IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEGHAN DeLONG, Personal Representative of
The Estate of Conner Charles DeLong, and
MEGHAN DeLONG in her own right

vs. No. 2:19-cv-02766-PD

AMERICAN HOME FURNISHINGS ALLIANCE, INC.
and AMERICAN SOCIETY FOR TESTING AND
MATERIALS, d.b.a. ASTM INTERNATIONAL

BRIEF IN SUPPORT OF THE MOTION OF DEFENDANT, AMERICAN HOME FURNISHINGS ALLIANCE, TO DISMISS THE PLAINTIFF'S COMPLAINT

I. FACTS:

This civil action was originally filed on May 8, 2019 in the Court of Common Pleas of Montgomery County, Pennsylvania, from which it was removed to this federal court by the co-defendant on June 25, 2019, based upon the diversity of citizenship of the parties.

As reflected by the plaintiff's complaint [Exhibit "A"] this wrongful death and survival action has been brought by a Florida resident in connection with a May 14, 2017 incident in which an eight-drawer dresser, which had not been anchored to the wall per the manufacturer's instructions, allegedly tipped over and fell, fatally injuring her two-year old son.

This suit was not filed against the alleged designer and manufacturer of the dresser, IKEA, which was previously sued by the plaintiff in Florida.

Instead, this suit was filed against both the moving defendant, American Home Furnishings Alliance (AHFA) a furniture industry trade association, and the American Society for Testing and Materials (ASTM), an organization involved in the development and publication of voluntary industry standards.

Quoting selectively from the current AHFA website, it is alleged that the AHFA *"is the voice of the residential furniture industry,"* that it *"serves a critical purpose in keeping its members and the industry at large informed about furniture safety issues,"* that it *"has worked for more than a decade on safety measures specifically designed to reduce the number of furniture tip-over accidents,"* that it is *"actively engaged with the U.S. Consumer Product Safety Commission ... and ASTM International on all safety initiatives involving residential furnishings"* and that *"the Alliance and its members seek to promote awareness of furniture safety issues and to keep manufacturers and importers up-to-date on compliance requirements,"* and *"support efforts to keep current safety standards relevant, effective and with a clear pathway to compliance."*

There is no allegation that the actual designer, manufacturer and importer of the chest of drawers, IKEA, was a member of either the AHFA, or the ASTM, or that the AHFA was itself a member of the ASTM.

The complaint avers that both the AHFA and the ASTM were involved in *"promulgating and implementing"* safety standards including what is obviously an ASTM standard, identified as ASTM F2057, with which the IKEA dresser was allegedly designed to comply, and which the plaintiff contends was inadequate to address the known risk that young children would climb dressers as if they were ladders, opening multiple drawers and increasing the risk of tip-over injuries.

It is also claimed that the defendants knew that the standards set forth in ASTM F2057 were inadequate to protect young children, but *"knowingly misled the entire furniture industry, United States government and American consumers"* into relying upon and developing a false sense of security from that standard, which the AHFA allegedly fostered through a campaign publicly lauding and bolstering the inadequate standard to furniture dealers and consumers, though there is no allegation that the plaintiff purchased the dresser herself, or was a recipient of any representations that were made in that regard.

The AHFA has allegedly *"encouraged"* the industry to comply with ASTM F2057 in an effort to stave off increased government oversight, consumer protection and accountability, while at the same time acknowledging that the AHFA has itself described the ASTM standard as being only a *"baseline"* safety *"best practice."*

It is also averred that the AHFA *"took no action"* in response to calls from the Consumer Product Safety Commission and Consumer Reports to change the ASTM standard by increasing the test weight.

Count 1 of the complaint, entitled "Negligence Against Defendant AHFA", would appear to co-mingle several alternative liability theories including (1) common law negligence premised upon the existence of a purported duty of care to the general public to promulgate, create, implement, or amend safety standards and to warn the public of risks or inadequacies of existing standards, (2) a claim of "good Samaritan" liability under Section 324A of the Restatement (Second) of Torts, premised upon an alleged undertaking or assumption of such a duty to protect the public, and (3) claims of negligent and/or intentional misrepresentation.

Count 2 does substantially the same with regard to the plaintiff's claims against the co-defendant, ASTM.

Specifically, it is claimed in Paragraphs 52-55 that the AHFA owed a duty to the general public to exercise reasonable care in connection with its alleged

promulgation and implementation of the voluntary safety standards, a duty of care in amending it, a duty to warn the public regarding safety risks about which it knew or should have known, and a duty to warn the general public of the inadequacies of existing safety standards.

Parroting the language of Section 324A, it is averred at Paras. 47-51 that the AHFA *"undertook, gratuitously or for consideration, to promulgate, implement or amend – or substantially participate in the promulgation, implementation, or amendment of – furniture stability standards, including but not limited to F2057,"* that it should have known that safety standards were *"necessary for the protection of young children,"* and that its failure to exercise reasonable care in so doing *"increased the risk of harm"* to the decedent. It is also claimed that the harm to the plaintiff's child was suffered *"because of Plaintiff's and IKEA's reliance"* on the AHFA's alleged promulgation, implementation or amendment of safety standards including F2057. Again, there is no allegation to suggest that the plaintiff had actually seen, read, or was even aware of ASTM F2057 prior to her son's injury.

Finally, among the acts or omissions attributed to the AHFA in Paragrapah 57 and its subparts, it is claimed that the trade association misled *"the furniture industry, United States government, and American consumers and public"* into believing that ASTM F2057 was adequate, that the AHFA knowingly engaged in *"burying, obfuscating, disregarding, discounting and delegitimizing data and statistics"*, that the AHFA engaged in conduct *"bolstering, defending and refusing to change"* the existing ASTM standard, and that it was guilty of *"Misrepresenting to the American consumers and public that F2057 was adequate,"* without providing any particulars regarding the specific communications or non-disclosures on which those allegations are based, or including any allegation that the plaintiff or her decedent were actually on the receiving end of any such representations or non-disclosures.

This lawsuit was filed on the heels of a press conference and the launch of a public media campaign in which the plaintiff and her Florida attorney have declined to disclose any information relating to their previous settlement with IKEA, and boasted that they intend to take on the entire furniture industry in order to develop a $50 million political "war chest" with which to lobby for the passage of more stringent furniture safety standards.

II. ARGUMENT:

A. THE COMPLAINT FAILS TO ESTABLISH THAT THE PLAINTIFF HAS THE LEGAL CAPACITY OR STANDING TO PURSUE THIS SUIT

In Paragraph 3 of the complaint, the plaintiff has averred that she *"has been or in the near future will be appointed Personal Representative of the Estate of Conner DeLong,"* an equivocal statement which fails to establish either that she currently has the legal capacity or standing to maintain a wrongful death claim on behalf of her son's estate, or more significantly, that she actually *had* that legal capacity or standing at the time this lawsuit was filed, as would plainly be necessary under Pennsylvania law. Tulewicz v. SEPTA, 529 Pa. 588, 606 A.2d 427 (1992); Prevish v. Northwest Medical Center, 692 A.2d 192 (Pa.Super. 1997), (all actions that survive a decedent must be brought by or against the personal representative of the decedent's estate). The same would appear to be true under Florida law were it relevant to the issue, a point which is not entirely clear because the complaint makes no reference to any state's wrongful death statute. Estate of Eisen v. Philip Morris USA, Inc., 126 So.3d 323 (Fla.App. 2013).

If an action is not commenced by a party having the legal capacity to sue, it is a nullity.

For that reason alone, the complaint must be dismissed for failure to state a claim upon which relief can be granted.

B. THE AHFA NEITHER OWED, NOR VOLUNTARILY ASSUMED A LEGAL DUTY TO SUPPORT A NEGLIGENCE CLAIM

There is no allegation suggesting that the AHFA played any role in the design, manufacturing, or sale of the chest of drawers involved in the accident, which was admittedly a product of IKEA.

Nor is there any allegation that the AHFA exercised control over the products manufactured or sold its member companies, let alone the entire furniture industry, that the AHFA had the authority, desire, or ability to do so, or that the actual seller of the product, IKEA, was even a member of the AHFA.

Nor is it alleged that the AHFA tested or inspected even the products of its own members, let alone those made overseas and sold in the U.S. by Swedes, in order to certify them, or to accredit them in some fashion as being compliant with voluntary ASTM standards, or those of anyone else.

Also noticeably absent from the complaint are any allegations of fact which might tend to establish any sort of a relationship between the plaintiff and the AHFA, or any of its members.

Nor is it even claimed that the plaintiff had any relationship with IKEA as the actual purchaser of the chest of drawers involved, as opposed to a mere end user of a product manufactured and sold to someone else by parties unrelated to this defendant.

While it is understood that the plaintiff's allegations that the AHFA "promulgated" or "implemented" the ASTM furniture tip-over standard at issue in this case, even though lacking any additional factual allegations to support them,

may well be accepted as true for purposes of the present motion (even though they are not,) it has not been claimed that the AHFA itself either authored, or developed that ASTM standard, a safety standard which the complaint also acknowledges was both *"voluntary,"* and *"baseline"* (i.e., minimal) in nature. [Para. 38].

It has consistently been recognized by an overwhelming majority of courts across the United States (including this Court on at least two occasions) that an industry trade association does not owe a legal duty to the end users of even its own members' products either to disseminate information, or to advocate, recommend or promulgate adequate product safety standards, at least where voluntary standards are involved and the trade association does not itself have the power or authority to enforce compliance. *See, e.g.,* Gunsalas v. Celotex Corp., 674 F.Supp. 1149 (E.D.Pa. 1987), (Tobacco Trade Association accused of negligence in disseminating inaccurate scientific and medical information to the public did not owe a legal duty to to perform research and inform the public of the dangers of cigarette smoking, even though it had promoted the use of tobacco products); Friedman v. F.E. Myers Co., 706 F.Supp. 376 (E.D.Pa.1989), (Water Systems Council owed no legal duty to parties allegedly injured due to PCB contaminated well water as a trade association which provided services to its members including the collection and dissemination of statistics, the education of its members, marketing promotion, lobbying and the development and distribution of industry engineering standards – although the association issued "public information releases", it was under no duty to do so, and it certainly owed no such duty to the plaintiffs); Howard v. Poseidon Pools, Inc., 506 N.Y.S.2d 523 (N.Y.App. 1986), (National Spa and Pool Institute could not be held liable for negligence in promulgating pool safety standards because it did not have the authority to control the manufacturers who produce swimming pools); Beasock v. Dioguardi Enterprises, Inc., 494 N.Y.S.2d 974 (N.Y.App. 1985), (although standards

promulgated by Tire and Rim Association had effectively become industry standards, it lacked the control necessary to impose liability because the trade association neither monitored nor mandated the use of those standards by any manufacturer); Commerce & Industry Ins. Co. v. Grinnell Corp., 1999 U.S. Dist. LEXIS 11269 (E.D.La. 1999), (National Fire Protection Association owed no legal duty to warehouse operator, and was entitled to summary judgment in connection with claims that it was involved in the development and promulgation of inadequate warnings and safety standards relating to the storage of warehouse merchandise, the court holding that policy considerations weighed against imposing liability upon a nonprofit standards developer who exercises no control over the voluntary implementation of its standards); Meyers v. Donnatacci, 220 N.J. Super. 73, 531 A.2d 398 (Law Div. 1987), (National Swimming Pool Institute, a voluntary non-profit trade association which offered suggested minimum standards for swimming pool safety, was entitled to summary judgment in connection with claims that it was negligent in promulgating inadequate standards relating to diving in shallow water neither had, nor assumed a legal duty to members of the public who might use its members' products which would support a negligence claim where it had no power to enforce compliance with its standards, the court recognizing that the mere foreseeability of harm does not give rise to a legal duty); Sizemore v. Georgia-Pacific Corp., 1996 WL 498410 (D.S.C. 1996), reconsideration denied, 1996 U.S. Dist. LEXIS 22401, (Hardwood Plywood and Veneer Association entitled to summary judgment in connection with claims that it had misrepresented or concealed information for decades relating to the flammability of plywood paneling in that it neither "owed a duty of care [n]or assumed a duty not otherwise owed to end users of a product allegedly manufactured by one of HPVA's members."); Bailey v. Edward Hines Lumber Co., 719 N.E.2d 178 (Ill.App. 1999), (trade association which published a guide containing allegedly inadequate

recommendations regarding the installation of roof truss systems neither had, nor voluntarily assumed a legal duty to provide construction workers with adequate warnings or instructions); N.N.V. v. American Ass'n. of Blood Banks, 89 Cal.Rptr.2d 885 (Cal.App. 1999), (trade association neither had, nor assumed a legal duty to the public in connection with its alleged negligence in exercising in recommending voluntary safety standards for the blood bank industry where it did not did not inspect and certify blood banks to ensure compliance); In re Welding Fume Products Liability Litigation, 526 F.Supp.2d 775 (N.D. Ohio 2007), (welding industry trade association neither had a legal duty, nor voluntarily assumed a legally binding undertaking to warn the public or the end users of industry products regarding the health hazards posed by the inhalation of welding rod fumes by virtue of its role in developing and publishing product warnings and welder health and safety publications).

There are sound considerations of public policy underlying the concept that trade associations owe no legal duties to members of the general public, including product end users, with regard to the safety of products in that trade, among them a recognition that such organizations serve many laudable social purposes.

In Meyers, for example, the Superior Court of New Jersey dismissed a failure to warn claim against the National Swimming Pool Institute based upon the absence of a legal duty on the part of that trade organization to warn the public regarding the dangers of diving in shallow water. After recognizing that the foreseeability of injury alone cannot determine the existence of a legal duty, which must also be rooted in a "value judgment" based on an analysis of public policy, the court made the following observations:

> NSPI is a non-profit trade association. Such organizations serve many laudable purposes in our society. They contribute to the specific industry by

> way of sponsoring educational activities, and assisting in marketing, maintaining governmental relations, researching, establishing public relations, standardization and specification within the industry, gathering statistical data and responding to consumer needs and interests. Furthermore, trade associations often serve to assist the government in areas that it does not regulate. *Webster, G. The Law of Associations, Matthew Bender (1986 ed.) Chapter 1.*
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> As explained in *Goldberg v. Housing Authority of Newark, supra, 38 N.J. at 583,* "whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship between the parties, the nature of the risk, and the public interest in the proposed solution." With this in mind and the facts presented herein, the court will not impose upon NSPI a legal duty. It would amount to raising NSPI to the status of a rule-making body which the facts clearly show is unwarranted and legally unsupportable.
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> 531 A.2d at 404-405.

Other courts have emphasized the fundamental unfairness of attempts to impose liability upon trade organizations in situations involving voluntary minimum safety standards which they lack the means or ability to enforce, reasoning that it is inappropriate to fasten liability upon a defendant which lacked the ability to control the acts or omissions of the parties manufacturing or selling the products involved. For example, in declining to impose a legal duty upon the Tire and Rim Association, the New York court in Beasock observed that where one does not commit the injury producing act directly, responsibility for its consequences requires, at the very least, a relationship with the tortfeasor sufficient to exercise control over his culpable conduct:

> Plaintiff's claim that the TRA is responsible because it promulgated dimensional standards which permitted mismatch injuries to occur presupposes that TRA is responsible for the products manufactured by others. However, it is clear that it had neither the duty nor the authority to control what the manufacturers produced.

> A duty to control the conduct of others may arise from a variety of relationships [*citation omitted*]. Such a duty, however, will not be imposed on one who does not control the tortfeasor [*citation omitted*]. Where one does not commit the injury producing act directly, responsibility for its consequences requires, at the very least, a relationship with the tort-feasor sufficient to exercise control over the culpable conduct [*citation omitted*].
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> Such control is lacking in this case. TRA neither mandates nor monitors the use of its standards by any manufacturer....
>
> For the same reason, a duty to warn may not be imposed upon TRA. Such a duty is generally imposed because of some special relationship between the parties, frequently involving some potential or existing economic benefit to the defendant [*citation omitted*]. It has long been settled that manufacturers, distributors and sellers are under a duty to give a reasonable warning of dangers in the use of products they furnish to those persons exposed to a foreseeable risk of harm [citations omitted]. Although there is an economic relationship between the manufacturer and the product alleged to have caused Mr. Beasock's injury which imposes a duty to warn, there is no such economic relationship between the decedent and a trade association of those manufacturers, such as TRA.
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> 494 N.Y.S.2d at 979.

That lack of control over the furniture products made or sold by members of the AHFA, let alone those of foreign suppliers like IKEA, distinguishes the current situation from that which was before the Supreme Court of New Jersey in Snyder v. American Ass'n. of Blood Banks, 144 N.J. 269, 676 A.2d 1036 (1996), in which it was held that the trade association involved did have a legal duty to develop adequate safety standards owed to the recipient of an HIV contaminated blood transfusion where the AABB was not a mere advisory body, but had established mandatory safety practice standards which were claimed to have been inadequate, and had undertaken the roles of both inspecting and accrediting hospitals and blood banks to ensure their compliance with those standards, absent which they could not be

licensed to operate in New Jersey. There are no allegations in this suit suggesting that the AHFA inspected or tested its members' products, that it monitored those products in any way, or that the AHFA had, or exercised such a degree control over its members, or foreign furniture sellers, whatever its actual role might have been with regard to the ASTM standard involved.

In rejecting the notion that an industry trade association either had, or assumed a legal duty to provide warnings to the public, at least one court has also considered the absurdity of such an approach if carried to its logical end of imposing tort liability upon the individual members of such organizations. In Welding Fumes, a U.S. District Court sitting in Ohio recently rejected both propositions when dismissing a lawsuit filed by a group of more than 1,000 welders who suffered injury stemming from their inhalation of manganese in welding rod fumes against various members of the American Welding Society, premised upon their failure to warn end users of the health hazards involved. Following an exhaustive review of case law on the subject in it recognized that most courts have rejected claims against trade associations based upon the absence of a legal duty to the end users of their members' products under general negligence principles, as well as the lack of liability premised upon assumed undertakings, the court turned to the question of whether such liability could be imposed upon Caterpillar, as an individual member of the AWS, concluding that this argument *"proves too much"* and *"stretches the concept of legal duty too far"*:

> Of course, if a trade association owes no duty to the end users of products in that trade, then the various members of that trade association who are not themselves product manufacturers are even further removed from owing a duty to end users. Just as the relationship between the trade association and the product user is "far too attenuated to rise to the level of a duty flowing between them," the relationship between the association's many non-

> manufacturer members and the product user is too weak to support negligence liability….
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> Indeed, plaintiffs' argument also fails because it proves too much. Plaintiffs claim that Caterpillar, solely through participation in AWS, undertook a duty to them (and to their employers, OSHA, the public health community, and others) to warn them accurately about the risk of neurological injury from manganese in welding fumes. But this argument would apply equally to other members of the AWS Safety & Health Committee (such as NIOSH and Professor Howden from The Ohio State University School of Welding Engineering) and even to certain AWS Safety & Health Committee guests (such as the U.S. Department of Safety, the U.S. Army Center for Health Promotion and Preventative Medicine, and the Florida Division of Safety. Following plaintiffs' argument, every member of a trade organization either has or assumes a duty to warn product users of dangers posed by the product, if those dangers are discussed at the organization's meetings. This argument stretches the concept of duty too far.
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> The law simply does not recognize the existence of a duty between trade association members and trade product users, in the circumstances of this case. Caterpillar did not breach a duty to the plaintiffs that was imposed by law, nor did it breach a duty it took upon itself voluntarily….
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> 526 F.Supp.2d at 799-801.

Quite possibly in recognition of the fact that most courts considering the question of whether a trade association has a legal duty to protect the public under general negligence concepts have held otherwise, the plaintiff has averred that the AHFA voluntarily ***assumed*** such duties on behalf of its members, parroting the legal elements of Section 324A of the Restatement (Second) of Torts through a series of conclusory allegations at Paras. 47-51 of the complaint.

Often described as "good Samaritan" liability, Section 324A allows for the imposition of civil tort liability under certain limited circumstances where a defendant has voluntarily undertaken to render services to another which he should

recognize as being necessary for the protection of third parties, and is negligent in performing that undertaking:

> **Section 324A Liability to Third Person for Negligent Performance of Undertaking**
> 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.

Although this has frequently been offered as a liability theory by plaintiffs' attorneys in their efforts to sue industry trade associations, it has very rarely been a successful one, as reflected by the extensive authorities cited previously to that effect.

As recognized in the vast majority of cases in which this argument has been raised, just as a trade association owes no duty to the general public to support a tort claim under general principles of negligence law, the actions of a trade association in connection with the issuance of aspirational mission statements, the alleged development, promotion or promulgation of voluntary product safety standards, the dissemination of information to the public, or lobbying efforts on behalf of its members are also legally insufficient to support a claim of "good Samaritan" liability under Section 324A of the Restatement.

1. The AHFA Did Not Assume the Legal Duties of Product Manufacturers

It is undisputed that product sellers and manufacturers owe legal duties to parties injured by unreasonably dangerous products under negligence and strict product liability principles, however, that liability does not extend to industry trade organizations, as recognized by this Court in Klein v. Council of Chemical Associations, 587 F.Supp. 213 (E.D.Pa. 1984), (trade association had no duty to warn consumers regarding product hazards under Section 402A of the Restatement).

In Gunsalas, Judge Shapiro this Court also rejected a claim under 324A(b) of the Restatement that the Tobacco Institute had assumed a legal duty owed by another party to perform research and to adequately inform the plaintiff of the dangers associated with smoking cigarettes:

> Neither the Tobacco Institute's corporate purposes nor the American Tobacco Company's general statements in advertising constitute the assumption of a duty to plaintiff to perform research and inform him of all dangers of cigarette smoking. The Pennsylvania courts have not yet extended "good samaritan" liability to companies for failure to comply with corporate purposes or promises made in advertising. We predict that the Pennsylvania Supreme Court when presented with this issue will not find that parties like the Tobacco defendants assumed a duty to plaintiffs on facts similar to the undisputed facts of record.

When rejecting such an assumed duty claim in Sizemore premised upon allegations that the Hardwood Plywood & Veneer Association had, through its industry research and advocacy efforts, misrepresented and concealed information regarding the flammability of plywood paneling from public officials and organizations involved in the creation of building codes for thirty years, the district court observed:

> ... HPVA's activities do not satisfy the second alternative requirement of Section 324A (defendant must have "undertaken to perform a duty owed by the other to the third person"). Because "the scope of a good samaritan's duty is measured by the scope of his or her undertaking," *Patentas v. United States*, 687 F.2d 707, 716 (3d Cir. 1982), plaintiffs must prove that HPVA affirmatively assumed the manufacturers' duties to warn the public of the alleged dangers of hardwood plywood paneling. "The foundation of the good samaritan rule is that the defendant specifically has undertaken to perform the task that he or she is charged with having performed negligently." *Id.*
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> Plaintiffs contend that HPVA undertook the duties and obligations of Georgia-Pacific and other manufacturers in connection with the design, testing and marketing of hardwood plywood paneling. But they point to only two pieces of evidence in support of their claim that HPVA assumed this duty: (1) unspecified statements in HPVA's charter and bylaws, and (2) a statement by HPVA's technical director that HPVA was the primary entity dealing with regulatory bodies on behalf of the manufacturers ....
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> * * * *
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> [T]here is nothing in the record to suggest that HPVA undertook to assume any duty to warn or any other duty owed by Georgia-Pacific or any other manufacturer of hardwood plywood paneling to the plaintiffs or the public at large. The unspecified HPVA charter and bylaw provisions invoked by the plaintiffs are for the benefit of HPVA's members, not the general public.

In rejecting the proposition that a welding industry trade association's mission statements (like the AHFA website language quoted extensively in this plaintiff's complaint) constituted a voluntary undertaking under Section 324A to assume a duty owed by another party, the district court made the following observations in the Welding Fume case:

> First, the AWS Safety & Health Committee's mission statements do not represent a legally binding voluntary undertaking by the AWS or by the Committee, much less by each organization belonging to the Committee's

> changing membership, to issue public reports on research concerning the hazards of manganese in welding fumes. For the Committee to state that it has a duty to "ensure a safe working environment for welders and associated personnel" is aspirational in nature; without more, it is not tantamount to shouldering a duty to an individual plaintiff....
> 526 F.Supp.2d at 799.

In the present case, the plaintiff is effectively asserting that the AHFA assumed legal duties that were owed to her, to her son, or to the general public by IKEA, a foreign furniture retailer which is not even claimed to have been a member of the trade association. If a trade organization's activities relating to alleged development, promulgation or implementation of voluntary safety standards, its dissemination of information to the public, or its lobbying efforts on behalf of its members does not in itself constitute a voluntary undertaking to assume the obligations of its own product manufacturer members, it most certainly would not amount to the assumption of the legal duties of foreign product suppliers with which it had no alleged relationship whatsoever.

2. The AHFA's Alleged Activities Did Not Increase the Risk of Harm

A number of courts have also rejected such claims against trade associations on the basis that their alleged acts or omissions with regard to safety standards or the dissemination of information did not *"increase the risk of harm"* to the plaintiff as would be required under Section 324A(a), as opposed to merely permitting the continuation of an existing risk.

As explained by the district court in Sizemore, this element of a 324A claim requires that a defendant's alleged activities result in *"some physical change to the environment, or some other material alteration,"* citing Patentas v. United States,

687 F.2d 707, 717 (3d Cir. 1982), or *"some change in conditions that increases the risk of harm to plaintiff over the level of risk that existed before the defendant became involved,"* citing Canipe v. National Loss Control Services Corp., 736 F.2d 1055, 1062 (5th Cir. 1984).

In explaining why that element was not satisfied in connection with claims asserted against a trade association based upon its alleged concealment or misrepresentation of information relating to the flammability of plywood paneling to organizations involved in the promulgation of building codes, the Sizemore court reasoned that the risk of harm before and after any of the association's allegedly wrongful activity was exactly the same, recognizing that conduct that *"merely permits the continuation of an existing risk"* is not an adequate basis to impose liability under Section 324A:

> The undisputed facts set forth above make it clear that no HPVA activity had a material effect on the nature of the hardwood plywood paneling installed in the plaintiff's home. There was nothing that he HPVA did or failed to do with respect to the paneling in plantiffs' home that resulted in an increased risk of harm.
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> .... At the most, HPVA's alleged conduct "merely permitted the continuation of an existing risk,' an inadequate basis upon which to impose liability under section 324(a)[sic]." *Ricci v. Quality Bakers of America Coop, Inc.,* 556 F.Supp. 716, 720 (D.Del. 1983) (citations omitted), *quoted in Meyers v. Donnatacci,* 220 N.J.Super. 73, 531 A.2d 398, 406 (1987). The risk of harm *before* any of HPVA's wrongful activity was that the use of hardwood plywood paneling as in interior finish ... was either unregulated or subject to the Class C flamespread rating requirement. The risk of harm *after* HPVA's allegedly wrongful activity was exactly the same .... Even assuming there was some risk of harm embodied in the Class C regulatory framework, HPVA did nothing to increase it within the meaning of Section 324A.

As was similarly recognized by this Court in Gunsalus, the Tobacco Institute's claimed failure to fulfill the promises made in its aspirational mission statement did not increase the risk of harm to the plaintiff caused by his cigarette smoking.

And as the Superior Court of New Jersey had previously reasoned when arriving at the same conclusion in Meyer in connection with allegations that the National Spa and Pool Institute had promulgated deficient voluntary safety standards, the risk to the plaintiff in that case was that of attempting to execute a shallow water dive, and there was nothing which the NSPI did, or failed to do which *increased* that risk, which existed independently of its alleged activities. The trade association's alleged conduct *"merely permitted the continuation of an existing risk,"* and that was not enough to satisfy Section 324(a) of the Restatement. 531 A.2d at 406.

The same would plainly be true in this case. Even assuming that the AHFA "promulgated" or "implemented" the ATSM furniture tip-over standard as falsely alleged in this suit, and that the standard was inadequate to prevent the tip-over incident underlying this claim, that risk already existed independent of the voluntary safety standard involved, and that risk was no greater *after*, than it was *before* ASTM F2057 came into existence. It is clear on the face of the complaint allegations that the AHFA did nothing to increase that existing risk through its allegedly wrongful activities. Even if one incorrectly assumes that its alleged efforts to improve matters by advocating, voting in favor of, or promoting at least a voluntary baseline safety standard did absolutely nothing to reduce that risk of injury, it certainly did not increase it.

3. The Complaint Fails to Adequately Plead Reliance

As for the complaint's conclusory (and facially disingenuous) allegation that the plaintiff "relied" upon the ASTM standard in an effort to satisfy Section 324A(c), no supporting factual allegations has been offered to suggest that the plaintiff had actually read, or was otherwise familiar ASTM F2057, or even that the plaintiff had heard of the AHFA or the ASTM, let alone read or heard any purportedly incomplete or misleading statements or assurances on the subject from either defendant at any time before this incident occurred.

As recognized by the U.S. District Court in Grinnell, *supra*, where a claim is premised upon a defendant's alleged failure to disclose information, there is simply no legal duty to do so absent either privity of contract, or the existence of a fiduciary relationship between the plaintiff and defendant, except in cases where the purportedly incomplete or misleading information is communicated directly to the plaintiff by the defendant, none of which are alleged in this complaint. This is consistent with general principles of Pennsylvania law as well. *See, e.g.*, Drapeau v. Joy Technologies, Inc., 607 A.2d 165 (Pa.Super. 1996), (an independent duty to disclose information arises where there is a confidential or fiduciary relationship between the parties to a transaction); Wilson v. Donegal Mut. Ins. Co., 598 A.2d 1310, 1315 (Pa.Super. 1991), (mere silence is not sufficient to constitute fraud in the absence of an independent legal duty to disclose information).

C. THE COMPLAINT FAILS TO STATE A PLAUSIBLE CLAIM FOR NEGLIGENT OR INTENTIONAL MISREPRESENTATION

While the AHFA submits that it neither had, nor assumed any legal duty to the plaintiff or her decedent which could support the plaintiff's claims under *any* of

the legal theories asserted in this suit as a matter of law, it is also clear from the face of the complaint that the plaintiff has failed to sufficiently plead a claim for either negligent, or intentional misrepresentation.

Although the complaint would appear to suggest that the AHFA made affirmative misrepresentations relating to product safety, they are stated in a vague and conclusory manner which fails to satisfy the requirement of F.R.C.P. 9(b) that such claims be stated "with particularity". For example, it is averred at Paragraph 57 g. that the trade association was guilty of *"Misrepresenting to the American consumers and public that F2057 was adequate to protect children from the unreasonably dangerous risk of furniture tip-over"* without any supporting factual allegations which would specifically indicate what those purported misrepresentations consisted of, to whom they were communicated, whether they were written or oral, when they were made, to whom they were made, or that the plaintiff was a recipient. In the same vein, it is alleged at Paragraph 57 p. and q. that the AHFA was guilty of *"Knowingly misleading"* the furniture industry and American consumers into selling or purchasing furniture that was hazardous without specifying whether this was through unspecified affirmative misrepresentations of some kind (and if so, the particulars) or through its failure to disclose information as repeatedly alleged elsewhere in the complaint.

In short, if the plaintiff seriously intended to assert a claim premised upon any affirmative misrepresentations on the part of the AHFA, the complaint fails to do so in a manner that would satisfy the enhanced pleading requirements of Rule 9(b).

Given the absence of any allegation relating to affirmative misrepresentations of fact on the part of the defendants, the plaintiff's misrepresentation claims are premised entirely upon the AHFA'a alleged failure to disclose information, warnings, or expert opinions relating to the claimed insufficiency of the ASTM standard purportedly promulgated by both of the defendants, a non-disclosure claim

which is not legally cognizable in the absence of any allegation of privity of contract, or a special fiduciary relationship as discussed previously.

Nor can such a failure to disclose claim be stated absent an allegation that the information which a defendant purportedly failed to disclose was not already available to the public. As recognized by this Court when granting a lead paint industry trade association's motion to dismiss a complaint advancing similar misrepresentation through non-disclosure claims in Philadelphia v. Lead Industries Ass'n., 1992 U.S. Dist. LEXIS 5849 (E.D.Pa. 1992), there can be no justifiable reliance upon a defendant's non-disclosure of information relating to product hazards even to product purchasers, and thus no claim for misrepresentation, where a complaint pleads no facts establishing that the defendant had information that the public did not already have. Nor, the court held, can the lobbying activities of an industry trade organization on behalf of its members be viewed as amounting to fraudulent misrepresentations in the first place:

> The fraudulent acts or misrepresentations pled by plaintiffs are primarily omissions, or failure to provide them with material information. In order for plaintiffs to state a cause of action for this type of fraud, they must plead facts that show that defendants had information of the health hazards posed by lead-based paints during the relevant period that the public did not have. Plaintiffs have not done so.
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> * * * *
>
> [T]here are still no allegations "that show that defendants had information of the health hazards posed by lead-based paints that the public did not have." .... The deficiency at issue is the failure to allege the fourth fraud element listed above, that is, "justifiable reliance by the recipient upon the [alleged] misrepresentation". [*citation omitted*.] That is, if the ill effects of lead-based paint were essentially public knowledge, then it cannot be said that plaintiffs relied upon defendants counter-representations in purchasing lead paint.
>
> * * * *
>
> The justifiable reliance element of fraud cannot be inferred merely from the allegations (1) that defendants launched a media, research and lobbying

> counter-offensive to improve the image of lead-based paint and (2) that at some point in time plaintiffs purchased lead-based paint. Indeed, plaintiffs do not even allege that their purchases were due, even in part, to this allegedly fraudulent media offensive. They do not even allege that they lacked the knowledge ... that lead-based paint was harmful. There is simply no allegation of reliance, not even one that can reasonably be inferred.
>
> Plaintiffs' fraud claim suffers from further deficiencies. Certain of the acts alleged by plaintiffs are simply not fraudulent. Efforts to oppose warning labels and anti-lead-paint legislation do not amount to fraudulent misrepresentations. Such activities may be self-interested, but they are not fraudulent.
>
> .... While plaintiffs do allege fraud here, they do so in a conclusory and vague fashion, thereby running afoul of the specificity pleading requirement of Rule 9(b). Given these vague allegations, it is not clear that defendants are alleged to have said, or even to have implied, anything that was false.
>
> [1999 U.S. Dist. LEXIS 5849, p. 11 of 21]

The same (and more) can be said in this case, in which the complaint not only fails to aver that the AHFA had information unavailable to consumers or the general public relating to furniture tip-over hazards, but also affirmatively asserts that both the Consumer Product Safety Commission and *Consumer Reports* magazine had publicly asserted prior to this accident in September, 2016 that the safety standard at issue, ASTM F2057, was inadequate. [Para. 39] The complaint also avers that the Consumer Product Safety Commission had warned in an August, 2016 *"public human factors assessment of furniture tip-over incidents"* of the dangers posed to young children interacting with storage units [Para. 23]. The complaint also claims that the AHFA was involved in *"burying, obfuscating, disregarding, discounting, and delegitimizing data and statistics revealing or suggesting that F2057 was inadequate to protect against the risk of furniture tip-over,"* another conclusory allegation which, although lacking in any particulars, further suggests that

information of the sort which the defendants in this suit are claimed to have failed to disclose was already in the public domain and available to the plaintiff – if it were not, it could not have been obfuscated, disregarded, discounted or delegitimized by the defendants. By asserting that the defendants were on notice of the claimed inadequacy of the existing ASTM standard by pointing to the existence of publicly available information to that effect, the plaintiff has herself defeated any claim of misrepresentation through the defendants' non-disclosure of that information.

III. CONCLUSION:

As noted at the outset of this brief, it is unclear from the complaint that the plaintiff has the legal capacity or standing to pursue this lawsuit as the lawfully appointed personal representative of the decedent's estate, and while it is anticipated that this issue can, or will likely be resolved through the plaintiff's response, that alone would necessitate that this suit be dismissed for failure to state a claim if that issue is not resolved.

Turning to the merits of the complaint allegations, the overwhelming weight of legal authority holds that industry trade associations do not have a legal duty to promulgate adequate voluntary product safety standards, to develop and lobby for the enactment of mandatory safety standards, to disclose information, or to offer product safety warnings to consumers, to the general public, or to the end users of even its own members' products under general negligence principles, and in this case, it is not even claimed that the product involved in the underlying accident was manufactured and sold by a member of the AHFA, which it was not. The dresser involved was instead allegedly manufactured and sold to someone by a Swedish company, IKEA, and although it was purportedly manufactured with the aim of complying with the admittedly "baseline" ASTM standard involved, there is also no

allegation that AHFA had the ability to enforce compliance with that admittedly "voluntary" standard by even its own members, let alone by a Swedish company.

It has also been held by nearly every court to consider the question that a trade association does not *assume* such legal duties pursuant to Section 324A of the Restatement (Second) of Torts on behalf of its members, let alone on behalf of an entire industry, simply by virtue of its issuance of aspirational mission statements, its participation in the advocacy, development (or in this case, the alleged "promulgation" or "implementation") of voluntary product safety standards, its lobbying activities, or its advocacy of, or opposition to product safety standards on behalf of its membership.

To hold otherwise would not only unfairly subject an industry trade association to liability for products which it did not itself design, manufacture or sell, and over which it had no meaningful control, but would potentially do the same for each individual member of the trade association who might have been present when potential product hazards were discussed, or were merely made aware of the activities or positions advanced by the association, a result which stretches the concept of legal duty too far, and one which would could fairly be anticipated to have a chilling effect upon the valuable services that trade associations provide to their members and the public at large, including the development and advocacy of minimal product safety standards where there are otherwise none at all.

Although the absence of any existing or assumed legal duty on the part of the AHFA to the plaintiff is sufficient by itself to warrant the dismissal of all of the liability theories asserted in this complaint for failure to state a claim, it is also plain that the plaintiff has failed to state a plausible cause of action for misrepresentation in accordance with the pleading specificity requirements of Rule 9(b). The plaintiff's vague and conclusory allegations simply do not support a misrepresentation claim either under a theory of non-disclosure, or on the basis of

unspecified affirmative misrepresentations, unaccompanied by sufficient factual allegations relating to what was said, how it was said, by whom it was said, when it was said, etc. Nor are the allegations sufficient to support any claim of justifiable reliance on the part of the plaintiff or her decedent, even if one assumes that they were on the receiving end of any communications.

Accordingly, the AHFA respectfully requests that the complaint be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) without leave to amend.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I, Andrew J. Gallogly, hereby certify that true and correct copies of the foregoing Brief in Support of Motion to Dismiss were served upon counsel of record for all parties upon its filing and acceptance through the electronic case filing system.

/s/ Andrew J. Gallogly
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