DECLARATION OF KEVIN W. KEANE IN SUPPORT OF PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION

THE AMERICAN BEVERAGE ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION,

Plaintiffs,

v.

THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant.
I, Kevin W. Keane, being duly sworn, depose and state as follows:

1. I am an adult over the age of eighteen, and if called to testify in this matter, I could and would testify as follows:

2. I am Senior Vice President, Policy and Public Affairs at the American Beverage Association (“ABA”). The information set forth below is based on my personal knowledge, information, and belief.

3. ABA is a national trade organization representing the non-alcoholic beverage industry, including beverage producers, distributors, franchise companies, and support industries. ABA members bring to market beverages including carbonated soft drinks, bottled water (including still water, mineral water, and artesian water), sports drinks, energy drinks, 100% juices, juice drinks, and ready-to-drink teas. These products are sold in various sizes with FDA-required labels that provide nutritional information (including calories and total sugar). In addition, ABA member companies voluntarily provide a front-of-pack calorie declaration showing the total number of calories per container (for beverages up to 20 ounces) and per 12 ounce serving (for larger sizes) pursuant to an industry initiative known as “Clear on Calories.” ABA and its member companies launched Clear on Calories in 2008, in conjunction with Mrs. Obama’s “Let’s Move!” initiative, for the purpose of enabling consumers to make informed beverage choices.

4. Products sold by ABA members throughout California, including in the City and County of San Francisco (the “City”), include but are not limited to Coca-Cola, Coca-Cola Life, Coke Zero, Pepsi, Diet Pepsi, Pepsi Next, Dr Pepper, Diet Dr Pepper, Gatorade, Powerade, Snapple, Lightly Sweetened Snapple, Tropicana Pure Premium, Trop50, Minute Maid, Hawaiian Punch, Fresca, Odwalla, Smartwater, and Vitaminwater. Of the member companies’ dozens of products, many are no- or low-calorie beverages.

5. In my capacity as Senior Vice President, Policy and Public Affairs at ABA, I direct ABA’s communications and public affairs work; interface with ABA members about issues affecting their interests; and serve as a liaison between industry and media about ABA’s work, including our industry initiatives such as Clear on Calories, the School Beverage...
Guidelines, and our recently announced Balance Calories Initiative.

6. I have read the City’s Ordinance No. 100-15 (the “Ordinance”), which amended the San Francisco Health Code “to require advertisements for sugar-sweetened beverages to include a warning about” what the City believes to be “harmful health effects of consuming such beverages and authorizing the Director of Health to impose penalties for noncompliance.”

7. The mandated warning (the “Warning”) reads as follows: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.”

8. The Warning must “occupy at least 20% of the area of each SSB Ad and the text shall be printed in a size and manner so as to be clearly legible to the intended viewers of the SSB Ad.”

9. The Ordinance defines an “SSB Ad” as “any advertisement, including, without limitation, any logo, that identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use that is any of the following: (a) on paper, poster, or a billboard, (b) in or on a stadium, arena, transit shelter, or any other structure, (c) in or on a bus, car, train, pedicab, or any other vehicle; or (d) on a wall, or any other surface or material.” It exempts, among other things, “any logo that occupies an area that is less than 36 square inches and is unaccompanied by any display, representation, or other information identifying, promoting, or marketing a sugar-sweetened beverage.”

10. In its advertisements in the City, ABA historically has utilized a mixture of media covered by and exempt from the Ordinance. To most effectively reach consumers, ABA utilizes different forms of media for its advertisements, taking into account factors such as targeted audience, cost, and location. ABA historically has chosen the mix of media that will enable it to most effectively convey its messages.

11. In September 2014, ABA and its member companies—including The Coca-Cola Company, PepsiCo, and Dr Pepper Snapple Group—along with the Alliance for a Healthier Generation, made a commitment at the Clinton Global Initiative to work together to reduce beverage calories consumed per person in the United States by 20 percent by 2025. This
commitment is referred to by the industry as the Balance Calories Initiative. In connection with that Initiative, ABA has engaged in national advertising and advertising in specific communities across the country to educate consumers about their beverage choices, and to increase and sustain consumer interest in access to smaller portion sizes, water, and no- and low-calorie beverages.

12. As part of the Balanced Calories Initiative, ABA launched Mixify—a first-of-its-kind national consumer awareness and engagement program encouraging teens and their families to balance the calories they consume, including beverage calories, with physical activity. Mixify advertisements were run in various media in the City starting in October 2014 as part of a national campaign. Because Mixify advertisements are sponsored by ABA and its member companies, all of the advertisements contain the logos for ABA, The Coca-Cola Company, PepsiCo, and Dr Pepper Snapple Group. See Ex. A. ABA and its members believe it is necessary to include all four logos, both to be transparent with regard to who is sponsoring the advertisements and because it enhances the credibility of the effort with consumers. See Ex. A; see also Ex. B (same for other campaigns).

13. ABA has previously advertised in the City on multiple occasions regarding other industry initiatives: (1) Clear on Calories, a campaign to educate consumers about the calories in beverages and the availability of different-calorie beverage options; (2) We’re Delivering, an advertising campaign designed to highlight industry initiatives that contribute positive benefits to communities; and (3) the School Beverage Guidelines, the industry’s voluntary commitment to remove full calorie soft drinks from schools, driving a 90 percent reduction in beverage calories delivered to schools nationwide.

14. ABA’s logo appears on ABA’s advertisements on media within the scope of the Ordinance, and frequently is larger than thirty-six square inches. ABA’s logo, like the logos of ABA’s members and their products, is an essential component of ABA’s and its members’ speech, identifying the advertisement at issue as reflecting the ABA’s views and serving as the most effective and efficient way to communicate messages from ABA and its members to members of the public.
15. ABA is uncertain whether the City would treat ABA’s logo as a “logo” within the meaning of the Ordinance, or even whether ABA’s use of its logo would render an advertisement one requiring the City’s Warning under the Ordinance.

16. All ABA advertisements—including those employed in ABA’s Mixify, Clear on Calories, School Beverage Guidelines, and We’re Delivering campaigns—also prominently feature the logos of its members. ABA and its member companies believe that the inclusion of the logos of some of America’s largest beverage companies—all staunch competitors in the marketplace—in these advertising campaigns is essential to convey unified support for their shared messages and render their shared advertisements more potent at promoting consumer awareness and response.

17. For those reasons, ABA believes that not being able to run such advertisements with the logos of its member companies would fundamentally distort and negate the intended messages of this shared speech.

18. One of ABA’s functions is to aggregate and report joint industry data.

19. Numerous ABA members—including, among others, The Coca-Cola Company, PepsiCo, and Dr Pepper Snapple Group—advertise or have advertised sugar-sweetened beverages in the City and have used their names to promote products and events in the City, as well as non-product-related advertisements.

20. I understand that for reasons such as audience accessibility, location, and cost, the member companies believe that outdoor advertising is an important venue for advertisements related to their beverage products.

21. These member companies also own, lease, or contract with others to manage coolers, fountains, and vending machines to sell or dispense their products. The companies’ products are sold at thousands of vending machines, coolers, and fountains throughout the City. This equipment generally includes the companies’ logos.

22. ABA believes the Warning required by the Ordinance conveys controversial and inaccurate messages, including that: drinking sugar-sweetened beverages uniquely contributes to obesity, diabetes, and tooth decay, regardless of other calories consumed or other lifestyle
choices, including exercise; consumers should avoid sugar-sweetened beverages; *added* sugar uniquely contributes to those adverse health consequences; and added sugar in covered beverages is worse in that respect than added sugar in exempted sugar-sweetened beverages and foods.

23. ABA strongly disagrees with those messages and considers them misleading and incorrect. *See, e.g.*, Compl. ¶¶ 38-72; 138-41.

24. If allowed to take effect, the Ordinance would significantly burden ABA’s and its members’ speech on covered media within the City.

25. The Ordinance will force ABA and its members against their will to convey messages that they do not believe or cease advertising on covered media.

26. Because of its size, format, and content—including its all-capitals “WARNING”—the messages the required Warning conveys would substantially overwhelm ABA’s and its members’ intended messages on advertisements impacted by the Ordinance.

27. The City’s required Warning would, for example, convert advertisements that ABA intends to educate members of the public about their beverage choices and to promote consumer awareness of portion sizes, calories, and the benefits of balancing caloric intake and outtake into hostile advertisements that criticize and discourage the consumption of ABA members’ products, denigrate their brands, and mislead the public about the contribution of beverages with added sugar to obesity, diabetes, and tooth decay.

28. ABA believes that displaying the City’s large, mandated warning on its own billboards, posters, and similar media would distort and negate its intended messages, and harm the businesses, reputations, customer relations, and goodwill of its members.

29. Because the Ordinance requires ABA to devote a full 20% of the space on any covered advertisement to the City’s hostile message, ABA considers it infeasible to neutralize or otherwise overcome the City’s message through so-called counter-speech elsewhere on the same advertisement. If ABA attempts to respond to the City’s misleading messages on the remaining 80% of its advertising space, little or no space would be left for the intended message of the original advertisement. Consumers would pay little to no attention to the intended message of
the original advertisement, focusing instead on the debate between the City’s warning and ABA’s so-called counter-speech, defeating the original purpose of the advertisement.

30. Because ABA’s advertising burdened by the City’s warning would be far less effective at conveying ABA’s intended message, and would affirmatively harm its members by subsidizing misleading and inaccurate speech about their products, ABA believes the value of advertising on covered media would be substantially diminished.

31. The Ordinance also would make advertising on covered media within City limits significantly more costly to ABA. Although ABA likely would be required to pay for 100% of its advertising space, it would be entitled to utilize only 80% of that space—effectively making each square foot of usable advertising space 25% more expensive, while subsidizing and underwriting 100% of the cost of the City’s hostile message.

32. The harm to ABA’s messages from conveying the City’s misleading Warning—with which ABA strongly disagrees—would significantly outweigh any reduced benefit of continuing to advertise on covered media.

33. As a result, if the Ordinance is allowed to take effect, ABA intends to withdraw from advertising burdened by the Ordinance on covered media in the City.

34. ABA believes that the City is free to advertise its views. But ABA believes that consumers are far more likely to pay attention to positive messages focused on steps consumers may take to choose appropriate beverages, based on portion size and calorie content, than they are to listen to messages “warning” them what not to drink. As a result, ABA anticipates that the result of the City’s Ordinance will be counterproductive to the City’s asserted purpose.

35. In 2016, as part of its overall Balance Calories Initiative, ABA plans to run advertisements similar to Exhibit A, including advertisements on covered media, in the City. If ABA is forced to include the Warning Mandate called for by the Ordinance on such advertisements, ABA will elect not to run the advertisements.

36. Pursuing this action to enjoin enforcement of the Ordinance is germane to the purpose of ABA, which is to publicly represent and protect the interests of ABA members.

[Signature Page Follows]
I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

KEVIN W. KEANE

Executed on January 11, 2016
Out of Home Advertising
Billboards
Billboards in Spanish

MANTÉN EL
BALANCE
ENTRE LO QUE COMES BEBES HACES
Point of Sale: Cooler & Vending

BALANCE
WHAT YOU
EAT, DRINK
& DO

BALANCE
WHAT YOU
EAT, DRINK
& DO
EXHIBIT B
Together, we’ve reduced beverage calories in schools by 88%.

America’s beverage companies have teamed up to remove full-calorie soft drinks from schools. And we’ve replaced them with lower-calorie and small portion-sized options like juices, teas and waters — reducing beverage calories by 88%.* Together with schools, we’re helping kids make more balanced choices every day. Learn more at Ameribev.org.

*Data compiled and analyzed by Keybridge Research LLC.
DECLARATION OF PAMELA WILLIAMS IN SUPPORT OF PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION

I, Pamela Williams, being duly sworn, depose and state as follows:

1. I am an adult over the age of eighteen, and if called to testify in this matter, I could and would testify as follows:

2. I am Executive Vice President of the California Retailers Association (“CRA”). The information set forth below is based on my personal knowledge or was provided to me by other CRA personnel with knowledge, and is true to the best of my knowledge, information, and belief.
3. CRA is a statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, restaurants, convenience stores, supermarkets and grocery stores, chain drug, and specialty retail, such as auto, vision, jewelry, hardware and home stores. CRA members sell beverages including carbonated soft drinks, bottled water (including still water, mineral water, and artesian water), sports drinks, energy drinks, 100% juices, juice drinks, and ready-to-drink teas. These products are sold in various sizes, and frequently are sold with FDA-required or voluntarily-provided labels or other markers that provide nutritional information (such as calories and total sugar).

4. Beverages sold by CRA members throughout California, including in the City and County of San Francisco (the “City”), include but are not limited to Coca-Cola, Coca-Cola Life, Coke Zero, Pepsi, Diet Pepsi, Pepsi Next, Dr Pepper, Diet Dr Pepper, Gatorade, Powerade, Snapple, Lightly Sweetened Snapple, Tropicana Pure Premium, Trop50, Minute Maid, Hawaiian Punch, Fresca, Odwalla, smartwater, and vitaminwater. The beverage portfolios include a wide variety of no- and low-calorie beverages. A number of CRA members sell their own private-label soft drinks.

5. In my capacity as Executive Vice President of CRA, I oversee member relations and communications and make policy decisions regarding regulatory and legislative issues affecting Association members. As Executive Vice President of CRA, I have personal knowledge of the operations of some CRA member retailers throughout the State of California, including in the City.

6. I have read the City’s Ordinance No. 100-15 (the “Ordinance”), which amended the San Francisco Health Code “to require advertisements for sugar-sweetened beverages to include a warning about” what the City believes to be “harmful health effects of consuming such beverages and authorizing the Director of Health to impose penalties for noncompliance.”

7. The mandated warning (the “Warning”) reads as follows: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.”

8. The Warning must “occupy at least 20% of the area of each SSB Ad and the text
shall be printed in a size and manner so as to be clearly legible to the intended viewers of the
SSB Ad.”

9. The Ordinance defines an “SSB Ad” as “any advertisement, including, without
limitation, any logo, that identifies, promotes, or markets a Sugar-Sweetened Beverage for sale
or use that is any of the following: (a) on paper, poster, or a billboard, (b) in or on a stadium,
arena, transit shelter, or any other structure, (c) in or on a bus, car, train, pedicab, or any other
vehicle; or (d) on a wall, or any other surface or material.” It exempts, among other things, “any
logo that occupies an area that is less than 36 square inches and is unaccompanied by any
display, representation, or other information identifying, promoting, or marketing a sugar-
sweetened beverage.”

10. In their advertisements in the City, CRA members historically have utilized a
mixture of media covered by and exempt from the Ordinance. To most effectively reach
consumers, CRA members utilize different forms of media for their advertisements, taking into
account factors such as targeted audience, cost, and location. CRA members historically have
chosen the mix of media that will enable them to most effectively convey their messages to
consumers.

11. CRA members are engaged in advertising on covered media in the City.

12. CRA members also host advertisements on their premises from sugar-sweetened
beverage manufacturers. Many advertisements include the logos of sugar-sweetened beverage
manufacturers or their products, many of which are larger than thirty-six square inches. CRA
members also host advertisements on their premises from sugar-sweetened beverage
manufacturers that include representations of their products.

13. Many CRA members also own, lease, or contract with others to host coolers,
fountains, and vending machines to sell or dispense beverage products. This equipment
generally includes sugar-sweetened beverage producers’ logos.

14. CRA believes that the Warning required by the Ordinance conveys controversial
and inaccurate messages, including that; consuming beverages with added sugar is dangerous
and harmful to health; consuming beverages with added sugar will, in and of itself, contribute to
1. becoming afflicted with obesity, diabetes, and tooth decay; consuming covered beverages with
2. added sugar uniquely contributes to obesity, diabetes, and tooth decay compared to beverages
3. with naturally-occurring sugar, or added sugar in exempted sugar-sweetened beverages and
4. foods. CRA strongly disagrees with those messages and considers them misleading and
5. incorrect. See, e.g., Compl. ¶¶ 38-72; 138-41.
6. 15. If allowed to take effect, the Ordinance would significantly burden CRA
7. members’ speech on covered media within the City.
8. 16. The Ordinance will force CRA members against their will to convey or associate
9. with messages that they do not believe, or cease advertising on covered media or hosting
10. advertisements on covered media within the scope of the Ordinance.
11. 17. Displaying the City’s large, mandated warning on their own billboards, posters,
12. and similar media would distort and negate CRA members’ intended messages, and harm their
13. businesses, reputations, customer relations, and goodwill.
14. 18. Displaying the City’s large, mandated warning on the media of sugar-sweetened
15. beverage manufacturers and distributors within the establishments of CRA members would harm
16. those members’ businesses, reputations, customer relations, and goodwill.
17. 19. Because the Ordinance requires CRA members to devote or ensure that
18. advertisers devote a full 20% of the space on any covered advertisement to the City’s hostile
19. message, it will be infeasible to neutralize or otherwise overcome the City’s hostile message
20. through so-called counterspeech elsewhere on the same advertisement.
21. 20. Because CRA members’ advertising burdened by the City’s warning would be far
22. less effective at conveying the members’ intended message, and would affirmatively harm its
23. members by subsidizing misleading and inaccurate speech about their products, CRA believes
24. the value of advertising on covered media would be substantially diminished.
25. 21. The Ordinance also would make advertising on covered media within City limits
26. significantly more costly to CRA members. Although CRA members would be required to pay
27. for 100% of its advertising space, it would be entitled to utilize only 80% of that space—
28. effectively making each square foot of usable advertising space 25% more expensive, while
22. The harm to CRA members’ messages from conveying the City’s misleading Warning—with which CRA and many of its members strongly disagree—would for some members significantly outweigh any reduced benefit of continuing to advertise on covered media.

23. As a result, if the Ordinance is allowed to take effect, I understand many CRA members would be forced to make a determination about whether to withdraw from advertising burdened by the Ordinance on covered media in the City.

24. CRA believes that the City is free to advertise its views. But CRA believes that consumers are far more likely to pay attention to positive messages focused on steps consumers may take to choose appropriate beverages, based on portion size and calorie content, than they are to listen to messages “warning” them what not to drink. As a result, CRA anticipates that the result of the City’s Ordinance will be counterproductive to the City’s asserted purpose.

25. Pursuing this action to enjoin enforcement of the Ordinance is germane to the purpose of CRA, which is to publicly represent and protect the interests of CRA members. I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on January 11, 2016

PAMELA WILLIAMS
DECLARATION OF MATT JOHNSON IN SUPPORT OF PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION
I, Matt Johnson, being duly sworn, depose and state as follows:

1. I am an adult over the age of eighteen, and if called to testify in this matter, I could and would testify as follows:

2. I am a Director of Field Marketing for California within PepsiCo’s (the “Company”) North America beverages business. The information set forth below is based on my personal knowledge, a review of the Company’s books and records, and discussions with other Company employees. The statements below are true to the best of my knowledge, information, and belief.

3. PepsiCo is a leading food and beverage company, and brings to market various types of beverages, including carbonated soft drinks, bottled water, sports drinks, energy drinks, 100% juices, juice drinks, and ready-to-drink teas. These products are sold in various sizes and, in the United States, carry FDA-required labels that provide nutritional information (including calories and total sugar) enabling consumers to make informed beverage choices.

4. Specific beverage products sold by PepsiCo throughout California, including in the City and County of San Francisco (the “City”), include but are not limited to Pepsi, Diet Pepsi, Tropicana Pure Premium Orange Juice, Trop50, Tropicana Punches, Naked Juice, Aquafina, Gatorade, Mountain Dew, Diet Mountain Dew, ready-to-drink Lipton teas, and other no- or low-calorie beverages.

5. In my capacity as PepsiCo’s Director of Field Marketing for California, I am responsible for the local marketing programs PepsiCo develops and executes for many of its beverage brands, including Pepsi, at retail accounts, sporting venues, and events throughout the state. I also consult with PepsiCo’s various beverage brand marketing teams to help them create and execute their media and promotional strategies in California. I have knowledge of PepsiCo’s beverage sales, marketing, and communications operations in the City.

6. It is my understanding the City has passed Ordinance No. 100-15 (the “Ordinance”), which amended the San Francisco Health Code “to require advertisements for sugar-sweetened beverages to include a warning about” what the City believes to be “harmful
health effects of consuming such beverages and authorizing the Director of Health to impose penalties for noncompliance.”

7. It is my understanding that the mandated warning (the “Warning”) reads as follows: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.”

8. It is also my understanding that the Warning must “occupy at least 20% of the area of each SSB Ad and the text shall be printed in a size and manner so as to be clearly legible to the intended viewers of the SSB Ad.”

9. Further, it is my understanding that the Ordinance defines an “SSB Ad” as “any advertisement, including, without limitation, any logo, that identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use that is any of the following: (a) on paper, poster, or a billboard, (b) in or on a stadium, arena, transit shelter, or any other structure, (c) in or on a bus, car, train, pedicab, or any other vehicle; or (d) on a wall, or any other surface or material.” It exempts, among other things, “any logo that occupies an area that is less than 36 square inches and is unaccompanied by any display, representation, or other information identifying, promoting, or marketing a sugar-sweetened beverage.”

10. In its advertisements in the City, PepsiCo historically has utilized a mixture of media including billboards, bulletins, panels and posters; advertising in airports, malls, stadiums, transit shelters, and other venues; advertising in and on buses, trucks, taxis, and commuter rails; sponsorship of and participation in parades, programs, and events; as well as various other forms of outdoor advertising. PepsiCo also reaches the City’s consumers by advertising through other media, including television, radio, magazines, newspapers, other print publications, internet, and other electronic means. PepsiCo believes that utilizing different forms of media allows it to most effectively convey its message to consumers.

11. PepsiCo believes that for reasons such as audience accessibility, location, and cost, outdoor advertising is a particularly important venue for advertisements related to its beverage products.
12. PepsiCo’s or its products’ logos often prominently appear on PepsiCo’s advertisements on media within the scope of the Ordinance. These logos, many of which are larger than thirty-six square inches, often incorporate or are accompanied by representations of the Company’s products. They are an essential component of PepsiCo’s messages, identifying the advertisement at issue as reflecting the views of PepsiCo, building brand awareness, and encouraging members of the public to pay attention to the advertisement.

13. PepsiCo’s advertisements regularly convey a variety of different messages. Some promote particular products; some increase brand awareness; some educate consumers about the nutritional content of its products and how to make healthy choices; some express support for various social, political, and cultural causes, initiatives, or events; and some are hybrids that convey more than one message.

14. PepsiCo operates the Pepsi Dream Machine in San Francisco, a kiosk featuring signage which encourages consumers to make a difference by recycling their bottles and cans on the go. See Ex. A.

15. PepsiCo has also run advertisements encouraging consumers to “Do Some Good” and share ideas for how Pepsi could invest money in initiatives focused on the environment, education, neighborhoods, health, arts & culture, and food & shelter, as part of the Pepsi Refresh Project. These advertisements include either logos that fall within the scope of the Ordinance or representations of the Company’s sugar-sweetened beverage products or both. See Exs. B-C.

16. PepsiCo actively participates in advertising campaigns led by the American Beverage Association (‘ABA’), lending its support and logo to advertisements, within and outside the scope of the Ordinance, intended to educate consumers about how to balance their caloric intake and output and how to consume sugar-sweetened beverages as part of a healthy diet and exercise pattern.

17. In September 2014, PepsiCo, ABA, The Coca-Cola Company, Dr Pepper Snapple Group, and the Alliance for a Healthier Generation, made a commitment at the Clinton Global Initiative to work together to reduce beverage calories consumed per person in the United States
by 20 percent by 2025. This commitment is referred to by the industry as the Balanced Calories Initiative. In connection with that Initiative, the Company has engaged in national advertising and advertising in specific communities across the country to educate consumers about their beverage choices, and to increase and sustain consumer interest in access to smaller portion sizes, water, and no- and low-calorie beverages.

18. As part of the Balanced Calories Initiative, PepsiCo, along with some of its competitors and ABA, has sponsored advertisements for ABA’s Mixify campaign—a first-of-its-kind national consumer awareness and engagement program encouraging teens and their families to balance their calories by moderating what they consume, including beverages, and by getting more exercise. ABA Mixify advertisements were run in various media in the City starting in October 2014. Because Mixify advertisements are sponsored by ABA and its member companies, all of the advertisements contain the logos for ABA, PepsiCo, The Coca-Cola Company, and Dr Pepper Snapple Group. PepsiCo believes it is necessary to include all four logos, both to be transparent with regard to who is sponsoring the advertisements and to enhance the credibility of the effort with consumers. See, e.g., Ex. D.

19. PepsiCo also is involved in other industry initiatives, including: (1) Clear on Calories, a campaign to educate consumers about calories in beverages and the availability of different-calorie beverage options; and (2) the School Beverage Guidelines, the industry’s voluntary commitment to remove full calorie soft drinks from schools, driving a 90 percent reduction in beverage calories delivered to schools nationwide. See Ex. E.

20. PepsiCo also runs advertisements that include logos or representations of both a low- or no-calorie beverage, as well as a Sugar-Sweetened Beverage. See Ex. C.

21. If allowed to take effect, the Ordinance will force PepsiCo to either convey the City’s Warning or cease advertising on covered media.

22. PepsiCo is concerned that displaying the City’s large, mandated Warning on PepsiCo’s own billboards, posters, and similar media would distort PepsiCo’s intended messages.
23. Because of its size, format, and content—including its all-caps “WARNING”—PepsiCo is concerned that the required Warning would substantially overwhelm PepsiCo’s intended messages on advertisements impacted by the Ordinance.

24. PepsiCo considers it infeasible to respond to the City’s message in the same advertisement. Trying to do so would turn an advertisement into a scientific debate. Given the requirements imposed by the City, there would also be too little room left for the original message.

25. Because PepsiCo’s advertising burdened by the Warning Mandate at issue in this case would be significantly less effective at conveying PepsiCo’s intended message, the value to PepsiCo of any advertising on covered media would be substantially diminished.

26. The Warning Mandate would also make advertising on covered media within City limits significantly more costly to PepsiCo. Although PepsiCo likely would be required to pay for 100% of its advertising space, it would be entitled to utilize only 80% of that space, effectively making each square foot of usable advertising space 25% more expensive, while subsidizing and underwriting 100% of the cost of the City’s message.

27. Generally speaking, PepsiCo believes that the harm to PepsiCo’s and its products’ brand and messages from conveying the City’s Warning would significantly outweigh any reduced benefit resulting from continuing to advertise on covered media.

28. As a result, if the Ordinance is allowed to take effect, PepsiCo intends to withdraw from advertising burdened by the Ordinance on covered media in the City.

29. PepsiCo generally makes its design and purchasing decisions for any advertisement several months prior to actual placement of an advertisement. This is particularly true for outdoor advertising. For example, the process of contracting for advertising space for an advertisement scheduled to be placed beginning in the third quarter of 2016 (or after July 25, 2016, the effective date of the Ordinance) will commence four to five months in advance. The process for designing the advertisement also commences four to five months in advance. Given the amount of lead time for this process, legal certainty is a critical factor for PepsiCo. It will not
enter into contracts for such advertising—whether with an advertising agency or the advertising space holder—until PepsiCo knows with certainty whether an advertisement will be permitted as planned or must have the mandated warning.

30. In light of the City’s recent action amending the Ordinance to apply to any new sugar-sweetened beverage advertisements as of October 20, 2015, the Ordinance is already harming PepsiCo because any new sugar-sweetened beverage advertisement it might presently place would need to either be taken down or revised to include the Warning, as of July 25, 2016. As a result, PepsiCo already has begun reducing its advertising on covered media.

31. PepsiCo owns, leases, or contracts with others to manage coolers, fountains, and vending machines to sell or dispense its products. This equipment generally includes PepsiCo’s or its products’ logo.

32. It is unclear whether, because of the depiction on such equipment of PepsiCo’s logo or representations of PepsiCo’s sugar-sweetened beverage products, the Ordinance requires PepsiCo to affix the Warning to these vending machines or other equipment. If the City and a court determine that it does, replacing the placards on all of this equipment would impose a significant additional cost on PepsiCo.

33. The Ordinance will cause PepsiCo irreparable harm by suppressing its speech on covered media within the City and forcing it to convey the City’s messages on any preexisting covered advertisements that remain in place.

34. The Ordinance will also cause irreparable harm to PepsiCo’s reputation. Even if PepsiCo itself declines to advertise on any covered media, retailers carrying PepsiCo’s products may choose to continue to use advertisements on covered media to promote those products, and the retailers’ compliance with the Ordinance will publicly associate PepsiCo’s products with the City’s message.

35. Finally, the Ordinance will inflict imminent and difficult-to-calculate economic damages on PepsiCo as a result of the above-discussed harms.
I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

MATT JOHNSON

Executed on January 8, 2016
EXHIBIT A
EXHIBIT B
EXHIBIT C
This year, the Pepsi Refresh Project™ is giving millions of dollars to fund ideas, across six different categories, that will refresh the world. Maybe it’s green spaces. Or educational comic books. Maybe it’s teaching kids to rock out. So submit your idea and vote for what you care about most at refresheverything.com.

The Pepsi Refresh Project
Thousands of ideas. Millions in grants.

every pepsi refreshes the world™
EXHIBIT D
Out of Home Advertising
Billboards
Billboards in Spanish

 mantén el balance entre lo que comes bebes haces
EXHIBIT E
Together, we’ve reduced beverage calories in schools by 88%.

America’s beverage companies have teamed up to remove full-calorie soft drinks from schools. And we’ve replaced them with lower-calorie and small portion-sized options like juices, teas and waters — reducing beverage calories by 88%.* Together with schools, we’re helping kids make more balanced choices every day. Learn more at Ameribev.org.

*Data compiled and analyzed by Keybridge Research LLC.
THE AMERICAN BEVERAGE ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION,

Plaintiffs,

v.

THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DECLARATION OF STEVE KELLY IN SUPPORT OF PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION
I, Steve Kelly, being duly sworn, depose and state as follows:

1. I am an adult over the age of eighteen, and if called to testify in this matter, I could and would testify as follows:

2. I am General Manager for the Northern California Market Unit of Coca-Cola Refreshments USA, Inc., a wholly-owned subsidiary of The Coca-Cola Company (the “Company”). The service area of the Northern California Market Unit spans the area from the Oregon/California border, east of the Central Valley counties, down to and including Ventura County. The number of employees for Northern California Market Unit is 1,570. The information set forth below is based on my personal knowledge and is true to the best of my knowledge, information, and belief.

3. The Company, incorporated in 1892, is the world’s largest beverage company. It is based in Atlanta, Georgia, and sells products in over 200 countries. It brings to market beverages including carbonated full-calorie, reduced-calorie, and no-calorie soft drinks, bottled water (including still water, mineral water, and artesian water), sports drinks, energy drinks, 100% juices, juice drinks, coffee drinks, and ready-to-drink teas. These products are sold in various sizes with FDA-required labels that provide nutritional information (including calories and total sugar) enabling consumers to make informed beverage choices.

4. Products sold by the Company throughout California, including in the City and County of San Francisco (the “City”), include but are not limited to Coca-Cola, Diet Coke, Sprite, Sprite Zero, Powerade, Fanta, Dasani, Schweppes, Minute Maid, Simply Orange, Gold Peak Tea, smartwater, vitaminwater, Odwalla, Illy, and many other no- or low-calorie beverages.

5. In my capacity as General Manager for Northern California at the Company, I have personal knowledge of the Company’s sales, marketing, and communications operations in the City.

6. I have read the City’s Ordinance No. 100-15 (the “Ordinance”), which amended the San Francisco Health Code “to require advertisements for sugar-sweetened beverages to include a warning about” what the City believes to be “harmful health effects of consuming such beverages and authorizing the Director of Health to impose penalties for noncompliance.”
7. The mandated warning (the “Warning”) reads as follows: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.”

8. The Warning must “occupy at least 20% of the area of each SSB Ad and the text shall be printed in a size and manner so as to be clearly legible to the intended viewers of the SSB Ad.”

9. The Ordinance defines an “SSB Ad” as “any advertisement, including, without limitation, any logo, that identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use that is any of the following: (a) on paper, poster, or a billboard, (b) in or on a stadium, arena, transit shelter, or any other structure, (c) in or on a bus, car, train, pedicab, or any other vehicle; or (d) on a wall, or any other surface or material.” It exempts, among other things, “any logo that occupies an area that is less than 36 square inches and is unaccompanied by any display, representation, or other information identifying, promoting, or marketing a sugar-sweetened beverage.”

10. In its advertisements in the City, the Company historically has utilized a mixture of media including billboards, bulletins, panels and posters; advertising in airports, malls, stadiums, transit shelters, and other venues; advertising in and on buses, trucks, taxis, and commuter rails; sponsorship of and participation in parades, programs, and events; as well as various other forms of outdoor advertising. The Company also reaches the City’s consumers by advertising extensively through other media, including television, radio, magazines, newspapers, other print publications, internet, and other electronic means. The Company believes that utilizing different forms of media allows it to most effectively convey its message to consumers.

11. The Company believes that for reasons such as audience accessibility, location, and cost, outdoor advertising is a particularly important venue for advertisements related to its beverage products.

12. The Company’s advertisements, within and outside the scope of the Ordinance, regularly convey a variety of different messages. Some promote particular products; some increase brand awareness; some educate consumers about the nutritional content of its products.
and how to make healthy choices; some express support for various social, political, and cultural
causes, initiatives, or events; and some are hybrids that convey more than one message.

13. The Company’s and its products’ logos often prominently appear on the
Company’s advertisements on media within the scope of the Ordinance. These logos, many of
which are larger than thirty-six square inches, incorporate representations of the Company’s
products, are an essential component of the Company’s speech, identifying the advertisement at
issue as reflecting the views of the Company, building brand awareness, and encouraging
members of the public to pay attention to the advertisement. This is particularly true in the
Company’s case, because it bears the name of its eponymous, most-recognized product.

14. Because members of the public are generally familiar with the Company’s logo,
the Company believes incorporating its logo (or other representations of its products) typically is
the most effective and efficient way to communicate messages from the Company to members of
the public. For example, over the last several years the Company has run advertisements
supporting equal protection regardless of sexual orientation, celebrating the Chinese New Year,
and promoting scholarship programs at San Francisco schools. These advertisements include
either logos that fall within the scope of the Ordinance or representations of the Company’s
sugar-sweetened beverage products. See Exs. A-C.

15. The Company also actively participates in advertising campaigns led by the
American Beverage Association (“ABA”), lending its support and logo to advertisements, within
and outside the scope of the Ordinance, intended to educate consumers about how to balance
their caloric intake and output and consume sugar-sweetened beverages as part of a healthy diet
and exercise pattern.

16. In September 2014, the Company, ABA, PepsiCo, Dr Pepper Snapple Group, and
the Alliance for a Healthier Generation, made a commitment at the Clinton Global Initiative to
work together to reduce beverage calories consumed per person in the United States by 20
percent by 2025. This commitment is referred to by the industry as the Balance Calories
Initiative. In connection with that Initiative, the Company has engaged in national advertising
and advertising in specific communities across the country to educate consumers about their
beverage choices, and to increase and sustain consumer interest in access to smaller portion sizes, water, and no- and low-calorie beverages.

17. As part of the Balanced Calories Initiative, the Company, along with some of its competitors and ABA, has sponsored advertisements for ABA’s Mixify campaign—a first-of-its-kind national consumer awareness and engagement program encouraging teens and their families to balance their calories by moderating what they consume, including beverages, and getting more active. Mixify advertisements were run in various media in the City starting in October 2014. Because Mixify advertisements are sponsored by ABA and its member companies, all of the advertisements contain the logos for ABA, the Company, PepsiCo, and Dr Pepper Snapple Group. The Company believes it is necessary to include all four logos, both to be transparent with regard to who is sponsoring the advertisements and because it enhances the credibility of the effort with consumers. See Ex. D.

18. The Company also is involved in other industry initiatives, including: (1) Clear on Calories, a campaign to educate consumers about calories in beverages and the availability of different-calorie beverage options; and (2) the School Beverage Guidelines, the industry’s voluntary commitment to remove full calorie soft drinks from schools, driving a 90 percent reduction in beverage calories delivered to schools nationwide. See Ex. E.

19. The Company also runs advertisements for its low- or no-calorie beverages, but which also include a logo or representation that identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use. See Ex. F.

20. If allowed to take effect, the Ordinance would significantly burden the Company’s speech on covered media within the City.

21. Because of its size, format, and content—including its all-capitals “WARNING”—the messages the required Warning conveys would substantially overwhelm the Company’s intended messages on advertisements impacted by the Ordinance.

22. The City’s required Warning would, for example, convert the Company’s promotional advertisements, and its advertisements intended to educate members of the public, or convey the Company’s support for a variety of political, social, or cultural causes or events,
into hostile advertisements that criticize and discourage the consumption of the Company’s
products, and denigrate its brand.

23. The Company believes that displaying the City’s large, mandated Warning on its
own billboards, posters, and similar media would distort and negate the Company’s intended
messages, and harm its business, reputation, customer relations, goodwill, and ability to compete
with other products not subject to the Ordinance. See Declaration of Peter N. Golder, PhD. ¶¶
47-67.

24. Because the Ordinance requires the Company to devote a full 20% of the space on
any covered advertisement to the City’s message, the Company considers it infeasible to
neutralize or otherwise overcome the City’s messages through so-called counter-speech elsewhere
on the same advertisement. If the Company attempts to respond to the City’s messages on the
remaining 80% of its advertising space, little or no space would be left for the intended message
of the original advertisement. Consumers would pay little to no attention to the intended message
of the original advertisement, focusing instead on the debate between the City’s Warning and the
Company’s so-called counter-speech, defeating the original purpose of the advertisement.

25. Because the Company’s advertising burdened by the City’s Warning would be far
less effective at conveying the Company’s intended message, the value to the Company of any
advertising on covered media would be substantially diminished.

26. The Ordinance also would make advertising on covered media within City limits
significantly more costly to the Company. Although the Company likely would be required to
pay for 100% of its advertising space, it would be entitled to utilize only 80% of that space,
effectively making each square foot of usable advertising space 25% more expensive, while
subsidizing and underwriting 100% of the cost of the City’s hostile message.

27. The harm to the Company’s brand and messages from conveying the City’s
Warning would significantly outweigh any reduced benefit of continuing to advertise on covered
media.

28. Although lead time varies, the Company makes its design and purchasing
decisions for any advertisement at least several weeks prior to actual placement of an
advertisement. Given the amount of lead time needed for this process, legal certainty is a critical factor for the Company. The Company does not expect to enter into contracts for future advertisements on covered media—whether with an advertising agency or the advertising space holder—unless the Company knows with certainty that such advertisements would not be subject to the mandated warning. The Company, however, will continue to advertise and participate in the San Francisco market through all non-covered forms of advertising, including print, radio, and television advertising.

29. In light of the City’s recent action amending the Ordinance to apply to any new sugar-sweetened beverage advertisements as of October 20, 2015, the Ordinance is already harming the Company because any new covered sugar-sweetened beverage advertisement it might presently place would need to either be taken down or revised to include the Warning as of July 25, 2016.

30. The Company owns, leases, or contracts with others to manage coolers, fountains, and vending machines to sell or dispense its products. This equipment generally includes the Company’s logo.

31. It is unclear whether, because of the depiction on such equipment of the Company’s logo or representations of the Company’s sugar-sweetened beverage products, the Ordinance requires the Company it to affix the Warning to these vending machines or other equipment. If the City and a court determines that it does, replacing the placards on all of this equipment would impose a significant additional cost on the Company.

32. The Ordinance will cause the Company irreparable harm by suppressing its speech on covered media within the City and forcing it to convey the City’s messages on any preexisting covered advertisements that remain in place.

33. The Ordinance will also cause irreparable harm to the Company’s reputation. Even if the Company itself declines to advertise on any covered media, retailers carrying the Company’s products may choose to continue to use advertisements on covered media to promote those products, and the retailers’ compliance with the Ordinance will publicly associate the Company’s products with the City’s message. The Company would suffer stigmatization and
reputational harm from this negative association between its brand and products and the City’s
Warning.

34. Ultimately, the Ordinance will inflict imminent and difficult-to-calculate
economic damages on the Company as a result of the above-discussed harms.

35. The Company shares the City’s overarching objective to foster a healthy and
vibrant community. While the Company disagrees with the City’s approach in the matter at
hand, it will continue to look for ways to listen and collaborate on ways to strengthen the
community in the future.

[Signature Page Follows]
I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

STEVE KELLY

Executed on January 12, 2016
EXHIBIT A
It's now official. #LoveWins
EXHIBIT B
EXHIBIT C
Out of Home Advertising
Billboards in Spanish

MANTÉN EL BALANCE ENTRE LO QUE COMES BEBES HACES

BANANALÁ, D.R.
EXHIBIT E
Together, we’ve reduced beverage calories in schools by 88%.

America’s beverage companies have teamed up to remove full-calorie soft drinks from schools. And we’ve replaced them with lower-calorie and small portion-sized options like juices, teas and waters — reducing beverage calories by 88%.* Together with schools, we’re helping kids make more balanced choices every day. Learn more at Ameribev.org.

*Data compiled and analyzed by Keybridge Research LLC.
EXHIBIT F
Coca-Cola Zero™ has pirated the taste of Coca-Cola® to the point that it’s hard to tell the two apart. As employees of the Coca-Cola® brand, we demand that the Coke Zero™ brand CEASE AND DESIST from copying our product. For all we care the Coke Zero™ brand can fold up like a cheap lawnchair. Coca-Cola® is the rightful home of real Coca-Cola® taste!
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE AMERICAN BEVERAGE
ASSOCIATION, CALIFORNIA RETAILERS
ASSOCIATION, CALIFORNIA STATE
OUTDOOR ADVERTISING ASSOCIATION,
Plaintiffs,
v.
THE CITY AND COUNTY OF SAN
FRANCISCO,
Defendant.

DECLARATION OF JAMES FOX IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION
I, James Fox, being duly sworn, depose and state as follows:

1. I am an adult over the age of eighteen, and if called to testify in this matter, I could and would testify as follows:

2. I am Senior Vice President, General Manager of the West Business Unit of The American Bottling Company, a subsidiary of Dr Pepper Snapple Group, Inc. (The American Bottling Company and other subsidiaries of Dr Pepper Snapple Group, Inc. are referred to collectively as “DPSG”). The information set forth below is based on my personal knowledge and is true to the best of my knowledge, information, and belief.

3. Dr Pepper Snapple Group, Inc. is a publicly-traded company. Through its subsidiaries, licensed bottlers and distributors, DPSG brings to market over fifty brands of beverages, including carbonated full-calorie, reduced-calorie, and no-calorie soft drinks, bottled water 100% juices, juice drinks, and ready-to-drink teas. These products are sold in various sizes with FDA-required labels that provide nutritional information (including calories and total sugar) enabling consumers to make informed beverage choices.

4. Products sold by DPSG and its licensed bottlers and distributors throughout California, including in the City and County of San Francisco (the “City”), include but are not limited to Dr Pepper, Diet Dr Pepper, Snapple, 7UP, Canada Dry Ginger Ale, Canada Dry Club Soda, Deja Blue Water, and Mott’s 100% Apple Juice.

5. In my capacity as Senior Vice President at DPSG, I am responsible for sales, marketing, and distribution of certain DPSG products in the West Business Unit, which territory includes the City of San Francisco. This includes overseeing the execution of advertising and marketing programs in the West Business Unit. Consequently, I have personal knowledge of DPSG sales and marketing of such products within the City.

6. I have read the City’s Ordinance No. 100-15 (the “Ordinance”), which amended the San Francisco Health Code “to require advertisements for sugar-sweetened beverages to include a warning about” what the City believes to be “harmful health effects of consuming such beverages and authorizing the Director of Health to impose penalties for noncompliance.”
7. The mandated warning (the “Warning”) reads as follows: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.”

8. The Warning must “occupy at least 20% of the area of each SSB Ad and the text shall be printed in a size and manner so as to be clearly legible to the intended viewers of the SSB Ad.”

9. The Ordinance defines an “SSB Ad” as “any advertisement, including, without limitation, any logo, that identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use that is any of the following: (a) on paper, poster, or a billboard, (b) in or on a stadium, arena, transit shelter, or any other structure, (c) in or on a bus, car, train, pedicab, or any other vehicle; or (d) on a wall, or any other surface or material.” It exempts, among other things, “any logo that occupies an area that is less than 36 square inches and is unaccompanied by any display, representation, or other information identifying, promoting, or marketing a sugar-sweetened beverage.”

10. In its advertisements in the City, DPSG (and/or its licensed bottlers and distributors) historically has utilized a mixture of media including, but not limited to, window coverings, point-of-sale signage, and product images and logos on vending machines, coolers, and fountains; sponsorship of and participation in programs and events; and various other forms of outdoor advertising. DPSG also reaches the City’s consumers by advertising extensively through other media, including at various times, television, radio, magazines, newspapers, other print publications, internet, and/or other electronic means. DPSG believes that utilizing different forms of media allows it to more effectively convey its message to consumers.

11. DPSG believes that for reasons such as audience accessibility, location, and cost, outdoor advertising is, at times, a particularly important venue for advertisements related to its beverage products.

12. DPSG’s advertisements, within and outside the scope of the Ordinance, regularly convey a variety of different messages. Some promote particular products; some increase brand awareness; and, some educate consumers about the nutritional content of its products and how to...
make healthy choices. Others convey a message about or express support for various educational or social causes, initiatives, or events; still others are hybrids that convey more than one message.

13. Its products’ logos often prominently appear on DPSG’s advertisements on media within the scope of the Ordinance. These logos, many of which are larger than thirty-six square inches, often incorporate representations of the Company’s products, and are an essential component of DPSG’s speech, identifying the advertisement at issue as reflecting the views of DPSG, building brand awareness, and encouraging members of the public to pay attention to the advertisement.

14. Because members of the public are generally familiar with its products’ logos, DPSG believes incorporating these logos (or other representations of its products) typically is the most effective and efficient way to communicate messages from DPSG to members of the public. For example, over the last several years DPSG has run advertisements concerning the Dr Pepper Tuition Giveaway, through which DPSG has given millions of dollars to help students reach their unique goals. These advertisements include either logos that fall within the scope of the Ordinance or representations of DPSG’s sugar-sweetened beverage products. See Ex. A.

15. DPSG also actively participates in campaigns led by the American Beverage Association (“ABA”), lending its support and logo to advertisements, within and outside the scope of the Ordinance, intended to educate consumers about how to balance their caloric intake and output and consume sugar-sweetened beverages as part of a healthy diet and exercise pattern.

16. In September 2014, DPSG, ABA, The Coca-Cola Company, PepsiCo, and the Alliance for a Healthier Generation, made a commitment at the Clinton Global Initiative to work together to reduce beverage calories consumed per person in the United States by 20 percent by 2025. This commitment is referred to by the industry as the Balance Calories Initiative. In connection with that Initiative, the Company has engaged in national and local advertising and advertising in specific communities across the country to educate consumers about their
beverage choices, and to increase and sustain consumer interest in access to smaller portion
sizes, water, and no- and low-calorie beverages.

17. As part of the Balanced Calories Initiative, DPSG, along with some of its
competitors and ABA, has sponsored advertisements for ABA’s Mixify campaign—a first-of-its-
kind national consumer awareness and engagement program encouraging teens and their families
to balance their calories by moderating foods they consume, including beverages, and becoming
more active. Mixify advertisements were run in various media in the City starting in October
2014. Because Mixify advertisements are sponsored by ABA and its member companies, all of
the advertisements contain the logos for ABA, DPSG, The Coca-Cola Company, and PepsiCo.
DPSG believes it is necessary to include all four logos, both to be transparent with regard to who
is sponsoring the advertisements and because it enhances the credibility of the effort with
consumers. See Ex. B.

18. If allowed to take effect, the Ordinance would significantly burden DPSG’s
speech on covered media within the City.

19. The Ordinance will force DPSG against its will to convey messages that it does
not believe or cease advertising on covered media.

20. Because of its size, format, and content—including its all-caps
“WARNING”—the messages the required Warning conveys would substantially overwhelm
DPSG intended messages on advertisements impacted by the Ordinance.

21. The City’s required Warning would, for example, convert DPSG’s promotional
advertisements, and its advertisements intended to educate members of the public, or convey
DPSG’s support for a variety of educational, or social causes, initiatives, or events, into hostile
advertisements that criticize and discourage the consumption of DPSG’s products, denigrate its
brand, and mislead the public about the contribution of beverages with added sugar to obesity,
diabetes, and tooth decay.

22. DPSG believes that displaying the City’s large, mandated Warning on its own
billboards, posters, and similar media would distort and negate DPSG’s intended messages, and
harm its business, reputation, customer relations, goodwill, and ability to compete with other products not subject to the Ordinance. See Declaration of Peter N. Golder, PhD. ¶¶ 46-66.

23. Because the Ordinance requires DPSG to devote a full 20% of the space on any covered advertisement to the City’s hostile message, DPSG considers it infeasible to neutralize or otherwise overcome the City’s hostile message through so-called counter-speech elsewhere on the same advertisement. If DPSG attempts to respond to the City’s misleading messages on the remaining 80% of its advertising space, little or no space would be left for the intended message of the original advertisement. Consumers would pay little to no attention to the intended message of the original advertisement, focusing instead on the debate between the City’s Warning and DPSG’s so-called counter-speech, defeating the original purpose of the advertisement.

24. Because DPSG’s advertising burdened by the City’s Warning would be far less effective at conveying DPSG’s intended message, the value to DPSG of any advertising on covered media would be substantially diminished.

25. The Ordinance also would make advertising on covered media within City limits significantly more costly to DPSG. Although DPSG likely would be required to pay for 100% of its advertising space, it would be entitled to utilize only 80% of that space, effectively making each square foot of usable advertising space 25% more expensive, while subsidizing and underwriting 100% of the cost of the City’s hostile message.

26. The harm to DPSG’s brand and messages from conveying the City’s misleading Warning would significantly outweigh any reduced benefit of continuing to advertise on covered media.

27. As a result, if the Ordinance is allowed to take effect, DPSG intends to cease advertising that is burdened by the Ordinance.

28. DPSG generally makes its design, purchasing and placement decisions for any point of sale (“POS”) advertisements at least six weeks prior to actual placement of the POS with a customer. For example, the process of contracting for development and printing of POS advertising for POS scheduled to be placed beginning in the third quarter of 2016 (or after July 25, 2016, the effective date of the Ordinance) will commence in April or early May.
29. DPSG owns coolers, fountains and vending machines to sell or dispense its products. This equipment generally includes DPSG’s logos or representations of its products. It is unclear whether the Ordinance requires DPSG to affix the Warning to these coolers, vending machines or fountains. If so, then replacing the panels on the equipment will impose upon DPSG a significant additional cost. The time required to design and create panels for vending machines and coolers is about six weeks. However, it will require about twelve months to install the new panels with the new advertising on the more than seven hundred (700) vending machines and coolers that DPSG has placed throughout the City. Given the amount of lead time for this process, legal certainty is a critical factor for DPSG. It will not enter into contracts for such advertising until DPSG knows with certainty whether an advertisement will be permitted as planned or must have the mandated Warning.

30. In light of the City’s recent action amending the Ordinance to apply to any new sugar-sweetened beverage advertisements as of October 20, 2015, the Ordinance is already harming DPSG because any new sugar-sweetened beverage advertisement it might presently place would need to either be taken down or revised to include the Warning, as of July 25, 2016.

31. The Ordinance will also cause irreparable harm to DPSG’s reputation. Even if DPSG itself declines to advertise on any covered media, retailers carrying DPSG’s products may choose to continue to use advertisements on covered media to promote those products, and the retailers’ compliance with the Ordinance will publicly associate DPSG’s products with the City’s misleading and controversial message. DPSG would suffer stigmatization and reputational harm from this negative association between its brand and products and the City’s Warning.

32. Finally, the Ordinance will inflict imminent and difficult-to-calculate economic damages on DPSG as a result of the above-discussed harms.
I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on January 12, 2016

JAMES FOX
EXHIBIT A
Dr Pepper is giving away $1,000,000 in tuition. Dr Pepper has been changing lives for years through the Dr Pepper Tuition Giveaway. This year Dr Pepper will award over $1,000,000 in free tuition to people across the country and will send 25 lucky contestants to a College Football Championship Game for the chance to throw for $100,000 in tuition.

Go to DrPepper.com and tell us your one of a kind story for your chance to WIN.
EXHIBIT B
Out of Home Advertising
Billboards
Billboards in Spanish

MANTÉN EL BALANCE
ENTRE LO QUE COMES BEBES HACES
Point of Sale: Cooler & Vending
Theodore B. Olson (#38137)
T Olson@gibsondunn.com
Andrew S. Tulumello (#196484)
ATulumello@gibsondunn.com
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Facsimile: 415.374.8469

Attorneys for Plaintiff
California State Outdoor Advertising Association

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE AMERICAN BEVERAGE ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION, Plaintiffs,

v.

THE CITY AND COUNTY OF SAN FRANCISCO, Defendant.

DECLARATION OF MEGHAN LOPER IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Case No. 3:15-cv-03415-EMC
I, MEGHAN LOPER, being duly sworn, depose and state as follows:

1. I am an adult over the age of eighteen, and if called to testify in this matter, I could and would testify as follows:

2. I am Assistant Executive Director of the California State Outdoor Advertising Association ("CSOAA"). The information set forth below is based on my personal knowledge and is true to the best of my knowledge, information, and belief.

3. CSOAA is a statewide trade association representing the interests of outdoor advertisers in the California Legislature and in local governments across the state. CSOAA’s membership includes 14 outdoor companies and 22 associate members.

4. In my capacity as Assistant Executive Director, I am responsible for the operations of CSOAA as well as for advocating for policy matters on behalf of CSOAA members. I have personal knowledge of the operations of CSOAA member outdoor advertisers throughout the State of California, including in the City and County of San Francisco ("the City").

5. CSOAA members offer advertising space throughout the State of California, including in San Francisco. This advertising space includes billboards, bulletins, panels and posters; advertising in airports, malls, stadiums, transit shelters, and other venues; advertising in and on busses, trucks, taxis, and commuter rails; as well as various other forms of outdoor advertising. In 2014, outdoor advertising comprised approximately 10% of the market share of all core advertising media in San Francisco in terms of total dollars spent, which was approximately twice the national average market share of 5.1%.

6. Purchasing decisions for outdoor advertising space typically are made several months prior to actual placement of an advertisement on CSOAA member property. For example, the process of contracting for advertising space for an advertisement scheduled to be placed beginning in the third quarter of 2016 (or after July 25, 2016, the effective date of the Warning Mandate) may commence as early as the first quarter of 2016, i.e. between January and March. Given the amount of lead time for placing outdoor advertisements, uncertainty with regard to whether an advertisement will be permitted or permitted as planned with the intended configuration and content will undoubtedly deter customers from entering into contracts for such advertising in the first place.
7. The size and location of an outdoor advertising space are the two most important factors in determining the price that CSOAA members charge for the use of such space. A decrease in the size of space that is usable for the customer’s advertisement would adversely affect the price and/or demand for outdoor advertising.

8. Advertising for sugar-sweetened beverages is an important source of business for CSOAA members. PepsiCo and Coca-Cola, for example, are important customers, as they are among the top 20 consumers of outdoor advertising space nationwide. San Francisco is one the major markets in which CSOAA members offer outdoor advertising space to these customers.

9. I have read the City’s Ordinance No. 100-15 ("the Ordinance"), which amended the San Francisco Health Code “to require advertisements for sugar-sweetened beverages to include a warning about the harmful health effects of consuming such beverages and authorizing the Director of Health to impose penalties for noncompliance.”

10. The Ordinance requires, for any sugar sweetened-beverage advertisement ("SSB Ad"), the display of the following message: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco." (hereinafter “Warning” or “Warning Mandate”).

11. I understand that the City’s Warning “shall occupy at least 20% of the area of each SSB Ad and the text shall be printed in a size and manner so as to be clearly legible to the intended viewers of the SSB Ad.”

12. I understand that the Ordinance defines “Advertiser” to include “any Person who . . . is in the business of placing or installing advertisements, or who provides space for the display of advertisements” and that such Advertisers are liable in their own right for the failure of SSB Ads posted in or on their property to comply with the Ordinance.

13. I understand that the Warning Mandate will become operative on July 25, 2016 and, as amended, will apply to SSB Ads not exempted on or before October 20, 2015.

14. The Ordinance uniquely targets outdoor advertisers and exempts all other forms of advertising from the Warning Mandate. The Warning must be included on advertisements “(a) on
paper, poster, or a billboard; (b) in or on a stadium, arena, transit shelter, or any other structure; (c) in
or on a bus, car, train, pedicab, or any other vehicle; or (d) on a wall, or any other surface or
material.” But other advertising media, including all newspaper, television, magazine, radio, internet,
circular, or other electronic media advertisements, are expressly exempted from the Warning
Mandate. The Ordinance provides that “SSB Ad’ does not include,” inter alia, “any advertisement
that is in any newspaper, magazine, periodical, advertisement circular or other publication, or on
television, the internet, or other electronic media.”

15. CSOAA members believe that the Warning Mandate will cause irreparable harm to
their businesses, reputations, customer relations and goodwill, and ability to compete with other
advertising media not subject to the Warning Mandate.

16. As an initial matter, I understand that advertisers of sugar-sweetened beverages intend
to curtail or stop their outdoor advertising activities in San Francisco due to the chilling effect of the
Warning Mandate on their speech. See Decl. of Steve Kelly ¶ 28; Decl. of Matt Johnson ¶ 28; Decl.
of James Fox ¶ 27; Decl. of Kevin W. Keane ¶ 33. As a direct result, CSOAA’s members’
businesses will suffer a significant yet unquantifiable loss of revenue and the loss of valuable
business relationships.

17. Indeed, certain CSOAA members have already begun to experience harm from the
Warning Mandate on their businesses. In at least one instance, a SSB customer expressed its concern
to a CSOAA member regarding the Warning Mandate and informed that CSOAA member that it was
electing to hold off on contracting for any outdoor advertising space in San Francisco in 2016 due to
the uncertainty surrounding the impact of the Warning Mandate.

18. Moreover, in light of the amendment to the Ordinance to apply the Warning Mandate
to any new SSB Ads as of October 20, 2015, the Ordinance is already harming CSOAA’s members
because any new SSB Ads that a customer might presently place would need to either be taken down
or revised to include the Warning, as of July 25, 2016. Accordingly, the City’s October 20, 2015
amendment to the Ordinance’s “grandfathering clause” further exacerbates the harm that the Warning
Mandate imposes on CSOAA members’ businesses and is causing present harm.
19. Relatedly, the Warning Mandate will inflict competitive harm on CSOAA members, who compete with other forms of media for SSB-advertising business. Because the Warning Mandate only applies to outdoor advertising and not to other forms of advertising media, it will incentivize SSB customers to move their business to media that are not subject to the Warning Mandate.

20. Following enactment of the Ordinance, CSOAA members’ competitors, who provide other forms of advertising media exempt from the Warning Mandate, began to market their exempt status as a reason for SSB manufacturers and retailers to shift advertising to their outlets, and have continued to do so.

21. Under the Warning Mandate, 20% of saleable space must be occupied by the Warning. This requirement imposes a substantial cost on advertisers forced to carry the City’s message. As explained above, the size of an advertising space, and its location, are decisive factors in determining the price a CSOAA member charges its customers. When faced with this substantial cost, CSOAA members offering advertising space to SSB customers may either absorb the cost or pass it to their SSB customers. If CSOAA members absorb the cost of carrying the City’s message, they will be forced to subsidize the City’s speech, in further violation of their First Amendment rights. Yet if they pass this cost through to their SSB customers, they will harm those relationships, dampen demand for their services, and otherwise accelerate the migration of SSB business to media not covered by the Warning Mandate, thereby aggravating the competitive harm caused by the Warning Mandate to CSOAA members.

22. The Warning Mandate will also cause irreparable harm to CSOAA members’ reputations as well as their own free speech and associational rights. In addition to forcing CSOAA members, or their customers, to subsidize the City’s speech, the Warning Mandate will force CSOAA members to publicly associate themselves with the City’s controversial message. California law requires outdoor advertisers to prominently display their name on all outdoor advertising structures. See California Outdoor Advertising Act, CAL. BUS. & PROF. CODE § 5400 (“No advertising structure may be maintained unless the name of the person owning or maintaining it, is plainly displayed...
thereon.

Consequently, the Warning Mandate forces CSOAA members to publicly associate themselves with and implicitly endorse the City’s message even if they disagree with that message or believe that it is false or misleading.

23. That forced association will, in turn, cause CSOAA members to be stigmatized and to suffer reputational harm by creating a negative association between the City’s Warning and CSOAA members’ brands in the public eye. Forcing CSOAA members to display the City’s Warning will cast them as companies that are willing to accept money and do business with producers of supposedly dangerous products. This association could be seized upon and used to stigmatize CSOAA members by special interest groups, such as Scenic America, whose core mission is to generate public opposition to outdoor advertising. See The Truth About Billboards, Scenic America, http://www.scenic.org/billboards-a-sign-control/the-truth-about-billboards.

24. The Warning Mandate will also have the effect of chilling CSOAA members’ own speech. If the Warning Mandate takes effect, CSOAA members must weigh whether they can afford the negative stigma associated with carrying the City’s controversial message and decide whether they should continue to offer advertising space to SSB customers in San Francisco at all. Indeed, given the lead time required in the process of planning, contracting for, and implementing outdoor advertisements, CSOAA members are already finding themselves faced with these difficult decisions.

25. Further, the Warning Mandate will infringe CSOAA members’ rights of editorial control. CSOAA’s members retain the right to, and in appropriate circumstances do, exercise control over the content of advertisements placed in or on their property. Among other reasons, CSOAA members exercise editorial control to adjust the content of advertisements in order to make them more appropriate for the targeted audience, more visually appealing, less likely to offend members of the public, and to avoid involvement in public controversies or attract public criticism that is harmful to their business reputation. For example, some CSOAA members elect not to take adult entertainment advertisements; some elect not to take marijuana-related advertisements; some elect not to take overtly negative political attack advertisements.
26. The right to exercise editorial control is reflected in the outdoor advertisers' code of industry principles. See Ex. (OAAA Code of Industry Principles). As reflected in the industry’s principles, the outdoor industry practices self-regulation. For example, the industry’s code includes a buffer zone around schools, places of worship, and other areas where children gather as a voluntary restraint on promoting products illegal for sale to minors. The industry’s code also includes an anti-obscenity clause, and it respects the right of outdoor advertisers to refuse advertising.

27. The code of industry principles reflects the industry’s careful balance between its commitment to promoting the highest free speech standards by “support[ing] the First Amendment right of advertisers to promote legal products and services,” while at the same time “support[ing] the right of media companies to reject advertising that is misleading, offensive, or otherwise incompatible with individual community standards.” Ex. The Warning Mandate infringes on CSOAA members’ observance of these principles by forcing them to either carry the City’s controversial message that SSBs are harmful, in derogation of their own right to review and approve the content of advertisements, or else to refrain from carrying SSB Ads, thereby depriving their SSB customers of an important venue for exercising their First Amendment right to promote their lawful products.

28. The Warning Mandate will also interfere with CSOAA members’ exercise of editorial control over the aesthetic attributes of advertisements placed in or on their advertising space. As reflected in the code of industry principles, outdoor advertisers “are committed to the excellence in the ads [they] exhibit because [their] medium provides the most public ‘art gallery’ there is.” Ex. In furtherance of this goal, CSOAA members are often involved with the design and layout of advertisements placed on their property, for example by advising their customers on the formatting, color, font, and dimensions in order to improve an advertisement’s appearance and to optimize use of the specific billboard space. The Warning Mandate infringes on CSOAA members’ right to exercise editorial control by dictating to CSOAA members not just the content but also the size, dimensions, and attributes of SSB Ads displayed in or on their advertising space.
29. Finally, the Warning Mandate will inflict imminent and difficult-to-calculate economic damages on CSOAA members as a result of the above-discussed harms.

30. Pursuing this action is germane to the purpose of CSOAA, which is to publicly represent and protect the interests of a broad range of member outdoor advertisers in the State of California.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

MEGHAN LOPER

Executed on 12TH January, 2016 in Sacramento, CA.
EXHIBIT
OAAA CODE OF INDUSTRY PRINCIPLES

In addition to adhering to external laws and regulations, the members of the Outdoor Advertising Association of America (OAAA) have adopted a set of voluntary industry principles. OAAA endorses this code and encourages its members to operate in conformance with these principles.

Observe Highest Free Speech Standards
- We support the First Amendment right of advertisers to promote legal products and services, however, we also support the right of media companies to reject advertising that is misleading, offensive, or otherwise incompatible with individual community standards, and in particular, we reject the posting of obscene words or pictorial content.

Protect the Children
- We are careful to place advertisements for products illegal for sale to minors on advertising displays that are a reasonable distance from the public places where children most frequently congregate.
- We are committed to a program that establishes exclusionary zones that prohibit stationary advertisements of products illegal for sale to minors that are intended to be read from, at least 500 feet of, elementary and secondary schools, public playgrounds, and established places of worship.
- We support reasonable limits on the total number of advertising displays in a market that may carry messages about products that are illegal for sale to minors.
- We seek to maintain broad diversification of customers that advertise using the medium.

Support Worthy Public Causes
- We are committed to providing pro bono public service messages to promote worthy community causes.
- We advocate the use of out of home advertising for political, editorial, public service, and other noncommercial messages.

Provide an Effective, Attractive Medium for Advertisers
- We are committed to providing value and service to advertisers in communities nationwide.
- We are committed to maintaining and improving the quality, appearance, and safety of advertising structures and locations.
- We encourage the use of new technologies to continuously improve the service provided to advertisers and the information provided to the public.
- We are committed to excellence in the ads we exhibit because our medium provides the most public “art gallery” there is.
OAAA CODE OF INDUSTRY PRINCIPLES

Respect the Environment
- We are committed to environmental stewardship.
- We encourage environmentally friendly business practices for the reduction of waste, improvement of energy efficiency, and use of recyclable materials.

Provide Effective and Safe Digital Billboards
- We are committed to ensuring that the commercial and noncommercial messages disseminated on standard-size digital billboards will be static messages and the content shall not include animated, flashing, scrolling, intermittent or full-motion video elements (outside established entertainment areas).
- We are committed to ensuring that the ambient light conditions associated with standard-size digital billboards are monitored by a light sensing device at all times and that display brightness will be appropriately adjusted as ambient light levels change.

Uphold Billboard Industry Self-Regulation
- We support billboard advertising as a business use to be erected in commercial and industrial areas.
- We support new billboard locations in unzoned commercial and industrial areas only where there is business activity.
- We oppose the construction of stacked bulletins (i.e., two 14’ x 48’ faces or larger facing in the same direction)
- We oppose the construction of new billboards on truly scenic segments of highways outside of commercial and industrial areas.
- We oppose illegal cutting and are committed to reasonable control and maintenance of vegetation surrounding billboards.
- We support the expeditious removal of illegally erected billboards without compensation; OAAA member companies are encouraged to inform responsible authorities if they become aware that illegal billboards are being erected.

Protect Billboard Industry Rights
- We support the right of out of home advertising companies to maintain lawfully erected billboards.
- We support laws that assure just compensation for removal of legal billboards.
United States District Court
Northern District of California
San Francisco Division

Case No. 3:15-cv-03415-EMC

THE AMERICAN BEVERAGE ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION,

Plaintiffs,

v.

THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

DECLARATION OF JAMES K. LYNCH IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Date: April 7, 2016
Time: 1:30 p.m.
Judge: Edward M. Chen
Courtroom: 5
I, James K. Lynch, hereby declare and state as follows:

1. I am a partner with the law firm of Latham & Watkins LLP, counsel of record for Plaintiff The American Beverage Association in the above-captioned action.

2. This declaration is submitted in support of Plaintiffs The American Beverage Association, California Retailers Association, and California State Outdoor Advertising Association’s Motion for Preliminary Injunction.

3. Attached hereto as Exhibit A is a true and correct copy of the Expert Report of Dr. Richard A. Kahn, prepared in connection with this matter.

4. Attached hereto as Exhibit B is a true and correct copy of the Expert Report of Peter N. Golder, Ph.D., prepared in connection with this matter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2016, in San Francisco, California.

/s/ James K. Lynch
James K. Lynch
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE AMERICAN BEVERAGE
ASSOCIATION, CALIFORNIA RETAILERS
ASSOCIATION, CALIFORNIA STATE
OUTDOOR ADVERTISING ASSOCIATION,

Plaintiffs,

v.

THE CITY AND COUNTY OF SAN
FRANCISCO,

Defendant.

EXPERT REPORT OF DR. RICHARD A. KAHN

January 12, 2016
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I. QUALIFICATIONS

1. From 1985 until my retirement in June 2009, I was the Chief Scientific and Medical Officer of the American Diabetes Association (“ADA”). My position included senior staff oversight for the ADA’s research grant program, two certification programs, all clinical guidelines and scientific position statements, professional education programs, and general information resources. At the ADA, I was involved with the development of communications to the public, health care professionals, and others about scientific issues.

2. I am currently an independent consultant, researcher, and a clinical professor. I consult primarily on diabetes, obesity, and nutrition for health-related organizations. In addition, I facilitate the development of scientific consensus statements and assist health-related organizations in their professional activities. I also perform independent research and hold the position of Clinical Professor of Medicine at the University of North Carolina.


4. From 1978 to 1985, I was the Chief of Scientific Affairs for the American Red Cross. From 1978 to 1985, I was an Associate Professor of Pathology at the Washington University School of Medicine, in St. Louis, Missouri.

5. A copy of my curriculum vitae, including publications I have authored, is attached as Appendix A.

6. In the last four years, I have not testified in any trials or depositions, or served as a testifying expert witness. I have not testified since the mid-1980s.
7. A list of documents I have considered in forming my opinion is included in Appendix B. However, this list cannot be exhaustive as my opinions are based on the cumulative knowledge over the course of my entire career.

8. I reserve the right to amend or supplement my opinion in response to information and testimony that is submitted in this matter as well as any scientific developments that may impact my opinion.

9. I am not being compensated in any fashion for my time or effort for rendering an opinion in this matter. I am being reimbursed for travel costs (transportation, hotel, meals, etc.) I may incur as a result of this matter. Furthermore, I have never received any form of compensation or funding from the beverage industry.

II. SUMMARY OF OPINIONS

10. Counsel for the American Beverage Association (“ABA”) have asked me to address whether:

   1. Beverages with added sugar play a role in the development of obesity and diabetes, including whether those questions are a matter of scientific debate and controversy.

   2. The City and County of San Francisco’s warning – “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay” (the “Warning”) – is scientifically vague, misleading, or controversial.

11. There is no scientific consensus that added sugar (including added sugar in beverages) plays a unique role in the development of obesity and diabetes. Rather, there is a vigorous and ongoing scientific debate over the potential role of added sugar per se – including added sugar in beverages – in the development of obesity and diabetes. Added sugar is not alone: a recent review by a prominent Stanford Prevention Research Center researcher noted that “[a]lmost every single nutrient imaginable has peer reviewed publications associating it with
almost any outcome,” even though very few hypotheses have withstood rigorous trials. Indeed, more broadly, there is no consensus on the cause(s) or contributing factor(s) of obesity and diabetes. Various hypotheses that have been put forth include the consumption of calories in excess of energy expenditure (from various sources), an increase in sedentary lifestyles, genetic factor(s), chemicals in the environment and/or in food, and/or other factor(s) that could be responsible for the high rates of obesity and diabetes in the U.S. and Westernized world.

12. Although I recognize there is significant debate over the subject, based on my review of the available scientific data and findings in the literature, I do not believe that added sugar uniquely contributes to obesity or to related conditions like diabetes, which tends to develop subsequent to chronic obesity. I believe that consuming an amount of calories that exceeds one’s energy output is the major factor that leads to obesity and, consequently, may lead to Type 2 diabetes. The data show that if total caloric intake is kept constant and the only difference is the source of some of those calories – some individuals receive more added sugar while others receive less – there is no weight gain. It is only when total calories are increased or decreased, whether through the addition or subtraction of added sugar or any other source of calories, and the remainder of an individual’s diet and physical activity are kept constant, that individuals gain or lose weight. There is nothing unique about added, or natural, sugar that may lead to obesity and diabetes more than any other source of excess calories. As far as metabolism is concerned, all sugars are treated in the same way, regardless of source or whether it is in solid food or in a liquid.

13. I also do not believe that added sugar uniquely contributes to diabetes. Type 2 diabetes – by far the most prevalent type of diabetes – is a complex disease, the cause(s) of

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1 Ioannidis JP. Implausible Results in Human Nutrition Research. BMJ. 2013; 347:f6698.
which are not fully understood. The available evidence does not establish that added sugar in and of itself, in liquid or solid form, causes diabetes. In addition, there is no evidence that a reduced consumption of added sugar can prevent the onset of diabetes. If there is any adverse effect from the consumption of added sugar, it is most likely due entirely to the calories it provides, which makes it indistinguishable from any other source of calories.

14. In sum, based on the available scientific data, when consumed as part of a diet that balances caloric intake with energy output, consuming beverages with added sugar does not contribute to obesity or diabetes.

15. The Warning is scientifically inaccurate, misleading, unhelpful to consumers, and undermines the scientific process. The Warning implies that consuming beverages with added sugar will uniquely contribute to obesity and diabetes without any regard to how much is consumed, or the consumer’s overall dietary and exercise pattern, or genetic makeup. The Warning also implies that there is no safe amount of sugar-sweetened beverages that can be consumed, which is contrary to the views of many scientists (including me) and organizations, including the U.S. Food and Drug Administration (“FDA”) and the most recent 2015-2020 Dietary Guidelines for Americans. In addition, the Warning implies that the body metabolizes added sugar differently – and in a more harmful way – than natural sugar, which is biologically incorrect. The human body does not distinguish between sugars found in a food and those added to a food, or between sugar added to solid food and sugar added to a beverage. Based on the available scientific data, when consumed as part of a diet that balances caloric intake with energy expenditure, consuming beverages with added sugar does not contribute to obesity or diabetes.
III. SCIENTIFIC CONTEXT

A. Obesity And Diabetes

16. Obesity in adults is defined as a body mass index (“BMI” – a standard measure of body fatness which is based on height and weight) over 30. An individual with a BMI of 25 to 29.9 is considered overweight. A BMI between 18.5 and 24.9 is considered normal or healthy weight.\(^2\) Approximately 35% of adults in the United States are obese.\(^3\) Obese individuals are generally at risk for many chronic diseases including diabetes.\(^4\) Obesity is a complex condition, the cause(s) of which are unclear, other than the consumption of calories in excess of expenditure over an extended period of time.\(^5\) Moreover, it is unclear why some individuals consume more calories than are expended or conversely expend fewer calories (less energy) than are consumed. To maintain body weight, energy (calorie) intake must equal energy (calorie) expenditure, which is the concept of energy balance.

17. Diabetes is also a complex disease, the cause(s) of which we do not fully understand. Approximately 9% of Americans have been diagnosed with diabetes.\(^6\) There are two major types of diabetes. Type 1 diabetes, which affects approximately 5% of those affected with the disease, is an auto-immune condition in which the body destroys its own insulin-


\(^5\) Kahn R, Sievenpiper JL, Dietary sugar and body weight: have we reached a crisis in the epidemic of obesity and diabetes? We have, but the pox on sugar is overwrought and overworked. Diabetes Care. 2014; 37:957-962 at 962.

producing cells in the pancreas. Without insulin, a hormone that regulates blood sugar, there is an abnormal elevation of blood sugar levels.

18. Type 2 diabetes, constituting approximately 95% of individuals with the disease, results from a combination of defective insulin action and decreased insulin secretion. Both Type 1 and Type 2 diabetes have genetic component(s) and environmental component(s), albeit different from one another, and the exact nature of each is unclear. The vast majority of people with Type 2 diabetes are obese or overweight, which is the primary risk factor for the disease.\(^7\) When referring to diabetes in this report, I am referring to Type 2 diabetes. However, I note that the Warning does not distinguish between Type 1 and Type 2 diabetes. Of importance, there is no evidence to my knowledge that Type 1 diabetes is associated with obesity.

19. The number of people with (prevalence of) obesity and diabetes in the United States and in other Westernized countries has increased over the last several decades, as I explain in more detail below. In adults, there was a significant increase in obesity among adults until about 2011, after which time the prevalence has remained stable.\(^8\) There was a significant increase in obesity among youth from 1999 until 2003, at which time the prevalence plateaued through 2012.\(^9\)

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B. Types Of Sugar

20. There are many types of sugar. They are all carbohydrates, composed of carbon, hydrogen, and oxygen. Simple sugars – including glucose, fructose, and galactose – are monosaccharides. Disaccharides include sucrose, maltose, and lactose. Scientists who study the relationship between sugars and obesity and Type 2 diabetes focus predominantly on sucrose – which is composed of one molecule of glucose and one molecule of fructose. The focus on sucrose is because it is the most commonly consumed sugar.\textsuperscript{10} Fructose is not found in isolation in nature and is rarely, if ever, consumed by itself. It is important to note that the metabolism of fructose differs considerably when glucose is present or when it is absent. Thus studies where the effects of consuming pure fructose are evaluated, in the absence of glucose, cannot be assumed to apply to normal eating situations where both glucose and fructose are consumed together. In addition, studies in which pure fructose is given in amounts well in excess or at the extreme levels of normal consumption, do not realistically convey how the body metabolizes this sugar under ordinary circumstances.

21. Sucrose occurs naturally in many plants, is commonly obtained from sugarcane or sugar beets, and is often known as table sugar. High fructose corn syrup (“HFCS”) is derived from the starch in corn and is composed largely of glucose and fructose, sugars that are present in many other plants and ingredients in the diet.\textsuperscript{11}

22. HFCS is primarily made in two forms: (1) HFCS-55; and (2) HFCS-42. HFCS-55 is the more common type of HFCS and is comprised of 55% fructose, 42% glucose, and 3%

\textsuperscript{10} Kahn R, Sievenpiper JL, Dietary sugar and body weight: have we reached a crisis in the epidemic of obesity and diabetes? We have, but the pox on sugar is overwrought and overworked. Diabetes Care. 2014; 37:957-962 at 959-60.

\textsuperscript{11} Kahn R, Sievenpiper JL, Dietary sugar and body weight: have we reached a crisis in the epidemic of obesity and diabetes? We have, but the pox on sugar is overwrought and overworked. Diabetes Care. 2014; 37:957-962 at 957.
glucose polymers. HFCS-42 is composed mainly of 42% fructose, 53% glucose, and 5% glucose polymers.\textsuperscript{12}

23. Contrary to popular belief, sucrose and HFCS-55 are very similar. Sucrose and HFCS-55 (the most common form) are both about half glucose and half fructose. Honey is also similarly about half glucose and half fructose. There are two primary differences between HFCS and sucrose. First, HFCS contains water and sucrose does not. Second, in sucrose, a chemical bond joins the glucose and fructose; in HFCS, no bond joins the glucose and fructose – the two molecules are free in solution, similar to the free glucose and fructose in honey or the free glucose and fructose in foods without added forms of these sugars. HFCS has some different properties that are beneficial in food and drink preparations. For example, because HFCS is in liquid form, it allows for easier handling compared to sucrose, which is generally transported in solid form. These benefits are why HFCS is commonly used as a sweetener. It should also be noted that in an acidic liquid environment, such as a soft drink, the bond that joins the fructose and glucose of sucrose is broken fairly rapidly. This means both HFCS sweetened beverages and sucrose sweetened beverages have what is called “free” glucose and fructose, which is another reason why both HFCS and sucrose-sweetened beverages are virtually the same. Most important of all, sucrose and HFCS at the same concentration have no known metabolic differences.

24. When sucrose or HFCS is used as an ingredient in food, that food is commonly referred to as having “added sugar.” From a biological perspective, the terms “sugar,” “total sugar,” “added sugar,” and “caloric sweetener,” almost always mean a mixture of glucose and

fructose, either as sucrose, HFCS, or some other source of these sugars. As noted above, sugars, including glucose and fructose, are also naturally occurring in many foods and beverages.

25. There is no difference between how humans metabolize “added sugar” and how they metabolize sugar that is naturally present in a food or beverage. This means that there is no difference between added sugar or naturally-occurring sugar in food or beverages and their impacts on health – including whether they contribute to obesity or Type 2 diabetes. As mentioned above, the metabolism of sucrose, whether added or not, is the same as the metabolism of HFCS. There is also no material difference in caloric contribution or taste between sucrose and HFCS. Thus, the sugars in sucrose and in HFCS are essentially the same in all regards.

C. Average Daily Calorie And Sugar Consumption

26. Added sugar is used in various foods and beverages to add taste, texture, and shelf life, among other reasons. Adults consume an average of about 13% of their daily calories from added sugars in foods and beverages. On average, about two-thirds of those calories, or 8.5% of adults’ total daily energy intakes, come from added sugar in foods (excluding beverages), which means that, on average, about one third of those calories (or 4.5% of total calories), come from added sugar in beverages, including self-sweetened beverages like coffee and tea. It is important to note from these statistics that the vast majority of total energy consumption (greater

15 Id.; see also DeSalvo KB, Olsen R, Casavale KO. Dietary Guidelines for Americans [statement by the US Department of Health and Human Services]. JAMA. Published online January 7, 2016.
than 95%) comes from sources other than sugar-sweetened beverages. Consumption patterns are similar in children.\textsuperscript{16}

27. Also, as shown in Figure 1, fruit juice and popular fruits (apples, pears) can have the same or more sugar than sugar-sweetened beverages.\textsuperscript{17}

Figure 1: Total Sugars And Fructose In Raw Fruits, Fruit Juices, And Colas.

![Figure 1: Total Sugars And Fructose In Raw Fruits, Fruit Juices, And Colas.](image)

Total sugars and fructose in raw fruits, 100% fruit juices, and cola soft drink (g/100 mL or g).\textsuperscript{18}

28. On average, Americans today consume more calories overall than they did in prior decades. According to the U.S. Department of Agriculture’s data, the average American consumed 2,039 calories in 1970, and 2,544 calories in 2010.\textsuperscript{19} That is a 25% increase over a


\textsuperscript{17} Klurfeld Adv Nutr. 2013.

\textsuperscript{18} Id.

relatively short period and, importantly, it is the period of time during which rates of obesity and diabetes increased dramatically.

Figure 2: Comparison Of Total Calories Consumed To The Sources Of Those Calories From 1970 To 2012

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29. In Figure 2, you can see that added sugar consumption began to increase around 1982 until 1999, and fat consumption increased during the same period. Thereafter, however, added sugar consumption decreased whereas fat consumption increased dramatically. Total calorie consumption from 1970 to 2012 increased by approximately 500 calories, and only roughly 5% of that increase (about 25 calories) came from an increase in added sugar consumption. About 95% of total calorie consumption increase during this time came from other sources, about half of which was from an increased consumption of fats.

30. Average per capita added sugar consumption has been declining in the United States since at least 1999.\textsuperscript{21} Between 1999 and 2008 alone, average per capita added sugar consumption decreased from about 100 grams per day to about 77 grams per day – a 23% decline over the decade.\textsuperscript{22} Two-thirds of that decrease came from decreased regular soft drink consumption – from approximately 37 grams per day to 23 grams per day, for a 37% decrease in sugar-sweetened beverage consumption.\textsuperscript{23} Of note, obesity rates have not declined despite the dramatic decline in added sugar and sugar-sweetened beverage consumption since 2003.\textsuperscript{24}

\begin{enumerate}
\item[	extsuperscript{22}] Id.
\item[	extsuperscript{23}] Id.; Kit BK, Fakhouri, THI, Park S, Nielsen SJ, Ogden DL. Trends In Sugar-Sweetened Beverage Consumption Among Youth And Adults In The United States: 1999-2010. Am J Clin Nutr. 2013; 98:180-188. \url{http://ajcn.nutrition.org/content/98/1/180.full.pdf+html}.
\end{enumerate}
These trends indicate that, at the population level, the large and sustained reduction in sugar-sweetened beverage consumption over the last 10+ years has not reduced obesity rates.

D. Descriptions Of Scientific Studies Related To Sugar Consumption

32. Different types of scientific studies can be, and are, used to study the effects of sugar consumption. These include randomized controlled trials (“RCTs”), prospective cohort studies, and ecological reports.

33. RCTs are the most reliable type of study to ascertain the effect of a specific food because their design can reduce the effects of factors other than the food being tested, i.e. confounding factors. In RCTs, researchers test whether an intervention (such as modifying sugar-sweetened beverage consumption) has an effect on an outcome (such as weight change). One group of subjects, called the intervention arm, receives the intervention. Changes in those

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subjects are measured against changes, if any, in control subjects, who do not receive the intervention. Randomly placing subjects in either the intervention or control arm eliminates any and all differences between the subjects in the intervention or control arms, assuming that the only difference between the groups is the intervention itself. Also, in virtually all RCTs, the exact design of the study, the outcomes to be determined, and the statistical analyses are almost always (as they should be) pre-specified, which means that they are decided upon prior to the initiation of the study. This eliminates many potential biases that are commonly found in other study designs, where the methodology is almost always not pre-specified.

34. Evidence from prospective cohort studies is not as strong as that derived from RCTs. In a prospective cohort study, a population of individuals is followed for a period of time and outcomes of interest are documented. These outcomes are then related to one or more characteristics of the population. Such characteristics could be the body weight of the subjects, specific foods consumed over time, education levels, race, gender, or other variables. Thus, cohort studies describe whether there is an association between two variables, e.g., body weight and heart attacks. The design of cohort studies precludes a definitive answer to the question of why the variables appear to be related. One variable may actually cause a change in another variable, or the relationship between the variables may be influenced to the same extent by yet a third (possibly unknown) variable; this is known as confounding. Or the relationship between the variables may be spurious, which can result from biases and flaws in the study design and analysis. Therefore, in a cohort study one cannot conclude that a particular variable causes or contributes to a particular outcome. Instead, they only reflect associations. For these reasons,

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26 Kaiser KA, Shikany, JM, Keating KD, Allison DB. Pro v Con Debate: Role of sugar sweetened beverages in obesity: Will reducing sugar-sweetened beverage consumption reduce
prospective cohort studies provide a secondary level of evidence but do not, by themselves, establish causation.\textsuperscript{27} They generate associations that should be studied in RCTs.

35. Ecological reports describe high-level changes at the population level, like the obesity and sugar-sweetened beverage consumption rates discussed above. These studies compare trends in a large population but do not measure changes in individuals. The data are often derived from population-wide survey measures and have little or no ability to control for important variables. Ecological reports are viewed as the least reliable source of information about the influence of a risk factor on an outcome.

IV. **THERE IS CONSIDERABLE DEBATE OVER WHETHER SUGAR-SWEETENED BEVERAGES UNIQUELY CONTRIBUTE TO OBESITY OR DIABETES**

36. Whether or not there actually is a meaningful link between sugar-sweetened beverages and obesity and diabetes is the subject of controversy and ongoing significant debate.

37. For example, a colleague from the University of Toronto’s Department of Nutritional Science and I recently participated in a written debate in the American Diabetes Association’s journal *Diabetes Care*. The debate centered around the “controversy in regards to sugar-sweetened drinks and the increased dietary intake of glucose and high-fructose corn syrup as a major contributor of obesity and metabolic syndrome.”\textsuperscript{28} As the journal explained:

> In the point narrative, Drs. Bray and Popkin report that ‘consumption of soft drinks has increased fivefold since 1950’ and that ‘consumption of sugar-sweetened beverages (SSBs) is related

\textsuperscript{27} Kaiser KA, Shikany, JM, Keating KD, Allison DB. Pro v Con Debate: Role of sugar sweetened beverages in obesity: Will reducing sugar-sweetened beverage consumption reduce obesity? Evidence supporting conjecture is strong, but evidence when testing effect is weak. Obesity Reviews. 2013; 14:620-633.

to the risk of diabetes, the metabolic syndrome, and cardiovascular disease...Thus, from their report, SSBs may be considered a culprit in the epidemic of obesity and the metabolic syndrome. In the counterpoint narrative, Drs. Kahn and Sievenpiper suggest that ‘there is no direct evidence that sugar itself, in liquid or solid form, causes an increase in appetite, decreases satiety, or causes diabetes.’ Thus, they state ‘if there are any adverse effects of sugar, they are due entirely to the calories it provides, and it is therefore indistinguishable from any other caloric food.’

The *Diabetes Care* journal editor explained that “both author groups clearly defend their positions, and in this regard, it is obvious we have more work to do to fully understand this area of research.”

38. As a U.S. Department of Agriculture (“USDA”) scientist and several researchers from Tufts University School of Medicine, Baylor College of Medicine, and the University of Central Florida wrote recently in *The International Journal of Obesity*, the “debates rage on, even though it is clear that public policy in such an important area should not be made in the absence of higher levels of proof than are currently available.” They continued, “[t]his debate is by no means settled. More and longer randomized controlled trials are clearly needed to establish an appropriate knowledge base related to sugar sweetened beverage consumption and its alleged link to obesity.”

39. As USDA’s Dr. Klurfeld explained in his article — “What Do Government Agencies Consider In The Debate Over Added Sugars?” — the “place of sugars in the U.S. diet is vigorously debated with much attention on added sugars, those added during processing or preparation of foodstuffs, particularly as they relate to obesity.” Dr. Klurfeld also noted that “the

29 *Id.*
30 *Id.*
32 *Id.*
list of foods associated with obesity includes many commonly eaten items, and it is not likely that they are all causally related.”33

40. *The Nutrition & Health* series recently published a treatise dedicated to the debate, entitled *Fructose, High Fructose Corn Syrup, Sucrose and Health*. The editor opened the book, which contains opinions by two dozen scientists, by explaining that “[t]he metabolic and health effects of both nutritive and non-nutritive sweeteners are controversial and subjects of intense scientific debate.”34 The Foreword of that book also describes “a growing number of authors [who] are pointing out that the fever pitch reached about certain obesity issues, especially sugar sweetened beverages and sugar in general, appears to be leading to exaggerations and distortions of the evidence base and dialogue around these issues in the scientific and public health literature.”35

41. In a 2014 regulatory statement, the FDA explained that “U.S. consensus reports have determined that inadequate evidence exists to support the direct contribution of added sugars to obesity or heart disease.”36 The FDA also noted the view that “there is a lack of scientific agreement on the effects of added sugars on health outcomes independent of the effects

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of total sugar” and that the “effects of some carbohydrates are not fully understood and are the subject of debate in the scientific community.”

42. Dr. Kimber L. Stanhope, an Associate Researcher in the Department of Molecular Biosciences, School of Veterinary Medicine and Department of Nutrition at the University of California, Davis, recently acknowledged that this controversy continues. In Dr. Stanhope’s article “Sugar consumption, metabolic disease and obesity: The state of the controversy,” she explains that “[t]he impact of sugar consumption on health continues to be a controversial topic.” Dr. Stanhope discusses a number of “evidence gaps,” which “allows the controversy to continue[.]”

43. In view of the above, it is clear that there continues to be much controversy over the hypothesis that added sugar in the form of solid food or sugar-sweetened beverages uniquely contributes to obesity or diabetes. A significant amount of additional scientific research is needed to reach any reliable conclusions. However, based on the evidence currently available, I do not believe that sugar-sweetened beverages uniquely contribute to obesity or diabetes. The FDA offered a similar view recently, explaining that “under isocaloric controlled conditions [i.e., on a calorie-equivalent basis] added sugars, including sugar-sweetened beverages, are no more likely to cause weight gain in adults than any other source of energy.”

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37 Id. at 11901, 11903. The FDA supplemented this rulemaking in 2015 to propose a daily reference value for added sugars (10% of daily calories).


39 Id.

44. This is consistent with the 2015-2020 Dietary Guidelines for Americans, which the federal government released this month. The Guidelines explain that the evidence between added sugars and health outcomes is “still developing” and recognize that “[a]ll foods consumed as part of a healthy eating pattern fit together like a puzzle to meet nutritional needs without exceeding limits, such as those for saturated fats, added sugars, sodium, and total calories.” In other words, all sources of calories should be consumed in balance with energy expenditure, while meeting nutritional requirements for vitamins and the like. Calories from added sugar may be part of that balance without leading to obesity or related conditions.

V. SUGAR-SWEETENED BEVERAGES DO NOT UNIQUELY CONTRIBUTE TO OBESITY OR DIABETES

A. Sugar-Sweetened Beverages Do Not Uniquely Contribute To Obesity

45. To summarize the data I will review below, virtually all studies show that sugar-sweetened beverage consumption does not lead to weight gain in the context of a diet in which energy intake is equal to energy expenditure. The data indicate that even changing one’s diet by consuming more sugar-sweetened beverages does not lead to weight gain if total energy consumption is kept constant (i.e., by decreasing the amount of calories consumed from another food(s)). Of course, increasing or decreasing overall caloric consumption – whether by consuming more/fewer sugar-sweetened beverages or any other caloric source – may lead to changes in weight. The data strongly suggest that it is the consumption of excess calories relative to one’s caloric output that leads to increases in weight, not whether those calories are composed of sugar-sweetened beverages or any other source of calories.


1. **Randomized Controlled Trials Show That Sugar-Sweetened Beverages Do Not Uniquely Contribute To Obesity**

46. Four different research groups conducted meta-analyses of randomized controlled trials on added sugar, including sugar in sugar-sweetened beverages, and all reached similar conclusions that added sugar per se does not lead to weight gain.43 There are essentially three analyses that have been performed: (1) **isocaloric** trials, in which all subjects receive the same number of total calories, but different levels of added sugar; (2) **hypercaloric** trials, in which intervention subjects receive additional calories from added sugar; and (3) **hypocaloric** trials, in which intervention subjects receive fewer calories from added sugar.

47. The isocaloric trials, which isolate the potential effect of added sugar, show no unique effect on weight. A meta-analysis sponsored by the World Health Organization (“WHO”) concluded that isocaloric “replacement of sugars with other carbohydrates did not result in any change in body weight.”44 Focusing on fructose, a group of Canadian researchers similarly concluded that “[f]ructose does not seem to cause weight gain when it is substituted for


other carbohydrates in diets providing similar calories. This group updated their findings last year with new data and reached the same conclusion.

48. Results from hypercaloric trials, which were only done in adults, were mixed. Some trials show that individuals fed a hypercaloric diet gained weight but this outcome was not seen in all trials. Furthermore, it was not possible in all trials, particularly those in which the subjects gained weight when fed a hypercaloric diet, to separate out the effects of the increase in total calories versus the source of the increase in total calories. As the WHO-sponsored review explained, “the change in body fatness that occurs with modifying intakes seems to be mediated via changes in energy intakes.”

49. Results from hypocaloric trials, which were done in children and adults, were also mixed. As with the limitation described in the hypercaloric trials, although the individuals who consumed less added sugar and fewer total calories did lose weight, whether the weight loss was due to a reduction of total calories consumed or a reduction of added sugar was not determined.

50. Two studies in children, which are controversial but the largest and longest-term trials that have been reported, merit discussion. In Ebbeling et al., subjects in the intervention group were given water and diet beverages as a replacement for sugar-sweetened beverages and received encouragement to consume the former through repeated check-in visits, “motivational”


calls, and mailed instructions. The control subjects maintained their current diet but in contrast did not receive any added attention. The intervention subjects decreased their average caloric intake by about 450 calories per day from all sources, not necessarily just sugar-sweetened beverages. There was no significant weight difference at the end of the two-year study period, which was the primary pre-specified analysis. However, the authors took the liberty of also conducting another analysis (i.e., weight loss at one year) and found modest weight differences between the two arms. This additional analysis raises the question of whether the investigators were looking for data to support their desired position; this is the primary reason why in RCTs all the analyses must be pre-specified. In a further sub-group analysis, the authors found that the modest weight differences observed at one year were limited to the Hispanic participants only, which raises the question whether the results of the trial can be generalized to all children. In any event, it was impossible to determine whether the children in the intervention arm lost weight because of a reduction in the consumption of added sugar, a reduction in total energy consumed, or because they received much more attention and encouragement than the children in the control arm. Of importance, once the intensive intervention ceased, weight gain tended to increase even though added sugar consumption remained low in the intervention group. This is consistent with the intervention (a reduction of total calories consumed and/or intensive encouragement), not sugar-sweetened beverages per se, playing the key role in weight loss.

51. In another study, by De Ruyter et al., children were randomized to receive non-caloric beverages or caloric beverages provided by the researchers. The authors did not collect data on total energy intake. Many students dropped out because they did not like the beverages,

and a significant percentage of students in the non-caloric arm were able to guess that they were drinking non-caloric beverages, limiting the attempt at blinding. After eighteen months, there was a statistically significant reduction in the group consuming fewer sugar-sweetened beverages although the weight loss was very modest. In any event, because the researchers failed to collect data on total caloric intake, it is not possible to know whether the findings are related to a reduction in calories from added sugar or a reduction in total caloric consumption.  


These results contrast with another trial in children, in which control children who actually increased their sugar-sweetened beverage consumption over the study period had no difference in body fat compared to children who almost entirely replaced sugar-sweetened beverages with milk. This comparison illustrates how manipulating caloric intake may affect weight, while merely manipulating the source of calories does not.  


52 In summary, if there is any weight gain or weight loss from an increase or decrease in calories from sugar-sweetened beverages, the totality of the evidence indicates the changes in weight reflect total calories consumed, not added sugar per se. Therefore, added sugar does not have a uniquely detrimental effect on health; any change in weight gain is likely due to total caloric intake relative to energy expenditure.

53 A similar effect has been reported for other foods and nutrients, including fats, proteins, and carbohydrates of various sources: increasing net calories leads to weight gain, and

decreasing net calories leads to weight loss.\textsuperscript{52} This is consistent with standard nutritional theory: all else being equal, reducing calorie intake will lead to weight loss and increasing caloric intake will lead to weight gain regardless of macronutrient composition.\textsuperscript{53} A large and widely-referenced trial of reduced-calorie diets emphasizing different percentages of protein, fats, or carbohydrates found that all “[r]educed-calorie diets result in clinically meaningful weight loss regardless of which macronutrients they emphasize,” and concluded that “the specific macronutrient content is of minor importance.”\textsuperscript{54} Similarly, a recent meta-analysis found comparable weight loss between low-fat and low-carbohydrate diets with reduced calories.\textsuperscript{55}

55. These findings have important clinical and policy implications because they suggest that merely reducing consumption of added sugar does not lead to meaningful, long-term weight loss or avoidance of obesity and related conditions. Only if reduced added sugar consumption is part of a net reduced calorie diet are people likely to lose weight – which would be true for a reduction in any caloric food or beverage.

56. It is also important to note that weight loss efforts targeting a single food or beverage are unlikely to be successful at meaningfully reducing weight, particularly over the


long term. Individual foods and beverages, included sugar-sweetened beverages, tend to constitute a relatively small percentage of the diet on average. Even if removing one food or beverage leads to a net calorie reduction, the effect would likely be small in most individuals – an insubstantial reduction of calories is unlikely to have an effect on the prevention of obesity and certainly not the prevention of diabetes which requires substantial weight loss. And there may be no real-world effect whatsoever, because people will often substitute one food for another over time or add calories from foods already being consumed, leading to no net calorie decrease. Even highly motivated and encouraged participants in long-term clinical weight loss trials have great difficulty maintaining weight loss for more than a year, even in the presence of an intensive weight loss intervention.

2. **Prospective Cohort Studies Do Not Demonstrate That Sugar-Sweetened Beverages Uniquely Contribute To Obesity**

57. Data from prospective cohort studies are mixed, with some showing that increasing added sugar intake (including that in sugar-sweetened beverages) is associated with obesity, and others showing no association. However, prospective cohort studies, as discussed above, suffer from significant design flaws and dependence on limited, self-reported information on diet and lifestyle characteristics. Also, in most of the studies, total caloric intake could not be accounted for. Thus, once again, any weight gain may be due to increased amounts of calories consumed. Studies that do control for caloric intake tend not to find an association between added sugar consumption and weight.

58. Unfortunately, the very basis of prospective studies – how much food and in what categories were consumed over a long period of time – is itself suspect. Generally, subjects are asked to estimate what and how much they ate over the last day or year, and are asked to

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56 Te Morenga 2013.
estimate how much they exercise, and so on. There are large and well-known discrepancies between what people report they ate and what they actually ate, which can distort results in wide variety of ways. As one review explained, dietary measures based on recall have “astonishingly poor measurement” when compared to objective measures, and “[a]lthough painful to admit, it is possible that epidemiologists have been deluded in their acceptance” of recall-based methods.

59. Also, these studies cannot control for all possible factors that could contribute to weight gain because of their design. For example, they cannot fully control for all other foods and beverages consumed by soda consumers as a dietary pattern, as well as all cultural, social, and environmental factors that may contribute to weight gain. To illustrate how this can occur, some observational studies have shown that subsequent children are more likely to have Down Syndrome than the first child. This could lead to the conclusion that birth order causes Down Syndrome. However, these findings are confounded by maternal age – mothers are older when they give birth to subsequent children than for the first, which is what is actually causing the increased risk. Unlike maternal age, which is fairly straightforward to measure and control for, dietary and lifestyle confounders are notoriously difficult to measure and control for. Thus, simply because two or more factors may have a similar trend does not at all mean that the rise or fall of one is causing the rise or fall of the other. The design limitations of prospective cohort studies preclude a finding that a reported association is causal.

60. In addition, prospective cohort studies generally do not publicly pre-specify how exposure would be defined, the number of analyses that will be performed, or the statistical tests

57 Kahn & Sievenpiper 2014 at 959.
to be used, and the results are not adjusted for repeated tests of significance. Any of these problems could easily lead to spurious results. In other words, the failure to pre-specify publicly the data analysis to be conducted may enable researchers to mine the data until they find an association worthy of publication.

61. In conclusion, cohort studies in adults and children provide inconsistent results and do not, for the most part, adjust for total caloric intake. When there is an adjustment for total caloric intake, the results tend to show no relationship between added sugar consumption and body weight, suggesting the reason for any increase or decrease in weight is due to an increase or decrease in total caloric intake (as also seen in the RCTs).

62. Interestingly, other foods have shown a similar or greater increase in weight compared to sugar-sweetened beverages when not adjusted for energy intake in prospective cohort studies. For example, Mozaffarian et al. combined three large cohorts and found that on a per serving basis, increasing consumption of meats, potatoes, desserts, fried foods, and some dairy foods, are associated with about as much, if not more, weight gain than increasing consumption of sugar-sweetened beverages.59

63. Thus, the prospective cohort studies do not establish that sugar-sweetened beverages play a unique role in the development of obesity.

B. Sugar-Sweetened Beverages Do Not Uniquely Contribute To Diabetes

64. The etiology (cause(s)) of Type 2 diabetes are complex and not understood, but excess energy intake relative to energy expenditure leading to overweight and obesity appears to be the primary risk factor for Type 2 diabetes.

65. As I have previously written, “[t]here is no direct evidence that sugar itself, in liquid or solid form, causes an increase in appetite, decreases satiety, or causes diabetes. If there are any adverse effects of added sugar, they are due entirely to the calories it provides, and it is therefore indistinguishable from any other caloric food. Excess total energy consumption seems far more likely to be the cause of obesity and diabetes.”\(^{60}\) Whether or not the consumption of added sugar causes diabetes has not been addressed in any RCT where non-diabetic subjects are randomized to diets differing only in sugar content (i.e., isocaloric) and followed for the development of diabetes. Thus, whether sugar causes the ultimate development of diabetes is not known.

66. A prominent research group recently summarized the available data, however, and concluded that “[h]igh quality evidence from longer-term randomized controlled trials, prospective cohorts, and systematic reviews and meta-analyses of these studies generally does not support the link between fructose alone and fructose-containing sugars and the development or aggravation of type 2 diabetes.”\(^{61}\)

67. As I and others have noted, trials investigating the potential effects of added sugar on various intermediate metabolic parameters associated with the development of diabetes have not shown consistent results. A major design flaw in these studies is that subjects were given unrealistically high doses of sugar or purified fructose.\(^{62}\) In addition, the adverse effects were

\(^{60}\) Kahn & Sievenpiper 2014.


not observed at all levels of sugar consumption and, in particular, at levels normally consumed in
the population.

68. An additional important limitation of studies that examined the relationship
between increased sugar consumption and various metabolic factors is that diabetes takes many
years to develop and requires a substantial defect in both insulin action and insulin secretion.
Many people can have mild to moderate abnormalities in one or both of these variables as well
as components of these variables and not develop diabetes in their lifetime. Thus, a finding that
there is an intermediate metabolic defect in a study in which subjects consumed extraordinarily
high levels of sugar over a very short period of time, does not at all substitute for direct evidence
that added sugar consumption increases the incidence of diabetes.

69. Results from prospective cohort studies are also inconsistent. Some studies report
small associations between the highest levels of added sugar consumption and the development
of diabetes, but these associations are most often absent at moderate levels of sugar consumption.
In all studies, the authors acknowledge that the results may be due to confounding by lifestyle or
other food related factors that relate to sugar consumption.63 Other prospective cohort studies
have not found associations between sugar-sweetened beverage consumption and diabetes.64 It
is worth noting that many foods and behaviors have been similarly associated with diabetes in
prospective cohorts, ranging from eating white rice, meat, and fried food, to watching television
and driving.65

63 Cozma AI, Ha V, Jayalath VH, de Souza RJ, Sievenpier JL. Sweeteners and Diabetes.
2014; 309-323.
64 Id.
65 E.g., Hu FB, Li TY, Colditz GA, Willett WC, Manson JE. Television Watching and Other
Sedentary Behaviors in Relation to Risk of Obesity and Type 2 Diabetes in Women. JAMA.
In summary, there is no direct or strong evidence that sugar-sweetened beverages play a unique role in the development of diabetes or contribute in any distinctive way.

VI. THE WARNING IS SCIENTIFICALLY MISLEADING, VAGUE, INACCURATE, AND CONTROVERSIAL

The City of San Francisco’s requirement that advertisements for certain types of sugar-sweetened beverages have a Warning stating that “[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay” is scientifically vague, misleading, inaccurate, and controversial. As the scientific debate shows, however, these issues are nuanced and complex and cannot whatsoever be viewed as “decided” upon in such a summary manner.

A. The Warning Is Misleading

The Warning is scientifically misleading and provides confusing information to consumers. The Warning implies that consuming beverages with added sugar will always contribute to obesity and diabetes without any regard to the consumer’s overall dietary and exercise pattern, two factors which strongly influence weight gain and related conditions. And even if one knows all of that information, one cannot single out a specific food or beverage as the source of calories that tipped the scale, which is what the Warning incorrectly signals to consumers.

The Warning also misleadingly conveys that there is no safe amount of sugar-sweetened beverages that can be consumed, which is contrary to the views of many scientists and

organizations. For example, the Dietary Guidelines and the FDA’s proposed added sugar daily reference value recognize that consumers may consume sugar-sweetened beverages. The American Dietetic Association has similarly noted that “all foods can fit into healthful diets, even those high in added sugars.”

1. The Warning Leads To Misleading Comparisons

The fact that the Warning is required only on advertisements for sugar-sweetened beverages creates the misleading impression that these beverages are meaningfully different from all other foods and beverages containing sugar that do not have the Warning requirement. The available scientific research suggests that weight gain and conditions related to weight gain, such as diabetes, are caused by the consumption of excess calories relative to one’s energy expenditure, not by consumption of any specific nutrient. By requiring a warning only for beverages with added sugar – and then even only some beverages with added sugar – but not for the vast array of other foods or beverages containing sugar, San Francisco is distorting the scientific data. The City’s Warning gives consumers the false impression that beverages with added sugar are “worse” than other beverages, or desserts, snacks and other foods that could well be regarded as equal if not stronger “contributors” to obesity and diabetes.

For example a consumer may choose to avoid a beverage with the Warning and then consume frequent servings of a bacon double cheeseburger, French fries and ice cream for dessert – which do not contain any warning – and believe they have made a healthier choice to

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reduce the possibility of becoming obese or develop diabetes.\textsuperscript{68} Alternatively, an individual could choose to consume a 100\% fruit juice, containing more sugar and more calories than a sugar-sweetened beverage, and again think they have made the better choice to avoid obesity and the development of diabetes.\textsuperscript{69} The line drawn by the City in terms of which products must contain the Warning and which are exempt is scientifically unfounded. Consumers could easily make less informed choices that promote the excess consumption of calories.

76. Nutritional bodies like the Academy of Nutrition & Dietetics warn against this kind of “classification of specific foods as good or bad” because it is “overly simplistic and can foster unhealthy eating behaviors.”\textsuperscript{70} Instead, their view is that “the total diet or overall pattern of food eaten is the most important focus of healthy eating. All foods can fit within this pattern if consumed in moderation with appropriate portion size and combined with physical activity.”\textsuperscript{71} The Warning encourages the opposite, which is confusing and potentially harmful to overall efforts at weight management.

77. Of course, encouraging a shift toward a more healthy lifestyle overall (defined as more exercise, consumption of more fruits, vegetables, well-balanced meals, and fewer total calories) may have important benefits. And, if an individual needs to reduce his or her caloric intake, replacing some beverages containing calories with those that do not is a good start, as is reducing other sources of foods eaten in excess.

\textsuperscript{68} Klurfeld Adv Nutr. 2013.

\textsuperscript{69} Indeed, 100\% fruit juices tend to have more sugar per serving than colas do, and similar associations have been reported between fruit juice, obesity, and diabetes. Muraki I, Imamura F, Manson JE, Hu FB, Willett WC, van Dam RM. Fruit consumption and risk of type 2 diabetes: results from three prospective longitudinal cohort studies. BMJ. 2013; 347:f5001. \url{http://www.bmj.com/content/347/bmj.f5001}.


\textsuperscript{71} Position of the American Dietetic Association at 259.
78. That is not to say that sugar-sweetened beverages should not or cannot be consumed at all. The Dietary Guidelines emphasize “the importance of focusing not on individual nutrients or foods in isolation, but on everything we eat and drink — healthy eating patterns as a whole.” This is the rationale for the Dietary Guidelines’ recommendation to limit added sugars to less than 10% calories per day, which is a “target to help the public achieve a healthy eating pattern — meeting nutrient and food group needs through nutrient-dense foods while staying within calorie limits.”\(^72\) This contradicts the Warning’s message that beverages with added sugar inherently and uniquely cannot be consumed as part of an overall balanced diet.

2. The Warning Misleadingly Implies That The Human Body Metabolizes Added Sugar Differently Than Natural Sugar

79. The Warning also implies that the body metabolizes added sugar differently than “natural” sugar, like that found in fruit and fruit juice. That is biologically incorrect. According to the American Dietetic Association, “Human metabolism does not distinguish between sugars found in a food and those added to the food.”\(^73\)

B. The Warning Is Vague

80. The Warning is vague and does not help consumers make better informed purchasing decisions because it does not provide the consumer with accurate information. It does not tell the consumer that they need to only consume the amount of calories equal to or less than the calories they expend to prevent weight gain, \(i.e.,\) maintain a healthy weight. Instead, the Warning singles out one source of calories as contributing to obesity and diabetes and does not

\(^72\) DeSalvo KB, Olsen R, Casavale KO. Dietary Guidelines for Americans [statement by the US Department of Health and Human Services]. JAMA. Published online January 7, 2016.

specify how much an individual needs to consume before the sugar-sweetened beverage(s) will (if at all) contribute to obesity and diabetes.

C. The Warning Is Inaccurate And At A Minimum Controversial

81. The Warning conveys the simplistic and inaccurate message that consuming a single type of food item, at any level, will contribute to obesity and diabetes. Obesity and diabetes are complex, multi-factorial disease states that develop over years, and there is much we do not know about their biological and environmental causes. What we do know is that it is possible to consume beverages with added sugar without developing these conditions. In sum, based on the available scientific data, when consumed as part of a diet that balances energy intake with energy expenditure (no weight gain), consuming beverages with added sugar does not contribute to obesity or diabetes. Nor is there evidence that consuming sugar-sweetened beverages in excess versus any other food in excess, will more likely lead to weight gain.
Richard A. Kahn

Jan. 11, 2016

Date
APPENDIX A
CURRICULUM VITAE
APPENDIX A
CURRICULUM VITAE

RICHARD ALLEN KAHN

PROFESSIONAL EXPERIENCE

INDEPENDENT CONSULTANT / RESEARCHER AND, UNIVERSITY OF NORTH CAROLINA, DEPARTMENT OF MEDICINE, CHAPEL HILL, NC

Professor of Medicine 2009-Present

Dr. Kahn’s interests are in the areas of the science and medicine of diabetes, obesity, health care reform, and health services research.

AMERICAN DIABETES ASSOCIATION 1985-2009
National Center, Alexandria, VA
Chief Scientific and Medical Officer 1988-2009
Assistant Executive Vice President 1985-1988

Senior executive staff responsibility for the Association's scientific and medical activities. This included the Association's clinical practice guidelines, research program, all professional education activities, two certification programs, program publications, and scientific and medical information resources.

AMERICAN RED CROSS 1976-1985
St. Louis, MO
Chief, Scientific Affairs 1982-1985
Scientific Director 1976-1985

Senior manager for all health-related programs and services in nation’s sixth largest Red Cross unit. Greatly expanded the number and diversity of programs offered to the public. Co-managed operations of the regional blood collection facility (The facility had a budget of $25 million with over 300 employees, and collected, processed and distributed 185,000 units of blood per year). Developed and initiated the first tissue bank facility in the entire Red Cross system and the first interstate tissue bank; the tissue bank quickly became the largest in the U.S. Led the development of an integrated organ and tissue procurement effort for the metropolitan St. Louis area. Managed a $1.1 million research laboratory.

AMERICAN RED CROSS NATIONAL RESEARCH LABORATORY 1972-1976
Washington, DC

Performed basic and clinical research on the function and preservation of blood cells, and the prevention of transfusion-transmitted diseases. Led the development of new techniques to store or freeze-preserve blood platelets for subsequent transfusion.
PRIOR ACADEMIC APPOINTMENT

WASHINGTON UNIVERSITY SCHOOL OF MEDICINE, St. Louis, MO  1978-1985
Associate Professor of Pathology

HONORS, AWARDS, AND OTHER PROFESSIONAL ACTIVITIES


Outstanding Young St. Louisan, St. Louis Magazine, St. Louis, Missouri---1985

Official United States Representative to International Conferences on “Tissue Banking in Asia and the Far East.”--- 1983-1984

Washington Heart Association Research Fellowship---1973-1974

Author of original in-depth analysis on the future of the blood collection/transfusion industry for the Office of Technology Assessment, U.S. Congress---1985

Health Care Financing Administration Award for Sustained Contributions to the Welfare of Medicare Beneficiaries with Diabetes---2000

The Sir Allister McIntrye Distinguished Award for Outstanding Services Internationally in the Field of Diabetes, University of the West Indies---2003

Charles H. Best Medal for Distinguished Service in the Cause of Diabetes, American Diabetes Association---2009

Albert Renold Medal for Distinguished Service, European Association for the Study of Diabetes---2009

Author of over 65 original publications (excluding abstracts) and numerous book chapters

ADVISORY BOARDS AND NATIONAL ORGANIZATIONS

Board of Directors, St. Louis Regional Transplant Association  1977-1983
Member, American Association of Tissue Banks  1979-1985
Treasurer, American Association of Tissue Banks  1979-1983
American Red Cross Transplantation Services Advisory Committee  1985-1993
Board of Directors, United Network for Organ Sharing (UNOS)  1988-1994
National Cholesterol Education Program Committee  1988-1993
National High Blood Pressure Education Committee  1988-1992
National Eye Health Education Program Steering Committee 1990-1994
Centers for Disease Control Diabetes, Technical Advisory Committee 1992-1998
National Diabetes Education Program Steering Committee 1995-1997
NCQA Committee on Performance Measurement 2002-2007
National Diabetes Quality Improvement Alliance 2000-2007

EDUCATION

A.B., University of Missouri, Columbia, MO (Major - Zoology) 1966
M.S., University of Missouri, Columbia, MO (Major - Physiology) 1968
Ph.D., Georgetown University, Washington, DC (Major – Physiology/Hematology) 1972
PUBLICATIONS

Richard A. Kahn

Original Research Publications and Editorials


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Book Chapters, Technical Reports


APPENDIX B
DOCUMENTS CONSIDERED
APPENDIX B
DOCUMENTS CONSIDERED


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EXHIBIT B
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE AMERICAN BEVERAGE ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION,

Plaintiffs,

v.

THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

EXPERT REPORT OF PETER N. GOLDER, PH.D.

January 12, 2016
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I. Introduction

A. Qualifications

1. I am a Professor of Marketing at the Tuck School of Business at Dartmouth College in Hanover, New Hampshire. In 2014, I was appointed by Dartmouth’s president to be one of seven inaugural faculty members in Dartmouth’s Society of Fellows. In 2015, I was appointed by Tuck’s dean to be coordinator of the school’s marketing faculty. Also, last year, I became co-Editor-in-Chief of the peer-reviewed academic journal *Marketing Letters*. Formerly, I was a Professor of Marketing and Coordinator of the Marketing Department Doctoral Program at the Stern School of Business at New York University in New York, New York.

2. I hold a Ph.D. in Business Administration (Marketing) from the University of Southern California and a B.S. in Mechanical Engineering from the University of Pennsylvania. A copy of my curriculum vitae is attached as Appendix A. A list of the cases in which I have testified during the past four years is included as Appendix B.

3. My research experience and interests include product branding, branding strategies, product positioning, communication strategies, historical analysis of the sources of market leadership, new product marketing, and global marketing. I teach or have taught MBA candidates and business executives on topics including marketing, marketing communications, consumer behavior, new product design, and global marketing, and present regularly to academic and professional audiences on these and other related topics. I have written more than thirty publications appearing in academic journals, as book chapters, and in the media, including publications in leading marketing and business journals such as *Journal of Marketing, Journal of Marketing Research, Marketing Science*, and *Harvard Business Review*. I currently serve on the editorial boards of *Marketing Science, AMS Review*, and *International Journal of Research in Marketing*, and serve as a peer reviewer of articles submitted to these journals, the *Journal of Marketing*, and *Journal of Marketing Research*.

4. My research and contributions to the field of marketing have been recognized with many best paper and best book awards.
B. Assignment

5. I was asked by Counsel for the American Beverage Association (“ABA”) to opine upon whether, and to what extent, the warning message as described in San Francisco Ordinance No. 100-15 (“Warning Message”) will influence consumers’ understanding of advertising messages on media such as paper, posters, and billboards (“covered media”). In particular, I was asked to examine what messages the Warning Message will send to consumers, how the Warning Message will affect the overall message sent by the advertisements, and how advertisements including the Warning Message would impact the companies’ brands and brand equity, both within and outside the City and County of San Francisco. Lastly, I was asked to opine upon whether the City’s request to implement the Warning Message on covered media would cause companies impacted by the City’s Ordinance to shift advertising from covered media to non-covered media.

C. Materials relied upon and compensation

6. In the course of my work, I reviewed the complaint and the ordinance received from Counsel, academic publications, textbooks, press articles, and advertisements. I reserve the right to supplement this report in the event that new information relevant to my opinions is produced in the case. I reserve the right to review and rely upon the research and opinions of other experts in this investigation. A complete list of the materials I have relied upon for this assignment is included in Appendix C.

7. I am being compensated for my work in this case at my standard rate of $750 per hour. My compensation on this matter is not contingent on the nature of my findings or on the outcome of this action. I have been assisted in this matter by staff of Analysis Group, Inc., who worked under my direction and supervision. In the past, I have not worked for any beverage company. I also have not received any compensation from beverage companies in connection with other consulting work.
II. Case Background

8. Effective June 25, 2015, San Francisco Ordinance No. 100-15 added Article 42, Division 1, Sections 4200-4206 to the San Francisco Health Code (hereafter referred to as the “Ordinance”). The Ordinance requires that any advertiser of sugar-sweetened beverages that places or causes an advertisement to be placed in certain media in San Francisco must include a Warning Message in the advertisement. The Warning Message is required to read “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco” (see Appendix D for illustrative representations of advertisements incorporating the Warning Message). The Ordinance further specifies that the label must cover at least 20 percent of the advertisement, be enclosed in a rectangular border the same color as the warning and the width of the first downstroke of the capital “W” in “WARNING,” and that the text be legible and in contrast to the text of the advertisement. Media covered by the Ordinance include advertisements placed on papers, posters, billboards, vehicles, transit shelters, and walls, and at stadiums. The operative date of the Ordinance is July 25, 2016.

III. Summary of Opinions

9. My conclusions are as follows:

- The Warning Message as described in San Francisco Ordinance No. 100-15 will disrupt and alter the messages that consumers take away from advertisements containing the Warning Message. The prominence of the Warning Message and the severity of its message will cause many consumers to perceive the Warning Message as one of the
primary messages of the advertisement, if not the primary message of the advertisement, detracting from — if not overwhelming — the carefully-designed message intended for the consumer. In simple terms, advertisements intended to convey carefully crafted themes and messages would be converted by the Warning Message into platforms that would weaken, neutralize, or even counteract those intended messages.

- The language, prominence, and presentation of the Warning Message will broadly signal to consumers that drinking beverages with added sugar is harmful to their health and is likely more harmful than other foods and beverages whose advertisements do not contain the Warning Message. The Warning Message tells consumers that drinking beverages with added sugar contributes to developing diseases such as obesity, diabetes, and tooth decay — without giving any consideration to their other dietary or lifestyle decisions. And because consumers tend to hone in on highly salient messages like the Warning Message, many consumers will perceive products with the Warning Message to be more dangerous than similar products without the Warning Message, even if the unlabeled products contain similar or more sugar or calories.

- Displaying the City’s Warning on a particular company’s advertisements would harm the companies’ brands and brand associations. When a brand’s image, meaning, or associations is affected by external factors, consumers’ perceptions of the brand can rapidly change. In the case of negative external factors affecting consumers’ perceptions, a company would have to exert substantial resources and effort to rehabilitate the brand and rejuvenate consumer’s positive feelings about the brand.

- San Francisco’s Ordinance will likely drive affected companies to change their advertising strategies and shift their advertising budgets from covered media to various other marketing media and communication means in order to avoid the harm that would be imposed by associating their companies and brands with the Warning Message.

IV. Consumer Purchasing, Companies’ Advertising, and Brands

10. In Section IV, I present three frameworks that provide the theoretical foundation underlying my opinions.
11. First, I present perhaps the most widely accepted model of the consumer buying process and examine the ways in which consumers could potentially understand advertising messages. Later in the report, I explain how warning messages can affect consumers in multiple ways at various stages during the buying process, and explain how consumers interpret information and then make purchase decisions.

12. Second, I provide a framework that describes companies’ advertising and communication policies, their advertising goals, and the various means and strategies by which they can achieve these goals.

13. Third, I explain why products tend to be connected to a brand, a brand strategy, and a carefully designed set of brand associations, all of which can be adversely affected by warning messages.

14. Following this third framework, in Section V, I describe how the Warning Message at issue in this case is likely to influence and disrupt consumers’ perceptions of advertising messages, as well as companies’ decisions about their advertising and marketing mix over time.

A. Consumer buying process

15. To better understand how a warning message can impact consumers, it is important to consider the process surrounding a consumer’s purchase decision. The consumer buying process is a widely accepted concept in the marketing literature, which proposes that consumers make purchases based on a series of activities that result in purchase and postpurchase consumption. The most well-known model describing the consumer buying process, as described by Kotler and Keller, proposes that “the consumer typically passes through five stages” as depicted in Exhibit 1:

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Exhibit 1: Kotler and Keller’s description of the buying process.⁶

16. Consumers do not always pass through all of these five stages extensively and might reverse or even skip some of them in the context of some specific purchases. For example, with familiar brands, consumers may skip the information search stage and use a shortcut to make a decision. These shortcuts are well-developed for repeat purchases for which conditions and information remain unchanged. When novel or salient information (e.g., a prominent warning message) is introduced, consumers are likely to reconsider some or all stages of their buying process.

Companies are cognizant of consumers’ tendencies to pay particular attention to new information — they therefore frequently incorporate new content into their advertising strategies. For example, when attempting to boost sales, companies may debut a new advertising message to attract the attention of consumers and nudge them to repeat their information searches and evaluations of product alternatives.⁷ Similarly, prominent and intrusive new information, such as

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that in a warning message, is likely to interfere with consumers’ processing of an advertisement’s intended message and draw consumers’ attention to the warning message. In the following section, I will explain each of these stages and their importance to consumer behavior.

**Problem recognition**

17. At the beginning of the Kotler and Keller consumer buying process, the consumer recognizes a problem or need; which can be very basic, such as hunger or thirst, or more advanced and complex, such as the need for a luxurious means of transportation (e.g., a luxury automobile) or the longing for (a moment of) “happiness.” For instance, a consumer returning home from a particularly hard or long workday may search for a beverage or snack to provide comfort or a treat before turning to the rest of their day’s activities. In this context, the consumer has numerous options. She can grab a drink or snack that is available (e.g., in her refrigerator or pantry); she can carefully think about what beverage or snack to buy; or she can purchase a snack or beverage without much thought, following an already-established routine. The first two options described above (selecting an option from her refrigerator or pantry or carefully thinking about what option to purchase) potentially involve an elaborate information search process.

**Information search**

18. Information sources for our representative consumer are abundant. *Personal* information sources such as friends, family, or neighbors, *commercial* sources such as advertisements, *public* sources such as consumer-rating organizations or Internet-based reviews, and the consumer’s own *experience* with a product can provide relevant insights and ideas as to which product — and, in this specific case, which beverage or snack — would seem most suitable to fulfill her particular need. According to Kotler and Keller, each information source performs a different role in influencing the purchase decision. Messages from commercial sources often play an important role in providing consumers with important decision-making factors such as the product’s brand, unique product characteristics (e.g., taste or heritage), price (e.g., coupons and rebates) and/or

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availability (where the product is sold). Likewise, where applicable, government marketing (through advertising on radio, television, newspapers and other media) can provide an effective means of providing information to consumers.

19. Gathering information allows consumers to learn more about product attributes as well as brands and brand associations. I explain the importance of brands in Section IV.C but will point out here that a consumer may encounter dozens of brands at the beginning of a product search. When our representative consumer enters a supermarket aisle, for instance, she faces a large variety of beverages and snacks while considering potential options. Most likely, this consumer will not engage in an extensive information search about each available product, but will focus on beverages or snacks with brands of which she is aware — be it through word-of-mouth, advertisements, promotional trials, coupons, and numerous other ways through which companies promote their brands. Oftentimes, a consumer will be aware of a dozen or more brands — an “awareness set” that she will typically limit further before making a purchase.

20. In order to further select from among the brands of which she is aware, a consumer will utilize the information learned from her information search and prior experiences to build so-called “consideration sets” to evaluate the alternatives at hand.

*Evaluation of alternatives*

21. Facing a dozen or more potential brands and/or products, the consumer will next proceed to reduce her potential choices on her way to arriving at a final judgment. One of the most well-known approaches to describe this process is the expectancy-value model. According to this model, “[t]he consumer arrives at attitudes toward various brands through an attribute evaluation procedure, developing a set of beliefs about where each brand stands on each attribute.”¹⁰ For each product in consideration to be purchased, the consumer then assigns importance weights to each of these beliefs and calculates the sum of all beliefs multiplied by each belief’s importance weight.

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22. For our representative consumer who has gathered information about various snacks and beverages, for instance, the main drivers of consumer choice may be a mix of: (1) physical attributes such as size or consistency; (2) sensory attributes such as taste and color; and (3) intangible benefits such as the tradition and values that some brands may symbolize, as opposed to other brands that are positioned as youthful and rebellious. Based on the expectancy-value model, each of these attributes would provide a belief about a benefit — in economics often referred to as “utility” — which then would be weighted by each consumer in order to identify the most favorable alternative for the consumer’s purchase decision. Of note, Kotler and Keller mention that the marketer can change several elements in this process. For example, using advertisements, marketers can attempt to alter beliefs about their own brand, beliefs about competitors’ brands, and the importance of the weights consumers assign to various attributes.\textsuperscript{11} In the same vein, marketers also can attempt to call attention to less-known attributes.

23. Consumers do not always use the expectancy-value model to make purchase decisions. Frequently, they combine the expectancy-value model with other decision-making processes that are simpler and less time consuming, or they rely on these simpler processes alone. For example, when consumers face a large set of product alternatives, they often use simple “mental shortcuts” — called heuristics — to reduce the number of options to a smaller consideration set. For our representative consumer, for instance, a heuristic such as “needs to be a brand with heritage” will keep certain brands in the choice set, but will likely remove others (e.g., more youthful and “edgy” brands) that do not fit that heuristic. Another example of a mental shortcut of the same type could be that the consumer demands that a beverage “needs to be non-carbonated.” This simple decision-making rule would cause all sodas to be removed from the consideration set, but would keep fruit juices, sports drinks, coffee, etc. in the consideration set.

24. Depending on the information available, consumers can create numerous simple rules that may result in very different consideration sets. Professors Payne, Bettman, and Johnson speak of the consumer as “the Adaptive Decision Maker” and have written a widely-known book with this title. One of the simple rules mentioned in this book and frequently applied in purchase decisions is known as the “elimination-by-aspects” rule. According to this heuristic, a consumer

\textsuperscript{11} Kotler and Keller (2012), p. 168.
would first determine the most important attribute she is searching for in a product and then use a cut-off value — a hurdle, so to say — which has to be met or exceeded by the attribute. 12 This first cut-off rule could be as simple as “must remind me of my childhood.” After eliminating any products/brands found in her refrigerator or pantry or on a supermarket shelf that do not qualify, the consumer would then use a similar cut-off for the next most important attribute, such as “needs to be consumed cold.” At this point, the choice set could contain ice cream, soda, or pudding.

25. Introducing a warning message into this process of evaluating alternatives is likely to substantially change consumers’ information processing. The addition of a warning message could alter whether particular brands survive many consumers’ processes of eliminating choices depending on their heuristics. For instance, if a warning message is sufficiently prominent, it could interfere with the criteria that consumers use to evaluate products during the process of “elimination-by-aspects.” Rather than prioritize a product that is cold and reminds them of their childhood, our representative consumer may suddenly prioritize a strong decision rule such as “I want to enjoy something simple, comforting, and non-problematic,” such as that “if it carries a warning message, I will not consider it.”

Purchase decision

26. Whether our consumer applies shortcut heuristics or systematic expected-value comparisons, her final decision will depend on her product knowledge, her beliefs, and her goals for that decision. Commercial and non-commercial sources of information can shift these perceptions and attitudes, but doing so is part of a complex process that has to be carefully designed in order to get consumers’ attention, engage their interest, and ensure their comprehension. Introducing new elements to this process — such as a warning message — will short-circuit and disrupt many consumers’ information search, evaluation of alternatives, and purchase decision as I will discuss in a later section of this report. 13

**Postpurchase behavior**

27. The consumer buying process does not stop after the purchase decision has been made, but considers the postpurchase stage as another important component. Before purchasing a product, consumers have a certain set of expectations based on their needs and resulting from their information search. Once a product has been purchased and consumed, the consumer assesses its performance. Given this new information, the consumer will evaluate the product’s performance and quality relative to expectations, leading to a measure of greater or lesser satisfaction. Consumers who are satisfied with their purchases are likely to become repeat purchasers.

28. After purchase and/or consumption, consumers might experience dissonance; i.e., thoughts and emotions\(^{14}\) that cause them to doubt their purchase. For instance, our representative consumer might see an advertisement for another product that makes her regret her choice, or recall a negative experience that she associates with a previous time that she consumed that product. If a marketer does not manage dissonance, consumers’ second thoughts about their purchases might reduce satisfaction with the product, create negative word of mouth, and decrease the chance of repeat purchases. Marketing communications help to reduce or avoid dissonance. Using the example of the representative beverage- or snack-seeking consumer once more, she may encounter a Girl Scout cookie stand in front of the supermarket and purchase Thin Mints cookies. After consuming them, any dissonance she could potentially experience may be alleviated by the images on the cookie box, creating positive associations (e.g., with youth or nostalgia), and reminding her of the contribution she made that supports a favorable cause. In other words, consumers’ postpurchase satisfaction is not only driven by the product itself, but also by a company’s marketing communications. In fact, some companies’ advertising is specifically directed at consumers in the postpurchase or post-consumption phase.\(^{15}\) Disrupting a marketer’s postpurchase communications, e.g., by imposing a warning message, can enhance dissonance and decrease consumer satisfaction.

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B. Companies’ advertising and communication policies

29. I will next discuss how companies develop effective communications, including advertising. This framework is well accepted in the marketing literature and is likewise useful for understanding my opinions in this case. The exhibit below represents a common depiction of the company’s communication management process. This process guides companies in providing consumers with the information and brand associations relevant for consumers to choose to purchase the company’s products and become satisfied, loyal, long-term customers.16

Exhibit 2: Steps in developing effective communications.17


Identify target audience and determine marketing objectives

30. The first step in the creation of a company’s communication policy is identifying a target audience for the company’s product or service. Knowing the target audience is critical to the subsequent decision-making process about branding and messaging. It is helpful to think of the audience in terms of its purchase motivations (as discussed above under problem recognition in the Consumer Buying Process) as well as its usage and loyalty. That is, how often does the target audience consume the product (i.e., do they eat ice cream weekly or on special occasions); and are they loyal to the brand (i.e., are they indifferent between Pepsi, Coke, and Dr Pepper, or will they drink only one brand)?

31. Companies can choose communication objectives along a number of different dimensions. Some of these are concrete measures of commercial success, for example, the objective to increase purchase intent. Others are more abstract and can include establishing associations in order to build brand equity. In the case of many products, such as most foods and beverages, brand awareness and positive brand associations are often a company’s primary objective. That is, the company seeks to improve consumers’ abilities to recognize a brand within the category of comparable products and to develop favorable associations with their brand. Oftentimes, fostering consumer recall is more difficult than creating brand recognition, which is why distinctive packaging and color differentiation are frequently utilized by companies seeking to establish brand awareness. For example, consumers are more likely to recognize Stouffer’s orange packaging than its name when asked to think of frozen entrees. Most importantly, brand awareness is foundational to establishing brand equity.

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20 Kotler and Keller (2012), p. 482, “Fostering the consumer’s ability to recognize or recall the brand within the category, in sufficient detail to make a purchase.”
Design advertising message and select communication channels

32. Significant resources and planning go into designing a company’s messages and determining how to convey that information to the public. When those messages are disrupted or undermined, it can cause significant damage to brand equity.

33. The optimal communication strategy requires the company to answer the following questions to elicit the desired response from its target audience:22

- **What should be communicated?** Otherwise known as the message strategy, companies seek to create themes, appeals, and ideas that aid in brand positioning within the market. The advertising message can relate to product attributes or to image associations.

- **How to convey the message?** The creative strategy of a company is equally as important as the message itself. A poorly communicated message can fall flat and have negative consequences for the brand. There are two broad classifications in which marketers translate a message into a specific communication: informational and transformational appeals. Informational appeals focus on product attributes and often rely on testimonials, product comparison ads, demonstration ads, or solution ads to convey a message. For example, blind taste tests could suggest that one product has a better flavor than another. Transformational appeals instead focus on non-physical attributes of the product, such as the experiences that might result from enjoying the product. The emotional component of transformational appeals can be triggered by advertisements that present the consumer desirable locations, such as a vacation island or a live concert. Eliciting emotions can be a challenging task for the advertiser and typically needs careful, sometimes iterative, field testing before a campaign is launched.23

- **Who should communicate the message?** The message and how it is conveyed may matter little if the source delivering the message does not appeal to the audience.

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Attractive and popular sources may result in better recall among consumers. However, the most important trait of a brand spokesperson is credibility.\textsuperscript{24} A credible or likable communicator can promote positive opinions of a brand or even reverse negative opinions. For example, Michael Jordan’s endorsement of Nike (e.g., his use of Air Jordans in the NBA) facilitated the brand’s popularity as a basketball shoe.\textsuperscript{25} In turn, a spokesperson lacking credibility can damage the advertisement message and ultimately the brand.\textsuperscript{26}

34. Communication channels fall into two broad categories: personal communication channels and non-personal communication channels. The full set of communication options is fully described in the following section.

35. To create strong, favorable, and unique brand associations in memory, the message content, message communication, message communicator, and message channels have to be carefully selected. As explained above, numerous elements of communication must be considered when an advertisement and its message are designed. Interference with these design efforts to create and sustain brand equity can result in severe damage to a product’s reputation and to a company’s brand.

\textit{Establish budget, decide media mix, and measure results}

36. Determining how much to spend on marketing communications is another important decision for a marketer. As Kotler and Keller state, spending for marketing communications varies substantially across industries and companies. Marketing theory distinguishes among four common approaches a company can take in setting its advertising budget: affordable,
percentage-of sales, competitive-parity, and objective-and-task.\textsuperscript{27} All of these methods seek to find a spending allocation that generates the greatest impact on achieving objectives such as brand equity, brand recall, brand awareness, and message recall.

37. Once the company determines its objective, designs a marketing message, selects the appropriate communicator of the message, and establishes its budget, it has to decide which mode or channel of communication will most efficiently convey its intended message to its intended audience. Authors in marketing typically identify seven broad modes of communication: advertising, sales promotion, events and experiences, public relations and publicity, direct and interactive marketing, word-of-mouth marketing, and personal selling. In the case of soft drinks, all of these communication modes can be employed. In this report, I focus on two major forms, Advertising and Events & Experiences. Numerous forms of each of these seven communication modes are shown in Exhibit 3.

\textsuperscript{27} Kotler and Keller (2012), pp. 488-490.
Exhibit 3: Common communications modes.\textsuperscript{28}

38. Brand-level advertising is pervasive and allows a company to repeatedly reach a geographically diverse set of consumers. It also exudes positive images about a company’s brand. Nike is an example of a brand that has built up a long-term image through communication and advertising methods.\textsuperscript{29} Such advertising can be communicated through many channels. Print advertisements and billboards are two among many advertising approaches a company can choose to promote its brand. Other advertising forms include but are not limited to television commercials, point of sale displays, Internet ads, radio, and product placement in entertainment programming.

Companies use various media to communicate a brand message to consumers. Access to a variety of media permits companies to tailor their message content to various audiences and

\textsuperscript{28} Kotler and Keller (2012), p. 479.
\textsuperscript{29} Keller (2013), p. 562.
market segments by making certain attributes and/or brand associations more salient, or simply to take advantage of lower costs (e.g., Internet banners vs. Super Bowl commercials).

39. Events and experiences also provide a way for companies to communicate with consumers. For instance, many beverage brands sponsor sporting events and concerts, as well as provide products for those events. These modes can be particularly effective because experiences are often more engaging for the consumer, offering a positive association with the product.

40. If one type of communication does not provide an efficient means to reach its consumer base, a company will redirect its communication strategy to a more effective media mix. If target values for brand and message recall, repeat purchases, or brand awareness are not meeting expectations, marketers will seek to change the company’s communication strategies until its effectiveness and efficiency measures indicate that communication objectives are met.30

41. Requiring advertisers to include a warning message on a particular medium, for instance, would diminish the effectiveness and efficiency of that medium by introducing negative messages about a product or brand and reducing the likelihood that consumers will perceive and retain the marketer’s intended message. Advertisers are likely to shift their communication strategies away from such media to more efficient alternatives.

C. The importance of brands and brand equity for consumers’ decision-making

42. Brands capture the combined effect from consumers’ experiences and companies’ communications. The consumer beliefs and attitudes throughout the buying process mentioned in prior sections of this report are largely sensitive to the traits and equity connected to the products’ brands.

43. The American Marketing Association defines a brand as a “name, term, sign, symbol, or design, or a combination of them, intended to identify the goods and services of one seller or group of sellers and to differentiate them from those of competition.”31 The term brand itself originates from the Old Norse word “brandr,” which translates into the English verb “to burn” — similar to

30 Of note, Kotler and Keller’s Marketing Management is widely considered as the standard resource for practitioners as well as educators.

farmers marking their livestock as a means of identification and signal of ownership.32 Aside from helping to identify the source of a product, brands serve numerous functions for consumers: they are risk reducers and search cost reducers, and they can signal quality.33

44. The more prominent a brand is to consumers, the more likely its economic success and resulting chance for long-run stability. For example, Colgate has been a leading brand in the toothpaste category for many decades,34 and is still considered to have strong brand equity.35 According to my colleague Professor Keller, “[c]ustomer-based brand equity occurs when the consumer has a high level of awareness and familiarity with the brand and holds some strong, favorable, and unique brand associations in memory.”36 Brand names are particularly important in the food and beverage industries37 because these products are experience goods and their value is at least partly derived from consumers’ emotional attachments to brands, both from individual consumption experiences and those of family members.38

Exhibit 4: Components of brand equity.

As depicted above in Exhibit 4, the strength element of brand equity relates to the awareness and recall of a brand’s name and image in consumers’ minds. As indicated above, Colgate’s brand strength and recognition transcends all generations of consumers throughout the US. Favorable associations are obviously important, as in the long term, a brand can only be successful if its associations are viewed in a positive light across consumers in the marketplace. For example, while unfavorable brand associations — such as the ones generated in the 2010 BP oil disaster — can still create much awareness, they hurt a brand (and in the case of BP, attempting to rehabilitate the brand in a positive light required enormous funds). In contrast, favorable associations such as the emotional relationships a consumer can have with a brand (e.g., associating the Colgate brand with trust and protection) build strong brand equity. Finally, uniqueness is important because consumers are more likely to buy the brand that differentiates itself from its competitors. In order to create and increase brand equity in terms of strong, favorable, and unique brand associations, marketers select from a set of communication approaches, which are often optimized over years and even decades. For many companies, building brand equity for the company is another important objective. Corporate brand equity “can be a powerful means for firms to express themselves in a way that isn’t tied to their specific products or services.” Interfering with any of these long-term programs with a warning message can create harm to a brand and may result in a reduction of brand equity that is beyond repair. Such disruptions can have long-run implications for a company’s success and financial viability.

39 To create favorable associations, “marketers often must link their brands to other entities, for example, people, places, things or other brands, as a means to improve their brand equity.” Keller, Kevin Lane, “Brand Synthesis: The Multidimensionality of Brand Knowledge,” Journal of Consumer Research, Vol. 29, March 2003, p. 595.
V. Introducing the Warning Message will interfere with consumers’ buying processes and companies’ advertising and branding strategies

46. Introducing a warning message on some forms of advertisements for a select set of products will alter consumers’ understanding of the messages conveyed by those advertisements and disrupt consumers’ perceptions of affected brands. In simple terms, advertisements intended to convey carefully crafted themes and messages would be converted by the Warning Message into platforms that would weaken, neutralize, or even counteract those intended messages. Those effects will be exacerbated by the Warning Message’s prominence (filling 20 percent of the advertisement) and the signals that it will send by its severe text (e.g., an all-caps WARNING).

47. The Warning Message is highly likely to signal that products with the Warning Message are harmful and more likely to contribute to obesity and other diseases than products whose advertisements do not carry the Warning Message — i.e., that there is something unique, and uniquely harmful, about products with the Warning Message. By sending this signal the Warning Message is very likely to cause consumers to short-circuit their buying processes in favor of other products, even if those other products contain similar or greater amounts of calories and sugar as the products whose ads bear the Warning Message.

48. To preserve brand equity, companies whose advertisements are affected by the Warning Message would shift their advertising and branding strategies towards other marketing means, such as different advertising media.

A. The Warning Message will effectively disrupt the advertisements’ intended message

49. As I mentioned in Section IV of this report, advertising messages are carefully developed and tested in order to ensure that they reach their target audience and convey content that will help consumers to recall strong, favorable, and unique brand associations. In general, adding any further content to a carefully designed advertisement is likely to change its message and therefore the set of characteristics that a consumer associates with that brand. Adding a large, highly salient warning message such as the one proposed by the City and County of San Francisco could alter or even override the intended message a consumer receives from an advertisement for several reasons, as I explain below.
Content of the Warning Message disrupts consumers’ processing of the advertisements’ message

50. The content of the Warning Message will interfere with consumers’ information search, evaluation of alternatives, product choice, and postpurchase experience for several reasons. The severity of the Warning Message and its prominence (see below) will likely cause consumers to perceive the Warning Message as one of the primary messages of the advertisement, if not the primary message of the advertisement, detracting from — if not overwhelming — the carefully-designed message intended for the consumer. Empirical research has shown that increased message severity (warnings with intensified perceived threats) leads to a deeper, more focused processing of the warning message’s content.44

51. Due to the saliency of the Warning Message, consumers presented with these labeled advertisements will focus on the content of the Warning Message, instead of other messages intended by the marketer. The effect of consumers honing in on a highly salient message such as the one in the Warning Message is a phenomenon known as focusing illusion. When operating under this bias, consumers make decisions based on the most prominent and distinct information they have available, to the detriment of other relevant but less alarming information.45 Hence, consumers’ information processing can be short-circuited by the prominence of the Warning Message, creating a mental shortcut (e.g., “If it has a warning message, I would rather look for something else”) instead of triggering a search for more information about the product — or the Warning Message’s accuracy. For many consumers who rely on such heuristics, the Warning Message’s presence would cut off consideration of a given product. Such decisions in the presence of the Warning Message would be largely informed by a message not originally intended by the advertisement and its sponsors.


Prominence of the Warning Message disrupts consumers’ information processing

52. In addition to the focusing illusion caused by the prominent and distinct content of the Warning Message, consumers’ processing and interpretation of the speaker’s originally intended message will also be impaired — if not inhibited — by the prominence of the Warning Message itself. According to the Ordinance, the Warning Message has to be at least 20 percent of the advertisement’s total area, with the “WARNING” header in all capital letters, and a border the same width as the downstroke of the “W” and the same color as the warning text. Due to its prominence, many consumers could perceive the Warning Message as the primary message of the advertisement; which would disrupt their processing of the advertisement’s originally intended message.

53. As explained in Section IV.A, because the Warning Message is new and prominent, consumers are very likely to pay more attention to the label and the label’s message, and less attention to the remainder of the advertisement. Some consumers will consider the Warning Message more heavily than other attributes, thus distorting their information search and evaluation of alternatives. For consumers whose evaluation process predominately relies on heuristics, the prominent Warning Message could create a rule that removes all sodas from their consideration set while allowing other foods and beverages (such as cookies, French fries, or smoothies) with similar or more calories to pass the test.

B. The Warning Message will signal to many consumers that beverages carrying the Warning Message are more harmful than other beverages and foods without the Warning

54. As explained more fully below, the Warning Message broadly signals to consumers the message that drinking beverages with added sugar is dangerous and more likely to make them develop
obesity, diabetes, and tooth decay than consuming other products whose ads do not contain the Warning Message. Particularly because consumers tend to overestimate the risks associated with warnings as described below, companies will avoid advertising that conveys those negative messages about its brands.

55. In Section IV of this report, I explained how consumers search for information and evaluate alternatives using their insights to either create a consideration set of relevant products or make a purchase decision. As I indicated, the process of forming a purchase decision is sensitive to the specific information considered by consumers. The novelty, prominence, and severe nature of San Francisco’s Warning Message will send particular messages to consumers and will cause some consumers to overweight that information in their decision-making processes.

56. For instance, the Warning Message tells consumers that drinking beverages with added sugar contributes to developing diseases such as obesity, diabetes, and tooth decay — without giving any consideration to their other dietary or lifestyle decisions. Indeed, I understand the Warning Message would appear on advertisements for a brand regardless of the advertisement’s underlying content. As a result, the Warning Message would appear even on routine advertisements for many beverages with added sugar (such as sports drinks and certain soda brands) that show an athlete or an individual engaged in significant physical activity — suggesting in that context that even for individuals engaged in physical activity, sports, and exercise, drinking a sports drink or soda is harmful and risky. In addition, because the Warning Message specifically points to “added sugar(s)” alone, and the Warning Message does not appear on foods or beverages with naturally occurring sugar, many consumers will understand the Warning Message to indicate that drinking beverages with natural sugar does not pose the health risks identified by the City.

57. Another effect of the Warning Message relates to a spillover of negative connotations onto products that should not be affected by the Warning Message. Although the Warning Message would apply only to a subset of a company’s products, the association between the Warning Message and the company’s brand names and logos may cause changes in consumers’ broader brand associations. Specifically, the consumer may associate the Warning Message with other
products under the brand’s broader umbrella, even though some of these products may include zero calories.

58. The implication of a health risk in the Warning Message will likely impact consumer’s processing of the advertisement message. Risk perceptions — especially for negative outcomes such as life-threatening events and health consequences — have been demonstrated to be overvalued by consumers. For example, Finucane, Slovic, and Mertz have shown that the risk of the extremely rare event of contracting diseases from blood transfusions is vastly overestimated by the general population. Similarly, researchers have observed that the perceived risk of rare fatal events, such as airplane crashes, is multiple times higher than the actual risk.

59. The literature on information processing theories suggests that consumers are more likely to recall dramatic and/or salient events when conducting a memory search to evaluate the risk of events. As a consequence, the characteristics or information associated with salient events are weighted disproportionately more heavily by consumers in their purchasing decisions than other available information, thus distorting their risk perceptions. This effect would likely cause consumers to perceive products with the Warning Message as more dangerous than similar products without the Warning Message, even if the unlabeled products contain similar or more sugar or calories.

60. Studies on the effects of warning messages in other industries have confirmed that consumers overestimate risks that they derive from warning messages. For example, researchers found that, when presented with online advertisements bearing a warning message for a hypothetical ADHD prescription drug, consumers overestimated the risks associated with treating ADHD to such an extent that they were more likely to avoid the product. This is consistent with previous research showing that warning messages can lead to exaggerated risk perceptions.

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extent that they would rather not take the drug at all.\textsuperscript{54} When measuring the effect of “black box” warning messages on actual antidepressant drugs for children and adolescents, observational studies found that, due to incorrectly shifted risk perception based on the warning messages, antidepressant prescriptions from physicians decreased and suicide rates instead increased.\textsuperscript{55} Another study showed that consumers’ perceived source of a warning could influence how heavily they weight the warning message, finding that consumers were more likely influenced by a public source they believe to be impartial than by a commercial source.\textsuperscript{56}

61. Consumers may infer that products without the Warning Message do not contribute to the effects described on the warning. This effect of switching from one consumption good to another one that satisfies the same consumption motivation and/or usage situation (e.g., refreshment in heat, relaxation while watching TV) has been established in the marketing literature.\textsuperscript{57} In a similar vein, it is likely that some consumers will not even carefully evaluate the takeaways from the Warning Message in their decision-making process, and instead — driven by the prominence of the label — use simple rules following the aforementioned elimination-by-aspects process, or an “it must have – it cannot have structure” (“if it carries a warning message, I will not consider it”).

62. In summary, on the one hand, consumers’ risk perceptions are distorted by warning messages, such that consumers expect negative outcomes (e.g., obesity, diabetes, tooth decay) to be much more likely than they in fact are. On the other hand, at least some consumers will take away from the City’s warning that products whose advertisements do not carry the warning message are better choices even when they could contain more sugar and/or calories than products whose advertisements do carry the Warning Message. This consideration may be driven by simple decision-making heuristics as well as the elaborate weighting processes — in both cases consumers will forego the product with the Warning Message and turn their attention to other products (e.g., a sugary snack rather than a can of soda). Thus, consumers may perceive


\textsuperscript{56} Munoz, Chebat, and Suissa (2010).

\textsuperscript{57} Ratneshwar and Shocker (1991).
products carrying the Warning Message as harmful, whereas they may perceive products that do not carry the Warning Message as non-harmful, or at least evaluate them without the interference of the Warning Message.

C. Displaying the City’s warning on the companies’ ads would harm the companies’ brands, both within and outside the City and County of San Francisco

63. As I explained in Section IV.C, brands are carefully crafted concepts that help consumers to identify the source of a product, reduce uncertainty and search costs, quickly assess quality, and convey unique, favorable associations. If a brand’s image, meaning, or associations are affected by external factors, consumers’ perceptions of the brand may rapidly change. In the case of negative external factors affecting consumers’ perceptions, the company would have to devote substantial resources and effort to rehabilitate the brand and rejuvenate consumer’s positive feelings about the brand. Even so, it could take years to begin to repair a “tarnished” brand image, if possible at all.\textsuperscript{58} The proposed Warning Message could be an external factor altering consumers’ feelings about the brand.

64. The empirically-established theory of informational cascades suggests that external factors, specifically, new information, can disrupt consumers’ attitudes (e.g., their image of a brand). “Informational cascades describe how people converge on adopting a behavior with increasing momentum and declining individual evaluation of the merits of the behavior, due to their tendency to derive information from the behavior of prior adopters […] The essence of informational cascades is that even though individuals make decisions based on their own private information, their decisions are influenced by other people’s decisions, too.”\textsuperscript{59} Further, the theory states that cascades are fragile and easily triggered by new information, even if that information initially affects only a limited number of people.\textsuperscript{60}

\textsuperscript{58} See Swanson (2013).
\textsuperscript{60} Golder and Tellis (2004), pp. 208-209.
As discussed at various places in this report, the proposed Warning Message would be new information in a novel presentation to consumers — a potential trigger for an informational cascade affecting the brand image. While the carefully developed brand image of a beverage company could currently elicit consumer associations with concepts such as “familiarity,” “tradition,” and “taste” or connotations such as “America,” the introduction of the Warning Message would introduce a new set of associations that interfere with the brand image established over many years by a company’s marketers. These conflicting associations could supersede the previously mentioned existing associations with concepts such as “obesity,” “diabetes,” and “tooth decay” or connotations such as “danger.” In turn, consumers would, at least to a certain extent, include these imposed associations into their buying process.

![Diagram of brand associations](image)

*Exhibit 5: Schema of brand associations (adapted from Keller, p. 73).*

Due to the nature of informational cascades, this new information beginning in San Francisco could trigger a chain of similar effects throughout the rest of the relevant market. Thus, the harm to brands could be significant and potentially irreparable. Such disruptions can have long-run implications for a company’s success and financial viability, which, if compromised, would limit the company’s competitiveness in the marketplace. Acknowledging these threats, companies are likely to attempt to adjust their advertising strategies to avoid the potentially irreparable damage that would be caused by presenting the Warning Message to consumers.
D. As a reaction to the implementation of the Warning Message, companies will shift their advertising budgets from covered media to non-covered media

67. As discussed previously in Section IV.B, a company chooses its media mix to communicate its message efficiently and effectively to consumers. Imposing the Warning Message on covered media would reduce the effectiveness of those particular forms of media for accomplishing advertising objectives. Companies whose advertising methods are affected by the Warning Message would likely reallocate resources to other channels of communications in order to avoid the above discussed effects of the Warning Message, such as skewing consumers’ perceptions, disrupting the advertisements’ intended messages, and introducing negatively-perceived brand associations. Various authors have described how affected companies in similar situations shift their resources and efforts towards other channels (in this case, newspapers, magazines, circulars, television commercials, online ads, social media, in-store promotions and trials, coupons, celebrity endorsements, and numerous other means of communication)\(^{61}\) (see Exhibit 3).

Because advertising through covered media requiring the Warning Message may no longer be effective or efficient advertising, companies would most likely shift their advertising strategies and budgets away from covered media to other more effective or efficient marketing and communication approaches. Specifically, companies may limit local San Francisco advertising spending and instead focus their resources on national media sources, which would still reach San Francisco residents or local media that is not covered (e.g., newspapers, flyers, etc.). At the same time, products that are not subject to the Warning Message will have an advantage relative to those that are. Companies that previously advertised successfully using covered media will lose those avenues for effectively and efficiently communicating with the public.

68. The Warning Message not only affects the manufacturers of beverages, but is likely to also influence retailers. For example, supermarkets frequently have in-store promotions for products such as soda as a means to draw consumers into the store, who will then purchase additional products.\(^{62}\) The Warning Message would likely affect supermarkets’ use of this frequently


applied strategy, as various media used for announcing such promotions fall under covered media. The Warning Message is likely to cause consumers to associate not only the beverage brand but potentially also the retailer’s brand with negative associations. Some retailers could react by disfavoring affected brands and products to avoid those negative associations.

Peter N. Golder

January 12, 2016
APPENDIX A
CURRICULUM VITAE
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**ACADEMIC EXPERIENCE**

Dartmouth College, Tuck School of Business  
Professor of Marketing, 2009-present  
Marketing Group Coordinator, 2015-present  
Co-Editor-in-Chief, *Marketing Letters*, 2015-present  
Faculty Fellow, Dartmouth College’s Society of Fellows, 2014-2017

New York University, Stern School of Business  
Professor of Marketing, 2008-2009  
Coordinator, Marketing Department Doctoral Program, 2008-2009  
George and Edythe Heyman Faculty Fellow, 2004-2009  
Associate Professor of Marketing, 1999-2008 (tenured in 2002)  
Assistant Professor of Marketing, 1995-1999

Peking University, Guanghua School of Management  
Visiting Professor of Marketing, 2006-2007

University of California, Los Angeles (UCLA)  
Visiting Assistant Professor of Marketing, 1994-1995

University of Southern California  
Research and Teaching Assistant, 1990-1994

**EDUCATION**

Ph.D. in Business Administration (Marketing), 1994  
University of Southern California, Los Angeles, CA

B.S. in Mechanical Engineering, 1984  
University of Pennsylvania, Philadelphia, PA

**HONORS**

Maynard Award for *Journal of Marketing* paper making the most significant contribution to marketing theory and thought (2013)

Elsevier Distinguished Scholar Award from Society for Marketing Advances—career achievement award for “brilliant work and nurturing of the historical method in research in marketing” (2012)

INFORMS Society for Marketing Science Long Term Impact Award—chosen from all papers published in *Marketing Science* during preceding 10 years (2012)
Excellence in Global Marketing Research Award, American Marketing Assoc. (2011)
Executive MBA Great Professor Teaching Award (2008)
Finalist, Little Award for Best Paper in Marketing Science (2007)
Finalist, Bass Award for Best Dissertation-based paper in Marketing Science (2007)
Best Paper Award, American Marketing Assoc. Technology and Innovation Group (2005)
Berry Book Prize (Best Book in Marketing), American Marketing Association (2003)
Early Career Award for First 10 Years of Contributions to Marketing Strategy Research, American Marketing Association (2003)
Editor’s Award for Reviewing, Journal of Marketing (2003)
Marketing Science Institute Young Scholars Program Faculty Member (2006, 2001)
O’Dell Award for Journal of Marketing Research paper making the most significant long-term contribution (1998)
Bass Award for best paper in Marketing Science or Management Science based on a marketing doctoral dissertation (1998)
Faculty Advisor Award for Field Study Achievement (UCLA - 1995)
Beta Gamma Sigma (1994)
Richard D. Irwin Dissertation Award Winner (1993)
AMA Doctoral Consortium Fellow, University of Illinois (1993)
Graduate of Conoco's Management Development Program (1985)
Second Prize, Senior Design Project, University of Pennsylvania (1984)
Pi Tau Sigma, National Honorary Mechanical Engineering Fraternity (1984)

JOURNAL PUBLICATIONS

- Harold H. Maynard Award for Journal of Marketing paper making the most significant contribution to marketing theory and thought (2013)


- Selected by JM Editor as single article from issue to feature on JM Blog
- Basis of our article in Financial Times (see Other Publications)
- Basis of our article in BusinessWeek online (see Other Publications)
- Featured on The Chronicle of Higher Education News Blog


- Robert D. Buzzell Best Paper Award from Marketing Science Institute (2007)
- Featured in Handelsblatt, a top German economics and business periodical
- Featured in *Insights from MSI* (Marketing Science Institute)
- Reprinted in ICFAI’s *Journal of Brand Management*


- INFORMS Society for Marketing Science Long Term Impact Award (2012)
- Best Paper Award, American Marketing Association Technology and Innovation Group (2005)
- Also published in the Marketing Science Institute working paper series and featured in their periodical, *Insights from MSI*


- INFORMS Society on Marketing Science Inaugural Practice Prize (finalist)


- Excellence in Global Marketing Research Award, American Marketing Association (2011)


- Featured in *The Wall Street Journal* (front page) and *Advertising Age*


- Frank M. Bass Award (1998) for best paper in *Marketing Science* or *Management Science* based on a marketing doctoral dissertation
- Featured in *The Wall Street Journal* (front page)
- Published in the Marketing Science Institute working paper series


- Featured in *The Wall Street Journal, The Economist, The Los Angeles Times, WirtschaftsWoche* (German business magazine) and *Harvard Management Update*
- Reprinted in *Harvard Business Manager*
- Invited keynote presentation at the Conference Board’s 1996 Marketing Conference


- William F. O’Dell Award (1998) for long-term contribution to the marketing discipline
- Findings referenced in *Wall Street Journal* op-ed article

**BOOKS AND OTHER PUBLICATIONS**


- Selected by Harvard Business Review as one of the top ten business books of 2001
- Reviewed in Harvard Business Review (September 2001)


- Winner of Marketing Science Institute Best Paper of the Year Award

RESEARCH INTERESTS
Market Entry, New Products, Market Leadership, Quality, Global Marketing, Branding

TEACHING INTERESTS
Marketing Concepts, Global Marketing, New Products, Marketing Strategy

PROFESSIONAL EXPERIENCE
Northrop Corporation, 1986-1990
Conoco, 1984-1986

GRANTS
NYU Stern Berkley Center grant from Kauffman Foundation (2006)
NYU Stern Berkley Center grant from Kauffman Foundation (2005)
Richard D. Irwin Dissertation Fellowship - National Award Winner (1993)
U.S. Department of Education - Awarded through Center for International Business Education and Research at University of Southern California (1993)
Dissertation Fellowship from Center for International Business Education and Research at University of Southern California (1992)
Marketing Science Institute (1992)
Fellowship, University of Southern California (1990-1994)
ACADEMIC SERVICE


Ad-hoc Reviewer: *Journal of Marketing, Journal of Marketing Research*

Dissertation Committee Chair/Co-Chair:
- Debanjan Mitra (placement: University of Florida)
- Rachel Shacham (placement: University of Minnesota)
- Tingting Fan (placement: Chinese University of Hong Kong)

Dissertation Committee: Jane Gu, Dmitri Markovitch, Sergio Meza

Co-Chair, Hot Thoughts on Innovation: Insights at the Intersection of Marketing and Technology, special interest conference sponsored by MSI and AMA, 2004.

Chair, Strategy Track, Winter AMA 2005, San Antonio, Texas

ASSOCIATIONS

American Marketing Association
Institute for Operations Research and Management Science (INFORMS)

*Revised January 10, 2016*
APPENDIX B
TESTIMONY IN THE LAST FOUR YEARS
Peter N. Golder
Testimony in the Last Four Years

United States Tax Court, Amazon.com, Inc. & Subsidiaries vs. Commissioner of Internal Revenue, deposed September 13, 2014, testified at trial November 20, 2014.

APPENDIX C
MATERIALS RELIED UPON
MATERIALS RELIED UPON

Legal Documents

Complaint for Declaratory and Injunctive Relief, The American Beverage Association, California Retailers Association, California State Outdoor Advertising Association v. The City and County of San Francisco, Case No. 3:15-cv-03415, United States District Court, Northern District of California, July 24, 2015.


Publicly Available Documents


Academic Literature


**Images**


Dr Pepper Advertisement, “DP-13810_654688_FullPage_r1_FPO.pdf,” received from counsel November 21, 2015.

APPENDIX D
ILLUSTRATIVE REPRESENTATIONS OF ADVERTISEMENTS
happiness. coca-cola.
WARNING
Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.
WARNING
Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.
WARNING

Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.