

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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**NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT**

AYMAN R. HAKKI, on behalf of
himself, all others similarly situated
and the general public,

Plaintiff,

v.

ZIMA COMPANY, et al.,

Defendants.

Civil Action No. 03cv2621 (GK)

THE BEER INSTITUTE'S
RULE 12(b)(6)
MOTION TO DISMISS

PLEASE TAKE NOTICE that, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendant, The Beer Institute, hereby moves this Court to enter an order dismissing plaintiff's complaint against it for failure to state a cause of action. For the reasons more fully set forth in the accompanying Memorandum in Support of The Beer Institute's Motion To Dismiss, which is incorporated herein by reference, The Beer Institute is entitled to dismissal of plaintiff's claims against it as a matter of law on each Count of the complaint, including violation of the District of Columbia Consumer Protection Procedures Act (hereafter "DCCPPA") (Count I); unjust enrichment (Count II); negligence (Count III); and rescission (Count IV). Specifically, The Beer Institute states as follows:

1. Plaintiff has not pled, and cannot plead, a cause of action against The Beer Institute under the DCCPPA because, as a non-profit trade association which does not manufacture, advertise or sell alcohol beverage products, plaintiff's claims against it do not fall within the scope of the DCCPPA.

2. Plaintiff does not state an unjust enrichment cause of action against The Beer Institute because plaintiff has not pled and cannot plead that he has conferred any benefit on The Beer Institute.

3. Plaintiff's negligence count is not directed to any conduct or omission on the part of The Beer Institute but, even had it been, plaintiff's complaint fails to plead and cannot plead the existence of a legally cognizable duty running from The Beer Institute to the plaintiff. Nor does plaintiff allege facts establishing the special relationship necessary to impose a duty on The Beer Institute to protect plaintiff from the illegal acts of third parties.

4. Plaintiff does not state a cause of action in rescission against The Beer Institute because, among other reasons, he has not pled – and cannot plead – that he or his children entered into any transaction with The Beer Institute which could be rescinded.

5. In addition to his inability to state any cognizable cause of action against The Beer Institute for the above four sets of reasons, plaintiff cannot plead and has not pled a legally sufficient causal connection between conduct of The Beer Institute and any injury he has allegedly sustained.

6. Further, the plaintiff's complaint challenges core political speech, petitioning and associational activities protected by the First Amendment and the *Noerr-Pennington* doctrine.

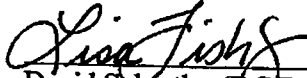
For these reasons, and those further expressed in the accompanying Memorandum in Support of The Beer Institute's Motion To Dismiss, The Beer Institute respectfully requests that this Court enter an order dismissing plaintiff's complaint as to it, with

prejudice, and for such further and different relief as this Court deems proper. A proposed Order is attached hereto.

Dated: December 23, 2003

Respectfully submitted,

THE BEER INSTITUTE



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**MEMORANDUM IN SUPPORT
OF THE BEER INSTITUTE'S
MOTION TO DISMISS**

The Beer Institute respectfully submits this memorandum of law in support of its motion pursuant to FED. R. CIV. P. 12(b)(6) to dismiss the plaintiff's complaint and each cause of action therein pled against it.

INTRODUCTION

With sweeping generalizations, the plaintiff brings claims of wrongdoing in the advertising and marketing of alcohol beverages against a large number of alcohol beverage manufacturers and distributors, and a sole trade association, The Beer Institute. By his pleading against The Beer Institute, plaintiff attempts to shift responsibility for the illegal consumption of alcohol by persons under twenty-one to a non-profit entity which does not manufacture, advertise or sell alcohol beverages, instead of those who illegally procure and consume alcohol and those who unlawfully provide alcohol to underage persons.¹ Plaintiff's claims against The Beer Institute rest on extraordinarily scanty

¹ Plaintiff pleads the fact that The Beer Institute is a non-profit organization, based in the District of Columbia. Compl. ¶ 33. Although plaintiff "artfully" omits to tell the Court more, publicly available information confirms that The Beer Institute is a non-profit trade association that "was organized in 1986 to represent the [brewing] industry

allegations. Only three paragraphs of this complaint address The Beer Institute at all (Compl. ¶¶ 33, 66, 110), and none of them state a legally cognizable cause of action against it.

On baldly insufficient allegations, the plaintiff asserts four counts: for violation of the District of Columbia Consumer Protection Procedures Act (Count I); for unjust enrichment (Count II); for negligence (Count III); and for rescission (Count IV).² In language that betrays the complete disconnection between plaintiff's factual allegations and his theories of liability against The Beer Institute, plaintiff seeks an injunction prohibiting it from (i) "engaging in any marketing of alcoholic beverages to underage persons"; (ii) disgorgement of "all amounts by which [The Beer Institute has] been unjustly enriched, plus costs and interest"; (iii) rescission of transactions and a return of revenues from the allegedly illegal sale of alcohol to persons under twenty-one; and (iv) alleged actual and statutory damages available under the District of Columbia Consumer Protection Procedures Act. D.C. CODE ANN. § 28-3901 (1976), *et seq.* (hereafter the "DCCPPA"); Compl. "Prayer for Relief."

before Congress, state legislatures and public forums across the country." See www.beerinstitute.org/whoweare.htm. In other words, The Beer Institute is one of Washington's many organizations that participate in public policy dialogue and debate before Congress and the Executive Branch about the scope and implementation of the country's laws and regulations relevant to their constituents. Plaintiff does not plead that The Beer Institute manufactures, advertises or sells alcohol beverages – nor could he.

² The complaint also contains general assertions titled "Fraudulent Concealment" which are intended to present an argument for tolling the 3-year statute of limitations. The section is not denominated a "count" of the complaint and plainly does not rise to the level of a separate cause of action under District of Columbia law. See, e.g., *District Cablevision Ltd. Partnership v. Bassim*, 828 A.2d 714, 729 (D.C. 2003); *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 2d 455, 463-64 (D.D.C. 1997).

Plaintiff's claims both as a matter of District of Columbia law and because the facts alleged preclude plaintiff's claims under each of the four counts pled. First, for multiple reasons, plaintiff's claims against The Beer Institute fall outside the scope of the DCCPPA. Second, plaintiff has not pled and cannot plead an unjust enrichment claim or seek a rescission remedy against The Beer Institute, which is not alleged to be and is not involved in the sale of alcohol beverages. Third, plaintiff's negligence count fails to plead any legally cognizable duty owed to plaintiff or any other person by The Beer Institute upon which liability could rest. Fourth, all of plaintiff's claims against The Beer Institute are barred by the legal remoteness of the plaintiff's alleged economic injury from any conduct by The Beer Institute. Finally, although this Court need not reach constitutional issues here statutory and common law precedent demonstrates the complaint cannot stand as a matter of law, the First Amendment to the United States Constitution also precludes claims against The Beer Institute for exercising its Constitutional rights of association, petition and political speech. In sum, plaintiff's complaint against The Beer Institute must be dismissed for numerous independently dispositive reasons.

ARGUMENT

The standards governing a Rule 12(b)(6) motion to dismiss for failure to state a claim were recently summarized in *United States ex rel Totten, v. Bombardier, Corp.*, 2003 WL 227769033 (D.D.C. Sept. 3, 2003):

In considering a motion to dismiss for failure to state a claim, the court must accept all the allegations in plaintiff's complaint as true and construe them in the light most favorable to plaintiff. *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C.Cir.1997). [However], "[c]ourts accept plaintiffs' allegations of fact,

not their conclusions of law. *Taylor v. Federal Deposit Insurance Corp.*, 132 F.3d 753, 762 (D.C.Cir.1997).

“Dismissal under Rule 12(b)(6) is proper when, taking the material allegations of the complaint as admitted, and construing them in plaintiff’s favor, the court finds that the plaintiff has failed to allege all the material elements of his cause of action.” *Weyrich v. The New Republic, Inc.*, 235 F.3d 617, 623 (D.C.Cir.2001) (citations omitted).

In addition to disregarding plaintiff’s conclusory allegations, this Court on a 12(b)(6) motion must disregard inferences in plaintiff’s favor that are not supported by facts set forth in the complaint. *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). And while this Court must generally limit its review to the allegations of the complaint, this Court may also consider facts of which judicial notice may be taken and the contents of documents that are both referenced in the complaint and central to the plaintiff’s claim. *Phillips v. Bureau of Prisons*, 591 F.2d 966, 969 (D.C. Cir. 1979); *Lipton v. MCI Worldcom, Inc.*, 135 F. Supp. 2d 182, 186 (D.D.C. 2001). If plaintiff’s factual allegations, read in light of such material, do not state a claim on which relief can be granted, the complaint must be dismissed.

Analyzed in this light, plaintiff’s complaint fails. Assuming for the purpose of this motion only that all of the alleged facts – in contrast to legal conclusions and unsupported rhetoric – of plaintiff’s complaint are true, plaintiff fails to allege any cognizable cause of action against The Beer Institute.

I. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE BEER INSTITUTE UNDER THE D.C. CONSUMER PROTECTION PROCEDURES ACT.

This Court should dismiss plaintiff’s claim against The Beer Institute under the DCCPPA. First, the DCCPPA does not apply to non-profit corporations such as The Beer Institute. Second, because The Beer Institute is not a “merchant,” it cannot be held

liable under the DCCPPA. Third, plaintiff's failure (and inability) to allege that The Beer Institute has been involved in a commercial transaction involving the sale of goods or services precludes liability under the DCCPPA. Fourth, as a matter of law, The Beer Institute cannot be held liable for aiding and abetting a violation of the DCCPPA. Finally, even if plaintiff were otherwise able to fulfill the statutory requirements of a cause of action under the DCCPPA, he has failed entirely to meet the pleading standard for a fraud claim. See FED. R. CIV. P. 9(b); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1278 (D.C. Cir. 1994).

A. **As a non-profit corporation, The Beer Institute cannot be held liable under the DCCPPA.**

As the complaint acknowledges, The Beer Institute is a non-profit trade association (Compl. ¶ 33), which by definition precludes plaintiff's claim against it under the DCCPPA. *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193 (D.C. 1997). In *Schiff*, a member of the AARP alleged that the organization violated the DCCPPA by misrepresenting its status as a non-profit corporation and the nature of its services. The appellate court affirmed the dismissal of the member's claim, concluding that the D.C. legislature has recognized that the DCCPPA cannot apply to non-profit organizations. *Id.* at 1197; accord *Save Immaculata/Dunblane, Inc. v. Immaculata Preparatory Sch., Inc.*, 514 A.2d 1152, 1159 (D.C. 1986) (concluding that non-profit organization cannot be held liable under the DCCPPA); *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 832 F. Supp. 419, 425 (D.D.C. 1993) (same), *vacated on other grounds*, 84 F.3d 1452 (D.C. Cir. 1996); *Kozup v. Georgetown Univ.*, 663 F. Supp. 1048, 1060-61 (D.D.C. 1987), *aff'd*, 851 F.2d 437 (D.C. Cir. 1988) (same). Because plaintiff admits

that The Beer Institute is a non-profit corporation, his claim against The Beer Institute under the DCCPPA must be dismissed.

B. **Plaintiff fails to allege that The Beer Institute engaged in any commercial transaction falling within the DCCPPA.**

The DCCPPA “was designed to police trade practices arising only out of consumer-merchant relationships.” *Howard*, 432 A.2d at 709. Specifically, a “trade practice” is “any economic act between a consumer and a merchant.” Council Report of Mar. 26, 1974 at 14. Accordingly, unless plaintiff can plead that The Beer Institute was involved in a “trade practice” or “a consumer-merchant relationship in a consumer transaction involving the sale of goods or services,” neither plaintiff nor any other consumer can maintain a cause of action against it under the DCCPPA. *Adam A. Weschler & Son, Inc. v. Klank*, 561 A.2d 1003, 1005 (D.C. 1989) (stating “it is the ultimate retail transaction between the final distributor and the individual member of the consuming public that the [DCCPPA] covers”). Plaintiff fails to allege – nor could he – that he or any other consumer has purchased anything from The Beer Institute, because The Beer Institute does not sell alcohol beverages, much less any other consumer product.

C. **The Beer Institute is not a “merchant,” and therefore, it cannot be held liable under the DCCPPA.**

Plaintiff’s complaint further fails because it does not allege – and cannot in good faith allege – that The Beer Institute is a merchant, a predicate requirement for a claim under the DCCPPA. *Howard v. Riggs Nat’l Bank*, 432 A.2d 701, 709 (D.C. 1981). The DCCPPA authorizes a cause of action against merchants who commit certain deceptive or unethical trade practices. A “merchant” is a “person who does or would sell, lease

(to), or transfer, either directly or indirectly, consumer goods or services, or a person who does or would supply the goods or services which are or would be the subject matter of a trade practice.” D.C. CODE ANN. § 28-3901(a)(3) (2003). Plaintiff does not and cannot plead that The Beer Institute manufactures, advertises or sells any alcohol beverage product or is otherwise a “merchant” subject to the DCCPPA. Consequently, this Court should dismiss plaintiff’s claim against it under the DCCPPA.

D. The Beer Institute cannot be held liable under the DCCPPA for aiding and abetting the alleged fraud of others.

Plaintiff also alleges that The Beer Institute violated the DCCPPA by aiding and abetting the supposed deceptive trade practices of others. Compl. at ¶ 66. Because there is no cause of action for “aiding and abetting” a consumer fraud under the DCCPPA, this Court should dismiss plaintiff’s claim. *Armstrong*, 832 F. Supp. at 425.

In *Armstrong*, former students of a vocational school claimed that a non-profit accreditation agency aided and abetted the school’s violation of the DCCPPA when the agency deceptively failed to withdraw the school’s accreditation. *Armstrong*, 832 F. Supp. at 422. The court refused to grant the students relief reasoning that “no provision of the DCCPPA creates a cause of action for aider-and-abettor liability; in the absence of such a provision, the court must assume that the Council intended to make liable only those who actually violate the DCCPPA.” *Id.* at 425. The court concluded that “there is no liability—either primarily or as an aider and abettor—for a non-profit” organization under the DCCPPA. *Id.* See also *Central Bank v. First Interstate Bank*, 511 U.S. 164, 177 (1994) (when a legislature enacts a statute containing a private right of action but does not specifically address liability for aiding and abetting, it is error to presume that an aiding and abetting claim may be brought under the same statute). For this reason as

well, this Court should dismiss plaintiff's claim against The Beer Institute under the DCCPPA.

E. Plaintiff fails to plead his DCCPPA claim against The Beer Institute with the specificity required.

Plaintiff's failure to plead his DCCPPA claims with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure is fatal to those claims.³ Specifically, the "pleader must state the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud." *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1278 (D.C. Cir. 1994) (quoting *United States v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982)); *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 464 (D.D.C. 1997). Plaintiff's DCCPPA claim against The Beer Institute fails to allege these predicate facts. Moreover, plaintiff fails to allege that he relied on any purported misrepresentation or omission by The Beer Institute. *See Howard*, 432 A.2d at 706 (fraud requires showing of reliance on an alleged misrepresentation). Finally and as a matter of common sense, plaintiff cannot establish the reasonableness of reliance on the part of persons under the legal drinking age on any alleged misrepresentation or omission by The Beer Institute, because the consumption of alcohol by those persons is prohibited by law. *See Aliche v. MCI Communications Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997); *Howard*, 432 A.2d at 707.

³ The complaint was filed in the District of Columbia Superior Court, but its Rule 9(b) imposes precisely the same requirement as the federal Rule 9(b).

II. PLAINTIFF HAS NOT ALLEGED THE ELEMENTS OF AN UNJUST ENRICHMENT CLAIM AGAINST THE BEER INSTITUTE.

To state a claim for unjust enrichment against The Beer Institute, the plaintiff must plead that “defendant was unjustly enriched at [plaintiff’s] expense and that the circumstances were such that in good conscience [the defendant] should make restitution.” *Emerine v. Yancey*, 680 A.2d 1380, 1384 (D.C. 1996). Specifically, a claim of unjust enrichment requires that plaintiff plead “(1) a *benefit* conferred upon the defendant *by the plaintiff*; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention of the benefit *by the defendant* under such circumstances as to make it inequitable for the defendant to retain the benefit.” *Int’l Bhd. of Teamsters & Chauffeurs v. Ass’n of Flight Attendants*, 663 F. Supp. 847, 854 (D.D.C. 1987) (quoting 276 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §1479 (3d ed. 1970) (emphasis added)). A plaintiff cannot state an unjust enrichment cause of action where, as here, he or she has not conferred a benefit on the defendant. *See Rapaport v. United States Dep’t of Treasury, Office of Thrift Supervision*, 59 F.3d 212, 217 (D.C. Cir. 1995) (“[u]njust enrichment simply does not lie when the plaintiff has not bestowed some sort of benefit upon the defendant.”); *4934, Inc. v. District of Columbia Dept. of Employment Servs.*, 605 A.2d 50, 56 (D.C. 1992).

Plaintiff here does not and cannot plead any transaction between himself or his children, if any, and The Beer Institute, in which a payment or other benefit was conferred by plaintiff upon The Beer Institute. On the contrary, as plaintiff’s complaint acknowledges, The Beer Institute is a non-profit trade association that does not sell alcohol beverages. (Compl. ¶ 33.) Not surprisingly, then, plaintiff does not allege that he (or any other person) has conferred a benefit, financial or otherwise, on The Beer

Institute, which is fatal to his unjust enrichment claim. *1934, Inc. v. District of Columbia Department of Empl. Servs.*, 605 A.2d 50, 56 (D.C. 1992) (“whether there has been unjust enrichment must be determined by the nature of *the dealings between the recipient of the benefit and the party seeking restitution*,” implying that some *dealings* must have occurred) (emphasis added); *see also, Ellsworth Assoc., Inc. v. United States*, 917 F. Supp. 841, 848 (D.D.C. 1996) (dismissing unjust enrichment claim where plaintiffs failed to allege “that any benefit has been conferred on the [] defendants *by the plaintiffs*”) (emphasis in original); *Bloomgarden v. Coyer*, 479 F.2d 201, 211 (D.C. Cir. 1973) (unjust enrichment claim unavailable as a matter of law where plaintiff did not confer benefit on defendant).

III. PLAINTIFF FAILS TO STATE A NEGLIGENCE CAUSE OF ACTION AGAINST THE BEER INSTITUTE.

A. Plaintiff does not plead a negligence claim directed to The Beer Institute.

As a threshold matter, the complaint contains no allegations of negligence directed at The Beer Institute, and it is uncertain whether plaintiff intended to state a claim for negligence against this defendant. Rather, this count of the complaint targets the alleged conduct of “manufacturers and distributors.” (Compl. ¶ 101.) The specific conduct described in the negligence count refers only to manufacturer defendants. (Compl. ¶ 102: number of advertisements; alleged failure of companies to take steps to prevent underage consumption of “their” products.) Plaintiff asserts that these acts and omissions foreseeably induce underage persons to illegally consume “defendant’s alcoholic beverages.” *Id.* None of these allegations could possibly apply to The Beer Institute.

B. Plaintiff fails to allege a legally cognizable duty owed by The Beer Institute to him or his children.

1. The complaint cannot plead negligence of The Beer Institute based on the products or marketing conduct of its members.

Numerous courts have held that, as a matter of law, no duty exists on the part of a trade association to protect the general public in relation to products manufactured or installed by its members. *See Meyers v. Donnatucci*, 531 A.2d 398 (N.J. Super. 1987) (holding that a trade association owed no duties to the public in relation to the products sold by its members); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990) (“there is no relationship [between the trade association and plaintiff] upon which plaintiff may base a claim for negligence against [the trade association]”); *Bailey v. Edward Hines Lumber Co.*, 719 N.E.2d 178, 180-185 (Ill. App. 1995) (trade association owed no duty to consumers). The plaintiff here cannot state a cognizable duty on The Beer Institute’s part with regard to the marketing or sale of alcohol beverages by certain of its members.

2. The complaint fails to plead the existence of a relationship between The Beer Institute and the plaintiff or any other person that could support a duty.

Even if plaintiff’s complaint could be read to sweep The Beer Institute into its negligence allegations, in order to state a claim for negligence under District of Columbia law, plaintiff must plead that The Beer Institute breached a legally cognizable duty it owed to the plaintiff. *District of Columbia v. Cooper*, 483 A.2d 317, 321 (D.C. 1984). Whether a defendant owes the plaintiff a duty is a question of law for the court. *Bell v. Colonial Parking, Inc.*, 807 F. Supp. 796, 797 n.3 (D.D.C. 1992), *aff’d*, 8 F.3d 71 (D.C.

Croce v. Hall, 657 A.2d 307, 310 (D.C. 1995) (quoting KEETON, PROSSER & KEETON ON TORTS, § 37, at 236 (5th ed. 1984)).

District courts have rejected the type of highly conclusory, generalized assertions of “duty,” on which plaintiff rests its claims against The Beer Institute. (Compl. ¶¶ 66, 101.)

To allege negligence, a complaint cannot merely make conclusory assertions but must specify a negligent act and characterize the duty whose breach might have resulted in negligence.

Appleton v. United States, 180 F. Supp. 2d 177, 182 (D.D.C. 2002) (citing *District of Columbia v. White*, 442 A.2d 159, 162 (D.C. 1982)), (citing *Kelton v. District of Columbia*, 413 A.2d 919, 922 (D.C. 1980))). Thus, plaintiff’s complaint cannot satisfy his pleading burden by resting on “mere ‘conclusory assertions’ regarding the existence of a duty.” *Office Prod. Co. Sec. Litig.*, 251 F. Supp. 2d 77, 98 (D.D.C. 2003) (citing *District of Columbia v. White*, 442 A.2d at 162).

Instead, the plaintiff must plead facts showing the predicate for imposing a legal duty under District law: facts demonstrating that there is a relationship between The Beer Institute and plaintiff such that The Beer Institute may have a legal obligation to protect the plaintiff.⁴ *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 850 (D.C. 1998) (absent a duty arising from a relationship, contractual or otherwise, between the parties, no cause of action for negligent spoliation exists); *Washington Metro. Area Transit Auth. v. Jeanty*,

⁴ Consistent with these fundamental principles, under District common law, a plaintiff cannot state a negligence cause of action for injuries resulting from the consumption of alcohol by persons under the legal drinking age against an entity which does not directly sell or deliver alcohol to the underage person. D.C. CODE ANN. §25-781; *Wadley v. Aspillaga*, 163 F. Supp. 2d 1, 6 (D.D.C. 2001) (refusing to extend District

18 A.2d 172, 174-75 (D.C. 1998) (duty of common carrier to its passengers is based on their relationship). Under District law, the relationships that generally support the imposition of such a duty include "landowner to invitee, businessman to patron, employer to employee, school district to pupil, hospital to patient, and common carrier to passenger." *Hall v. Ford Enters., Ltd.*, 445 A.2d 610, 611 n.4 (D.C. 1982); see also W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 56, at 341-42 (4th ed. 1971).

Thus, as "a matter of policy," District of Columbia law does not impose a duty absent a pre-existing relationship between the parties that puts the defendant in the best position to protect the plaintiff from the alleged harm. *District of Columbia v. Beretta U.S.A. Corp.*, No. Civ. A 0428-00, 2002 WL 31811717, at *17 (D.C. Super. Dec. 16, 2002), appeal pending; *Workman v. United Methodist Committee on Relief*, 320 F.3d 259, 263 (D.C. Cir. 2003) (citing *Doe v. Dominion Bank of Washington*, 963 F.2d 1552, 1559 (D.C. Cir. 1992)). The existence of a pre-existing relationship between the parties fairly circumscribes the universe of potential plaintiffs to which any person or company may become liable. *Beretta U.S.A.*, 2002 WL 31811717 at *17 (class of potential plaintiffs must be limited as a policy matter by the existence of an actual relationship).

3. The complaint fails to allege a legally cognizable duty on The Beer Institute's part to prevent the illegal acts of plaintiff's children.

Indeed, where a plaintiff seeks to hold a defendant liable for the illegal, intentional or reckless acts of a third party – in this instance, plaintiff's child or children, if any – the standards for pleading and proving a duty are even higher.⁵ District of

common law to find a duty on the part of social or business hosts who serve alcohol). The Beer Institute does not sell or deliver alcohol to consumers.

⁵ Plaintiff claims a heightened duty on The Beer Institute's part here, when the reverse is actually the case. District of Columbia courts have explicitly rejected the

Columbia courts have repeatedly held that a defendant has *no* affirmative duty to prevent the illegal acts of third parties – such as the illegal sale of alcohol to underage persons, absent a *special* relationship between the parties or a relationship which allows the defendant to control the third party actor. Where a special relationship of control or protection exists, a duty may be imposed because “the ability of one of the parties to provide for his own protection *has been limited in some way by his submission of the control to the other.*” *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 482-83 (D.C. Cir. 1970) (emphasis added). Plaintiff here cannot plead such a special relationship with The Beer Institute, either directly as to himself or as to his children.

A “special relationship of control” is required for a duty to arise to prevent the illegal acts of third parties for two reasons pertinent here. First, the existence of a special relationship involving a heightened responsibility owed by the defendant or involving the defendant’s control of the third party actor prevents the imposition of limitless liability on the basis of generalized foreseeability alone, since “[e]veryone can foresee the commission of crime virtually anywhere and at any time.” *Cook v. Safeway Stores, Inc.*, 354 A.2d 507, 509 (D.C. 1976). Second, the existence of a special relationship of control ensures that the defendant is in a position to prevent the alleged injury. *Kline*, 439 F.2d at 483-84. Plaintiff has not pled and cannot plead the existence of a pre-existing relationship – much less a special relationship – between The Beer Institute and either the

theory that the sale of “unusually dangerous products” – a category into which alcohol beverages do not fall in any event – gives rise to a heightened duty toward those injured by their subsequent, illegal use. *Delahanty v. Hinckley*, 564 A.2d 758, 760, 761 (D.C. 1989). In fact, District law plainly establishes that it is plaintiff who bears a “heightened burden” when attempting to hold a defendant liable for injuries caused by the illegal acts of a third party. *Id.* at 762.

plaintiff himself or between The Beer Institute and his child or children (if any) upon which a duty can even theoretically rest.

C. **Plaintiff cannot satisfy the proximate cause requirement for his negligence claim because his alleged injury is too remote from any conduct of The Beer Institute.**

Any negligence claim must start with an “appropriate plaintiff, namely a plaintiff whose alleged injury possesses *a sufficiently direct causal relationship to the alleged wrongdoing.*” *Service Employees Int’l Union Health and Welfare Fund v. Philip Morris, Inc.*, 249 F.3d 1068, 1072 (D.C. Cir. 2001) (emphasis added) (citing *Associated Gen. Contractors, Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 533-35 (1983)). Whether or not a particular plaintiff’s injury is too indirect or remote from a defendant’s conduct to support a cognizable cause of action is a question of law the courts are capable of deciding on a motion to dismiss. *Id.*; *In re Tobacco/Governmental Health Care Costs Litig.*, 83 F. Supp. 2d 125, 130 (dismissing common law claims brought by government of Guatemala seeking to recover costs of medical care it was required by law to provide to its smoking citizens, as a matter of law, because plaintiff’s injuries were “too remote, contingent, derivative and indirect to survive”); *Beretta U.S.A. Corp.*, 2002 WL 31811717, at *22.⁶ Thus, where a plaintiff’s injuries are too legally remote from anything the defendant is alleged to have done or not done, the plaintiff cannot plead proximate cause as a matter of law.⁷ *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 271-74 (1992).⁸

⁶ See also *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 234-35 (2d Cir. 1999), cert. denied, 528 U.S. 1080 (2000).

⁷ It is not only plaintiff’s negligence claim that is barred by the arguments just described: all of plaintiff’s claims suffer from the same flaw that the supposed injury to

The remoteness doctrine bars claims such as those here because, ~~first~~ plaintiff claims that underage individuals who illegally consumed and/or purchased alcohol beverages were directly harmed by defendants' alleged acts, and that he and other parents of underage consumers and/or purchasers were indirectly harmed -- the harm to the parents (for which redress is sought here) was a consequence of the direct harm allegedly caused to their children. But the law is well-settled that a claim to redress an indirect injury caused by an alleged direct injury to another person does not state a claim as a matter of law. See, e.g., *Holmes*, 503 U.S. at 266 n.10 (proximate cause "demand[s]" a "direct relation between the injury asserted and the injurious conduct alleged"; economic harm caused by prior injury to another was "too remote" from illegal acts to allow recovery); *Service Employees*, 249 F.3d at 1074 (quoting the district court: "the 'tortured path' from the defendants' alleged wrongdoing to the [plaintiff's] increased expenditures demonstrates that [the plaintiff's] claims are precisely the type of indirect claims that the proximate cause requirement is intended to weed out" on a dispositive motion); *Beretta U.S.A.*, 2002 WL 31811717 at *26-28.

plaintiff and members of the proposed class is too remote from the alleged conduct of The Beer Institute to allow recovery. See, e.g., *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris Inc.*, 171 F.3d 912, 936-37 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) (unjust enrichment claim barred by remoteness doctrine); *Ass'n of Washington Public Hospital Districts v. Philip Morris Inc.*, 241 F.3d 696, 706 (9th Cir. 2001) (state consumer protection act claims barred by remoteness doctrine).

⁸ In the past five years, eight federal Courts of Appeal -- every federal appellate court to consider the issue -- have uniformly applied the remoteness doctrine to bar union health benefit funds from suing tobacco companies for the costs of treating their participants' smoking-related illnesses. See *Service Employees*, 249 F.3d at 1071 n.2 (collecting cases).

In addition, plaintiff's claim is barred because the causal link between the conduct of The Beer Institute alleged by plaintiff and the injury supposedly caused him by that conduct is too attenuated to allow relief. Thus, courts have repeatedly determined as a matter of law that "the sheer number of links in the chain of causation" or "the tortured path one must follow from . . . alleged wrongdoing to [plaintiff's] increased expenditures," in and of themselves, prevent plaintiff from pleading a legally sufficient causal link. *Steamfitters Local Union No. 420 Welfare Fund*, 171 F.3d 912, 933 (3d Cir. 1999); *In re Tobacco/Gov'tal Health Care Costs Litig.*, 83 F. Supp. 2d at 129; *Beretta U.S.A. Corp.*, 2002 WL 31811717 at *23 (citing *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 423 (3d Cir. 2002)).

Here, the number and attenuation of the links asserted in the purported chain of events between The Beer Institute's alleged "assistance" to brewers' marketing efforts and plaintiff's claimed indirect economic injury stemming from his child's or children's use of "family assets" to illegally purchase alcohol, preclude plaintiff from being able to plead a sufficient causal link to support claims. Even if one credits plaintiff's wholly conclusory allegations, the lengthy causal "chain" he alleges involves at least seven steps from: (1) The Beer Institute's alleged conduct of "facilitation" of unspecified brewer conduct through; (2) the process by which independent brewers develop and place advertisements; (3) brewers sell beer to wholesalers⁹; and (4) wholesalers sell beer to

⁹ Brewers manufacture and sell their products under the distribution system established by federal and District of Columbia law, 27 U.S.C. § 201, *et seq.*; 27 C.F.R. § 1.1, *et seq.*; D.C. CODE ANN. §§ 25-102, 25-111, to wholesale distributors licensed by the federal government and District of Columbia. 27 U.S.C. § 203(c); 27 C.F.R. § 1.22. The District has enacted a comprehensive system of regulation prohibiting the sale of alcohol beverages without a license and establishing a number of license categories for manufacturers, wholesalers and retailers within the District. D.C. CODE ANN. §§ 25-102-

licensed or permitted retailers; (5) to underage persons' alleged generic attraction to those advertisements; (6) and taking or using of their parents' or guardians' funds; (7) to illegally purchase alcohol from an independent retailer.

As the complaint reflects, however, the plaintiff's causal "chain" could also involve eight or more steps – those outlined above, plus the involvement of one or more adults in the retail purchase and resale or provision of alcohol to the underage.¹⁰ Moreover, there is one complete break in the alleged causal chain, inasmuch as the complaint does not allege that any particular person under the legal drinking age has seen or relied on these advertisements in making the decision to purchase alcohol. Under District law, courts have dismissed complaints involving similarly "tortured paths" of causation on the ground that such a causal chain is too attenuated to afford the putative plaintiff standing to sue. *In re Tobacco/Gov'tal Health Care Costs Litig.*, 83 F. Supp.2d at 129; *Beretta U.S.A. Corp.*, 2002 WL 31811717 at *23-24.

Finally, and wholly apart from all the issues of remoteness, plaintiff here is at a further remove from the supposed injury, because he has not alleged that he has or even had a child who drank illegally or, if so, whether the child drank a relevant brand or

120. The District Alcohol Beverage Control Act also protects the independence of wholesale and retail licensees and limits a variety of financial and business practices perceived to permit manufacturers to influence unduly retail trade practices and decisions. D.C. CODE ANN. §§ 25-302, 25-303 and 25-731-736. Manufacturers outside the District (all of the manufacturing defendants named in the complaint) must sell and ship product to a wholesaler or retailer licensed by the District. Finally, persons under twenty-one years of age are prohibited from attempting to purchase, purchasing, possessing or consuming alcohol beverages. D.C. CODE ANN. § 25-1002.

¹⁰ Plaintiff's complaint is wholly unrevealing as to how any individual or group of underage consumers obtain alcohol from a wholesale or retail establishments, but one can reasonably infer two options: persons under 21 illegally purchase alcohol directly from

product, or damaged in a purchase transaction causing an economic injury. Generally, hypothesized injury to members of an uncertified class is simply not relevant to the question of whether the plaintiff has a direct injury. See, e.g., *Warth v. Seldin*, 422 U.S. 490., 501 (1995) (“[T]he [named] plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class . . .”).

For all these reasons, plaintiff’s negligence claim against The Beer Institute should be dismissed based on the indirect, attenuated and broken causal chain alleged in plaintiff’s complaint between plaintiff’s claimed injury and any act or omission of The Beer Institute.

IV. PLAINTIFF IS NOT ENTITLED TO RESCISSION FROM THE BEER INSTITUTE BECAUSE THERE IS NO AGREEMENT, TRANSACTION OR CONTRACT BETWEEN THEM TO RESCIND.

Plaintiff’s attempt to invoke the equitable remedy of rescission against The Beer Institute is fatally flawed because there is no legal basis on which he could seek such a remedy from The Beer Institute. Plaintiff has not pled, and cannot plead, that he and The Beer Institute have entered into any transaction, agreement or any other contract capable of being rescinded. Compl. ¶¶105-107; see *Doolin v. Envtl. Power Ltd.*, 360 A.2d 493, 496 (D.C. 1976) (recognizing rescission is an equitable remedy). Axiomatically, there can be no rescission where there is no transaction to be rescinded. See *In re Estate of Johnson*, 820 A.2d 535, 539 (D.C. 2003) (rescission seeks “to restore the aggrieved party to that party’s position at the time *the contract was made* as opposed to seeking damages for breach of contract”) (internal citation omitted) (emphasis added); *Dean v. Garland*, 779 A.2d 911, 915 (D.C. 2001) (“a party seeking rescission must restore the other party

retailers or they arrange for an adult to purchase alcohol for them, and then illegally

to that party's position *at the time the contract was made*" (emphasis added); *Dresser v. Sunderland Apartments Tenants Assoc., Inc.*, 465 A.2d 835, 840 (D.C. 1983) (noting that rescission provides a remedy where a material misrepresentation occurs *in the execution of a contract*) (emphasis added). Accordingly, plaintiff has not provided any competent, legally recognized basis upon which to invoke a rescission remedy against The Beer Institute, and this count of his complaint against it should be dismissed as well.

V. PLAINTIFF'S CLAIMS ALSO FAIL BECAUSE THE NOERR-PENNINGTON DOCTRINE PRECLUDES CLAIMS BASED ON ASSOCIATION AND PETITIONING ACTIVITIES.

The issue of illegal underage drinking – and how government and industry may best discourage it – has been studied and debated by both the Executive and Legislative Branches of the Federal government for a number of years.¹¹ The Beer Institute has actively participated in the public dialogue about what measures most effectively reduce underage drinking and has responded to requests for information, documents and testimony from the Federal Trade Commission and both houses of the United States Congress.¹² The claims pled against the Beer Institute are thus based on political speech¹³ and activities that are core protected activities under the First Amendment and

purchase the products from those adults.

¹¹ See, e.g., Federal Trade Commission, *Alcohol Marketing and Advertising: A Report to Congress* 1 (Sept. 2003).

¹² See, e.g., Statement of Jeff Becker, President of the Beer Institute, to the Senate Committee on Health, Education, Labor and Pensions, Subcommittee on Substance Abuse and Mental Health Services (Sept. 30, 2003) (<http://www.beerinstitute.org/pdfs/testimony093003.pdf>).

¹³ As demonstrated above, The Beer Institute does not manufacture, sell or market any products and does not engage in commercial transactions with consumers. Its speech cannot be considered "commercial speech." See, e.g., *Virginia State Bd. of Pharmacy v. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1975) (commercial speech is

the *Noerr-Pennington* doctrine and, as such, cannot state a viable claim against the Beer Institute. See *Eastern RR Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

Of course, “normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case,” such as those set forth above. *Escambia Cty., Fla. v. McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*). Where such grounds are not present, however, and the exercise of First Amendment rights is involved, the court should act quickly and decisively to prevent any chilling effect on speech that might result from dragging out the determination of whether the plaintiff has stated a meritorious claim. *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 50 (D.C. 1983) (“[t]he early sifting of groundless allegations from meritorious claims made possible by a Rule 12(b)(6) motion is an altogether appropriate and necessary judicial function”). *Accord Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1063-64 (9th Cir. 1998); *Franchise Realty Interstate Corp. v. San Francisco Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1082-83 (9th Cir. 1976); *Lewis v. Time Inc.*, 83 F.R.D. 455, 461-62 (E.D. Cal. 1979).

A. **Plaintiff's complaint challenges core political speech and petitioning activities protected by the First Amendment and the *Noerr-Pennington* doctrine.**

The only Beer Institute conduct that plaintiff identifies (Compl. ¶¶ 66, 111) is protected association, political speech and petitioning activity that falls within the scope of the First Amendment and the *Noerr-Pennington* doctrine:

“speech which does ‘no more than propose a commercial transaction’” (citation omitted); *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001).

(a) “[S]tatements regarding marketing efforts and underage consumers” – This is protected advocacy about a subject of current debate in Congress and the FTC.

(b) Consultations with Beer Institute members – This complains of the exercise of the rights of free speech and association¹⁴ that is necessary to any concerted effort to petition the government.¹⁵

(c) Discouraging members from taking certain public positions – Again, this targets the exercise of the free speech and association rights that is necessary to the exercise of the right to petition.

(d) “[S]tatements regarding the marketing efforts and trade practices” of members – This is protected advocacy about a subject of current debate in Congress and the FTC and about which the government has solicited The Beer Institute’s views.

(e) “[S]erv[ing] as a clearing house and depository for information” for members – Again, this complains about the exercise of the free speech and association rights that is necessary to the exercise of the right to petition.

(f) Participation in public debate “about the alcohol industry’s marketing practices toward underage consumers” – This alleges protected advocacy about a subject of current debate in Congress and the FTC and about which the government has solicited the Beer Institute’s views.

(g) Statements about the beer industry’s role in industry self-regulation – This, too, alleges protected advocacy about a subject of current debate in Congress and the FTC and about which the government has solicited the Beer Institute’s views.

¹⁴ See *Noerr*, 365 U.S. at 136 (“We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action . . .”); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (“The First Amendment protects political association as well as political expression”) (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

¹⁵ See, e.g., *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294-95 (1981) (the Supreme “Court has acknowledged the importance of the freedom of association in guaranteeing the right of the people to make their voices heard on public issues”); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”) (citations omitted).

(h) Advocacy of voluntary self-regulation of beer marketing, rather than mandatory regulation by the Beer Institute or the government, as one of the effective means of addressing concerns about underage people's exposure to marketing – This, too, is protected advocacy about a subject of current debate in Congress and the FTC and about which the government has solicited the Beer Institute's views.

(i) Discussion of the scientific literature addressing whether there is a causal nexus between advertising and underage people's decision to drink unlawfully, or whether other factors cause underage drinking – This, too, is protected advocacy about a subject of current debate in Congress and the FTC and about which the government has solicited the Beer Institute's views.

Although plaintiff seeks to manufacture a cause of action against the Beer Institute by a generic, conclusory labeling of such speech as “misrepresentations,” the conduct upon which plaintiff's claim is based is association and advocacy that lies at the very core of the First Amendment and the *Noerr-Pennington* doctrine. Such activity cannot form the basis of suit against the Beer Institute as a matter of law.

B. The First Amendment precludes the imposition of liability for statements made about a subject of governmental interest.

Public debate about the methods the government should employ to discourage underage drinking is core political speech that is protected by the First Amendment. *Mills v. State of Alabama*, 384 U.S. 214, 218 (1966) (“a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs”).¹⁶ The First Amendment broadly protects core political speech based on a fundamental belief in the free exchange of ideas during robust debate about governmental affairs. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (“Discussion[s] of public issues . . . are integral to the

¹⁶ See also *Meyer v. Grant*, 486 U.S. 414, 420-22 (1988); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Calif.*, 475 U.S. 1, 8-9 (1985); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1966).

operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . .¹⁷

Plaintiff seeks prior restraints (injunctive relief), as well as civil punishment for previous speech. Imposing liability on a trade association for advocacy about a matter of governmental interest impermissibly chills the exercise of First Amendment rights:

The threat of sanctions may deter the[] exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 433 (1963) (citations omitted); *see also Thornhill*, 310 U.S. at 101-02. "Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison*, 447 U.S. at 535-37, 540.¹⁸

¹⁷ *See also Bellotti*, 435 U.S. at 790-91 ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 272-73 (1964) (recognizing that "erroneous statement is inevitable in free debate," and holding that error, too, "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive'"); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("Such regulation, however, whether aimed at fraud or other abuses, must not trespass upon the domain set apart for free speech and free assembly."); *Thornhill v. State of Alabama*, 310 U.S. 88, 95 (1940) ("The safeguarding of [the freedom of speech and of the press] to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government.").

¹⁸ *See also International Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. National Right to Work Legal Defense and Ed. Found., Inc.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978) (noting, in *dicta*, that the activities of a tax-exempt, non-profit organization that conducts educational projects and supports "right to work"

The remedies plaintiff seeks – ban on certain types of alcohol advertising and placements in various media – are far too broad to pass constitutional muster. For example, in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), the United States Supreme Court held – using only an intermediate level of scrutiny for commercial, rather than political, speech – that a ban on placing billboards within 1,000 feet of a school violated the First Amendment because it was not narrowly tailored to avoid infringing on rights to speak to adults.

Here, there is no compelling state interest in restricting The Beer Institute from advocating point-of-sale controls and parental supervision as more effective methods of preventing underage drinking. And the statutory and common-law causes of action asserted by plaintiff are not narrowly tailored to achieve such interests, however illusory. Thus, the First Amendment precludes liability under plaintiff's Complaint.

C. **The Noerr-Pennington doctrine also protects all manner of petitioning and associational activity from liability.**

The First Amendment guarantees, *inter alia*, “the right of the people . . . to petition the Government for a redress of grievances.” U.S. CONST. AMEND. I. By preventing courts from imposing liability for such activities, the *Noerr-Pennington* doctrine protects the government's power to gather information and consider and pass laws. *Eastern RR Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) (“the whole concept of representation depends upon the ability of the people to

legislation “are protected modes of association and expression under the first amendment,” and that “[a]ny law that adversely affects the exercise of first amendment freedoms in connection with” these activities “must be necessary to correct a serious and substantive [actual, and not potential,] evil and must be precisely drawn to serve that purpose”).

make their wishes known to their representatives”); see also *Mariana v. Fisher*, 338 F.3d 189, 197 (3d Cir. 2003) (“The dual principles underlying the *Noerr-Pennington* doctrine are the constitutional right to petition under the First Amendment and the importance of open communication in representative democracies.”).¹⁹

Noerr-Pennington immunity is content neutral and does not inquire into the truth or falsity of the representations or the intent of the person petitioning Congress. *Noerr*, 365 U.S. at 139; *A Fisherman's Best, Inc. v. Recreational Fishing Alliance*, 310 F.3d 183, 192 (4th Cir. 2002). The scope of petitioning activities protected by the *Noerr-Pennington* doctrine is quite broad, and includes not only testimony to Congress, but publicity campaigns designed to influence public opinion.²⁰

For this reason as well, plaintiff's complaint against The Beer Institute should be dismissed.

CONCLUSION

Plaintiff's complaint thoroughly and completely fails to state a claim against which relief can be granted against The Beer Institute on any of its four counts. As plaintiff's own allegations demonstrate, he cannot cure the substantial legal defects of his

¹⁹ “[A]lthough originally developed in the antitrust context, the doctrine has now universally been applied to business torts.” *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310-12 (4th Cir. 2003); cf. *Whelan v. Abell*, 48 F.3d 1247, 1254 (D.C. Cir. 1995) (because *Noerr-Pennington* is based on “the protected right to petition,” there is no reason why, “as an abstract matter,” the doctrine should not be applied to common law torts because “there is nothing inherently sacrosanct about common law torts”).

²⁰ See, e.g., *Noerr*, 365 U.S. at 143-44; *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 382 (1991); *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000); *International Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818, 826 (7th Cir. 1999); *Federal Prescription Serv., Inc. v. American Pharm. Ass'n*, 663 F.2d 253, 257 (D.C. Cir. 1981).

claims against this defendant and his claims against The Beer Institute should be
dismissed with prejudice.

Dated: December 23, 2003

Respectfully submitted,

THE BEER INSTITUTE



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