DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO	
7325 South Potomac Street Centennial, CO 80112	DATE FILED: July 14, 2014 3:45 PM FILING ID: 1AF3B2C4DEA49 ▲ COURT USE ONLY ▲ CASE NUMBER: 2011CV1891
IN RE PRODUCE LITIGATION	Case No.: 2011CV1891, et al. 2013CV31951 (Adams) 2013CV31987 (Adams) 2013CV31991 (Adams) 2011CV1891 (Arapahoe) 2013CV31208 (Boulder) 2011CV6682 (Denver) 2013CV33348 (Denver) 2013CV33411 (Denver) 2013CV33461 (Denver) 2013CV33475 (Denver) 2013CV33476 (Denver) 2013CV33478 (Denver) 2013CV33480 (Denver) 2013CV33481 (Denver) 2013CV33537 (Denver) 2013CV33911 (Denver) 2012CV779 (Douglas) 2011CV5007 (El Paso) 2012CV1196 (El Paso) 2013CV30806 (El Paso) 2013CV30023 (Elbert) 2013CV30217 (Fremont) 2013CV31357 (Jefferson) 2013CV30958 (Larimer) 2013CV30196 (Mesa) 2013CV30518 (Pueblo)
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DEFENDANT FRONTERA PRODUCE LTD'S RESPONSE IN OPPOSITION TO PRIMUS GROUP, INC.'S AMENDED MOTION AND BRIEF IN SUPPORT OF MOTION TO DISMISS FRONTERA'S CROSS CLAIMS

Defendant, **FRONTERA PRODUCE LTD,** (hereinafter Frontera), by and through its attorneys, **OVERTURF MCGATH HULL & DOHERTY P.C.,** respectfully submits its Response in Opposition to Primus Group, Inc.'s (hereinafter "Primus") Motion and Brief in Support of Motion to Dismiss Frontera's Cross Claims ("Motion"), as follows:

I. OVERVIEW

As a preliminary and critical matter, Primus' Motion is based on arguments that may not properly be considered under C.R.C.P. 12. Despite repetitive assertions that it is challenging the 'sufficiency of' the allegations raised in Frontera's cross claims, Primus' arguments relate solely to challenging the factual accuracy of Frontera's allegations. These arguments would not even pass muster under Rule 56, let alone under the standards required of a motion to dismiss allegations at the onset of a case. While Primus may dispute the material facts as alleged by Frontera, they must be taken as true for the purpose of Primus' Rule 12 Motion. *Allen v. Steele*, 252 P.3d 476, 481 (Colo. 2011). As set forth in detail below, when properly viewed under the correct legal standard, Frontera's cross claim allegations state *prima facie* claims against Primus for negligence, negligent misrepresentation, breach of contract and contribution. [1]

Primus' Motion to Dismiss is premised largely upon the false assertion that it owes no duty of care to Frontera. Primus fails to recognize any difference in the duty it owed to Frontera in comparison with the duty it owed to Plaintiffs. Consequently, Primus' Motion to Dismiss relies on well-worn and disingenuous arguments it has made in its many motions to dismiss claims filed by Plaintiffs, which in at least one instance, have been found to be frivolous (See, *May 15, 2014 Order in Robertson case*, p. 8 ("… in an attempt that can be described as frivolous at best, Primus Group argues that

[1] Judge Russell's commentary in his May 15, 2014 Order, appended as **Exhibit 1**, succinctly summarizes the problems with Primus' Motion … it is "fraught with the untenable position that in order to have survived [a Motion to Dismiss] Plaintiffs should have been required to plead facts in such an elaborate manner that they demonstrated a high probability of success. Additionally, Primus Group goes so far as to point to a lack of evidence in arguing that Plaintiffs failed to allege sufficient facts in their Complaint. Contrary to Primus Group's assertions, in resolving a motion to dismiss, the Court is only charged with determining whether a plaintiff has stated a plausible claim to relief." *May 15, 2015Order in Robertson case*, p. 9

Plaintiffs' Complaint failed to establish a duty under Oklahoma's third-party beneficiary theory duet to a lack of supporting evidence."), **Exhibit 1**).

Primus repeatedly argues that the scope of the audit it contracted to perform did not include biological testing at the Jensen Farms Packinghouse (JFP) to detect the presence of the *Listeria* bacterium. However, this argument misses the point entirely - Primus (1) failed to accurately audit the Jensen Farms packinghouse in compliance with GMP, GAP, the FDA Food Code, industry standards, and its own audit standards; and (2) provided the JFP with a Superior rating instead of failing the packinghouse in a manner that would be consistent with those standards. Those standards are designed, in part, to *prevent* the bacterial contamination of food products. As a *direct* result of this conduct, Frontera marketed the Jensen Farm cantaloupe to the public, resulting in the *Listeria* outbreak which is the subject matter of nationwide litigation. It is an undisputed fact in this case that had Primus failed JFP, Frontera would not have marketed any Jensen Farms cantaloupe.

II. FACTS[2]

Because of Primus' inferences that its audit did not have to be done in a manner that was consistent with Good Manufacturing Practices (GMP), Good Agricultural Practices (GAP) and industry standards (See, *Motion to Dismiss*, at pp. 4-5), it is important to provide the Court with a greater context for considering the Motion to Dismiss. This context reveals that Primus adopted many of these standards in its audit protocols and that evidence exists from which a jury could conclude that the JFP audit did not comply with GMP, GAP, and industry standards or Primus' own audit protocols.[3] Further, one of the governmental entities that investigated the *Listeria* outbreak, concluded, *inter alia*, that the Primus audit was, "seriously deficient in their inspection and findings." *Government Sentencing Statement in the case of United States v. Eric Jensen*. This information has been widely known to all parties involved in the *Listeria* litigation, including Primus, for quite some time.

The tactic employed by Primus in its nationwide motions to dismiss apparently is premised on the strategy that Courts will grant such motions based on limited or inaccurate information. For example, Judge Skavdahl, in the *Corsi* case, found that, "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 distributed." (See, *October 11, 2013 Order Granting Defendant Primus Group Inc.'s Motion to Dismiss Second Amended Complaint in Corsi case*, pp. 8-9, **Exhibit**

[2] Frontera hereby corrects a typographical error noted at ¶ 14 if its cross claim. Frontera received the results of the Primus audit conducted on July 25, 2011 at the JFP on August **3**, 2011.

[3] In fact, Primus identifies the FDA's *Guide to Minimize Microbial Food Safety Hazards of Melons; Draft Guidance* in July of 2009, GAP and GMP as documents relevant to the disputed facts in the *Listeria* cases in its Initial Disclosures Pursuant to C.R.C.P. 26(a)(1) at p. 5.

2).[4] However, in the Colorado cases, Frontera has not disputed Plaintiffs' allegation that it would not have marketed the cantaloupe if the Primus audit had failed the JFP (See, *Frontera's Answer and Cross Claims, ¶¶ 15, 17*). Moreover, this undisputed fact must be taken as true for purposes of Primus' Motion to Dismiss. Frontera should not be prevented from "having its day in court," including the opportunity to present complete and accurate facts to a jury. The following facts are important to the Court's decision on this issue.[5]

1. The FDA initially promulgated its Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables as early as October 1998 (See, **Exhibit 3**).

2. More specifically, within the melon industry, the standard of care for the processing of melons in the United States has been recognized in the industry for some time. As early as November 7, 2005 the melon industry promulgated its *Commodity Specific Food Safety Guidelines for the Melon Supply Chain* (See, **Exhibit** 4).

3. These guidelines were adopted as draft guidance by the Food and Drug Administration Center for Food Safety and Applied Nutrition in its *Guide to Minimize Microbial Food Safety Hazards of Melons; Draft Guidance* in July of 2009 (See, **Exhibit 5**).

4. More generally, the FDA also Published its Food Code in 2009 (See, **Exhibit 6**).

5. The FDA also promulgated Food Good Manufacturing Practices (Food GMPs) which were published in Title 21 of the Code of Federal Regulations, Part 100 (21 CFR 110) which were effective years prior to the audit in question (See, *GMPs – Section One: Current Food Good Manufacturing Practices,* hhtp//www.fda.gov/food/guidanceregulation/cgmp/ucm11907.htm, **Exhibit 7**)

6. In November 2009, The United States Department of Agriculture (USDA) initially promulgated its Good Agricultural Practices and Good Handling Practices Audit Verification Program (See, Policy and Instruction Manual, Table of Contents, **Exhibit 8(A)**. In April 2011, USDA promulgated its Good Agricultural Practices and Good Handling Practices Audit Verification Program Users' Guide (See, Table of Contents and General Information, **Exhibit 8(B)**.

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[4] Even so, it is interesting to note that Primus employed this very same tactic in Colorado, stating, "Moreover, while Plaintiffs speculate that Jensen Farms would not have distributed the cantaloupe had Dilorio failed the audit, Plaintiffs' contention is wholly without support." (See, Primus' Motion to Dismiss Plaintiffs' Complaint at p. 8).

[5] If the Court believes that Frontera's cross claim would not withstand Primus' Motion to Dismiss without specific allegations regarding the following facts, then Frontera respectfully requests leave to amend its Cross Claims.

7. Primus has specifically recognized that its audit "expectations" are based upon certain of the above referenced standards (See, Primus' *Auditee Facility Audit Guidelines: A Guide for Auditees Preparing for PrimusLabs.com Audits*, **Exhibit 9**).

8. Primus adopted many of the standards set forth in the above-referenced standards in the scoring guidelines used to conduct the July 2011 JFP audit. (See, *Packinghouse with HACCP Audit Scoring Guidelines V08.06*, **Exhibit 10**).

9. Primus admitted that its standard packinghouse audit without HAACP as contracted by Jensen Farms assessed the packing house on (a) good manufacturing practices; (b) food safety file requirements; (c) food security; and (d) miscellaneous survey questions (See, *Primus Group Inc.'s Designation of Non-Parties at Fault*, pp. 2-3, **Exhibit 11**).

10. Primus admitted that the packinghouse audit by Mr. Dilorio "noted three separate minor deficiencies, three separate major deficiencies and five complete non-compliances all of which deviated from GMP." (See, *Primus Group Inc.'s Designation of Non-Parties at Fault*, pp. 2-3, **Exhibit 11**).

11. Primus has admitted that "the front page of the packinghouse audit report stated that, no antimicrobial solution is injected into the water at the wash stations." (See, Primus Group Inc.'s Designation of Non-Parties at Fault, pp. 2-3, **Exhibit 11**). More importantly, this same audit report, in at least four separate places, notes that the cantaloupe is only washed with water and that no anti-microbial solution is used. Rather than flag the lack of an anti-microbial solution as a deviation from industry standard, downgrade JFP's audit score, or fail the audit, in all instances, the auditor simply found that the audit score was not affected by this practice (See, *August 3, 2011 PrimusLabs Audit Packinghouse v08.06 Report,* [and Exhibit E to Frontera's Cross Claims], pp. 5, 12, 13, **Exhibit 12**).

12. "According to James R. Gorny, Ph.D., who at the time was Senior Advisor for Produce Safety, Center for Food Safety & Applied Nutrition at the FDA, *Jensen Farms significantly 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 added that the conveyer that the defendants used to process and pack the cantaloupes spread contamination and essentially "inoculated" the cantaloupes with *Listeria monocytogenes*. Dr. Gorny opined that *the Primus Labs representative that conducted the pre-harvest inspection of Jensen Farms was seriously deficient in their inspection and findings.*" (See, Government Sentencing Statement in the case of *United States v. Eric Jensen*, ¶ 24, **Exhibit 13**). [Emphasis Added].

13. Primus has admitted that the "Jensen Farms' cantaloupe operation at the packinghouse was performing at less than 50% of its capacity at the time Dilorio performed the audit." (See, **Exhibit 11**, p. 4)

14. The Primus *Guide for Auditees Preparing for PrimusLabs.com Audits* (**Exhibit 9**) at p. 5 states, "It is **imperative** that the plant is running product and that a normal compliment of personnel are on site when the audit occurs in order for the auditor to complete a valid assessment. If the plant is not running and/or there are not production staff on site, then the audit will have to be terminated and cancellations charges will be applied or the audit can continue as and educational audit." [Emphasis in the original]. Mr. Dilorio's undisputed failure to terminate the audit calls into question whether he correctly applied PrimusLabs audit survey systems (See, *PrimusLabs 3rd Party Auditor Development*, **Exhibit 14**, at p. 1) and whether he conducted an appropriate audit.

15. Primus' *Guide for Auditees Preparing for PrimusLabs.com Audits* (**Exhibit 9**) at p. 10 states, "There shall be no generation of condensation, dust or spillage from equipment." Apparently, this operational practice is reflected in the Primus Audit Packinghouse criteria as follows, "1.9.6 Are floor surfaces in good condition, with no standing water, no debris trapping cracks and are they easy to clean?" (See, **Exhibit 12**, p. 9). Mr. Dilorio's response was, "Yes, the floor surfaces were in good condition with no standing water and free from debris trapping cracks." (See, **Exhibit 12**, p. 9). However, FDA Officials who conducted the environmental assessment of Jensen Farms on September 22-23, 2011 noted, "Certain aspects of the packing facility, including the location of a refrigeration unit drain line, allowed for water to pool on the packing facility floor in areas adjacent to packing facility equipment. Poor drainage resulting in water pooling around the food processing equipment." (See, the FDA's *Environmental Assessment: Factors Potentially Contributing to the Contamination of Fresh Whole Cantaloupe Implicated in a Multi-State Outbreak of Listeriosis*, p. 4, **Exhibit 15**).[6]

16. Consistent with the industry standards and regulations cited above, Primus *Guide for Auditees Preparing for PrimusLabs.com Audits* (**Exhibit 9**) at p. 3 states, "Cooler and Cold Storage Audit. This audit is designed to be used for facilities that are receiving goods directly from the fields, orchards etc. after harvest. If there is any packing repacking, grading etc. occurring on site, then a Packinghouse Audit should be used." However, Primus' Audit Packinghouse criteria did not address post-harvest practices. As a result, Primus did not audit Jensen's post-harvest practices. FDA Officials who conducted the environmental assessment of Jensen Farms on September 22-23, 2011 noted, in the report's Postharvest Practices section, "The cantaloupes were not pre-cooled to remove field heat before cold storage. Warm fruit with field heat potentially created conditions that would allow the formation of condensation, which is an environment ideal for *Listeria monocytogenes* growth." (See, p. 6, **Exhibit 15**).

[6] While conditions in the JFP may have changed between the time of the Primus audit and the FDA environmental assessment, it is equally possible that they may have not changed. This is one of many reasons why Frontera should be permitted to conduct discovery on this issue and why the Motion to Dismiss should be denied.

III. LEGAL STANDARD

A motion to dismiss for failure to state a claim is only properly granted, where accepting all of the allegations of the complaint as true and viewing them in the light most favorable to the plaintiff, the factual allegations do not, as a matter of law, support a claim for relief. *Gandy v. Colo. Dept. of Corrections*, 284 P.3d 898 (Colo. App. 2012). Such motions may not be granted unless it appears "beyond doubt" that the plaintiff can "prove no set of facts that would entitle [them] to relief." *McKenna v. Oliver*, 159 P.3d 697 (Colo. App. 2006), cert denied. Motions to dismiss for failure to state a claim are disfavored and should not be granted if relief is available under any theory of law. *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248 (Colo. 2012).

In deciding a motion to dismiss, the Court may consider not only the allegations in the pleading, but also any documents incorporated by reference[7] or attached thereto as exhibits[8], as well as any matters of which the Court may take judicial notice[9]. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006).

IV. REPLY

Due to the overlapping nature of Primus' Motion to Dismiss Plaintiffs' Complaints, and the underlying Motion here, Frontera incorporates by reference the arguments contained in its Response to Primus' Motion to Dismiss Plaintiffs' Complaints, as if set forth herein in full.

A. Frontera's Cross Claims Contain Sufficient Allegations, if Taken as True, to Show a *Prima Facie* Claim of Negligence Against Primus

1. The Cross Claims' Allegations are Sufficient to Support a Finding that Primus owed Frontera a Duty of Care

Primus correctly notes that the determination of the existence of a legal duty, the first element of a negligence claim, is a question of law for the Court. (See, *Response*, p. 6. See also, *Metropolitan Gas Repair v. Kulik*, 621 P.2d 313, 317 (Colo. 1980)). However, Primus is incorrect in both labeling this a nonfeasance case, and in its argument that a

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[7] Frontera's cross claims incorporate by reference the following documents: Frontera's contract with Jensen Farms (Paragraph 3 of the Cross Claims); the full content of the FDA/USDA "Guide to minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables" and the FDA Food Code (Paragraph 3 of the Cross Claims); and Wal-Mart's approved list of auditors (See Paragraph 5 of the Cross Claims).

[8] The entire content of the seven exhibits to Frontera's Cross Claims may therefore be properly considered.

[9] Please refer to cases cited within *Walker* finding that administrative agency files and decisions may be the proper subjects of judicially noticed facts. This would allow consideration by the Court of any FDA, CDHPE, and CDC files and decisions concerning food safety, food safety audits, and the roles and responsibilities of food safety auditors in deciding the underlying Motion.

duty may only be imposed upon a finding of the existence of a special relationship between Primus and Frontera.

a. A Duty Exists Under the Restatement Regardless of Distinction Between Nonfeasance and Misfeasance

One of the cases relied upon by Primus in its Motion, *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1159 (Colo. App. 2008)[10] states:

> "a duty may be imposed based upon the principles articulated in (Restatement (Second) of Torts) 323 and 324A *regardless of whether* the actor's conduct constituted nonfeasance or misfeasance."

[Emphasis added]. Thus, even if this matter were assumed to be in the nature of a nonfeasance case, the analysis is not limited to whether a special relationship between Primus and Frontera exists. Rather, an analysis is to be undertaken of the factors set forth in Restatement (Second) of Torts Sections 323[11] and 324A.

Section 324A (1965) 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.

[Emphasis added].

Factual allegations meeting every element of the Restatement test were alleged in Frontera's Cross Claims. Primus should have recognized that reasonable care in its audit practices was necessary to protect marketers and retailers of Jensen Farms, including Frontera. Primus knew or should have known that its audit services were required by the network of contracts between these parties for the purpose of protecting against the economic harm of marketing or selling produce processed in a facility that was non-compliant with industry and agency standards. Factual allegations to this effect are set forth in paragraphs 3-5, 9-11, and 16 of Frontera's Cross Claims. Frontera

[10] See Motion, p. 5.

[11] Section 323 does not address duties owed to third persons, and thus need not be analyzed here.

likewise alleged that Primus' failure to exercise reasonable care increased the risk of harm. (See, *Frontera's Cross Claims*, ¶¶ 12-13, and 18[12]). Finally, Frontera has also alleged that it suffered harm because of its reliance on Primus' audit. (Id., ¶¶ 6-7, 11, 13-17). For purposes of a C.R.C.P. 12 motion, these allegations must all be taken as true. In sum, the allegations of Frontera's Cross Claims, taken as true, are sufficient to give rise to a duty of care owed by Primus to Frontera under either subsections (a) or (c) of Restatement (Second) of Torts Section 324A.

b. A Duty Exists Under Colorado Law Applicable to Misfeasance Cases

To the extent that the distinction between nonfeasance and misfeasance continues to have any import, Primus is incorrect in alleging that the claims against it should be characterized as nonfeasance, rather than misfeasance. Primus is not a party to these cases because it failed to act. Affirmative actions were taken by Primus that resulted in harm. These affirmative acts are not limited to "the mere act of preparing an audit," as set forth on page 10 of Primus' Motion (citing Hon. G. David Miller's now reconsidered Order in the *Hauser* case). Rather, and of critical importance, Primus undertook the *affirmative* act of providing a "superior" rating on the relevant audit of the JFP.[13] At the time Primus provided its audit results to Jensen Farms, it knew or should have known that Jensen Farms would provide the audit to other entities in the cantaloupe distribution chain who would rely on this information for business purposes.

In misfeasance cases such as this one, Colorado courts' imposition of a duty of care is based on the following factors: the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury or harm, and the consequences of placing the burden on the actor. *Smit v. Anderson*, 72 P.3d 369, 373 (Colo. App. 2002), citing, *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992), and *Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo. 1987). Please refer to Frontera's Response to Primus' Motion to Dismiss Plaintiffs' Complaints for full briefing on these factors.

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[12] Please also note that the packinghouse audit itself is incorporated by attachment to the Cross Claims as Exhibit D. In that document the auditor expressly notes in five separate locations that no chlorine or biocide is in use, but fails to down score the facility as a result. Additionally, the findings of governmental agencies on the sufficiency of the audit are incorporated by reference, and are public or agency records of which the Court may take judicial notice.

[13] See, *January 10, 2012 Letter of the Committee on Energy and Commerce to the Commissioner of the U.S. Food and Drug Administration,* p. 1, **Exhibit 16** noting, in part, that "FDA officials identified 'serious design flaws' in the processing technique used at Jensen Farms and 'poor sanitary design of the facility itself' as the causes of contamination, and they indicated that 'everything that was found wrong was addressed in FDA guidance' published in 2009. Yet these flawed facility designs and processing techniques were both recommended by and rated as 'superior' by the third-party auditor of Jensen Farms."

Contrary to Primus' assertion, the material which the Court may consider on a motion to dismiss (allegations of Frontera's cross claims, exhibits, documents incorporated by reference, and agency information of which the Court may take judicial notice) contains more than sufficient factual information demonstrating the existence of a duty of care. Frontera has alleged that Primus' affirmative acts, created or increased a risk of harm. (See, *Frontera Cross Claims*, ¶¶ 8, 11, 12). This risk is both foreseeable and far reaching - Primus' actions *affirmatively* represented to any individual or entity in the distribution chain that Jensen Farms not only passed its food safety audit but did so with a "superior" rating, while ignoring Jensen Farms' violations of government regulations and industry standards for cantaloupe processing. Again, this foreseeability is alleged in Frontera's Cross Claims. *Id.*, ¶¶ 5 and 16[14].

The risk involved and the likelihood of injury are also self-evident, or may be found by reference to the FDA documents incorporated into Frontera's Cross Claims by reference. Likewise, the social utility of food safety auditors and the burden of requiring that they exercise due care in their work are self-evident, or may be found by reference to agency publications of which the Court may take judicial notice. It also bears repeating that this is a Rule 12 motion, to which the legal standards cited above apply. Frontera's allegations, taken as true, state a *prima facie* claim for negligence against Primus.

c. Primus' Audit Controlled Whether the Cantaloupe Would be Released to the Public, Causing Injury.

Primus argues in its Motion that it had no ownership, possession or control of the injury-causing circumstances or instrumentality, and thus it owed no duty of care. (See, Motion, p. 12). This statement is simply inaccurate. Primus' activities put it in position to directly influence the injury-causing circumstances or instrumentality. The FDA issued a report stating that facility and equipment design and postharvest practices were causal factors in the *Listeria* outbreak. (See, **Exhibit 15**, p. 4). Primus was contracted to inspect and otherwise conduct a food safety audit of the JFP packinghouse with due care. Had its auditor properly taken note of non-compliant items, or even down-scored the facility for items that posed a clear potential for microbial contamination, such as the failure to use an antimicrobial agent in the cantaloupe rinse water, a "superior" rating would not have been provided, and the cantaloupe would not have been released for sale to the public. (See, e.g. *Frontera's Cross Claims*, ¶ 17).

Primus' failure to downgrade and ultimately fail the audit of the JFP for Jensen Farms' failure to use an antimicrobial agent is *particularly* disturbing. According to Dr.

[14] Contrary to Primus' suggestion, the magnitude of the harm need not be foreseeable, only the risk that some harm may result from their failure to exercise due care. It is incredulous that Primus infers that it is not foreseeable that a poorly performed food safety audit carries some risk of harm to consumers or those downstream in the distribution chain.

Trevor Suslow, a post-harvest expert regarding melons, "Having antimicrobials in *any* wash water, particular the primary or the very first step, is absolutely essential, and therefore as soon as one hears that that's not present, that's an instant red flag. *** What I would expect from an auditor is that they would walk into the facility, look at the wash and dry lines, know that they weren't using an antimicrobial, and just say: 'The audit's done. You have to stop your operation. We can't continue.'" (See, http://www.cnn.com/2012/05/03/health/listeria-outbreak-investigation/ at p. 5/13).

2. Frontera's Cross Claims Contain Allegations, Which Must be Accepted as True Under C.R.C.P. 12, Alleging that Primus' Poor Audit Performance Constituted a Breach of its Duty of Care

Frontera has sufficiently alleged breach of duty of care by Primus. (See, *Frontera's Cross Claims*, ¶¶ 12-13, and 18. Please also refer to FDA, CDC, and CDHPE documents opining on Primus' audit deficiencies; such documents being incorporated by reference in Frontera's Cross Claims (Paragraph 18) and proper subjects of judicial notice.) On a motion to dismiss, these allegations must be viewed in the light most favorable to Frontera and taken as true. While a fact issue as to whether Primus' audit fell below the standard of care may ultimately arise, this disputed issue of fact is inappropriate for resolution under Rule 12.

3. Causation Has Also been Sufficiently Pleaded to Withstand a Motion to Dismiss

When Frontera's allegations are taken as true and viewed in the light most favorable to the non-moving party, as they must for the purpose of Primus' Motion, causation has also been adequately pled. Frontera did in fact rely upon Primus' audit and certification in deciding to release the cantaloupe for sale. (See, *Frontera's Cross Claims*, ¶¶ 5-6, 14-17). Furthermore, Frontera has alleged that this was a causal factor in the economic harm it has suffered. (Id., ¶ 23). Thus, dismissal of Frontera's negligence cross claim pursuant to C.R.C.P. 12 is not warranted.

B. Frontera's Cross Claims Contain Sufficient Allegations, if Taken as True, to Show a *Prima Facie* Claim of Negligent Misrepresentation Against Primus

Primus correctly set forth the elements in its Motion as follows: (1) in the course of business, profession, or employment, or in any transaction in which Primus has a pecuniary interest; (2) Primus supplied false (or misleading) information; (3) for the guidance of others in their business transactions; (4) causing Frontera pecuniary loss; (5) Frontera justifiable relied upon the information; and (6) Primus failed to exercise reasonable care or competence in supplying the information. *Motion*, p. 15, citing, *Agile Safety Variable Fund, L.P. v. RBS Citizens, N.A.*, 793 F.Supp.2d 1248, 1257 (D. Colo. 2011). Accordingly, Frontera's Cross Claims contain factual allegations sufficient to set forth each element of a negligent misrepresentation claim.

Frontera alleged that Primus provided the information in the course of its business. (See, *Frontera's Cross Claims*, ¶ 6). Frontera alleged that Primus provided false or misleading information in the form of a "superior" rating on the JFP audit certificate, and the report itself. (Id., ¶ 11, 13, 18). Frontera alleged that Primus supplied this information "for the guidance of others in their business transactions," including Jensen who then foreseeably provided the audit results to Frontera. (Id., ¶¶ 6, 11, 16). Frontera also alleged that it justifiably relied on the audit information from Primus. (Id., ¶ 5-6, 11, 15-17). Finally, for the same reasons the information provided was false or misleading, Frontera alleged that Primus failed to furnish the information with due care. There is no valid Rule 12 challenge to the sufficiency of Frontera's negligent misrepresentation claim.

C. Frontera's Cross Claims Contain Sufficient Allegations, if Taken as True, to Show a *Prima Facie* Claim of Breach of Contract Against Primus

Primus' Motion correctly states that the intention of parties to benefit a third party may be evidenced not only by the face of the contract itself, but can be found from "the surrounding circumstances," or some combination thereof. *Motion*, p. 16, citing, *Jefferson County School Dist. no. R-1 v. Shorey*, 826 P.2d 830, 843 (Colo. 1992). Frontera has alleged "surrounding circumstances" that infer third party beneficiary status, including but not limited to: the requirement in Frontera's contract with Jensen that Jensen's facilities comply with food safety standards (*Cross Claims*, ¶¶ 3-4), that Primus was on Wal-Mart's approved list of auditors (*Cross Claims*, ¶ 5) with Frontera serving as the exclusive distributor of Jensen Farms cantaloupe to Wal-Mart. Additionally, for the purpose of a C.R.C.P. 12 Motion, Frontera's allegation that Primus knew that Frontera would be relying on this audit in determining whether to release cantaloupe for sale, must be taken as true. (See, *Frontera's Cross Claims*, ¶ 6, 7, 16). Discovery is expected to reveal that Primus had far greater knowledge of the network of contracts and audit requirements of these parties than is suggested by its Motion to Dismiss. Thus, Primus' strategy of prevailing at the Rule 12 stage of the proceedings, based on limited or inaccurate information should not be allowed to prevail.

D. As the Underlying Tort Claims Have Been Sufficiently Pled, Frontera's Contribution Claim Survives Primus' Motion

Primus' only argument for dismissal of Frontera's contribution claim is that it is derivative of Frontera's other cross claims, which were allegedly not sufficiently pled. Primus' argument significantly mis-construes the nature of claims alleged under the Uniform Contribution Among Tortfeasors Act ("UCATA"), which provides that "(1) Except as otherwise provided in this article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." *C.R.S.* § 13-50.5-102.

The basis for the statutory claim is that each tortfeasor is *liable for the same injury to person*. The contemplated liability arises not from claims between the tortfeasors, but from the tortfeasors' individual duties to the injured person. See, *Kussman v. City & Cnty. of Denver*, 706 P.2d 776, 780 (Colo. 1985) ("A 'common liability' giving rise to a right of contribution exists only when tortfeasors are 'jointly or severally liable in tort for the same injury.' § 13-50.5-102(1). This latter phrase denotes a circumstance in which each tortfeasor may be held liable for the entire damages arising from a single injury.")

Frontera's claim under this section may only be dismissed if Primus is found not to be liable to the injured Plaintiffs. The plain language of the UCATA demonstrates that claims under that Act are not derivative of claims brought between tortfeasors on the basis of duties owed by the tortfeasors *to each other*. Primus is clearly in error in suggesting that Frontera's UCATA claim is derivative of Frontera's other claims against Primus. Frontera's UCATA claim is properly pleaded and arises from Primus' liability to Plaintiffs for their injuries. In demonstration of such liability, Frontera again references the arguments set forth in its Response to Primus' Motion to Dismiss Plaintiffs' Complaints.

E. Leave to Amend

Primus concludes that, in the unlikely event Frontera's allegations are deemed insufficient to support a claim, it would not be possible to cure any such deficiencies through amendment of the pleadings. As highlighted in the Facts section of this Response, there is ample evidence of Primus' involvement, role, and responsibility for the *Listeria* outbreak. Accordingly, if the Court should dismiss one or more of Frontera's Cross Claims it should be without prejudice, and with leave to amend. Permission to amend is to be given where there is a possibility of adequate statement of claim by amendment. *Smith, for and on behalf of Leech v. Mills*, 225 P.2d 483 (Colo. 1950).

V. CONCLUSION

Primus' Motion to Dismiss, like its Motion for Reconsideration of Judge Russell's Order denying its Motion to Dismiss in the *Beach* case, is "fraught with the untenable position that in order to" survive a motion to dismiss, Frontera "should have been required to plead facts in such an elaborate manner that they demonstrated a high probability of success." (See, **Exhibit 1**, p. 9). In Colorado, it is black letter law this is neither the required pleading standard, nor is it the legal standard for a motion to dismiss pursuant to Rule 12. Frontera's Cross Claims contain sufficient allegations, which, when accepted as fact for the purposes of this motion, state prima facie claims against Primus arising from its role in the *Listeria* outbreak.

For the reasons discussed above, Frontera respectfully requests that this Court enter an Order DENYING Primus' Motion to Dismiss Frontera's Cross Claims.

Respectfully submitted this 14th day of July 2014.

OVERTURF McGATH HULL & DOHERTY P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANT FRONTERA PRODUCE LTD'S RESPONSE IN OPPOSITION TO PRIMUS GROUP, INC.'S MOTION AND BRIEF IN SUPPORT OF MOTION TO DISMISS FRONTERA'S CROSS CLAIMS** was efiled via ICCES and Served in Arapahoe District Court and provided by E-Service, this 14th day of July 2014 to the following:

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In accordance with C.R.C.P. 121, §1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.