denied in part as set forth below.

I. Background[1]

In September 2011, the Colorado Department of Public Health and Environment traced the source of a multi-state Listeria outbreak to cantaloupe grown by Jensen Farms, a Colorado company, and distributed by Defendant Frontera Produce Ltd. ("Frontera"). A total of 147 people from 28 states were infected with at least one of the outbreak-associated Listeria strains, and 33 deaths were reported. Onsager's 75-year-old husband, Jerome, was one of the people infected. Jerome fell ill during the first week of September 2011, after consuming a Listeria-contaminated cantaloupe that had been purchased from the Wal-Mart Supercenter in Bozeman, Montana. On January 12, 2012, Jerome died as a result of the Listeria infection he contracted from the contaminated cantaloupe.

Primus is a company that provides auditing services to agricultural and other businesses involved in the manufacture and sale of food products. Prior to the Listeria outbreak, Jensen Farms and/or Frontera contracted with Primus to conduct an audit of Jensen Farms' ranchlands and packinghouse. It was the intent of the contracting parties to ensure that the Jensen Farms' facilities, premises, and procedures met or exceeded applicable standards of care related to the production

[1] Consistent with the well established standard applicable to Rule 12(b)(6) motions, the following facts are taken from the Amended Complaint (doc. 21) and accepted as true for present purposes.

of cantaloupes. Frontera represented to the public and retail sellers that its produce products were "Primus Certified," which meant that Jensen Farms had to pass the Primus audit before Frontera would distribute its cantaloupes.

Primus engaged a subcontractor, Bio Food Safety, to audit Jensen Farms on its behalf. Bio Food Safety auditor James Dilorio ("Dilorio") conducted the audit on July 25, 2011, approximately one week before the Center for Disease Control identified the first victim of the Listeria outbreak. Dilorio gave the Jensen Farms packinghouse a "superior" rating and a score of 96%.

On or about September 10, 2011, the Food and Drug Administration ("FDA") and the state of Colorado inspected Jensen Farms and collected several samples, including whole cantaloupes and environmental samples, many of which tested positive for Listeria. As a result, the FDA initiated an environmental assessment and on October 19, 2011, issued a report identifying several deficiencies in facility design, equipment design, and postharvest practices at Jensen Farms. The FDA's report was not consistent with Primus's audit, which found that many of the same facility and equipment designs and postharvest practices were in "total compliance." Had Jensen Farms received a failing audit score, its cantaloupe products would not have qualified as having been "Primus Certified" and would not have been distributed by Frontera.

In August 2013, Onsager, as personal representative of her late husband's estate, commenced this action against Walmart Stores Inc., Frontera, and Primus. She brings a negligence claim against Primus, alleging it was negligent in (1) performing the audit and (2) hiring and supervising Bio Food Safety. Onsager also brings claims against Primus for negligent infliction of emotional distress and loss of consortium. Primus moves to dismiss Onsager's claims pursuant to Rule 12(b)(6) on the ground that they fail to state a claim upon which relief may be granted.

II. <u>Legal Standard</u>

Fed. R. Civ. P. 12(b)(6) permits a party to move for dismissal where the allegations of a pleading "fail[] to state a claim upon which relief can be granted." A cause of action may be dismissed under Fed. R. Civ. P. 12(b)(6) either when it asserts a legal theory that is not cognizable as a matter of law, or if it fails to allege sufficient facts to support an otherwise cognizable legal claim. *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996).

To survive a Rule 12(b)(6) motion, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (20070. "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009). The allegations in a complaint must rise above the level of mere speculation, but need only "raise a reasonable expectation that discovery will reveal evidence of" a basis for liability. *Twombly*, 550 U.S. at 555-56.

In determining whether this standard is satisfied, the court must accept all factual allegations in the complaint as true and construe them in the light most favorable to the plaintiffs. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). But the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555. "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1055 (9th Cir. 2008). Assessing a claim's plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950.

III. <u>Discussion</u>

A. Negligence

Onsager alleges Primus was negligent in conducting the July 25, 2011, audit

at the Jensen Farms packinghouse.[2] Generally speaking, she claims Dilorio was negligent by: (1) failing to detect and report several conditions and practices that were in violation of Primus's audit standards and applicable FDA guidance and industry standards, (2) failing to downscore Jensen Farms for those deficiencies, and (3) giving Jensen Farms a passing audit score. (Doc. 21, ¶¶ 51-56).

To maintain an action in negligence under Montana law,[3] "the plaintiff must prove four essential elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached that duty, (3) the breach was the actual and proximate cause of an injury to the plaintiff, and (4) damages resulted." *Peterson v. Eichhorn*, 189 P.3d 615, 620-21 (Mont. 2008).

1. Duty

Primus first argues Onsager has failed to allege facts showing that it owed Jerome ("the decedent") any legal duty. Absent such a legal duty, there can be no negligence. *Slack v. Landmark Co.,* 267 P.3d 6, 10 (Mont. 2011). Whether a

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[2] Because Primus does not argue otherwise, the Court assumes for purposes of this discussion that Primus can be held liable as a principal for the alleged negligence of its agents, Bio Food Safety and Dilorio.

[3] Because jurisdiction in this case is premised on diversity of citizenship, the Court looks to the substantive law of Montana as the forum state for purposes of determining whether Onsager has stated a claim for relief. *See Medical Laboratory Mgmt. Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806, 812 (9th Cir. 2002).

legal duty exists is an issue of law for the court to decide. *Gourneau ex rel. Gourneau v. Hamill*, 311 P.3d 760, 762 (Mont. 2013).

The question of whether an auditor of agricultural production facilities who contracts with a farm owner to audit the farm owner's facilities owes a duty to the end consumer of the agricultural product is one of first impression in Montana. Because the Montana Supreme Court has not yet considered the issue, this Court must predict how the highest state court would resolve it, using "decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho* Falls, 742 F.3d 1100, 1102 (9th Cir. 2013).

Primus argues it cannot have owed the decedent any duty arising out of the contract with Jensen Farms because Onsager has not alleged facts demonstrating that it was in near privity with the decedent, or that the decedent was a third party beneficiary of the contract.

The Montana Supreme Court has held that a party to a contract may owe a duty of care to a non-contractual third party if the two are in "near privity." *Thayer v. Hicks*, 793 P.2d 794, 798 (Mont. 1990); *Jim's Excavating Service v. HKM Associates*, 878 P.2d 248, 255 (Mont. 1994). *Thayer* held that an accountant owes a duty of care to third parties with whom the accountant is not in privity of

contract if the following factors are present: (1) the accountant was aware that his professional work product was to be used for a particular purpose, (2) in furtherance of which a known party was intended to rely, and (3) there was some conduct on the part of the accountant linking him to that party, which shows the accountant's understanding of that party's reliance. *Thayer*, 793 P.2d at 788 (adopting near privity rule established in *Credit Alliance Corp. v. Arthur Andersen & Co.*, 493 N.Y.S.2d 435, 440 (1985)).

Primus argues Onsager has not alleged facts suggesting that the elements necessary to demonstrate a "near privity" relationship between it and the decedent were satisfied here. (Doc. 27, at 14.). Specifically, Primus contends Onsager has not alleged facts from which it can be inferred that the decedent reviewed or relied on the food safety audit report, or that Primus knew the decedent would rely on its audit report for any particular purpose. (Doc. 27, at 14).

Onsager does not argue otherwise, and does not claim to have alleged facts establishing that Primus was in "near privity" with the decedent. Rather, Onsager takes the position that a "near privity" relationship is not a prerequisite to establishing that Primus owed the decedent a duty of reasonable care under the circumstances. As Onsager correctly points out, *Thayer* and its progeny are distinguishable because they are not personal injury cases and address only

pecuniary loss in the specific context of claims for negligent misrepresentation under the Restatement (Second) of Torts § 552. *See Thayer*, 793 P.2d at 788-91; *Jim's Excavating*, 878 P.2d at 253-54; *Western Security Bank v. Eide Bailly LLP*, 249 P.3d 35, 40-44 (Mont. 2010). Because Onsager is not alleging a claim against Primus for negligent misrepresentation under § 552, this line of authority is inapposite.

Primus next argues that Onsager cannot establish contract-based duty of care because she has not alleged facts showing that the decedent was an intended third-party beneficiary of the contract with Jensen Farms. As discussed below, however, the Court concludes that Primus owed the decedent a duty of reasonable care as set forth in § 324A of the Restatement (Second) of Torts Accordingly, the Court need not address Onsager's alternative theory that Primus also owed the decedent a contractual duty as a third-party beneficiary.

Onsager next argues Primus owed the decedent a common law duty of care as set forth in the Restatement (Second) of Torts § 324A. Although the Montana Supreme Court has not yet had occasion to expressly adopt § 324A, this Court predicts it would do so if presented with the facts as alleged by Onsager.

The Montana Supreme Court has "adopted the 'long-standing principle of tort law that one who assumes to act, even though gratuitously, may thereby become

subject to the duty of acting carefully, if he acts at all.'" *Lokey*, 243 P.3d at 385 (quoting *Nelson v. Driscoll*, 983 P.2d 972, 981 (Mont. 1999). As the *Lokey* court recognized, this common law principle is embodied in sections 323 and 324 of the Restatement (Second) of Torts. *Lokey*, 243 P.3d at 385 (citing *Nelson*, 983 P.2d at 981). Section 323 imposes a duty of reasonable care on those who gratuitously or for consideration render services to another. The particular provision at issue here is § 324A, which largely parallels § 323 but addresses liability to third persons. The fact that the Montana Supreme Court effectively adopted § 323 and cited § 324 with approval in *Loke*y suggests it would also adopt § 324A.

Section 324A provides as follows:

> 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 (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The facts as alleged by Onsager fall squarely within subsections (b) and (c).[4] Onsager alleges that Primus contracted with Jensen Farms to perform a food safety

[4] Onsager does not allege or argue that Primus's allegedly negligent audit somehow increased the risk presented by the Jensen Farms cantaloupe, which means that subsection (a) is inapplicable.

audit, thereby undertaking for consideration to render services to another. Onsager also alleges that Primus held itself out as an expert in the field of food safety and performed the July 25, 2011, food safety audit to ensure that the cantaloupes produced by Jensen Farms were fit for human consumption and were not contaminated by potentially lethal pathogens like Listeria. (Doc. 21, ¶¶ 21, 23-24). Onsager claims Primus was aware that Jensen Farms needed to pass the audit with a sufficiently high point score in order to sell its cantaloupes to Frontera for distribution. (Doc. 21, ¶ 33). Accepting these allegations as true, it is reasonable to infer that Primus should have recognized that the food safety audit was necessary to protect the decedent and other consumers of Jensens Farms cantaloupes.

With regard to subsection (b), the Restatement supplies the following illustration which is particularly instructive here: "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. Noting that Primus does not argue otherwise, the Court will assume for present purposes that Jensen Farms owed a duty to the decedent to ensure that its food

products were not contaminated with potentially lethal pathogens. With respect to subsection (b), then, Onsager has sufficiently alleged that Primus undertook that duty, at least in part, by contracting to perform the July 25, 2011, audit.

The facts alleged here are also analogous to the situation described in one of the illustrations to subsection (c):

> A Company employs B Company to inspect the elevator in its office building. B Company sends a workman, who makes a negligent inspection and reports that the elevator is in good condition. Due to defects in the elevator, which a proper inspection would have disclosed, the elevator falls and injures C, a workman employed by A Company. B Company is subject to liability to C.
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> Restatement (Second) of Torts, § 324A, Comment e, illustration 4.

Onsager alleges that Primus contracted with Jensen Farms to conduct a food safety audit, and that Primus was negligent in performing the audit and giving Jensen Farms a "superior" rating with a score of 96%. Onsager claims that if Primus had not been negligent, Jensen Farms would not have received a passing audit score and its cantaloupes would not have been distributed by Frontera to retailers across the country for consumption by customers, including the decedent. (Doc. 21, ¶¶ 59-63). Onsager alleges that by giving Jensen Farms a passing audit score, Primus represented to Jensen Farms that its facilities and food safety procedures met or exceeded good agricultural and manufacturing practices and

industry standards. (Doc. 21, ¶¶ 68-69). Onsager claims that Jensen Farms reasonably relied on that representation when selling its cantaloupe to Frontera for distribution to retailers and consumers. (Doc. 21, ¶ 68-70). Had Primus not been negligent, Onsager alleges, Jensen Farms would not have received passing audit score, and the contaminated cantaloupes would not have been distributed by Frontera and consumed by the decedent. Onsager has thus alleged sufficient facts that, when taken as true, establish that Primus owed the decedent a duty of care under § 324A(b) & (c) of the Restatement (Second) of Torts.

Other courts have reached the same conclusion in litigation arising out of the Listeria outbreak allegedly caused by Jensen Farms' cantaloupes. Thus far, four courts addressing similar motions to dismiss have concluded based on factual allegations like those made here that Primus owed the consumer plaintiffs a common law duty of reasonable care pursuant to § 324A. See *Robertson v. Frontera Produce et al*, Case No. CIV-11-1321-R (W.D. Okla. Jan. 23, 2014) (attached as Doc. 27-6) (concluding that the plaintiff sufficiently pled facts to establish that Primus owed a duty under § 324A(b) & (c); *Hauser v. Frontera Produce et al,* Case No. 2012 CV 1196 (Colo. Dist. Oct. 30, 2013) (copy attached as Doc. 44-2) (concluding on reconsideration that Primus owed a duty of reasonable care under § 324A(b)); *Braddock v Frontera Produce et al*, Case No.

8:13CV258 (D. Neb. Feb. 5, 2014) (copy attached as Doc. 27-7) (concluding that Primus owed a duty of reasonable care under § 324A(b)); *Gilbert v. Frontera Produce et al*, Case No. 12-2754 (W.D. La. Feb. 28, 2014) (copy attached as Doc. 44-5) (concluding there were sufficient facts pled to show that Primus may have owed a duty to the consumer under § 324A). But see *Underwood v. Jensen Farms et al*, 2014 WL 6903751 (E.D. Okla. Dec. 31, 2013) (declining to expand the scope of liability under Oklahoma law and concluding that Primus did not owe a duty under § 342A).

The Court finds the logic of those courts holding that Primus owed the decent a duty under § 324A persuasive, particularly because such a result is consistent with general principles of Montana common law. Whether a common law duty of care exists in any given case "depends upon whether the injury to another was reasonably foreseeable and upon a weighing of policy considerations for and against imposition of liability." *Lokey*, 243 P.3d at 386. "[F]oreseeability is 'measured on a scale of reasonableness dependent upon the foreseeability of the risk involved with the conduct alleged to be negligent.'" *Gourneau ex rel. Gourneau v. Hamill*, 311 P.3d 760, 762 (Mont. 2013) (quoting *Poole v. Poole*, 1 P.3d 936, 939 (Mont. 2000). "Foreseeability depends upon whether the injured party was within the scope of risk created by the alleged negligence" and "whether

the defendant could have foreseen that [its] conduct could have resulted in injury to the plaintiff." *Lokey*, 243 P.3d at 386. Relevant "[p]olicy considerations include prevention of future harm, the burden placed upon the defendant, the consequences to the public of imposing a duty and the availability of insurance for the risk involved." *Lokey*, 243 P.3d at 386.

Accepting the facts alleged in the Amended Complaint as true, the decedent was within the scope of risk created by Primus's allegedly negligent food safety audit and Primus reasonably could have foreseen that a negligent audit would result in injury to consumers, including the decedent. Onsager alleges that Primus contracted to perform the food safety audit to ensure that Jensen Farms' facilities, premises, and procedures met or exceeded applicable standards of care regarding the production of cantaloupe, and that the cantaloupe Jensen Farms produced would be fit for human consumption and would not be contaminated by potentially lethal pathogens like Listeria. (Doc. 21, ¶¶ 23, 24). Onsager claims Primus was aware that if Jensen Farms did not pass the audit and receive a Primus Audit Certification, its cantaloupes would not have been purchased by Frontera and distributed to retailers for human consumption. (Doc. 21, ¶¶ 25, 33). Onsager alleges that if Primus had properly performed the audit, Jensen Farms would have received a failing score and the contaminated cantaloupes that caused the

decedent's illness would not have been distributed. (Doc. 21, ¶¶ 61-63). Accepting these facts as true, it was foreseeable that Primus's allegedly negligent conduct in failing to properly perform the food safety audit could result in injury to the decedent.

The question of whether an auditor of agricultural production facilities owes a duty of care to the ultimate consumer admittedly raises competing policy concerns. On the one hand, imposing such a duty could prevent future harm by preventing the distribution of contaminated food for consumption by the public. Thus, the benefit to the public would be significant. On the other hand, holding that auditors owe a duty of care to such a broad class of potential plaintiffs could impose a significant burden on the industry. Presumably, however, insurance is available to third-party auditors like Primus – which would alleviate the extent of that burden. On balance, the Court finds that the duty contemplated by § 324A is consistent with Montana public policy. Onsager has thus alleged facts establishing that Primus owed the decedent a duty of reasonable care under § 324A as required to state a claim for negligence.

2. Breach

Primus next argues that even if it owed a duty of care to the decedent, Onsager has not alleged sufficient facts to establish that it breached that duty

because she has not identified the specific standard of care to which a food safety auditor must adhere.

Where, as here, "a duty has been established, the breach of that duty is a question of fact to be resolved by a jury." *Morrow v. Bank of America, N.A.*, 324 P.3d 1167, 1177 (Mont. 2014). Notwithstanding Primus's argument to the contrary, the Court finds that Onsager's Amended Complaint alleges sufficient facts which, if true, would permit a reasonable jury to conclude that Primus breached its duty of care to the decedent. Onsager claims that "Primus agreed, pursuant to its own guidelines, to assess and determine if Jensen Farms' packinghouse facilities, premises, and food safety procedure 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." (Doc. 21, ¶ 34). Onsager specifically alleges that "Mr. Dilorio failed to observe, or properly downscore or consider, multiple conditions or practices that were in violation of" those industry standards. (Doc. 21, ¶ 52). In addition, she alleges that "[t]he true and actual state of these conditions and practices was inconsistent and irreconcilable with the 'superior' rating and 96% score, that Mr. Dilorio ultimately gave to Jensen Farms packing house." (Doc. 21, ¶ 52). Onsager claims that "Mr.

Dilorio erroneously represented to Jensen Farms that its packinghouse facilities, premises, and food safety procedures met or exceeded" good agricultural and manufacturing practices and industry standards. (Doc. 21, ¶ 67). Exactly what those manufacturing practices and industry standards are will be fleshed out as this litigation progresses. For now, it is enough that Onsager cites those standards and claims Primus breached them while conducting the food safety audit.

3. Causation

Even assuming Onsager has adequately alleged the duty and breach elements of her negligence claim, Primus argues she has not pled sufficient facts demonstrating causation. But review of the Amended Complaint shows otherwise.

The Montana Supreme Court describes its "longstanding approach to proximate cause in negligence cases" as follows: "It is sufficient if the facts and circumstances are such that the consequences attributable to the wrongful conduct charged are within the field of reasonable anticipation; that such consequences might be the natural and probable results thereof, though they may not have been specifically contemplated or anticipated by the person so causing them." *Rohlfs v. Klemenhagen, LLC*, 227 P.3d 42, 61 (Mont. 2009) (internal quotation omitted).

The Amended Complaint alleges facts which, taken as true, establish that the allegedly negligent food safety audit caused the decedent's illness and death.

To begin with, it alleges that Frontera required Jensen Farms to undergo and pass a food safety audit before buying and distributing its cantaloupes. (Doc. 21, ¶ 25). The Amended Complaint further alleges that had Primus not been negligent, Jensen Farms would have failed the food safety audit and its cantaloupes would not have been distributed by Frontera. (Doc. 21, ¶ 63). Had Frontera not purchased and distributed the cantaloupes, Onsager alleges, retailers and their customers, including the decedent, would not have received and ultimately consumed the contaminated cantaloupes. (Doc. 21, ¶ 64). Onsager thus claims that Primus's negligence "constituted a proximate cause of [the decedent's] injuries and damages...." (Doc. 21, ¶ 106).

Primus characterizes Onsager's allegation that Frontera would not have distributed the contaminated cantaloupe as "nothing more than conjecture for which she fails to provide any factual support." (Doc. 27, at 23). But Onsager specifically alleges as one of the underlying facts that a "'Primus certification,' which meant that Jensen Farms had to successfully pass a Primus audit of its ranchlands and packinghouse, was required before Frontera would distribute and sell Jensen Farms cantaloupes." (Doc. 21, ¶ 25). Whether Onsager will be able to come forward with evidence to support that factual allegation as this case moves forward remains to be seen. But for purposes of stating a claim for negligence,

Onsager's allegations of causation are adequate.

To the extent Primus suggests that "the placement of the contaminated cantaloupe into the stream of commerce and the decedent's subsequent consumption of contaminated cantaloupe" were superseding intervening causes, it is mistaken. "[A]n intervening act is a force that comes into motion after the defendant's negligent act which combines with the negligent act to cause injury to the plaintiff." *Larchick v. Diocese of Great Falls-Billings*, 208 P.3d 836, 848 (Mont. 2009). While "an intervening act may sever the chain of liability for the defendant in certain situations," it will not do so "if the 'intervening act is one that the defendant might reasonably foresee as probable or one that the defendant might reasonably anticipate under the circumstances." *Larchick*, 208 P.3d at 849 (quoting *Fisher v. Swift Transportation Co. Inc.*, 181 P.3d 601, 610 (Mont. 2008)). As discussed above, it should have been reasonably foreseeable to Primus that if Jensen Farms passed the food safety audit, its cantaloupes would be distributed, sold, and consumed.

Because Onsager has alleged sufficient facts to support the elements of a negligence claim, this aspect of Primus's motion to dismiss should be denied.

B. Negligent Hiring and Supervision

Onsager also seeks to recover against Primus on a theory of negligent hiring

and supervision. She alleges that Primus owed the ultimate consumers of Jensen Farms' products, including the decedent, a duty to act with reasonable care in the selection, approval, and monitoring of its subcontractors, and alleges that Primus breached that duty. (Doc. 21, ¶ 102).

Primus maintains that these conclusory allegations are not sufficient to state a claim against it for negligent hiring and supervision. The Court agrees. The Amended Complaint simply alleges that Primus had a duty to act with reasonable care in hiring and supervising Bio Food Safety and Diliorio and that it breached that duty. Onsager has not alleged any facts whatsoever in support of her theory that Primus was somehow negligent in hiring and supervising Bio Food Safety and Dilorio. She does not allege, for example, that Primus knew or should have known that Bio Food Safety and Diliorio were not qualified to perform the audit or were otherwise incompetent. Nor does she identify any particular instance or example of allegedly negligent supervision, or allege what Primus could or should have done differently while supervising Bio Food Safety and Dilorio to prevent or correct their allegedly negligent conduct. Absent any supporting factual allegations whatsoever, Onsager may not proceed against Primus under a theory of negligent hiring and supervision. This aspect of Primus's motion to dismiss should be granted accordingly.

C. Negligent Misrepresentation

Onsager has not pled negligent misrepresentation as a separately delineated claim for relief, but explains in response to Primus's motion to dismiss that she believes she has "stated a claim of duty arising from" the Restatement (Second) of Torts § 311. Section 311 recognizes a claim for negligent misrepresentation resulting in physical harm, and provides as follows:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results (a) to the other, or (b) to such third persons as the actor should expect to be put in peril by the action taken.
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> (2) Such negligence may consist of failure to exercise reasonable care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it is communicated.
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> Restatement (Second) Torts § 311.

Finding that Primus owed a duty under §311 would be problematic in this case for two reasons. First, the Montana Supreme Court has not adopted § 311 or given any indication that it would be inclined to do so. Second, even if this Court could safely predict that the Montana Supreme Court would adopt § 311, Onsager makes clear that she is relying on § 311 for the limited purposes of establishing the duty element of her general negligence claim. Because Onsager has not pled an independent claim for negligent misrepresentation, and because the Court has

concluded that Primus had a duty of reasonable care under section § 324A of the Restatement (Second) of Torts, the Court need not consider whether Primus also had a comparable duty under § 311.

D. Negligent Infliction of Emotional Distress

Onsager has alleged a claim for negligent infliction of emotional distress, based on the "emotional torment" she and her family maintain they suffered as a result of the Defendants' alleged negligence. (Doc. 21, ¶¶ 107-116). Under Montana law, an independent claim for negligent infliction of emotional distress "can be maintained only upon a showing that the plaintiff suffered serious or severe emotional distress as the reasonably foreseeable consequence of the defendant's act or omission." *White v. State es rel. Montana State Fund*, 305 P.3d 795, 805 (Mont. 2013) (internal quotations omitted).

Primus moves to dismiss Onsager's claim negligent infliction of emotional distress on the ground that the decedent's illness and death were not reasonably foreseeable at the time of the audit. As discussed above, however, the Court finds that the risk to the decedent, as the ultimate consumer of the cantaloupes, was reasonably foreseeable to Primus. Because Primus does not challenge Onsager's claim for negligent infliction of emotional distress on any other basis, its motion to dismiss should be denied in this regard.

E. Loss of Consortium

Onsager's Amended Complaint also includes a claim for loss of consortium. (Doc. 21, ¶¶ 122- 126). Primus argues that because Onsager has failed to plead a cause of action for negligence, her derivative claim for loss of consortium fails as a matter of law. As discussed above, however, Onsager has stated a claim for negligence, which means Primus's motion to dismiss her derivative claim for loss of consortium should be denied.

IV. Conclusion

IT IS RECOMMENDED that Primus's Motion to Dismiss be granted in part and denied in part as set forth above.

DATED this 10th day of July, 2014

Jeremiah C. Lynch
United States Magistrate Judge