IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

MARY PUMPHREY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 6:13-cv-03308-MDH**
	)	
FRONTERA PRODUCE LTD., a foreign corporation; PRIMUS GROUP, INC., d/b/a PRIMUS LABS, a foreign corporation; DILLON COMPANIES, INC., d/b/a "Dillons"; and JOHN DOES 1-10,	)	
	)	
Defendants.	)	

ORDER

Defendant Primus Group, Inc. d/b/a Primus Labs (hereinafter "Primus") has filed a Motion to Dismiss Plaintiff's First Amended Complaint (Doc. 46). The Court has reviewed the issues raised in the motion, together with relevant briefing by the parties.

Primus argues that the allegations contained in Plaintiff's Amended Complaint do not demonstrate that it owed a duty to Plaintiff, and therefore, no liability can be imposed upon it for the death of William Pumphrey. Federal Rule of Civil Procedure 8 requires that a complaint present "a short and plain statement of the claim showing that the pleader is entitled to relief." In order to meet the standard, and survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "*Twombly* and *Iqbal* did not abrogate the notice pleading

standard of Rule 8(a)(2)." *Hamilton v. Palm*, 621 F.3d 816 (8th Cir. 2010). To meet the plausibility standard, "[a] Plaintiff need only elect facts that permit a reasonable inference that the defendant is liable." *Id.*

In considering a motion to dismiss, a court assumes all facts alleged in the complaint are true, construes the complaint liberally in the light most favorable to the plaintiff, and grants dismissal only if "it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle the plaintiff to relief." *Doe v. Norwest Bank Minn., N.A.*, 107 F.3d 1297, 1304 (8th Cir. Minn. 1997).

The "touchstone" of duty under Missouri law is foreseeability. *LAC, ex rel DC v. Ward Parkway Shopping Ctr. Co.*, 75 S.W.3d 247, 257 (Mo. 2002). A duty may arise by operation of a statute, by obligation assumed in a contract, or by the common law *Scheibel v. Hillis*, 531 S.W.2d 285 (Mo. Banc 1976). Under the common law "a duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury." *Lopez v. Three Rivers Electric Cooperative, Inc.*, 26 S.W.3d 151, 155 (Mo. Banc 2000).

"Plaintiff need not show that the very injury resulting from defendant's negligence was foreseeable, but merely that a reasonable person could have foreseen that injuries of the type suffered would be likely to occur under the circumstances." *Smith v. Archbishop of St. Louis*, 632 S.W.2d 516, 521 (Mo. App. 1982).

"When a defendant undertakes to do something that the defendant knew or should have foreseen would harm others or increase the risk of harm to others, the defendant has a duty to exercise reasonable care in the undertaking." *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 70 (Mo. App. 2003).

A party entering into a contract may place himself in such a relation toward third persons as to impose upon him an obligation to act in such a way that the third persons will not be damaged. *Wolfmeyer v. Otis Elevator Co.*, 262 S.W.2d 18, 21 (Mo. 1953). Missouri case law is consistent with the Restatement 2d of Torts, Section 324(A) which reads:

> 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.

Plaintiff's Amended Complaint alleges that Defendant, Primus, "provided auditing services for agriculture and other businesses involved in the manufacture and sale of food products . . . ." (Amended Complaint, ¶4); that Defendants Jensen Farms or Frontera, or both of them, "contracted with Defendant Primus to conduct an audit of Jensen Farms' ranchlands and packing house." (Amended Complaint, ¶15); that "audit services offered by Primus were designed, in part, to make sure that the auditee passed the audit so that the produce products . . . would be brought to market. . . ." (Amended Complaint, ¶18); that "Primus intended to aid such companies in ensuring the food products produced were of high quality, were fit for human consumption, and were not contaminated by a potentially lethal pathogen, like *Listeria*." (Amended Complaint, ¶24); that "It 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, including, but not limited to, good agricultural and manufacturing practices, industry standards, relevant FDA industry guidance, and Primus's own audit standards and scoring guidelines. It was further the intent of these contracting parties to ensure that the food products that Jensen Farms produced and that Frontera distributed, would be of high quality for consumers, and would not be contaminated by potentially lethal pathogens, like *Listeria*. (Amended Complaint ¶34).

According to the Amended Complaint, ". . . Primus agreed, pursuant to its own guidelines, to assess and determine if Jensen Farms' packinghouse facilities, premises, and food safety procedures met or exceeded the applicable good agriculture 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." (Amended Complaint, ¶35). The Amended Complaint further details Plaintiff's allegations concerning Primus' obligation under its contract with Jensen Farms and/or Frontera in Paragraphs 34, 35, 36, 37, 38, 39, 40, 41, 42, and 43 of the Amended Complaint.

The Amended Complaint then details the failures of Primus' audit (or failures of Primus' alleged agent Biofoods Safety) in Paragraphs 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58 and 59. The Amended Complaint then alleges facts, which if true, relate the alleged failures of Primus and its agents to the distribution of the unsafe cantaloupes and Mr. Pumphrey's death in Paragraphs 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70 and 71 of the Amended Complaint. The alleged relationship between Listeriosis suffered by Mr. Pumphrey and the cantaloupe is detailed in the Amended Complaint in Paragraphs 72, 73, 74, 75 and 76.

If the facts alleged to be true by Plaintiff in the First Amended Complaint are proven to be true, Plaintiff states a cause of action against Defendant Primus under the common law of

Missouri and the Restatement 2nd of Torts Section 324(A). Primus assumed a duty pursuant to contract. The performance of that duty was designed in part to protect the public from contaminated food products. Injury or death to third persons such as William Pumphrey was a foreseeable consequence of the negligent performance of that duty. Plaintiff should be afforded the opportunity to prove the facts alleged. Defendant Primus' Motion to Dismiss (Doc. 47) is **DENIED**.

IT IS SO ORDERED.

DATED: July 3, 2014

/s/ Douglas Harpool
DOUGLAS HARPOOL
UNITED STATES DISTRICT JUDGE