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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

Case No. 3:15-cv-03415 EMC

DEFENDANT CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Hearing Date: April 7, 2016
Time: 1:30 p.m.
Place: Crtrm. 5, 17th Fl.

Trial Date: None set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the City and County of San Francisco's mandatory warning on advertisements for sugar-sweetened beverages requires the disclosure of factual and accurate information that is reasonably related to San Francisco's significant interest in public health.

2. Whether San Francisco's warning requirement directly advances its interest in public health and is reasonably tailored to serve that interest.

3. Whether the warning requirement is facially valid where it applies broadly to concededly commercial speech but is alleged to also apply to some instances of noncommercial speech.

4. Whether Plaintiffs have shown that the remaining preliminary injunction factors favor enjoining the warning requirement.

INTRODUCTION

The City and County of San Francisco has adopted a requirement that ads for sugar-sweetened beverages (SSBs) display a simple warning: consuming these drinks contributes to obesity, diabetes, and tooth decay. This is not a controversial claim in light of the amount of sodas and other very caloric and non-nutritious sugary beverages that people drink, and in light of the mountains of scientific evidence about the health risks of such consumption. Because this simple warning is factual and accurate, and because it serves San Francisco's very strong interest in promoting the health of its citizens, sugary beverage advertisers have no First Amendment right not to display it on their commercial speech, and cannot show they are likely to succeed on the merits of their claim. The Court should deny the motion for preliminary injunction.

STATEMENT OF FACTS

A. Drinking Sugar-Sweetened Beverages Contributes to Obesity, Diabetes, and Tooth Decay.

Obesity and diabetes are a public health crisis. More than a third of American adults are obese, and another third are overweight. Among children, a third are overweight or obese. S.F. Health Code § 4201; Schillinger Rep. ¶ 8. Nearly one in seven adults, and more than one in five low-income or minority adults, has type 2 diabetes, and 40% of adults are pre-diabetic, placing them at risk to

develop diabetes in the near term. Schillinger Rep. ¶ 12. And nearly a quarter of American teenagers have type 2 diabetes or pre-diabetes. Many will face a lifetime of managing a complex disease and attempting to avoid complications like blindness and amputation. Schillinger Rep. ¶¶ 14-15.

Rates of obesity and diabetes have climbed in the United States for decades. Schillinger Rep. ¶¶ 10, 12-14. And while the last few years have seen a change in this trend—very recently, rates of obesity have plateaued, and diabetes rates have slightly dropped, Willett Rep. ¶ 21—the costs of these epidemics remain staggering. The national economic impact of obesity—in healthcare costs, lost productivity, disability, and premature mortality—is $227 billion annually. Schillinger Rep. ¶¶ 11. The mortality costs are still more alarming; "as a result of the substantial rise in the prevalence of obesity and its life-shortening complications such as diabetes, life expectancy at birth and at older ages" could actually be shorter for today's youth than their parents. *Id.* ¶ 10. And while tooth decay does not have the same dramatic impact on mortality as obesity and diabetes, it, too, is a chronic disease that can result in pain, infection, and tooth loss. *Id.* ¶ 23.

San Francisco has experienced its share of these epidemics, especially in its low-income and minority communities. Nearly a third of children and adolescents in San Francisco, and nearly half of its adults, are overweight or obese. S.F. Health Code § 4201; Schillinger Rep. ¶ 9. Nearly a third of San Francisco schoolchildren have tooth decay. *Id.* ¶ 23.

Obesity and diabetes are complex conditions, but obesity is widely acknowledged to be a risk factor for diabetes, Willett Rep. ¶ 50; and obesity, in turn, results when the body consumes caloric energy that it does not burn, *id.* ¶ 59. There is a broad consensus that reducing obesity will require Americans to consume less added sugar, *i.e.* sugar that is not naturally present in foods and beverages, which sweetens food but adds no nutrition. As Plaintiffs' own expert has put it, in assessing strategies to address excessive calories, a "***reduction in consumption of added sugars should head the list*** because they provide no essential nutrients."[1] This recognition is also reflected in the recent official recommendations of the federal agencies charged with formulating nutrition policy, *see* 7 U.S.C. § 5341(a), the 2015-2020 Dietary Guidelines for Americans, which now recommends that Americans

[1] R. Kahn & J.L. Sievenpiper, "Dietary Sugar and Body Weight: Have We Reached a Crisis in the Epidemic of Obesity and Diabetes?" *Diabetes Care* 2014; 37:961 (emphasis added).

consume less than 10% of their daily calories from added sugar.[2] Willett Rep. ¶ 9. The World Health Organization has recommended the same. *Id*. Many leading health organizations have recommended that individuals reduce their intake of SSBs or avoid them altogether, including the American Diabetes Association and others. Schillinger Rep. ¶ 27.

The single largest source of added sugar in the American diet is sugar-sweetened beverages, which alone account for about 40% of added sugar consumed, and this percentage is higher for children and teens. Willett Rep. ¶ 18. Although only about half of Americans drink soda regularly, those who do typically consume one or more sodas every day, and the biggest consumers of SSBs are young people, low-income people, and African-Americans and Latinos. *Id*. ¶ 17. The soda industry has increased the size of its servings in recent decades, from 6.5 ounces in the 1950s to 20 ounces today, and a single-serving 20-ounce soda alone contains 240 calories from added sugar—an amount that exceeds the total daily allowance for added sugar from all sources. *Id*. ¶ 15. And a significant number of people consume far more than that—20% of young adults, and 16% of teens, consume more than 500 calories per day from soda. *Id*. ¶ 17.

Unsurprisingly in light of these consumption levels, the link between SSB consumption and obesity and diabetes is well established by empirical research, including by large observational studies and by those randomized experimental trials that are feasible to perform.[3] The strength and consistency of this evidence establishes that consuming SSBs causes obesity and diabetes. Willett Rep. ¶¶ 68-69. While there is some debate about whether their contribution comes simply because they contribute so many non-nutritive calories to American diets, or whether there is ***also*** something especially obesity-causing about SSBs (such as that people do not compensate for soda calories by reducing calories elsewhere or because of the unique way the liver processes liquid sugar, *id.* ¶¶ 58, 61-62)—there is no reasonable dispute that SSB consumption and obesity are linked. Willett Rep. ¶ 19; Schillinger Rep. ¶ 21. Indeed, even the soda industry does not dispute this. Plaintiff American

[2] Federal law requires that the dietary guidelines be "based on the preponderance of the scientific and medical knowledge which is current at the time the report is prepared." 7 U.S.C. § 5341(a)(2).

[3] Nutritional hypotheses, particularly about complex and long-developing diseases, are notoriously difficult and expensive to test through randomized, double-blind trials. Willett Rep. ¶¶ 35, 72.

Beverage Association (ABA) and the largest soda companies have launched a "Balance Calories Initiative" under which they have "set a goal ***to reduce beverage calories consumed*** per person nationally by 20 percent by 2025, the single-largest voluntary effort by an industry ***to address obesity***." Ex. E to Declaration of Jeremy Goldman (emphasis added). There is similarly no dispute that consuming SSBs causes tooth decay. Schillinger Rep. ¶¶ 22-23.

B. San Francisco's Disclosure Requirement

This is not the first time San Francisco has tried to discourage SSB consumption to address obesity, diabetes, and tooth decay. In 2014, San Francisco voters considered an initiative, sponsored by the Board of Supervisors, that would have taxed the distribution of SSBs to discourage consumption and fund health education and other health programs. Ex. F to Goldman Dec. at 204. The measure won the support of more than 55% of the City's voters, but failed to garner the 2/3 approval it needed to pass. Ex. G to Goldman Dec. at 13. The American Beverage Association's California PAC spent more than $9 million to defeat the SSB tax, Ex. H to Goldman Dec. at 4, and the ABA has opposed similar tax proposals elsewhere. One argument the ABA makes is that a tax on SSBs "won't solve the complex challenges of diabetes and obesity"; instead "education is the key to addressing obesity and diabetes." Ex. I to Goldman Dec. at 1.

San Francisco agrees that education is important, and has sought to educate people about the contribution of SSBs to obesity and diabetes through public education campaigns. Declaration of Christina Goette, ¶ 4. But the City would be hard pressed to match the scale of the marketing efforts of the soda industry, whose advertising is ubiquitous in many stores in San Francisco, especially in low-income and minority neighborhoods, Exs. A-C to Goette Dec., and whose total worldwide marketing expenditures total in the multi-billions. Marion Nestle, *Soda Politics: Taking on Big Soda & Winning* (2015), at 117. The soda industry, too, purports to educate consumers about avoiding obesity—but this effort appears to consist solely of uninformative platitudes like "calories count," Ex. C to Goette Dec. at 1, and "balance what you eat, drink and do," ECF No. 50-9.

In an effort to help San Franciscans make better and more informed drink choices, the City enacted Ordinance No. 100-15 ("Ordinance") on June 25, 2015, codified at San Francisco Health Code §§ 4200-4206. Ex. D to Goldman Dec. As of July 25, 2016, the Ordinance will require SSB ads in

San Francisco to include the text, "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." §4203(a). This message must cover at least 20% of the ad and be set off in a rectangular border. *Id.* The design, text, and size of San Francisco's warning all comport with internationally accepted design standards for health warnings, and for that reason the warning is likely to be effective at informing consumers of the health risks of SSBs, changing attitudes toward SSBs, and persuading consumers to adopt healthier habits. Hammond Rep. ¶¶ 38-39. A recent study showed that a significant number of parents reported they would not choose SSBs for their children after viewing a similarly worded warning. *Id.* ¶¶ 36-37.

The warning requirement applies to ads for sodas and other nonalcoholic beverages that contain added sugars and more than 25 calories per 12 ounces of beverage, but it does not apply to milk and 100% fruit-juice drinks. S.F. Health Code § 4202.[4] The warning requirement applies broadly to any advertisement in San Francisco that markets, promotes, or identifies an SSB for sale or use, including in-store advertisements, but does not apply to advertisements on specified media that are distributed both inside and outside the city: newspapers and other periodicals as well as television and electronic media. *Id.*

Although San Francisco is the first jurisdiction to enact a warning requirement for SSBs, bills that would require a near-identical warning on SSB bottles and cans are now pending in New York State, Washington State, and Hawaii; and Baltimore is considering a warning on SSB ads. Exs. J-M to Goldman Dec. New York's bill has been endorsed by the American Diabetes Association, the American Heart Association, and many other health organizations and prominent scientists. Goldman Dec. Ex. N.

[4] According to the 2015-2020 Dietary Guidelines, dairy accounts for only 4% of added sugars, and fruits and 100% fruit juice account for only 1%. Figure 2-10. Lower consumption rates, and the greater nutritional value of these drinks, distinguish them from SSBs. Willett Rep. at 3 n.2.

ARGUMENT

I. THE WARNING REQUIREMENT IS LAWFUL BECAUSE IT IS REASONABLY RELATED TO SAN FRANCISCO'S INTEREST IN PROMOTING PUBLIC HEALTH

A. *Zauderer* Is a Deferential Standard

The government may require a commercial speaker to disclose factual information about its product so long as the mandated disclosure is reasonably related to the government's interests. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).[5] This deferential standard is akin to rational basis review. *See, e.g.*, *Safelite Group, Inc. v. Jepsen*, 764 F.3d 258, 262 (2d Cir. 2014); *CTIA – The Wireless Association v. City of Berkeley*, -- F.Supp.3d --, No. C-15-2529 EMC, 2015 WL 5569072, at *12 (N.D. Cal. Sept. 21, 2015) (*CTIA I*).

Zauderer's deference is rooted in the reason why commercial speech is protected under the First Amendment at all. Commercial speech holds a "subordinate position . . . in the scale of First Amendment values." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (internal quotation marks omitted). It is protected not because of any liberty or autonomy interest of the speaker, but because "the free flow of commercial information" promotes "intelligent and well informed" "private economic decisions." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976); *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010). In short, it is a listener-focused, rather than a speaker-focused, protection.

This purpose of protecting listeners' informational interests explains the difference between the lenient scrutiny afforded to mandatory disclosures by *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and the more exacting scrutiny of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). *Central Hudson* prescribes a kind of intermediate scrutiny for restricting or silencing commercial speech—allowing for regulation, but only where the State has a sufficiently strong reason to turn off the spigot of information. *Zauderer*, by contrast, requires merely that a factual disclosure—more information for the consumer rather than less—must bear a "reasonable relationship" to an important state interest. 471 U.S. at 651; *see also*

[5] This Court has previously referred to the *Zauderer* opinion as a plurality. *See, e.g.*, *CTIA I*, 2015 WL 5569072, at *11. The City respectfully notes that *Zauderer*'s Part V, which announces the standard for mandatory disclosures in commercial speech, garnered the support of six members of the Court. 471 U.S. at 629; *id.* at 673 (opn. of O'Connor, J., joined by Blackmun, C.J., & Rehnquist, J.) (joining Part V).

Milavetz, 559 U.S. at 249. *Zauderer*'s light touch reflects the principle that a commercial speaker's "constitutionally protected interest in ***not*** providing any particular factual information in his advertising is minimal." 471 U.S. at 651; *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-14 (2d Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.").

Plaintiffs pay lip service to the principle that commercial speech protections serve the listener's interest, ECF No. 50 at 18:2-3, 19:23-24, but they discard it when they argue that "being forced to speak when one would prefer to remain silent is an independent First Amendment wrong," *id.* at 19:12-13. That argument only applies to noncommercial speech, *see Frudden v. Pilling*, 742 F.3d 1199, 1205-06 (9th Cir. 2014) (cited by Plaintiffs; holding that motto on mandatory school uniforms violated First Amendment); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8-9 (1986) (plurality) (cited by Plaintiffs; holding that it violated the First Amendment to require utility to provide access to other speakers in a noncommercial newsletter), and it has no force here.[6] *See infra* Section III (arguing that San Francisco's warning applies only to commercial speech).

B. The Health Warning Is Factual and Accurate

Zauderer's deferential standard applies to factual disclosures compelled in the context of commercial speech. 471 U.S. at 651. In announcing its standard, *Zauderer* described the attorney-advertising disclosures before it as "purely factual and uncontroversial information" about the terms of contingency-fee arrangements. *Id.* Plaintiffs seize on the phrase "purely factual and uncontroversial" and posit that it requires the disclosure's contents to be beyond dispute. But there is no indication that *Zauderer* meant "uncontroversial" to impose a demanding standard of consensus. *Zauderer* uses the word "uncontroversial" only once, and *Milavetz* does not use it at all, instead simply referring to the mandated disclosure as "required factual information" or as "an accurate statement." 559 U.S. at 250;

[6] To the extent Plaintiffs can claim any liberty interest in their commercial speech, that concern is allayed by the fact that San Francisco's warning clearly identifies that the message is compelled by the City. *Cf. Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557, 561-62 (2005) (First Amendment principle prohibiting compelled speech did not apply in compelled-subsidy case where the government was the speaker).

see also Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (*Zauderer*'s "purely factual and noncontroversial" language "merely describes the disclosure the Court faced in that specific instance"). As a result, any requirement that word imposes is satisfied as long as the disclosure is accurate. *See, e.g., id.*; *CTIA I*, 2015 WL 5569072, at *17 ("the term 'uncontroversial' should generally be equated with the term 'accurate.'").

The warning the City requires is factual and accurate: The evidence shows no credible disagreement that drinking sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay. *See supra* at 1-4.

Plaintiffs do not really contest this. Indeed, with regard to obesity, they could not, in light of the ABA's own admission that "reduc[ing] beverage calories consumed" addresses obesity. Ex. E to Goldman Dec. Instead, Plaintiffs construct an elaborate straw man and then tear it down, by claiming that the warning conveys not merely that drinking SSBs ***contributes*** to obesity, diabetes, and tooth decay, but that drinking SSBs ***uniquely and inevitably contributes*** to these health harms, to a greater extent than consuming other foods with the same amount of calories, and that drinking SSBs in any amount is dangerous. ECF No. 50 at 11:24-12:5. This rebuttal is in keeping with the soda industry's response to America's obesity crisis: that there is nothing special or especially worrisome about SSBs, that a calorie is just a calorie, that any food or beverage is okay if you "balance what you eat, drink and do." Ex. I to Goldman Dec.; ECF No. 50-9.

Whether those arguments are right or wrong is irrelevant to the accuracy of San Francisco's warning, because it does not make the many additional claims that Plaintiffs purport to find in it.

1. The Kahn Critique Is Based Exclusively on the Supposed Implications of the Warning's Text

Time and again, Plaintiffs' expert Dr. Kahn opines that "there is considerable debate over whether sugar-sweetened beverages ***uniquely*** contribute to obesity." ECF No. 50-24 at 15 (caps and bold omitted; italics added).[7] Dr. Kahn's opinions should be taken with more than a few grains of salt.

[7] *See also* ECF No. 50-24 at 12 ("I do not believe that added sugar ***uniquely*** contributes to obesity or to related conditions like diabetes"); *id.* at 18 ("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"); *id.* at 23 ("added sugar does not have a ***uniquely*** detrimental effect

His CV discloses little original research or clinical experience in the field of SSBs and obesity or diabetes. Schillinger Rep. ¶ 40. His opinions are contrary to the current views of his former employer, the American Diabetes Association, which has ***endorsed*** a mandatory warning that drinking SSBs contributes to obesity, diabetes, and tooth decay, Ex. N to Goldman Dec., and which recommends that people at risk for diabetes "avoid sugar-sweetened beverages," Schillinger Rep. ¶ 27. And while Dr. Kahn touts his independence from the beverage industry, Kahn Rep. ¶ 9, he is a former board member of the Smart Choices program, a package-labeling initiative funded by the processed food industry that gave its nutritional seal of approval to products like Froot Loops—which Dr. Kahn publicly defended on the ground that they were better choices than doughnuts. Willett Rep. ¶ 64. Smart Choices voluntarily stopped operations after it drew scrutiny from the FDA for potentially misleading consumers. *Id.* Dr. Kahn's views on nutrition thus seem unlikely to reflect those of mainstream nutrition scientists.

But for purposes of the argument here, the Court can accept Dr. Kahn's opinions—that there is some debate about whether SSBs pose "unique" health risks, and that they can safely be consumed in moderation without inevitably leading to obesity and diabetes—and still uphold San Francisco's warning requirement. San Francisco's warning simply does not claim that sugary drinks intrinsically and inevitably cause obesity and diabetes beyond their caloric contribution. Even on Dr. Kahn's view—that total calories determine weight gain, that the source of the calories does not matter, and that "[t]here is nothing unique about added . . . sugar that may lead to obesity and diabetes more than any other source of excess calories," ECF No. 50-24 at 3—added sugar, and the sugary beverages that deliver added sugar, contribute to weight gain yet supply no redeeming nutrients, as Dr. Kahn has admitted elsewhere when he said that reducing added sugars should head the list of nutrition strategies to address obesity. *See supra* at 2.[8]

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on health"); *id.* at 27 ("the prospective cohort studies do not establish that sugar-sweetened beverages play a ***unique*** role in the development of obesity") (all emphases added).

[8] Plaintiffs also cite the FDA's proposed rule to add a line to the nutrition facts panel identifying the amount of added sugar in foods; Plaintiffs point to the FDA's statements that "added sugars do not contribute to weight gain more than any other source of calories." 79 Fed. Reg. 11880, 11,904 (Mar. 3, 2014). Plaintiffs neglect to cite the remainder of that sentence: foods containing solid fats and added sugars "make up a significant percentage of the American diet ***and are a source of excess calories***." *Id.* (emphasis added). And the immediately following sentences describe the

Dr. Kahn also offers nothing to rebut the concerns that led San Francisco to focus on SSBs: Regardless of whether soda is theoretically the same as any other source of an equivalent number of calories, in the real world, SSBs are the single largest source of added sugar, are overconsumed by a great many people, and are aggressively promoted by the soda industry, whose worldwide marketing budget in 2013 alone exceeded $5 billion. Nestle, *Soda Politics*, at 117; Goette Dec. Exs. A-C.

Moreover, Dr. Kahn's report does not call into question the overwhelming evidence that SSBs contribute to obesity and diabetes. His main critique is that the many studies showing an association of SSBs with obesity and diabetes do not prove that SSBs cause obesity and diabetes ***independently*** of the calories they contribute. Willett Rep. ¶¶ 25, 38, 44, 46; Schillinger Rep. ¶ 21. But because the warning does not claim that some property of SSBs other than calories contributes to obesity, this critique is irrelevant. *Id*. Dr. Kahn also claims that observational studies cannot show that SSB consumption ***causes*** obesity and diabetes; in his view, only randomized experimental studies can prove causation. Kahn Rep. ¶ 34. But randomized clinical trials of nutrition claims are prohibitively expensive and infeasible to perform for long periods of time. Willett Rep. ¶¶ 35, 72. For that reason, observational studies are frequently used in public health to establish causation and recommend public health interventions, especially for slow-developing conditions like obesity and diabetes, and the multi-factor criteria for establishing causation through experimental studies are met here. *Id.* ¶¶ 68-69. If the want of experimental evidence prohibits the government from requiring a warning, then cigarette warnings are also unlawful; randomized clinical trials of smoking cessation generally concluded that it had no benefit. *Id.* ¶ 35.

2. Plaintiffs' Claims About What The Warning Conveys Are Wrong

Because Dr. Kahn claims only that there is debate about whether SSBs uniquely and inevitably contribute to obesity and diabetes, Plaintiffs must argue that the warning conveys that SSBs uniquely and inevitably contribute to obesity and diabetes, and therefore is inaccurate under *Zauderer*.

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evidence that "children who consumed [SSBs] have increased . . . body fat" and that "greater consumption of SSBs is associated with increased body weight in adults." *Id.* And the sentence that precedes Plaintiffs' selectively-quoted sentence says that "consumption levels of added sugars alone exceed the discretionary calorie recommendations of 5 to 15 percent." *Id.*

The warning says no such thing. Plaintiffs' assertions about what the warning "conveys" are betrayed by its plain language, which nowhere says that SSBs contribute to obesity, diabetes, and tooth decay because they have "unique" properties not shared by other sugary products, that SSBs are the only food or beverage products that contribute to obesity, diabetes, or tooth decay, or that SSBs are inherently dangerous, regardless of quantity or any other factor. To the contrary, the warning's use of the word "contributes" suggests that other factors are relevant too. Hammond ¶ 60. The warning is commonsensically and reasonably understood to refer to the quantities in which SSBs are commonly sold and in which they are consumed by many people—the real world context in which it actually appears, and in which Plaintiffs themselves cannot dispute its accuracy.

Moreover, most of Plaintiffs' arguments about what the warning conveys—that SSBs pose some ***unique*** danger not posed by other beverages or foods—are really just an end-run around *Zauderer* itself, which holds that a disclosure requirement is not invalid simply because it applies to one source of a problem but not others. 471 U.S. at 651 n.14 ("[W]e are unpersuaded by appellant's argument that a disclosure requirement is subject to attack if it is "under-inclusive"—that is, if it does not get at all facets of the problem it is designed to ameliorate. As a general matter, governments are entitled to attack problems piecemeal . . . ."); *see also Sorrell*, 272 F.3d at 115-16 (state could compel mercury disclosures on lamps even if lamps did not make the greatest contribution to mercury pollution). And any argument that San Francisco's straightforward warning is misleading unless it explains more precisely the nature and extent of the contribution SSBs make to health harms runs counter to this Court's recent admonition that

> *Zauderer* cannot be read to establish a "factual and uncontroversial" requirement that can be so easily manipulated that it would effectively bar any compelled disclosure by the government. This is particularly true where public health and safety are at issue . . . . Any time there is an element of risk to public health and safety, practically any speech on the matter could be deemed misleading unless there were a disclosure of everything on each side of the scientific debate – an impossible task.

CTIA I, 2015 WL 5569072, at *18.

Plaintiffs attempt to bolster their argument with expert reports, but these reports likewise do not show that the warning means anything other than what it says. Dr. Kahn devotes Section VI of his report to opinions that the warning is misleading because it conveys that drinking SSBs is more

harmful than consuming other sugary foods and beverages, that SSBs cannot be consumed in any safe quantity, and that consuming SSBs will outweigh all other lifestyle factors that affect whether obesity or diabetes develops. Kahn Rep. ¶¶ 72-81. But Dr. Kahn's report and C.V. establish no expertise or qualifications in in the field of risk communication or in what warnings "imply" or "convey." Hammond Rep. ¶ 81. His opinions on the subject cite no relevant literature; they are bare assertions unsupported by any empirical research, scientific methodology, or theoretical framework. Hammond Rep. ¶ 73. Although courts may give some weight to otherwise inadmissible evidence in the preliminary injunction context, *see Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984), these opinions are so unrelated to any putative qualifications, and so devoid of analysis, research, or other support, that they are entitled to none. *See, e.g.*, *Sega Enterprises Ltd. v. MAPHIA*, 948 F. Supp. 923, 929 (N.D. Cal. 1996) (disregarding opinions outside expert's field).

Plaintiffs also offer the report of marketing professor Peter Golder, who contends that the presence of the warning on SSB ads but not ads for other products means that "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." Golder Rep. ¶ 62; *see also id.* at ¶¶ 47, 59. But his opinion about what "some consumers" will take away is not supported by anything he cites or by the text of the warning itself (which does not say that SSBs are worse than everything else); moreover, evidence from Mexico's SSB tax suggests that people substituted bottled water for SSBs when SSBs became more expensive relative to other foods. Hammond Rep. ¶ 62; Schillinger Rep. ¶ 35. Of course, San Francisco has very good reasons to focus on SSBs, *see supra* 3-4—as it is entitled to do under *Zauderer*—and to the extent the warning causes people to think about what those reasons are, there is no basis to believe that they will misconstrue or misperceive them. But Dr. Golder's opinion does not make the warning inaccurate in any event.

Dr. Golder is also wrong when he opines that the warning will lead people to overestimate the risks of SSBs. Golder Rep. ¶¶ 55-60. There is an established literature and significant scientific research about health warnings and risk communication, and Dr. Golder not only has ignored most of it, but has failed to notice that the very sources he cites contradict his opinion. Hammond Rep. ¶¶ 49-

57, 68-69. As Dr. Hammond's report demonstrates, there is no evidence that people will overestimate the health risks of SSBs based on the warning. The citation that Dr. Golder offers to support his claim that consumers overestimate the risk of negative outcomes was discussing rare events that are easily imagined, but does not apply to behavioral risk factors, such as nutrition-related chronic diseases, that are neither rare nor easily imagined. *Id.* ¶ 49. Indeed, the same book Dr. Golder cites actually identifies diabetes as an "underestimated" risk and contains a chapter discussing the importance of health warnings to address underestimates of risk for behavior risk factors. *Id.* Nor does the literature on health warnings support Dr. Golder's claim that consumers will infer that other foods, like doughnuts or candy bars, do not contribute to obesity and diabetes simply because SSB ads bear the warning but ads for other foods do not. Golder Rep. ¶ 61. As Dr. Hammond points out, Dr. Golder offers no support for this assertion. Hammond Rep. ¶¶ 59-60.

In sum, San Francisco's warning is constitutional under *Zauderer* whether all calories are the same as Dr. Kahn would have it, or whether liquid sugar poses special risks. Under either view, there is no serious dispute that the warning—as opposed to Plaintiffs' straw men versions of the warning—is accurate. And there can be no question that it is valuable information for consumers to have when they decide what drink to buy. Since the touchstone of commercial speech protection is the interest of the listener in receiving information, the City's factual and accurate warning passes muster under the *Zauderer* test.[9]

C. The Warning Is Reasonably Related to San Francisco's Interests in Preventing Obesity, Diabetes, and Tooth Decay and Informing Consumers of Health Risks

Although *Zauderer* is a deferential standard, it nonetheless requires that a mandatory disclosure be "reasonably related" to the government's interests. 471 U.S. at 651.[10] As the term "reasonable" signifies, this test, too, is deferential. *Discount Tobacco*, 674 F.3d at 566-67. Nonetheless, *Zauderer*

[9] A look at exhibit D-2 to the Golder report, ECF No. 50-25 at 50—a mock-up of a Coca-Cola ad with the required warning appended—underscores this point. The text of the ad says "#openhappiness" and "happiness. coca-cola." There is more than a little irony in Plaintiffs' claim that the health warning is the misleading content in this ad.

[10] The government's interest is not limited to preventing deception of consumers. *See American Meat Institute v. U.S. Dep't of Agric.*, 760 F.3d 18, 21-22 (D.C. Cir. 2014) (en banc); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, C.J. & Dyk, J.); *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 113-15 (2d Cir. 2001).

acknowledges that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." 471 U.S. at 651.

Plaintiffs argue that their speech is chilled within the meaning of *Zauderer* by offering evidence that sugary drink sellers will shift their advertising away from billboards and other media that are subject to the Ordinance. This argument is unavailing: Chilling occurs only where a disclosure is so burdensome "that it essentially operates as a restriction on constitutionally protected speech." *Am. Meat Inst. v. U.S. Dep't of Ag.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc). A disclosure so lengthy that it makes advertisement effectively impossible is an undue burden. *Ibanez v. Fla. Dept. of Bus. & Prof. Regulation*, 512 U.S. 136, 146-47 (1994); *Dwyer v. Cappell*, 762 F.3d 275, 283 (3d Cir. 2014). By contrast, self-serving and dubious claims that a company will cease advertising do not establish an undue burden. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 55 (1st Cir. 2000) (cigar company's claims that it would cease advertising if subject to disclosure requirements were implausible where cigarette companies continued to advertise after being subject to disclosure requirements), *rev'd in part on other grounds sub nom. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).[11]

And Plaintiffs do not claim even that. Unlike the advertisers in *Consolidated Cigar*, Plaintiffs make no claim that they will advertise less—*i.e.*, that consumers will be deprived of commercial information about sodas—but merely that they will advertise less on "covered media," ECF No. 50 at 16-17, because they prefer that consumers not be reminded that their products contribute to chronic diseases. Yet even as to covered media, a soda company's asseveration that it would choose not to

[11] There is ample reason to doubt soda companies' assertions that they will withdraw their billboard advertising from San Francisco when the Ordinance goes into effect. For example, Plaintiff CSOAA identifies many benefits to outdoor advertising not offered by other forms of media. *See* <http://www.csoaa.com/#!benefits-of-outdoor/c12fr>. The soda companies aver that they "choose to use the covered media, among others, because they believe that is the most effective way to spread their messages." ECF No. 50, at 23 n.13. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n.24 (noting durability of commercial speech).

It is also notable that if Plaintiffs' argument on this point were accepted, then state and local requirements on advertising would be effectively foreclosed, because there will always be some advertising that the regulating entity cannot reach. States that require disclosures on advertising in national magazines and on the internet run afoul of the Commerce Clause, *Consolidated Cigar Corp.*, 218 F.3d at 56, and the problem is a fortiori greater for localities. A rational advertiser will always shift away from the kind of advertising that is covered by a disclosure requirement at least to some extent—but if that creates chilling, then anything other than a federal disclosure requirement will create chilling.

advertise rather than disclose accurate information about its products does not establish that the requirement is "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651. No disclosure requirement could be upheld under such a rule, which effectively gives every speaker a veto over all such legislation. Soda companies may avoid making the disclosure by choosing not to speak—but because their "constitutionally protected interest" in not speaking an accurate disclosure is "minimal," *id.*, they cannot argue that the Constitution prohibits any regulation that puts them to the choice.

Plaintiffs also argue that the warning—which must cover at least 20% of an SSB ad—chills or unduly burdens their speech by effectively taking over their ads. According to Plaintiffs, either the prominence of the warning will cause consumers to misperceive the warning as the only message of their ad, ECF No. 50 at 16; or advertisers will be unable to counterspeak without transforming the ads "from product promotion into scientific debate," *id.* at 17; or their "creative content . . . cannot fit on the advertisement's remaining space," *id.* at 17 n.10; or their creative content is otherwise "incompatible with the tenor and content of the City's warning," *id.* These arguments are foreclosed by case law holding that a requirement of devoting 20% of advertising space to a health warning is not unduly burdensome. *Discount Tobacco*, 674 F.3d at 567; *Consolidated Cigar*, 218 F.3d at 55.

Plaintiffs dress up their argument with a novel factual contention, based on Dr. Golder's assessment of the prominence of the warning, that consumers will see only the warning and not soda companies' promotional speech. Golder Rep. ¶¶ 50-53. This contention is baseless. As Dr. Hammond demonstrates, San Francisco's required warning is consistent with international standards and evidence-based best practices for health warnings in its text, size, and appearance. Hammond Rep. ¶ 42. The purpose of the warning is for consumers to notice it, and risk communication literature supports San Francisco's contention that consumers will notice and process the warning. *See infra* at 5. But the contention that the warning will drown out soda companies' ads is not supported by that literature; instead, studies of tobacco advertising and package warnings demonstrate that consumers notice and receive brand information even in the presence of warnings. Hammond Rep. ¶¶ 46-47, 68. Dr. Golder cites no evidence to the contrary.

As for Plaintiffs' remaining arguments that counterspeech is "infeasible" or that they will have to change the "tenor and content" of their ads to accommodate the warning, these arguments amount to

nothing more than a preference not to convey a health warning. Of course it is possible for soda companies to use 80% of their ad space to convey anything they like about the relationship between their products and health risks. Since there is nothing in the warning that prohibits them from doing so, their speech rights are not unduly burdened.

II. EVEN IF HEIGHTENED SCRUTINY APPLIES, THE WARNING REQUIREMENT IS CONSTITUTIONAL

"Laws that restrict speech are fundamentally different than laws that require disclosures, and so are the legal standards governing each type of law." *Discount Tobacco*, 674 F.3d at 552. For that reason, the *Central Hudson* framework governing commercial speech restrictions does not apply to this case, nor does the Ninth Circuit's recent decision increasing the scrutiny afforded some commercial speech restrictions, *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016). *See id.* at 649 (heightened scrutiny appropriate where law seeks to silence truthful speech for paternalistic reasons); *CTIA – The Wireless Association v. City of Berkeley*, -- F.Supp.3d ---, No. 15-cv-02529-EMC, 2016 WL 324283, at *3 (N.D. Cal. Jan. 27, 2016), *appeal docketed*, No. 16-15141 (9th Cir. Feb. 1, 2016) (*CTIA II*). But even assuming that *Retail Digital Network* or *Central Hudson* applied here, the Ordinance would nonetheless be constitutional.

Retail Digital Network holds that content- or speaker-based restrictions on non-misleading commercial speech regarding lawful goods or services are subject to heightened judicial scrutiny. 810 F.3d at 648 (citing *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011)). But this standard does not rise to the level of strict scrutiny, and it "may be applied using the familiar framework of the four-factor *Central Hudson* test." *Id.* & n.3. Those factors are: "(1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest justifying the regulation is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than is necessary to serve that interest." *Id.* at 643 (citing *Central Hudson*, 447 U.S. at 566). Only the last two factors are at issue here.[12]

[12] Selling and consuming SSBs are lawful activities, and while some advertisements for those products may well be misleading, the Ordinance's scope is not defined by whether a particular advertisement is misleading. Plaintiffs have not disputed that the City's interests in enacting the Ordinance are substantial.

A. The Ordinance Directly and Materially Advances the City's Interests

Plaintiffs argue first that the Ordinance contains too many exceptions to advance the City's interests—*i.e.*, that it is unconstitutionally underinclusive with respect both to covered media (applying, for example, to billboards but not television or internet advertisements), and to covered products (excluding beverages such as 100% fruit juice and flavored milk). Second, Plaintiffs contend that the warning is insufficiently informative. ECF No. 50 at 20-22.

Underinclusiveness is a problem when the exceptions to the law ensure that it will fail to achieve its aim, or where it draws distinctions between different kinds of speech that bear no relationship to the government's interests. *Metro Lights L.L.C. v. City of Los Angeles*, 551 F.3d 898, 905-06 (9th Cir. 2009). However, as both the Supreme Court and the Ninth Circuit have recently emphasized:

> Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding "underinclusiveness limitation." [*R.A.V. v. St. Paul,* 505 U.S. 377, 387 (1992).] A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests.

Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1668 (2015); *accord*, *Wolfson v. Concannon*, --- F.3d ---, No. 11-17634, 2016 WL 363202, at *5 (9th Cir. Jan. 27, 2016) (en banc).

With respect to covered and exempted media, there is an obvious difference between geographically fixed signs (like billboards, storefront signage, and vending machines), and media that reach San Francisco but simultaneously other municipalities as well (like the internet, radio, television, and newspapers). In the latter media, placing the warning only on ads viewed in San Francisco would likely pose technological, logistical, or economic burdens that do not exist with fixed signs. By exempting those media from the Ordinance, the City avoids potential litigation asserting that it is effectively seeking to regulate outside of its jurisdiction—challenges that could jeopardize the Ordinance or delay its implementation. *Cf. World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 685 (9th Cir. 2010) (exceptions to freeway-facing sign ban served city's interest in removing blight by allowing some freeway improvement projects to go forward that otherwise might not). Apart from the potential for legal challenges, the City may reasonably conclude that, in view of the logistical

burdens it would impose to require the warning on multi-jurisdictional media, "its interests should yield" in those instances. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (city reasonably distinguished between onsite and offsite commercial advertising, concluding that its interests should yield in the case of the former but not the latter); *accord*, *Metro Lights*, 551 F.3d at 908, 910-11.[13]

These exceptions do not undermine the City's interest in enacting the Ordinance. Even if they meant that the warning does not appear on the "lion's share" of total SSB advertising in San Francisco, ECF No. 50 at 21, the warning will still appear on signs throughout the City, such as on vending machines and storefronts. *See* Exs. A-C to Goette Dec. (photos of retail-environment ads). Plaintiffs do not contend otherwise, and their own expert avers that consumers will associate the warning with soda companies' brands even where the warning does not appear. Golder Rep. ¶¶ 63, 65. Thus, even a limited warning promotes the City's interest in public health. *See Metromedia*, 453 U.S. at 511 and *Metro Lights*, 511 F.3d at 910-11 (both explaining that, while city could have banned more advertising, more limited ban nonetheless advanced its interest).

With respect to the City's decision to address SSBs rather than other beverages, Plaintiffs' argument ignores the rule that even where heightened scrutiny applies, "policymakers may focus on their most pressing concerns." *Williams-Yulee*, 135 S. Ct. at 1668. San Francisco had good reason to single out SSBs because they are the single largest source of added sugar in American diets and because beverages like milk and 100% fruit juice are consumed in lesser quantities and supply more nutrition than SSBs. Willett Rep. at 3 n.2. The Ordinance's focus on SSBs and not other beverages is fully consistent with the City's interest in public health.

[13] Plaintiffs quote from certain discovery responses by the City, ECF No. 50, at 21, but omit the City's response to an interrogatory about the exclusion of certain media, in which the City explained that "it may limit the scope of the warning requirement to avoid regulating outside of its geographic jurisdiction and/or to avoid imposing an excessive logistical, technological, or economic burden." CCSF's Response to CSOAA Interrogatory No. 2. Of course, it is the warning itself that directly promotes public health, but excluding certain media from the Ordinance's scope where it could forestall feasibility objections and potential legal challenges is entirely consistent with the City's public health interest. *See World Wide Rush*, 606 F.3d at 685 ("exceptions … must be considered holistically, not in isolation.").

For these reasons, Plaintiffs' reliance on cases in which a law's "exemptions defeated its purpose," *Metro Lights*, 551 F.3d at 905, is misplaced. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999). Nor is this a case where the exemptions "bear[] no relationship ***whatsoever*** to" the city's asserted interests. *Cincinnati v. Discovery Networks, Inc.*, 507 U.S. 410, 424 (1993). Here the City has valid public health reasons to focus on SSBs, *see id.* at 425 n.20 (distinguishing *Metromedia*, 453 U.S. at 511, on the ground that there the city could believe that offsite advertising presented "a more acute problem"), as well as to exclude certain media from the warning requirement, *see Metro Lights*, 551 F.3d at 911 (distinguishing *Discovery Network* by noting that, in the present case, the city has "some basis for distinguishing" between different types of commercial signage and the exception "does not work at inexorable cross-purposes" to the city's interest).

Plaintiffs' second contention—that the warning provides too little information to be effective—is likewise meritless. A recent study tested the same language used in San Francisco's warning and found that, compared to beverages with no health warning, parents who read the warning were significantly less likely to choose an SSB for their child. Hammond Rep. ¶¶ 36-37. Plaintiffs complain that the warning does not tell consumers about the nutritional value of any targeted product, but San Francisco is not required to convey nutritional information that otherwise appears on the product label; its warning instead conveys information that the product label does not.

There is likewise no basis for Plaintiffs' assertion that San Francisco must say that "overconsumption of any food or beverage, regardless of added sugar content, equally contributes to weight gain." ECF No. 50 at 22. The City is entitled to focus on those aspects of the problem it considers most acute, and—given existing patterns of consumption, and given evidence that people do not compensate for SSBs by reducing calories elsewhere in their diets—in practice all foods and beverages do ***not*** contribute equally to the social epidemic of obesity. Willett Rep. ¶¶ 60-63.

Plaintiffs also suggest that, in response to the warning, consumers may substitute for SSBs other foods or beverages that are just as unhealthful. But the evidence indicates that many people do

make better choices (like water) to replace their consumption of SSBs. Hammond Rep. ¶ 62.[14] And Plaintiffs' contention that San Francisco must explain "how total caloric intake, exercise, age, or genetics factor into the equation," ECF No. 50 at 22, would replace the warning with an essay; it is an argument calculated to preclude the government from ever requiring health or safety warnings at all. *See CTIA I*, 2015 WL 5569072, at *18. Moreover, warnings on advertisements or packages must be concise to be effective, Hammond Rep. ¶ 29, and it is neither necessary nor appropriate for consumer product warnings to address risk factors not specific to that product, Hammond Rep. ¶¶ 64, 78.

B. The Ordinance Is Not More Extensive Than Necessary

The last prong of *Central Hudson* does not impose a least-restrictive-means test, but requires only a "'fit' between the legislature's ends and the means chosen to accomplish those ends,—a fit that is not necessarily perfect, but reasonable . . . ." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (internal quotation marks and citations omitted). Plaintiffs contend that the Ordinance burdens more speech than necessary because San Francisco could simply propagate the warning in its own advertisements without requiring any private party to carry it. ECF No. 50 at 22. But Plaintiffs' argument would mean that no disclosure requirement could ever be upheld under *Central Hudson*. In any event, the evidence establishes that there is independent value to a disclosure or warning that accompanies an advertisement for a product. *See* Hammond Rep. ¶¶ 31-32.

The cases Plaintiffs cite do not control the result here. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 (1977), not only predated *Central Hudson*, but involved a speech ***restriction***—a ban on real estate signs—rather than a compelled disclosure. And in *Evergreen Ass'n v. City of New York*, the court found that the law compelled speech on a "contested public issue"—the morality of abortion. 740 F.3d 233, 250-51 (2d Cir. 2014). Here, even if the warning were deemed to convey a message

[14] Dr. Kahn cites a "position statement" by the Academy of Nutrition & Dietetics that classifying specific foods as good or bad (as he construes the warning) "can foster unhealthy eating behaviors." Kahn Rep. ¶ 76. That organization, incidentally, touts PepsiCo as one of its two "premier sponsors." *See* <http://www.eatrightpro.org/resources/about-us/advertising-and-sponsorship/meet-our-sponsors>. Yet even its website states that "[t]he daily limit [for SSBs] should be no more than 8 to 12 ounces, ***or—better yet—none at all***." <http://www.eatright.org/resource/food/nutrition/nutrition-facts-and-food-labels/hard-facts-about-soft-drinks> (emphasis added). Efforts to reduce consumption of SSBs, which supply calories and no nutrients, are critical from a public health perspective. *See* Schillinger Rep. ¶ 34; Willett Rep. ¶¶ 7, 11-12, 63.

about the "unique" health risks of SSBs (which it does not), that message would not be an expression of moral or political ideology, but would simply reflect a judgment about what the science shows, notwithstanding the absence of conclusive proof or the persistence of some (largely industry-funded) debate. *See A Woman's Friend Pregnancy Res. Clinic v. Harris*, No. 2:15-CV-02122-KJM-AC, 2015 WL 9274116, at *25 (E.D. Cal. Dec. 21, 2015), *appeal docketed*, No. 15-17517 (9th Cir. Dec. 24, 2016) (distinguishing *Evergreen*); *CTIA I*, 2015 WL 5569072, at *17 n.10 ("To require the government to prove a particular quantum of danger before issuing safety warnings would jeopardize an immeasurable number of laws, regulations, and directives."); *CTIA II*, 2016 WL 324283, at *6 (noting that "science is almost always debatable at some level"). And while the City does engage in public health advertising on the subject of SSBs, by itself it is unlikely to have the effectiveness or reach of a multi-channel approach that includes a warning message on SSB advertisements as well. *See* Hammond Rep. ¶¶ 31-33; Goette Decl. ¶¶ 4-5.

III. THE ORDINANCE DOES NOT REACH SUBSTANTIAL NONCOMMERCIAL SPEECH

Plaintiffs argue that the Ordinance is facially invalid because Plaintiffs "routinely use billboards and other outdoor advertisements . . . to speak out on cultural, social, and health issues" or to advertise their sponsorship of public events like the Chinese New Year Parade, and "the Ordinance would sweep much of this noncommercial speech within its scope." ECF No. 50 at 7:25-8:4. Plaintiffs err in claiming that these ads are noncommercial speech.

Although the "core notion of commercial speech" is speech that does "no more than propose a commercial transaction," *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quotation marks omitted), "this definition is just a starting point," *Jordan v. Jewel Food Stores, Inc.* 743 F.3d 509, 516 (7th Cir. 2014). "Where the facts present a close question," *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011), courts apply the three-factor test set forth in *Bolger*, 463 U.S. at 66-67: (1) whether the speech is an advertisement, (2) whether the speech refers to specific products, and (3) whether the speaker has an economic motivation for engaging in the speech. When all three factors are present, there is " 'strong support' " for the conclusion that the speech is commercial speech. *Hunt*, 638 F.3d at 715 (quoting *Bolger*, 463 U.S. at 67). An advertisement that includes

"discussions of important public issues" or "links a product to a current public debate" does not thereby become noncommercial speech. *Bolger*, 643 U.S. at 67-68 (quotation marks omitted).

Plaintiffs' examples of supposedly noncommercial speech covered by the Ordinance fall broadly into two categories: promotions of their event sponsorships and other altruistic endeavors, *see, e.g.*, ECF Nos. 50-7, 50-13, 50-14, and billboards and other signs containing commentary about public issues along with their logos or depictions of their products, *see, e.g.,* ECF Nos. 50-9, 50-10, 50-12. Application of the *Bolger* factors to these examples demonstrates that they are commercial speech. Each is conceded by Plaintiffs to be an advertisement; if they were not advertisements; they would not be covered by the Ordinance at all since the Ordinance only applies to "any advertisement, including . . . any logo, ***that identifies, promotes, or markets*** a Sugar-Sweetened Beverage for sale or use." S.F. Health Code § 4202 (emphasis added). The second *Bolger* factor is whether the advertisement refers to a specific product. In most of the examples Plaintiffs offer, this factor is also clearly met. But even where the ad does not reference a specific product, this "is far from dispositive, especially where 'image' or brand advertising rather than product advertising is concerned." *Jordan*, 743 F.3d at 519. The third *Bolger* factor—whether the speaker has an economic motivation for engaging in the speech—is met as well. Showing support for public events like the Chinese New Year Parade, informing the public that Coca-Cola is reducing beverage calories in schools, ECF No. 50-10 at 2, or reminding people that PepsiCo wants to "do some good," ECF No. 50-7 at 2, "has an unmistakable commercial function: enhancing the [advertiser's] brand in the minds of consumers." *Jordan*, 743 F.3d at 519; *see also Transp. Alternatives v. City of New York*, 218 F. Supp. 2d 423, 437 (S.D.N.Y. 2002) (display of logos in corporate sponsorship of nonprofit's bicycle race was commercial speech). The "Mixify" ads that Plaintiffs point to—which display major soda companies' logos and try to assure consumers that they can continue to drink sodas and stay healthy as long as they exercise and cut calories elsewhere—are no different. Just as an eight-page pamphlet sponsored by a condom seller informing the public about family planning is commercial speech, *Bolger*, 463 U.S. at 67-68, so too is a soda company-sponsored billboard reassuring the public that they can continue to drink soda.

The fact that some of the exemplar ads also include noncommercial speech does not change this result. Commercial speech receives full First Amendment protection only where it is "inextricably intertwined with otherwise fully protected speech," *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988), such that the speaker cannot convey its noncommercial message without combining it with commercial speech, *Fox*, 492 U.S. at 474 (1989). Since "nothing in the nature of things requires" soda companies to combine their marriage-equality advocacy or their arguments about nutrition and health "to be combined with commercial messages," their commercial speech does not obtain full First Amendment protection by virtue of being inextricably intertwined with noncommercial speech. *Charles v. City of Los Angeles*, 697 F.3d 1146, 1152 (9th Cir. 2012) (internal quotation marks omitted).

Finally, even if Plaintiffs could show that the Ordinance reaches some noncommercial speech, this facial challenge would nonetheless fail. Plaintiffs make no argument that the Ordinance would impact "a 'substantial' amount of protected speech in relation to its many legitimate applications," a requirement for a facial First Amendment challenge. *Virginia v. Hicks*, 539 U.S. 113, 124 (2003); *see also Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011). Nor could they; the number of Coca-Cola sponsorships or PepsiCo "do good" promotions is plainly dwarfed by straightforward SSB advertisements. Exs. A-C to Goette Dec. Thus, even if the Ordinance applied to some instances of noncommercial speech, Plaintiffs' remedy would be to seek to invalidate it only as applied to those instances. *Hicks*, 539 U.S. at 124.

IV. PLAINTIFFS HAVE FAILED TO ESTABLISH A LIKELIHOOD OF IRREPARABLE HARM FAVORING THE ISSUANCE OF A PRELIMINARY INJUNCTION

Plaintiffs claim that they will be irreparably harmed in the absence of an injunction because the Ninth Circuit has held that the loss of First Amendment freedoms constitutes irreparable injury. ECF No. 50 at 23. But that principle does not support the issuance of a preliminary injunction where, as here, Plaintiffs' constitutional claim is tenuous. *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991); *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). Plaintiffs' claim of irreparable harm is also undermined by

their own contention that there are many other media in which they may communicate their message without being subject to the warning requirement.[15]

Plaintiffs further contend that they will suffer a loss of reputation and goodwill if they are required to display the warning, but that argument is predicated on their First Amendment claim. *See CTIA I*, 2015 WL 5569072, at *20 n.13. If a factual warning about SSB consumption undermines the reputation and goodwill that Plaintiffs have cultivated, that result is not a cognizable injury; it is a legitimate consequence of the free flow of information—precisely the value that the First Amendment seeks to protect in the commercial context.

Finally, under the terms of the Ordinance, the warning requirement does not go into effect until a year after enactment. That timetable would have allowed Plaintiffs to litigate their claim in the ordinary course—such as by moving for summary judgment—rather than asking this Court for extraordinary relief. Indeed, Plaintiffs filed their complaint last July, but did not move for a preliminary injunction until January 2016. Where the urgency is one of Plaintiffs' own creation, —in other words, where the relief is sought as a tactical litigation decision—that factor favors denial of the motion. *See, e.g.*, *Capital Associated Indus., Inc. v. Cooper*, No. 1:15-CV-83, 2015 WL 5178057, at *11 (M.D.N.C. Sept. 4, 2015) ("Courts must be vigilant to ensure that this extraordinary remedy is not used to manufacture a sense of urgency where none exists so as to allow the case to leapfrog earlier filed actions that may be of equal or greater urgency.").

V. THE REMAINING FACTORS FAVOR DENIAL OF AN INJUNCTION

In "balanc[ing] the hardships of the public interest against a private interest, the public interest should receive greater weight." *Fed. Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228, 1236

[15] Plaintiffs cite *Reno v. ACLU*, 521 U.S. 844, 880 (1997), for the proposition that loss of even one medium of communication constitutes irreparable injury. ECF No. 50, n.13. But apart from the fact that *Reno* was not discussing irreparable harm, *cf. Utah Gospel Mission v. Salt Lake City Corp.*, 316 F.Supp.2d 1201, 1221-22 (D. Utah 2004) (no irreparable harm where plaintiffs had ample other places in which to communicate their message), or a voluntary decision to speak elsewhere, its reference to the "exercise of [one's] liberty of expression" is inapplicable where, as here, the speech is commercial and accordingly derives its protection not from the expressive interests of the speaker, but from the societal interest in the free flow of commercial information. (*See supra*, Section I.A.) Plaintiffs do not show that there will be irreparable harm to this informational function if some SSB advertising shifts to other media. Plaintiffs cite *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994), but that case involved a law prohibiting homeowners from displaying signs on their own property, which the Court found had special First Amendment protection, and is not relevant here. *Id.* at 57-58.

(9th Cir. 1999); *Fund For Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (if injunction would implicate public interest, plaintiffs must show the "public interest favors the[m]"). Plaintiffs argue that there is a public interest in upholding First Amendment principles, *see Doe v. Harris*, 772 F.3d 563, 583 (9th Cir.2014), but "where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may [then] in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312-13 (1982). Beyond the public's general interest in the implementation of laws enacted by their duly elected representatives, *see Planned Parenthood of Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997), the public has an interest in the health of the City's residents and the communication of health and safety information. *See, e.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009).

Moreover, like their argument regarding irreparable harm, Plaintiffs' argument that the balance of the hardships or the public interest favor the issuance of an injunction because of the Ordinance's impact on First Amendment interests is obviously one that depends on the merits of their First Amendment claim. It therefore fails for the same reasons. *See CTIA I*, 2015 WL 5569072, at *20. Similarly, Plaintiffs' argument that an injunction will prevent San Franciscans from being misled is meritless because the warning is not misleading. Finally, Plaintiffs contend that the public interest will be harmed if SSB manufacturers choose to limit their otherwise ubiquitous advertising in order to avoid the warning requirement. That argument has it exactly backward. *Zauderer* held that an advertiser's constitutionally protected interest in ***not*** disclosing factual information is "minimal." 471 U.S. at 651. If Plaintiffs choose silence in order to avoid disclosing facts about their products, that choice stands as their own condemnation of the informational value of their advertising, and does not establish harm to the public interest.

CONCLUSION

For the foregoing reasons, the City respectfully requests that Plaintiffs' motion for a preliminary injunction be denied.

Dated: February 23, 2016

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