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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

AMERICAN BEVERAGE ASSOCIATION,  
et al.,  
  
Plaintiffs,  
  
v.  
  
CITY AND COUNTY OF SAN  
FRANCISCO,  
  
Defendant.

Case No. 15-cv-03415-EMC

**ORDER DENYING PLAINTIFFS’  
MOTION FOR PRELIMINARY  
INJUNCTION**

Docket No. 50

Plaintiffs are the American Beverage Association (“ABA”), California Retailers Association (“CRA”), and California State Outdoor Advertising Association (“CSOAA”). They have filed suit against Defendant the City and County of San Francisco (“City” or “San Francisco”), challenging two ordinances enacted in 2015, which modified the San Francisco Administrative and Health Codes. Plaintiffs contend these ordinances violate their and their members’ constitutional rights.

Currently pending before the Court is Plaintiffs’ motion for a preliminary injunction in which they focus on only one of those ordinances – *i.e.*, that which modified the City Health Code. The ordinance, though passed in 2015, does not become operative until July 25, 2016.<sup>1</sup> *See* Compl. ¶ 20. In essence, the ordinance requires certain kinds of advertisements related to sugar-

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<sup>1</sup> Plaintiffs have not delayed in seeking preliminary injunctive relief. Plaintiffs initiated this lawsuit on July 24, 2015. *See* Docket No. 1 (complaint). On the same day, Plaintiffs moved for a preliminary injunction. *See* Docket No. 14 (motion). Subsequently, the parties agreed that the City would not enforce the ordinance pending a final judgment in this case. *See* Docket No. 35 (stipulation and order, filed in August 2015). A few months thereafter, the Court set a hearing and briefing schedule for the preliminary injunction motion. *See* Docket No. 45 (stipulation and order, filed in October 2015).

1 sweetened beverages (“SSBs”) to display a warning from the City that says: ““WARNING:  
2 Drinking beverages with added sugar(s)[<sup>2</sup>] contributes to obesity, diabetes, and tooth decay. This  
3 is a message from the City and County of San Francisco.”” S.F. Health Code § 4203(a).

4 The pending motion focuses on Plaintiffs’ First Amendment challenge to the ordinance.  
5 According to Plaintiffs, the ordinance violates their and/or their members’ free speech rights by  
6 forcing them to include a warning that they would not otherwise give. In essence, Plaintiffs  
7 contend the ordinance compels speech unconstitutionally. Having considered the parties’ briefs  
8 and accompanying submissions, as well as the oral argument of counsel, the Court hereby  
9 **DENIES** Plaintiffs’ motion for a preliminary injunction.

## 10 I. FACTUAL & PROCEDURAL BACKGROUND

### 11 A. Parties

12 Plaintiffs are three organizations: ABA, CRA, and CSOAA.<sup>3</sup>

- 13 • “ABA is a national trade organization representing the non-alcoholic beverage industry,  
14 including beverage producers, distributors, franchise companies, and support industries.  
15 ABA members bring to market beverages including carbonated soft drinks, bottled water .  
16 . . . , sports drinks, energy drinks, 100% juices, juice drinks, and ready-to-drink teas.”  
17 Keane Decl. ¶ 3. Products sold by ABA members throughout California, including the  
18 City, include Coke, Pepsi, and Dr. Pepper. *See* Keane Decl. ¶ 4.
- 19 • “CRA is a statewide trade association representing all segments of the retail industry  
20 including general merchandise, department stores, mass merchandisers, restaurants,  
21

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22 <sup>2</sup> Added sugar is “sugar that is not naturally present in foods and beverages, which sweetens food  
23 but adds no nutrition.” Opp’n at 2; *see also* Kahn Reply Rpt. ¶ 55 (acknowledging that “added  
24 sugar contains no essential nutrients”).

25 <sup>3</sup> Although Plaintiffs in this case are these three organizations only, at times, the Court uses the  
26 term “Plaintiffs” loosely – *i.e.*, to mean not only Plaintiffs but also their members, as (for the most  
27 part) it is their members’ free speech rights that are primarily at issue. *See, e.g.*, Compl. ¶ 30  
28 (“This action is germane to the purpose of ABA and neither the claims asserted nor the relief  
requested require the participation of its members.”); Compl. ¶ 25 (“Plaintiffs also seek an  
injunction, restraining the City . . . from enforcing or threatening to enforce any part of the  
Ordinances against Plaintiffs and any of Plaintiffs’ members.”); Compl. ¶ 154 (“The Speech Ban  
constitutes impermissible viewpoint discrimination in violation of Plaintiffs’ and their members’  
First Amendment rights.”).

1 convenience stores, supermarkets and grocery stores, chain drug, and specialty retail . . . .  
2 CRA members sell beverages including carbonated soft drinks, [etc.]” Williams Decl. ¶ 3.  
3 Beverages sold by CRA members throughout California, including the City, include Coke,  
4 Pepsi, and Dr. Pepper. *See* Williams Decl. ¶ 4.

- 5 • “CSOAA is a statewide trade association representing the interests of outdoor advertisers  
6 in the California Legislature and in local governments across the state. CSOAA’s  
7 membership includes 14 outdoor companies and 22 associate members.” Loper Decl. ¶ 3.  
8 “CSOAA members offer advertising space throughout the State of California, including in  
9 San Francisco. This advertising space includes billboards . . . ; advertising in airports,  
10 malls, stadiums, transit shelters, and other venues; advertising in and on buses [etc.]”  
11 Loper Decl. ¶ 5.

12 Defendant is the City of San Francisco.

13 Both Plaintiffs and the City have support from third-party organizations. More  
14 specifically, the Association of National Advertisers, Inc. (“ANA”) has filed an amicus brief in  
15 support of Plaintiffs. In turn, various public interest organizations, including but not limited to the  
16 American Heart Association and the American Academy of Pediatrics (California), have  
17 submitted an amicus brief in support of the City.

18 B. Ordinance

19 The ordinance being challenged by Plaintiffs is City Ordinance No. 100-15. It has been  
20 codified in the San Francisco Health Code at §§ 4200-06.

21 Section 4201 states the findings and purpose underlying the ordinance. It provides as  
22 follows:

23  
24 Human consumption of Sugar-Sweetened Beverages (SSBs) is  
25 linked to a myriad of serious health problems including, but not  
26 limited to: weight gain, obesity, coronary heart disease, diabetes,  
27 tooth decay, and other health problems. Scientific evidence shows  
28 that underlying these chronic health problems is metabolic  
syndrome (MetS). MetS is characterized by changes in a body’s  
normal biochemistry that can lead to obesity, insulin resistance,  
hypertension, dyslipidemia (high cholesterol), and visceral fat.  
SSBs are linked to excess weight and obesity, which are putting  
more Americans on the path to MetS. Heavy added sugar

1 consumption may itself be a direct cause of MetS by increasing the  
2 risk for hypertension, dyslipidemia, and visceral fat. While most  
3 people with MetS are obese, normal-weight individuals can acquire  
4 the syndrome as well, given poor dietary habits. Heavy  
5 consumption of sugary drinks has been linked to MetS through a  
6 variety of biological pathways, and is therefore a risk factor in  
7 chronic disease.

8 The consumption of soft drinks, according to the American Dental  
9 Association, has displaced nutritious beverages and foods from the  
10 diet. According to the American Heart Association, for the  
11 American diet, soft drinks and other sugar-sweetened beverages are  
12 the primary source of added sugar. According to the first print  
13 (February 2015) of the United States Department of Agriculture's  
14 Scientific Report of the 2015 Dietary Guidelines Advisory  
15 Committee (the "2015 USDA Report"),<sup>[4]</sup> although added sugars  
16 provide calories, they do not provide other nutrients.

17 Sugar-sweetened sodas, and fruit drinks containing less than 100%  
18 juice by volume, are major sources of added sugars in American  
19 diets, contributing an average of 10.58 teaspoons of added sugars  
20 each day. The American Heart Association recommends that adult  
21 women consume no more than six teaspoons of added sugars daily,  
22 that adult men consume no more than nine teaspoons daily, and that  
23 children ages 4-8 years old consume no more than three teaspoons  
24 daily. However, most Americans consume more than 19.6  
25 teaspoons of added sugars per day. Even regular, moderate  
26 consumption of sugary drinks (one 12-ounce can a day) increases  
27 the risk of cardiovascular disease mortality by nearly one-third.

28 The American Heart Association reports that about one in three teen  
or younger children in the United States are overweight or obese and  
that childhood obesity is now the number one health concern among  
American parents, ahead of drug abuse and smoking. Obese  
children suffer more often from sleep apnea, asthma, joint problems,  
fatty liver disease, gallstones, and acid reflux (heartburn).

Obese children are more likely to become obese adults, further  
increasing their risks for higher rates of type 2 diabetes, heart  
disease, and some cancers later in life. Profound mental health and  
quality of life impacts are seen in children with severe obesity.  
Obese children are more prone to low self-esteem, negative body  
image, and depression. As of 2010, nearly one-third of children and  
adolescents in San Francisco were either obese or overweight.  
Among adults, consumption of SSBs is associated with a risk of  
weight gain and obesity, cardiovascular disease, a significantly  
higher risk of stroke, high blood pressure, type 2 diabetes, dental  
erosion, and the risk of pancreatic cancer. The 2015 USDA Report  
concludes that the consumption of added sugars negatively impacts  
obesity, type 2 diabetes, cardiovascular diseases and dental caries,  
and "strong evidence supports reducing added sugar intake to reduce  
health risks." (See also, USDA, *Report of the Dietary Guidelines*

<sup>4</sup> The Dietary Guidelines for Americans is jointly published by the U.S. Department of Health and Human Services and the U.S. Department of Agriculture every five years.

1                    *Advisory Committee on Dietary Guidelines for Americans*, 2010.)  
 2                    In 2011-2012, 41.8% of adults in San Francisco were either obese or  
 3                    overweight.

4                    The World Health Organization recommends that not more than  
 5                    10% of calories be from added sugars, and the Institute of Medicine  
 6                    (U.S.) recommends not more than 25%. Medical research has  
 7                    shown that for over 70% of adults, 10% or more of calories is from  
 8                    added sugars, and for approximately 10% of adults, 25% or more of  
 9                    calories is from added sugars, and that the risk of mortality from  
 10                    cardiovascular disease increased exponentially with an increase in  
 11                    the percentage of calories from added sugars. The 2015 USDA  
 12                    Report concludes that even though an appropriate pattern of  
 13                    consumption of added sugars for most people is 4% to 6% of total  
 14                    calories, the mean intake of total calories from the consumption of  
 15                    added sugars in the U.S. population is 13%, and from 15% to 17%  
 16                    for children 9 years of age and older, adolescents, and young adults,  
 17                    and the evidence shows that when added sugars in foods exceed 3%  
 18                    to 9% of total calories, a healthful food pattern may be difficult to  
 19                    achieve.

20                    Low-income families are more likely to be affected by obesity and  
 21                    diabetes. For example, the Bayview-Hunters Point neighborhood  
 22                    had more per capita emergency room visits due to diabetes between  
 23                    2009 and 2011 than any other neighborhood in San Francisco.  
 24                    Eighteen percent of three- to four-year-olds enrolled in San  
 25                    Francisco Head Start were obese, with an additional 13% being  
 26                    overweight. Head Start serves children of low-income families.

27                    According to the American Dental Association, a steady diet of  
 28                    sugary foods and drinks, including juice and sports drinks, can  
 29                    damage teeth. Cavity-causing bacteria in the mouth feed on sugar  
 30                    and produce acids that attack tooth enamel for up to 20 minutes after  
 31                    eating or drinking. In extreme cases, softer enamel combined with  
 32                    improper brushing, grinding of the teeth, or other conditions can  
 33                    lead to tooth loss.

34                    The annual cost of being overweight and obese to California  
 35                    families, employers, the health care industry, and the government is  
 36                    estimated to be \$21 billion. The San Francisco Budget and  
 37                    Legislative Analyst estimates that up to \$61.8 million in costs  
 38                    incurred by San Franciscans with obesity and diabetes are  
 39                    attributable to sugary beverage consumption. The total national cost  
 40                    of diabetes in 2007 was \$174 billion.

41                    For adults in San Francisco, approximately 29% of Caucasians, 50%  
 42                    of Latinos, 29% of Asians, and 43% of African Americans consume  
 43                    one or more sodas each day. Of 9th graders in San Francisco,  
 44                    approximately 31% of Caucasians, 48% of Latinos, 31% of Asians,  
 45                    and 58% of African Americans consume one or more sodas each  
 46                    day. On average, children consumed 11.96 teaspoons of added  
 47                    sugars from sodas and fruit drinks per day – 47% of their total intake  
 48                    of added sugars. A single 12-ounce can of soda contains eight to ten  
 49                    teaspoons of sugar, and typical container sizes of popular sugary  
 50                    drinks marketed to children far exceed the American Heart  
 51                    Association's recommended daily amounts.

1 Research shows that lifestyle interventions are more cost-effective  
2 than medications in preventing or delaying type 2 diabetes. The  
3 American Heart Association reports that U.S. food labels do not  
4 distinguish between sugars that naturally occur in foods and added  
5 sugars, making it difficult for consumers to know the amount of  
6 added sugars that are in food or beverages.<sup>5</sup> And food producers  
7 and distributors do not typically communicate this information to  
8 consumers, in advertisements or otherwise. Yet sugar-sweetened  
9 beverages are aggressively marketed, without providing such basic  
10 information to consumers, be they children, adolescents, young  
11 adults, or others. According to the 2015 USDA Report, young  
12 adults are among the largest consumers of sugar-sweetened  
13 beverages and are the direct targets of marketing for sugar-  
14 sweetened beverages.

15 The City's purpose in requiring warnings for SSBs is to inform the  
16 public of the presence of added sugars and thus promote informed  
17 consumer choice that may result in reduced caloric intake and  
18 improved diet and health, thereby reducing illnesses to which SSBs  
19 contribute and associated economic burdens. Posting warnings that  
20 beverages are sugar-sweetened will inform the public before  
21 purchases, which will help ensure that San Franciscans make a more  
22 informed choice about the consumption of drinks that are a primary  
23 source of added dietary sugar.

24 S.F. Health Code § 4201.

25 Based on the findings and purpose above, the City will be requiring certain kinds of  
26 advertisements to contain a warning regarding SSBs. More specifically,

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27 <sup>5</sup> In July 2015, the Food and Drug Administration ("FDA") issued a notice that it was revising  
28 certain provisions of a proposed rule issued in March 2014 "that would amend FDA's labeling  
regulations for conventional foods and dietary supplements to provided updated nutrition  
information" on the Nutrition Facts and Supplement Facts labels. FDA, Food Labeling: Revision  
of the Nutrition and Supplement Facts Labels, 80 Fed. Reg. 44303, 44303 (July 27, 2015). Some  
of the revisions concerned added sugars.

29 According to the notice, new information from the "Scientific Report of the 2015 Dietary  
30 Guidelines Advisory Committee" "led the FDA "to reconsider [its] thinking for not establishing a  
31 DRV [daily reference value] or requiring the declaration of a percent DV [daily value] for added  
32 sugars on the Nutrition Facts and Supplement Facts labels." *Id.*; see also Schillinger Rpt. ¶ 29  
33 (taking note of FDA's proposed rule "that the nutrition facts panel display a percent daily  
34 recommended value for added sugars to help people limit their consumption of added sugars to  
35 10% of daily calories or less, a limit recommended by the 2015 Dietary Guidelines Advisory  
36 Committee"). The 2015 Dietary Guidelines Advisory Committee had recommended "a limit of  
37 10% of daily calories from added sugar." Schillinger Rpt. ¶ 30; see also Willett Rpt. ¶¶ 9, 15;  
38 Kahn Reply Rpt. ¶ 68. This is roughly "equivalent to about 48 grams or 12 teaspoons of sugar,  
based on a 2000 calorie per day diet." Willett Rpt. ¶ 60. Based on the FDA website, it appears  
that the comment period closed in October 2015, but apparently no concrete action has taken place  
since. See  
<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm> (last visited May 17, 2016).

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any Advertiser who posts an SSB Ad, or causes an SSB Ad to be posted, in San Francisco shall place on the SSB Ad the following warning . . . (the “Warning”):

“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.”

S.F. Health Code § 4203(a).<sup>6</sup> “The Warning shall be enclosed in a rectangular border within the printed advertisement,” and “[t]he Warning shall occupy at least 20% of the area of each SSB Ad.”<sup>7</sup> *Id.* § 4203(b).

“SSB” is defined as “any Nonalcoholic Beverage sold for human consumption . . . that has one or more added Caloric Sweeteners and contains more than 25 calories per 12 ounces of beverage,” *id.* § 4202, but certain beverages are specifically excluded, including, *e.g.*, milk and milk alternatives and 100% natural fruit or vegetable juice. *See id.*

“SSB Ad” is defined as

any advertisement, including, without limitation, any logo, that identifies, promotes, or markets a [SSB] 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.

*Id.* Similar to above, certain kinds of advertisements are specifically excluded:

- (a) any advertisement that is in any newspaper, magazine, periodical, advertisement circular or other publication, or on television, the internet, or other electronic media;
- (b) containers or packages for Sugar-Sweetened Beverages;
- (c) any menus or handwritten listings or representations of foods and/or beverages that may be served or ordered for consumption in a Retailer’s establishment;

<sup>6</sup> The City Director of Health “may by regulation . . . change the text of the Warning based on available medical or scientific information regarding the health impact of [SSBs].” S.F. Health Code § 4203(c)(1).

<sup>7</sup> The City Director of Health “may by regulation . . . modify the minimum area of SSB Ads that the Warning must occupy to improve or ensure the effectiveness of the Warning.” S.F. Health Code § 4203(c)(3).

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- (d) any display or representation of or other information about, a sugar-sweetened beverage, including, without limitation, any logo, on a vehicle, if the vehicle is being used by any Person who is in the business of manufacturing, distributing or selling the sugar-sweetened beverage in the performance of such business;
- (e) 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; or
- (f) any shelf tag or shelf label that states the retail price, order code, description, or size of a product for sale.

*Id.*<sup>8</sup>

Finally, the ordinance exempts certain SSB Ads from coverage – *e.g.*, “any sign, excluding any general advertising sign . . . , permitted by the City before the Operative date” and

any general advertising sign permitted by the City before the Operative Date that includes an SSB Ad, if the SSB Ad has not been substantially changed for a period of 50 or more years before the Operative Date and the Advertiser provides the Director, on the Director’s request, records or other information that substantiates the SSB Ad has not been substantially changed over the 50-year period.

*Id.* § 4203(d).

The City Director of Health “may assess and collect administrative penalties” for a failure to comply with the ordinance. *Id.* § 4204 (providing that Chapter 100 of the San Francisco Administrative Code “shall govern the amount of fees and the procedures for the imposition, enforcement, collection, and administrative review of administrative citations”). “[F]or each placement of an SSB Ad, each day a violation is committed or permitted to continue shall constitute a separate violation of Section 4203.” *Id.* § 4204(a).

**II. DISCUSSION**

A. Legal Standard

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on

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<sup>8</sup> As indicated in the City’s brief, these exemptions were driven by multiple concerns – for example, jurisdictional and practical. *See* Opp’n at 17 (noting that “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”; also, “the City avoids potential litigation asserting that it is effectively seeking to regulate outside of its jurisdiction”).

1 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the  
 2 balance of equities tips in his favor, and that an injunction is in the public interest.” *Network*  
 3 *Automation, Inc. v. Advanced Sys. Concepts*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting *Winter*  
 4 *v. Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008) (rejecting the position that, “when a  
 5 plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may  
 6 be entered based only on a ‘possibility’ of irreparable harm”). The Ninth Circuit has held that the  
 7 “serious questions” approach survives *Winter*: that is, where plaintiffs have raised “serious  
 8 questions going to the merits” and a hardship balance that tips sharply toward the plaintiff, a  
 9 preliminary injunction may issue, assuming the other two elements of the *Winter* test are also met.  
 10 *See Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

11 In the instant case, the critical issue is the likelihood-of-success factor.

12 B. Likelihood of Success on the Merits

13 1. Noncommercial Speech

14 As a preliminary matter, the Court addresses Plaintiffs’ contention that the City ordinance  
 15 covers not only commercial speech but also noncommercial speech and, because noncommercial  
 16 speech is at issue, strict scrutiny applies. Plaintiffs make this noncommercial speech argument  
 17 because they have, at times in the past, communicated noncommercial messages in their  
 18 advertisements – *e.g.*, Coke issued advertisements proclaiming “Love Wins” after the Supreme  
 19 Court’s marriage equality ruling, and Plaintiffs have publicized the Pride Parade and the Chinese  
 20 New Year’s Festival on signs depicting Plaintiffs’ products and logos. *See Mot.* at 8 (giving these  
 21 and additional examples). According to Plaintiffs, “[e]ven if [their] use of identifying logos or  
 22 product representations rendered such speech *partly* commercial, those features are so inextricably  
 23 intertwined with the non-commercial messages that the City’s regulation of the whole is subject to  
 24 strict scrutiny.” *Mot.* at 8 (emphasis in original). *See, e.g., Riley v. Nat’l Fed’n of Blind*, 487 U.S.  
 25 781, 795-96 (1988) (addressing state statute that, *inter alia*, required professional fundraisers,  
 26 before appealing for funds, to disclose to potential donors the percentage of charitable  
 27 contributions collected during the previous twelve months that were actually turned over to  
 28 charity; rejecting state’s argument that, “even if charitable solicitations generally are fully

1 protected, this portion of the Act regulates only commercial speech because it relates only to the  
2 professional fundraiser’s profit from the solicited contribution” – “we do not believe that the  
3 speech retains its commercial character when it is inextricably intertwined with otherwise  
4 protected speech”).

5 It is highly debatable whether all of the examples provided by Plaintiffs are situations  
6 where commercial and noncommercial speech are, in fact, inextricably intertwined. *See generally*  
7 *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 957-58 (9th Cir. 2012) (noting that, in close  
8 questions, a mixed-content publication – *i.e.*, a publication with both commercial and  
9 noncommercial speech elements – is evaluated for, *e.g.*, whether the publication is in an  
10 advertising format, whether the publication references a specific product, and what is the  
11 underlying economic motive of the speaker); *see also Jordan v. Jewel Food Stores, Inc.*, 743 F.3d  
12 509, 518, 521 (7th Cir. 2014) (noting that “[v]ery often the commercial message is general and  
13 implicit rather than specific and explicit”; also emphasizing that “the inextricably intertwined  
14 doctrine applies only when it is legally or practically impossible for the speaker to separate out the  
15 commercial and noncommercial elements of his speech” – “[b]ut simply combining commercial  
16 and noncommercial elements in a single presentation does not transform the whole into  
17 noncommercial speech”).

18 However, even assuming some of these examples are problematic under the First  
19 Amendment, Plaintiffs are presenting a *facial* challenge to the ordinance. In a facial challenge  
20 (such as with a claim of overbreadth), the plaintiff must establish that the challenged law infringes  
21 upon a “‘substantial’ amount of protected free speech, ‘judged in relation to the statute’s plainly  
22 legitimate sweep.’” *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003); *cf. Cal. Teachers Ass'n v. Bd.*  
23 *of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001) (stating that “[t]he touchstone of a facial vagueness  
24 challenge in the First Amendment context . . . is not whether some amount of legitimate speech  
25 will be chilled; it is whether a substantial amount of legitimate speech will be chilled”). *See First*  
26 *Resort, Inc. v. Herrera*, 80 F. Supp. 3d 1043, 1051 (N.D. Cal. 2015) (stating that, “even if the  
27 Ordinance targets non-commercial speech when applied to First Resort, that would not ipso facto  
28 demonstrate that it does so in all circumstances – as required in a facial challenge”). Plaintiffs

1 have failed to establish that a substantial amount of noncommercial speech will be affect judged in  
 2 relation to the amount of commercial speech regulated. Accordingly, Plaintiffs' facial challenge  
 3 predicated on noncommercial speech is not likely to succeed.

4 2. Commercial Speech

5 a. Heightened Scrutiny

6 Because commercial speech is at issue in this facial challenge, and the challenged  
 7 ordinance requires disclosure rather than suppression of speech, strict scrutiny is not required  
 8 under *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985). In  
 9 *Zauderer*, the plaintiff, an attorney, ran an advertisement in which he "publiciz[ed] his willingness  
 10 to represent women who had suffered injuries resulting from their use of a contraceptive device  
 11 known as the Dalkon Shield Intrauterine Device." *Zauderer*, 471 U.S. at 630. In the  
 12 advertisement, the plaintiff stated that "[t]he case are handled on a contingent fee basis of the  
 13 amount recovered. If there is no recovery, no legal fees are owed by our clients." *Id.* at 631.  
 14 Based on the advertisement, the state Office of Disciplinary Counsel filed a complaint against the  
 15 plaintiff, alleging that the plaintiff had violated a disciplinary rule because the advertisement  
 16 "fail[ed] to inform clients that they would be liable for costs (as opposed to legal fees) even if their  
 17 claims were unsuccessful" and therefore was deceptive. *Id.* at 633. The state Supreme Court  
 18 agreed with the state Office of Disciplinary Counsel. The plaintiff appealed, asserting that his  
 19 First Amendment rights had been violated.

20 On appeal, the United States Supreme Court made a distinction between "disclosure  
 21 requirements and outright prohibitions on speech." *Id.* at 650. While, "in some instances  
 22 compulsion to speak may be as violative of the First Amendment as prohibitions on speech," here,  
 23 the state was not "prescrib[ing] what shall be orthodox in politics, religion, [etc]." *Id.* at 651.  
 24 Instead,

25  
 26 [t]he State has attempted only to prescribe what shall be orthodox in  
 27 commercial advertising, and its prescription has taken the form of a  
 28 requirement that appellants include in his advertising purely factual  
 and uncontroversial information about the terms under which his  
 services will be available. Because the extension of First  
 Amendment protection to commercial speech is justified principally

1 by the value to consumers of the information such speech provides,  
 2 appellant's constitutionally protected interest in not providing any  
 3 particular factual information in his advertising is minimal. Thus, in  
 4 virtually all our commercial speech decisions to date, we have  
 5 emphasized that because disclosure requirements trench much more  
 6 narrowly on an advertiser's interest than do flat prohibitions on  
 7 speech, "[warnings] or [disclaimers] might be appropriately required  
 8 . . . in order to dissipate the possibility of consumer confusion or  
 9 deception."

10 *Id.* The Court then "recognize[d] that unjustified or unduly burdensome disclosure requirements  
 11 might offend the First Amendment by chilling protected commercial speech. But we hold that an  
 12 advertiser's rights are adequately protected as long as disclosure requirements are reasonably  
 13 related to the State's interest in preventing deception of consumers." *Id.* The Court ultimately  
 14 concluded that this standard was satisfied in the case under consideration.

15 In spite of *Zauderer*, Plaintiffs protest that heightened scrutiny is warranted under *Retail*  
 16 *Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016). There, the Ninth Circuit held  
 17 that *Central Hudson's* intermediate scrutiny test for commercial speech should not be applied  
 18 when there are content- or speaker-based restrictions on nonmisleading commercial speech  
 19 regarding lawful goods or services; rather, heightened judicial scrutiny should apply under *Sorrell*  
 20 *v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

21 Plaintiffs' argument is without merit for several reasons. First, *Retail Digital* addressed a  
 22 restriction on commercial speech. In contrast, the instant case involves not a *restriction* on  
 23 commercial speech, but rather the compelled *disclosure* of information. Thus, the applicable legal  
 24 framework is *Zauderer*, not *Retail Digital*. See *CTIA v. City of Berkeley*, No. 15-cv-02529-EMC,  
 25 2016 U.S. Dist. LEXIS 10332, at \*8-9 (N.D. Cal. Jan. 27, 2016) (hereinafter *CTIA II*) (noting that  
 26 "nothing in *Retail Digital's* holding or reasoning suggests *Sorrell* did away with the Supreme  
 27 Court's distinction (as articulated in *Zauderer* and embraced in *Milavetz*<sup>9</sup>) between restrictions  
 28 on commercial speech and compelled disclosure of such speech").

Second, while Plaintiffs assert that *Zauderer* is not applicable because *Zauderer* governs  
 only where the governmental interest is the prevention of consumer deception, this Court has

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<sup>9</sup> See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010).

1 already rejected that argument in another case. *See CTIA v. City of Berkeley*, No. C-15-2529  
 2 EMC, 2015 U.S. Dist. LEXIS 126071, at \*40-41 (N.D. Cal. Sept. 21, 2015) (hereinafter *CTIA I*)  
 3 (noting that several circuit courts have rejected that same argument). *Zauderer* applies where the  
 4 government asserts an interest in, e.g., public health and safety. *See, e.g., id.*; *see also Am. Meat*  
 5 *Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (addressing a federal regulation that  
 6 required disclosure of country-of-origin information about meat products); *Nat'l Elec. Mfrs. Ass'n*  
 7 *v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (addressing a state statute that required manufacturers of  
 8 some mercury-containing products to label their products and packaging to inform consumers that  
 9 the products contain mercury).

10 Accordingly, the Court considers the ordinance's constitutionality under *Zauderer*.

11 b. *Zauderer*

12 As this Court has previously noted in *CTIA I*, the *Zauderer* test is essentially a rational  
 13 basis/rational review test. *See CTIA I*, 2015 U.S. Dist. LEXIS 126071, at \*39. More specifically,  
 14 under *Zauderer*, where there is a compelled disclosure in the context of commercial speech, the  
 15 compelled disclosure does not violate the First Amendment so long as the disclosure requirement  
 16 is reasonably related to the state's interest.<sup>10</sup> *See Zauderer*, 471 U.S. at 651 (holding that "an  
 17 advertiser's rights are adequately protected as long as disclosure requirements are reasonably  
 18 related to the State's interest").

19 The Ninth Circuit has indicated that, under *Zauderer*, the application of rational basis  
 20 review may predicated on a showing that the compelled disclosure in the commercial context is  
 21 factual. *See, e.g., Videosoftware Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953, 966 (9th  
 22 Cir. 2009) (stating that "the [the state statute's] labeling requirement is unconstitutionally

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23  
 24 <sup>10</sup> Plaintiffs suggest that, in the instant case, the *Zauderer* rational review should be ratcheted up in  
 25 some way because the warning is required only when Plaintiffs decide to speak in the first place.  
 26 *See Mot.* at 4 (arguing that the ordinance at issue here is different from the ordinance at issue in  
 27 this Court's *CTIA* case because the latter compelled speech "by completion of a transaction" while  
 28 the former is triggered "by the utterance of speech that the City disfavors") (emphasis in original).  
 There is some logic to this argument – the ordinance arguably taxes speech per se. However,  
*Zauderer* posed a similar situation (the attorney was sanctioned because his advertisement, *i.e.*, his  
 speech, did not disclose to clients that they would be liable for costs (as opposed to legal fees)  
 even if their claims were unsuccessful). Nevertheless the Supreme Court required only rational  
 basis review.

1 compelled speech under the First Amendment because it does not require the disclosure of purely  
 2 factual information[] but compels the carrying of the State’s controversial opinion”). However,  
 3 the Court notes that it is not clear whether *Zauderer* itself imposed a factual predicate requirement  
 4 – or, for that matter, a “factual and uncontroversial” one – before rational review could apply. In  
 5 *Zauderer*, the Supreme Court held that disclosure requirements in the commercial context are  
 6 constitutional so long as they “are reasonably related to the State’s interest.” *Zauderer*, 471 U.S.  
 7 at 651. It is only in a prior paragraph that the Supreme Court noted that the state’s “prescription  
 8 has taken the form of a requirement that appellant include in his advertising purely factual and  
 9 uncontroversial information about the terms under which his services will be available.” *Id.*  
 10 Arguably, the Court’s reference to “factual and uncontroversial” was simply a description of what  
 11 the state’s compelled disclosure was; it is not clear whether the Court necessarily held that a  
 12 compelled disclosure must be factual and uncontroversial before rational review can be applied.

13 For purposes of this opinion, however, the Court proceeds with the assumption that there is  
 14 a factual *and* uncontroversial predicate to *Zauderer*’s rational review test.<sup>11</sup> Proceeding with this  
 15 understanding, the Court reaffirms its analysis in *CTIA – i.e.*, that the “factual and  
 16 uncontroversial” requirement of *Zauderer* means, at most, that the compelled disclosure must  
 17 convey a fact rather than an opinion and that, generally speaking, it must be accurate. *See CTIA II*,  
 18 2016 U.S. Dist. LEXIS 10332, at \*18-19 (stating that “[u]ncontroversial’ should generally be  
 19 equated with the term ‘accurate’; in contrast, ‘factual’ goes to the difference between a ‘fact’ and  
 20 an ‘opinion’”). As noted in *CTIA I*, the “uncontroversial” requirement should not be read  
 21 expansively to mean something beyond accuracy, especially as the term “uncontroversial’

22 \_\_\_\_\_  
 23 <sup>11</sup> In a number of unpublished decisions, the Ninth Circuit has assumed that under *Zauderer*, the  
 24 compelled disclosure must be both “factual” and “uncontroversial.” *See Crazy Ely W. Vill., LLC*  
 25 *v. City of Las Vegas*, 618 Fed. Appx. 904, 906 (9th Cir. 2015) (stating that “[t]he government may  
 26 compel ‘purely factual and uncontroversial’ speech”); *S. Cal. Inst. of Law v. Biggers*, 613 Fed.  
 27 Appx. 665, 666 (9th Cir. 2015) (stating that “the required disclosure of past bar exam results easily  
 28 satisfies [the *Zauderer*] standard: such requirement relates only to disclosure of ‘purely factual and  
 uncontroversial information,’ and is reasonably related to CBE’s legitimate interest”); *CTIA –*  
*Wireless Ass’n v. City & County of San Francisco*, 494 Fed. Appx. 752, 753 (9th Cir. 2014)  
 (stating that “any governmentally compelled disclosures to consumers must be ‘purely factual and  
 uncontroversial’”). But the Ninth Circuit has not closely examined in a published decision what  
*Zauderer* requires anything other than focusing on the factual nature of the compelled disclosure,  
 as in *Videosoftware Dealers*.

1 appeared only once in *Zauderer*” and, in *Milavetz*, 559 U.S. at 229, which was decided after  
2 *Zauderer*, the Supreme Court did not use that term at all and instead referred to factual and  
3 accurate information only. *CTIA I*, 2015 U.S. Dist. LEXIS 126071, at \*59-60 (also stating that “a  
4 court should tread carefully before deeming compelled speech controversial for *Zauderer*  
5 purposes”). The Sixth Circuit underscored the same point in *Discount Tobacco City & Lottery,*  
6 *Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (noting that the *Milavetz* Court used  
7 “the language *required factual information and only an accurate statement* when describing the  
8 characteristics of a disclosure that is scrutinized for a rational basis”) (emphasis in original), and  
9 further pointed out that “whether a disclosure is scrutinized under *Zauderer* turns on whether the  
10 disclosure conveys factual information or an opinion, not on whether the disclosure emotionally  
11 affects its audience or incites controversy.” *Id.* at 569. Moreover, the factual and uncontroversial  
12 requirement, if extant, should not “be so easily manipulated that it would effectively bar any  
13 compelled disclosure by the government,” particularly “where public health and safety are at  
14 issue.” *CTIA I*, 2015 U.S. Dist. LEXIS 126071, at \*60-61. As this Court emphasized in *CTIA II*,  
15 “[a] ‘controversy’ cannot automatically be deemed created any time there is a disagreement about  
16 the science behind a warning because science is almost always debatable at some level.” *See*  
17 *CTIA II*, 2016 U.S. Dist. LEXIS 10332, at \*19.

18 In the instant case, the warning required by the ordinance likely passes the factual and  
19 accurate requirement.

20 i. Tooth Decay

21 As an initial matter, the Court notes that the battle over the factual and uncontroversial  
22 requirement really concerns obesity and diabetes, and not tooth decay. That is, there is no real  
23 dispute that SSBs, because of their sugar content, do contribute to tooth decay. The City’s expert,  
24 Dr. Schillinger, has presented testimony that

25  
26 [t]he causal link between dietary sugars and tooth decay has long  
27 been firmly established, and the basic biological mechanisms are  
28 well understood. In fact, the causal relationship between sugar and  
tooth decay was definitively established as early as the 1930s, based  
on a randomized controlled trial carried out in Sweden. We now  
understand that dietary sugars, including in the form of SSBs,

1 provide a substrate for oral bacteria that cause cavities to flourish  
 2 and to generate enamel-demineralizing acids. Modifying factors  
 3 such as fluoride and dental hygiene would not be needed if we  
 4 tackled the single cause – added sugars. Quantitative analyses show  
 5 a dose-response relationship between the sugar or its  
 6 monosaccharide intakes (such as fructose) and the progressive  
 7 lifelong development of cavities and resultant tooth loss. This  
 8 results in a substantial dental health burden throughout life. While  
 9 processed starches have cavity-causing potential when  
 10 accompanying sucrose, human studies do not provide unequivocal  
 11 data of their ability to cause cavities in the absence of sugar.

12 Schillinger Rpt. ¶ 22. Dr. Schillinger’s testimony is not rebutted. For example, Plaintiffs’ expert,  
 13 Dr. Kahn, does not appear to opine on tooth decay at all, either in his opening or reply report.

14 Plaintiffs protest that the warning required by the ordinance is misleading because it  
 15 suggests that “consuming beverages with added sugar is dangerous regardless of one’s diet or  
 16 lifestyle” and that “consuming beverages with added sugar necessarily and inevitably contributes  
 17 to . . . tooth decay at any level of consumption.” Mot. at 6. But this argument is unavailing. The  
 18 ordinance simply says SSBs “contribute” to tooth decay; it does not say that SSBs inevitably result  
 19 in or will necessarily cause tooth decay. Nor would a reasonable consumer so construe the  
 20 warning.<sup>12</sup>

21 Moreover, Plaintiffs do not fundamentally dispute that it is accurate to say that SSBs do, in  
 22 the aggregate, “contribute” to tooth decay. *See* Schillinger Rpt. ¶ 22. No reasonable consumer  
 23 would likely construe the warning as specific to him or her; instead, a reasonable consumer would  
 24 understand the warning is directed to the general public and that the statement that SSBs are a  
 25 contributing factor is to be viewed in the larger context of public health.<sup>13</sup>

26 \_\_\_\_\_  
 27 <sup>12</sup> Although the *Zauderer*-related case law does not specifically reference how a “reasonable  
 28 consumer” would understand a compelled disclosure, the Court is hard pressed to see what other  
 framework should apply. Moreover, at the hearing, the parties did not dispute that the warning  
 should be evaluated from the perspective of a reasonable consumer. *Cf. Rice v. Fox Broad. Co.*,  
 330 F.3d 1170, 1182 n.8 (9th Cir. 2003) (stating that, for a false advertising claim brought  
 pursuant to California Business & Professions Code § 17200, a “plaintiff must prove that  
 defendants’ statements are misleading to a reasonable consumer”).

<sup>13</sup> To the extent Plaintiffs suggest that the mere use of the term “contribute” is misleading, the  
 Court does not agree. The term “contributes” is weaker than the term “causes”: if the warning  
 here is deemed misleading, this would cast substantial doubt on disclosures which mandate the  
 term “causes.” *See, e.g.*, <https://www.federalregister.gov/articles/2010/11/12/2010-28538/required-warnings-for-cigarette-packages-and-advertisements#h-19> (last visited May 17,  
 2016) (discussing cigarette warnings, one of which is “Smoking Causes Lung Cancer, Heart

1 As for Plaintiffs' contention that the ordinance is misleading because it identifies and  
 2 singles out one of many cause(s) for tooth decay, that position lacks merit because such an  
 3 argument would credit an underinclusiveness argument rejected in *Zauderer*:

4  
 5 [W]e are unpersuaded by appellant's argument that a disclosure  
 6 requirement is subject to attack if it is "under-inclusive" – that is, if  
 7 it does not get at all facets of the problem it is designed to  
 8 ameliorate. As a general matter, governments are entitled to attack  
 problems piecemeal, save where their policies implicate rights so  
 fundamental that strict scrutiny must be applied. The right of a  
 commercial speaker not to divulge accurate information regarding  
 his services is not such a fundamental right.

9 *Zauderer*, 471 U.S. at 651 n.14. See also *Nat'l Elec.*, 272 F.3d at 116 (stating that, "[a]bsent  
 10 interference with such a fundamental right, a state may choose to tackle a subsidiary cause of a  
 11 problem rather than its primary cause, particularly where that primary cause lies out of its reach";  
 12 thus, the state statute, which required mercury-containing light bulbs to be labeled, was "rationally  
 13 related to the state's goal, notwithstanding that the statute may ultimately fail to eliminate all or  
 14 even most mercury pollution in the state"). The government has the power to tackle less than all  
 15 causes of a public health problem, at least so long as it has a reasonable basis for doing so under  
 16 *Zauderer*. Perforce, the government must have the ability to focus on less than all potential causes  
 17 of a public health problem, at least where the government has a reasonable basis for doing so.

18 Here, the City had a reasonable basis to identify SSBs as a contributor to tooth decay. For  
 19 example, the portion size for a standard soft drink bottle is now 20 ounces and a "20-ounce single  
 20 serving bottle provides 65 grams of sugar (equivalent to 16 teaspoons)." Willett Rpt. ¶ 15; see  
 21 also Willett Rpt. ¶ 60 (stating that even a "12 oz. serving of soda contains on average . . . 39 grams  
 22 of sugar, which is equivalent to about ten teaspoons of table sugar"). It is not surprising that a  
 23 food/beverage source that provides a significant amount of sugar in one portion size would be  
 24 "targeted," particularly where it does not provide any nutritive value. Compare, e.g., Willett Rpt.

25  
 26  
 27 Disease, Emphysema, and May Complicate Pregnancy"); 21 C.F.R. § 1143.5 (governing required  
 28 warning statements for cigars – e.g., "Cigar smoking can cause lung cancer and heart disease"); 27  
 Cal. Code Regs. § 25601 (Proposition 65, requiring communication of a message that "the  
 chemical in question is known to the state to cause cancer, or birth defects or other reproductive  
 harm").

1 at 3 n.2 (noting that 100% fruit juice “contains a number of healthful vitamins and nutrients” and  
 2 that “[m]ilk also contains a number of important vitamins and minerals, including calcium,  
 3 vitamin D and magnesium, as well as protein”; adding that amounts consumed of juice and milk  
 4 are typically smaller, *i.e.*, in comparison to consumption of SSBs). Plaintiffs cite to a 2015 letter  
 5 written by the American Dental Association (“ADA”) to the U.S. Secretary of Health and Human  
 6 Services and U.S. Secretary of Agriculture in which it states:

7  
 8 We recognize the growing popularity of singling-out sugar-  
 9 sweetened beverages as a key driver of dental caries. Advocates  
 10 postulate that lowering sugar-sweetened beverage consumption rates  
 11 will lower the prevalence of dental caries. Unfortunately, the  
 12 evidence is not yet sufficient to single out any one food or beverage  
 13 product as a key driver of dental caries.

14 Letter, dated May 8, 2015, *available at*

15 [http://www.ada.org/~media/ADA/Advocacy/Files/ltr\\_150508\\_hhs\\_dgac2015\\_nosig.ashx](http://www.ada.org/~media/ADA/Advocacy/Files/ltr_150508_hhs_dgac2015_nosig.ashx) (last  
 16 visited May 17, 2016). That SSBs may not be a “key driver” is not dispositive. The City still had  
 17 a reasonable basis to target SSBs for the reasons stated above.

18 Accordingly, the Court finds that the warning that drinking SSBs “contributes” to tooth  
 19 decay is likely factual and accurate. The City has a legitimate interest in public health and safety,  
 20 and the warning that SSBs contribute to tooth decay is reasonably related to the City’s interest in  
 21 public health and safety. *See Zauderer*, 471 U.S. at 651.

22 To the extent Plaintiffs suggest that rational review still cannot be satisfied because of the  
 23 size of the warning, the Court is not persuaded. The City had a reasonable basis for requiring that  
 24 the warning constitute 20% of the advertisement. The warning had to be of a sufficient size to be  
 25 salient – *i.e.*, noticed and attended to – and research on health warnings for tobacco products has  
 26 led the World Health Organization (“WHO”) for instance, to recommend that tobacco product  
 27 packaging and labeling bear a health warning of 50% or more, but no less than 30%, of the  
 28 principal display areas. *See* Hammond Rpt. ¶¶ 17, 20-22 (also noting that 180 countries have  
 ratified the WHO’s approach); Guidelines for Implementation of Article 11 of the WHO  
 Framework Convention on Tobacco Control ¶ 12, *available at*  
[http://www.who.int/fctc/guidelines/article\\_11.pdf](http://www.who.int/fctc/guidelines/article_11.pdf). By comparison, 20% is relatively modest. *Cf.*

1 also Hammond Rpt. ¶ 35 (“Two additional studies [regarding cigarette warnings] have  
2 demonstrated that increases in the salience of warnings through the use of pictorials further  
3 increases the efficacy of health warnings that cover 20% of cigarette advertisement space by  
4 increasing message processing and recall.”). Moreover, to the extent Plaintiffs suggest that a  
5 warning commanding less space than 20% would still be effective, that is not dispositive as, in  
6 *Zauderer*, the Supreme Court “declined to apply a ‘least restrictive means’ analysis to disclosure  
7 requirements and stated: ‘We do not think it appropriate to strike down such requirements merely  
8 because other possible means by which the State might achieve its purposes can be  
9 hypothesized.’” *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 55 (1st Cir. 2000); *cf. Disc.*  
10 *Tobacco*, 674 F.3d at 561 n.10 (in tobacco warning case, addressing plaintiffs’ reliance on  
11 *Entertainment Software Association v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006), where the  
12 Seventh Circuit found unconstitutional a compelled disclosure that covered only approximately  
13 10% of the package; noting that the Seventh Circuit’s “conclusion that the sticker failed to be  
14 narrowly tailored because of its size compared to the size of a video-game box followed the  
15 court’s decision to employ *strict scrutiny*” rather than a lesser standard of review) (emphasis  
16 added). As discussed below, the burden imposed by the 20% size requirement is not insubstantial,  
17 and could raise serious questions on the merits, but is not sufficient to establish that the ordinance  
18 is likely unconstitutional.

19 ii. Obesity/Diabetes

20 For the warning on obesity/diabetes, Plaintiffs make the same basic arguments as above –  
21 *i.e.*, that the warning is misleading because it suggests that (1) “consuming beverages with added  
22 sugar is dangerous regardless of one’s diet or lifestyle,” (2) “consuming beverages with added  
23 sugar necessarily and inevitably contributes to obesity [and] diabetes,” and (3) “consuming  
24 beverages with added sugar uniquely contributes” to obesity and diabetes. Mot. at. 6.

25 Similar to above, the Court is not persuaded that Plaintiffs are likely to prevail on the  
26 merits of their constitutional claim. Again, the required disclosure only says that SSBs  
27 “contribute” to obesity and diabetes, not that they will necessarily result in diabetes or obesity in  
28 any particular case; nor does the disclosure state that SSBs are the sole or even dominant cause. A

1 reasonable consumer is not likely to understand the warning to impart either message as ascribed  
2 by Plaintiffs.

3         There is no real dispute as to the literal accuracy of the required warning. Although there  
4 may be a legitimate scientific debate as to how exactly SSBs contribute (*e.g.*, Plaintiffs’ and the  
5 City’s experts disagree as to whether SSBs contribute to diabetes through their glycemc effects  
6 and the metabolic role of fructose, *see* Willett Rpt ¶ 11; Schillinger Rpt. ¶ 21; Kahn Reply Rpt. ¶  
7 30), both sides agree that, at the very least, SSBs can contribute to weight gain because they  
8 provide calories, and that weight gain can lead to obesity and diabetes. *See, e.g.*, Kahn Reply Rpt.  
9 ¶ 7 (stating that the City’s experts “and I agree that excess consumption of calories will lead to  
10 weight gain and that may lead to obesity and diabetes”; adding that “[e]xcess consumption occurs  
11 when at any level of energy intake the number of calories consumed exceeds the number of  
12 calories expended”). Thus, the statement that SSBs contribute is both factual and accurate. While  
13 it is true that individuals respond differently to different diets depending on behavior (reduction of  
14 other sources of calories, amount of exercise, genetic predisposition, etc.), as noted above, no  
15 reasonable consumer would likely construe the warning as specific to him or her and instead  
16 would understand the warning is directed to the general public, and that warning is to be viewed in  
17 the larger aggregative context of public health. Accordingly, the Court concludes that the warning  
18 related to obesity/diabetes is factual and accurate within the meaning of *Zauderer*.

19         Plaintiffs point out that SSBs are not the only source of calories; practically all foods and  
20 beverages provide calories. *See* Kahn Reply Rpt. ¶ 10 (stating that “any calories – whatever their  
21 source – can contribute to obesity and diabetes if more calories are consumed than expended”).  
22 Moreover, even if added sugar is the focus, there are many beverages with added sugars that have  
23 not been targeted (*e.g.*, certain kinds of flavored milk), and no foods with added sugars have been  
24 targeted at all. In short, Plaintiffs again contend that, by singling out SSBs, the City has implicitly  
25 imparted the message that SSBs uniquely contribute to obesity and diabetes in a way that other  
26 foods and beverages do not (*i.e.*, in a noncaloric way).

27         But Plaintiffs’ position is problematic because, as noted above, to disallow the required  
28 disclosure of less than all contributing factors, even where there is a reasonable basis for selecting

1 the identified factors, would be contrary to *Zauderer* which rejected the underinclusiveness  
2 assignment. That argument is also inconsistent with the rational basis test of *Zauderer* which  
3 eschews the less restrictive alternative test.

4 Here, the City had a reasonable basis for requiring the disclosure of SSBs as a contributing  
5 factor to diabetes and obesity. SSBs are a significant source of calories. The City's expert, Dr.  
6 Willett, states in his report that SSBs are the fourth leading source of calories in diets for adults  
7 and the third for children. *See* Willett Rpt. ¶ 18 (citing the Dietary Guidelines for Americans,  
8 2010). Plaintiffs' expert, Dr. Kahn, implies that this fact is misleading because "[m]anipulating  
9 what constitutes a source (e.g., all meat or divided into types of meat) can lead to many variations  
10 of what are the largest to smallest source of calories." Kahn Reply Rpt. ¶ 52. However, Dr. Kahn  
11 does not dispute that this conclusion was reached in the Dietary Guidelines for Americans, a joint  
12 publication of the U.S. Department of Health and Human Services and the U.S. Department of  
13 Agriculture. *Cf.* 7 U.S.C. § 5341(a)(2) (providing that the information and guidelines in the  
14 Dietary Guidelines for Americans "shall be based on the preponderance of the scientific and  
15 medical knowledge which is current at the time the report is prepared"). Moreover, Dr. Kahn does  
16 not explain specifically how the Dietary Guidelines improperly grouped sources. Accordingly,  
17 Dr. Kahn's statement is of little value here and does not establish the City's action was  
18 unreasonable.

19 Plaintiffs protest that SSBs represent only 5% of total caloric intake. Plaintiffs make this  
20 assertion based on a statement by the City's own expert, Dr. Willett, that added sugars (not just  
21 SSBs) account for about 13% of calories and that SSBs account for 39% of all added sugar intake  
22 (*i.e.*,  $13 \times 39\% = 5$ ). *See* Kahn Reply Rpt. ¶ 43 (citing Willett Rpt. ¶ 18). But Plaintiffs' deductive  
23 calculation, even if mathematically correct, is not persuasive in light of the fact that a single-  
24 serving size of many SSBs represents a substantial number of calories. For example, a standard  
25 serving size for a soda is 20 ounces and that imparts as many as 240 calories. *See* Willett Rpt. ¶  
26 15 (noting that "the portion size of sodas has increased substantially, from a 6.5-oz standard soft  
27 drink bottle in the 1950s to a typical 20-oz bottle today"; adding that "[t]he 20-ounce single  
28

1 serving bottle provides 65 grams of sugar (equivalent to 16 teaspoons) and 240 calories”).<sup>14</sup>  
 2 Assuming a diet of 2,000 calories per day, one serving size of soda represents more than 10% of  
 3 the total caloric intake. For young children, 240 calories is likely an even higher percentage of  
 4 total caloric intake, which is especially problematic given that there is undisputedly a child obesity  
 5 problem, both in the country and in San Francisco, and there is evidence that SSBs contribute a  
 6 significant portion of calories for children in particular. *See* Willett Rpt. ¶ 17 (noting that “US  
 7 children and youth obtain 224 calories per day from SSBs on average, which is nearly 11% of  
 8 their daily total caloric intake”); Schillinger Rpt. ¶ 9 (stating that a 2011 report “found that 32% of  
 9 San Francisco youth were overweight or obese”).

10 Second, to the extent Plaintiffs argue that, at the very least, other sources of added sugar  
 11 should have been targeted for disclosure, they fare no better. Putting aside the fact that SSBs  
 12 provide no nutritive value, which is not necessarily the case with other sources of added sugar  
 13 (*e.g.*, flavored milk or even many foods with added sugar), SSBs are a significant source of added  
 14 sugar. As recognized in the Dietary Guidelines, “[a]s a percent of calories from total added  
 15 sugars, the major sources of added sugars in the diets of Americans are soda, energy drinks, and  
 16 sports drinks (36% of added sugar intake), grain-based desserts (13%), sugar-sweetened fruit  
 17 drinks (10%), dairy based desserts (6%), and candy (6%).” *Dietary Guidelines for Americans*,  
 18 2010, at 28, available at <http://health.gov/dietaryguidelines/2010/> (last visited May 17, 2016).

19 Furthermore, there is no dispute that the Dietary Guidelines recommend a daily limit of  
 20 10% (*i.e.*, of total calories) for added sugars. *See* note 5, *supra*. But, *e.g.*, a single serving of soda  
 21 (20 ounces) exceeds that 10% recommended daily limit (assuming total calories of 2,000). And,  
 22 similar to above, the situation is even worse for young children.<sup>15</sup> *See* Willett Rpt. ¶ 9 (noting that  
 23

24 \_\_\_\_\_  
 25 <sup>14</sup> Even a 12-ounce serving size of soda contains a large number of calories. *See* Willett Rpt. ¶ 60  
 26 (stating that “[a] typical 12 oz. serving of soda contains on average 140-150 calories and 39 grams  
 27 of sugar, which is equivalent to about ten teaspoons of table sugar”).

28 <sup>15</sup> Even Plaintiffs’ expert, Dr. Kahn, implicitly recognizes that beverages with added sugar pose a  
 greater concern for children compared to adults, as for added sugar consumption in adults, 33%  
 comes from beverages, while, for children and adolescents, the percentage is 41%. *See* Kahn  
 Reply Rpt. ¶ 50 (although arguing that “those proportions are likely less today, since overall sugar  
 consumption continues to decline”).

1 “standard single serving sizes of SSBs provide all (in a 20-ounce serving of many SSBs) or nearly  
2 all (in a 12-ounce serving) of the recommended maximum daily added sugar amount for most  
3 adults, and more in children”); Schillinger Rpt. ¶ 31 (stating that, based on the Guidelines, a 12-  
4 year-old girl whose daily calorie intake is 1,600 calories should limit intake of added sugar to less  
5 than 160 calories). The City has also provided evidence indicating that, aside from children,  
6 certain groups in the community are also particularly affected by added sugars in their diets. *See*  
7 Willett Rpt. ¶ 8 (stating that “[c]onsumption levels [in the United States] are higher among  
8 African-Americans, Hispanics and low-income individuals – the groups with disproportionately  
9 high prevalence of obesity and obesity related chronic diseases”); Willett Rpt. ¶ 17 (stating that  
10 “industry data . . . report[s] that the soda-drinking half of the [U.S.] population are more likely to  
11 be male, young, single, poorly educated, low-income, blue-collar, Hispanic, African American,  
12 and living in the South or Midwest”), and not just at the national but also at the local level. *See*  
13 Schillinger Rpt. ¶ 9 (noting that “[o]besity rates are high locally as well” – *e.g.*, “[a] 2011 report  
14 measured obesity rates among 5th, 7th and 9th graders and found that 32% of San Francisco youth  
15 were overweight or obese[;] [i]n San Francisco, 46.4% of adults are obese or overweight,  
16 including 61.7% of Hispanics and 51.3% of African Americans”).

17 The Court thus concludes that it is likely the City’s mandated warning (and its use of the  
18 term “contribute”) is factual and accurate, even as to obesity and diabetes, and the City had a  
19 reasonable basis for identifying SSBs as a cause. The City has a legitimate interest in public  
20 health and safety, and the warning that SSBs contribute to obesity and diabetes is reasonably  
21 related to the City’s interest in public health and safety, particularly in light of the evidence  
22 indicating that SSBs are a significant source of calories as well as a significant source of added  
23 sugar. *See Zauderer*, 471 U.S. at 651.

### 24 iii. Chilling Effect

25 Plaintiffs argue that, even if *Zauderer* rational review is satisfied (for tooth decay or  
26 obesity/diabetes), the ordinance is still unconstitutional because *Zauderer* recognized that  
27 “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by  
28 chilling protected commercial speech.” *Zauderer*, 471 U.S. at 651. According to Plaintiffs, the

1 ordinance here will result in chilled speech because (1) the primary message of an advertisement  
 2 containing the warning will *be* the warning (given, *e.g.*, its required size, which is 20% of the  
 3 advertisement) so Plaintiffs will not want to engage in any advertising in the first place (at least  
 4 not on the covered media), and (2) Plaintiffs cannot practically engage in counterspeech to address  
 5 the warning because the size of the warning is substantial (again, 20% of the advertisement) and,  
 6 in any event, counterspeech would transform the advertisement from product promotion into a  
 7 scientific debate.

8 Although the Court did consider the issue of chilling effects in *CTIA*, *see generally CTIA I*,  
 9 2015 U.S. Dist. LEXIS 126071, at \*50-52, 66-67, it takes this opportunity to examine more  
 10 closely whether a specific analysis of chilling effect is required under *Zauderer*. The relevant text  
 11 from *Zauderer* is as follows:

12 We do not suggest that disclosure requirements do not implicate the  
 13 advertiser’s First Amendment rights at all. We recognize that  
 14 unjustified or unduly burdensome speech requirements might offend  
 15 the First Amendment by chilling protected commercial speech. *But*  
 16 we hold that an advertiser’s rights are adequately protected as long  
 17 as disclosure requirements are reasonably related to the State’s  
 18 interest . . . .

19 *Zauderer*, 471 U.S. at 651 (emphasis added).

20 *Zauderer* simply requires that a disclosure requirement be reasonably related to the  
 21 government’s interest, and nothing more. In *Zauderer*, the Supreme Court assumed there may be  
 22 chilling effects, but held that, as long as the disclosure requirements “are reasonably” related to the  
 23 State’s interest, the advertiser’s rights are “adequately protected.” *Id.* At least one circuit court  
 24 appears to have adopted this analysis. *See Disc. Tobacco*, 674 F.3d at 556 (noting that, in  
 25 *Milavetz*, “the Court upheld the required disclosures without separately analyzing whether they  
 26 were unjustified or unduly burdensome,” which “makes sense because the *Zauderer* rule is that  
 27 when disclosure requirements are ‘reasonably related to the State’s interest in preventing  
 28 deception of consumers,’ the rights of an advertiser are adequately protected”). Accordingly, the  
 possible chilling effects asserted by Plaintiffs does not alter fundamentally the analytical  
 framework under *Zauderer*. Instead the degree of any chilling effect is subsumed under the

1 *Zauderer* test. If, for instance, the disclosure requirement was so burdensome and chilling (*e.g.*, if  
2 the warning had to cover 80% of the ad), it may not be “reasonably related” to the state’s interest  
3 even under *Zauderer*.

4 To the extent Plaintiffs contend the warning required by the ordinance in fact unreasonably  
5 burdens Plaintiffs, they are not likely to prevail. Plaintiffs claim that the primary message of an  
6 advertisement containing the warning will be the warning (and not the advertisement) given its  
7 required size, which is 20% of the advertisement. However, as the City points out, the required  
8 warning is text only; it is not pictorial. Thus, the force of the pictorial advertisement is not likely  
9 to be overcome by the text warning. *See* Hammond Rpt. ¶ 47 (pointing out that advertisements  
10 usually use “full color, pictures and brand imagery”; adding that “[r]esearch across a wide variety  
11 of domains has unequivocally demonstrated that pictorial information is far more salient compared  
12 to text only information”) (emphasis omitted). As noted by the City’s expert, David Hammond,  
13 “[a] paper published in the *Journal of the American Medical Association* – one of the leading  
14 medical journals in the world – demonstrated that advertising messages are still effective in the  
15 presence of health warnings on ads. For example, recall of brand information in the advertisement  
16 remained very high in the presence of health warning.” Hammond Rpt. ¶ 46.

17 The Court acknowledges that Plaintiffs’ expert, Peter Golder, has challenged Dr.  
18 Hammond’s statements, emphasizing that

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20 [b]rand recall . . . is not the same as advertising message recall. A  
21 consumer may recall what brand was represented in the  
22 advertisement, but not recall the message and language of the  
23 advertisement. The tobacco study cited by Dr. Hammond not only  
24 acknowledged the distinction between the two concepts but also  
25 found that, in the presence of a warning message, consumers’ recall  
26 of the advertising message (or “heading”) was lower than their recall  
27 of the warning message.

28 Golder Rpt. ¶ 32. But the Court is not persuaded by Dr. Golder’s analysis because, at least for the  
products at issue in this case – SSBs – the advertising message is, in effect, the brand, and brand  
recall is not particularly affected by a text warning message.

Moreover, as noted above, the 20% size requirement, while substantial, is not without  
precedent. Plaintiffs’ claims that they could not really engage in counterspeech because of the size

1 of the warning (20% of the advertisement) are dubious. Not only is 80% of the space available,  
2 Plaintiffs have shown that they have employed pithy advertising on how to achieve balanced diets  
3 and lifestyles. *See, e.g.*, Keane Decl., Ex. A (advertisement stating, “Balance what you eat, drink,  
4 and do”). To be sure, the 20% size requirement is not insubstantial and as discussed below makes  
5 this a close question whether Plaintiffs have raised at least serious questions on the merits.  
6 Nonetheless, for the reasons discussed above, the Court concludes the size requirement does not  
7 likely render the ordinance unconstitutional.

8 The Court also finds unconvincing Plaintiffs’ claim that they will not engage in any  
9 advertising in the covered media if the ordinance is allowed to go into effect. Although Plaintiffs  
10 have submitted declarations from some of the major beverage companies stating that they will  
11 withdraw advertisements covered by the ordinance if the ordinance goes into effect,<sup>16</sup> the Court  
12 does not find those declarations particularly compelling. As the City points out, these declarations  
13 are self-serving in nature. *Cf. Consolidated Cigar*, 218 F.3d at 55 (rejecting companies’ argument  
14 that “the twenty-percent coverage of the warnings will so burden cigar manufacturers that they  
15 will cease advertising altogether[;] [t]he companies offer precious little to support this difficult-to-  
16 believe proposition, and we find it unpersuasive”; adding that “[o]ther industries, including the  
17 manufacturers of cigarettes and smokeless tobacco products, have successfully incorporated  
18 warning schemes into their advertising practices, and cigars present no special considerations that  
19 lead us to believe a different result will ensue here”). Moreover, the explanation as to why the  
20 companies will entirely withdraw from the covered media is not entirely satisfactory. For  
21 example, the PepsiCo declaration states as follows:

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25 <sup>16</sup> *See* Johnson Decl. ¶ 28 (“[I]f the Ordinance is allowed to take effect, PepsiCo intends to  
26 withdraw from advertising burdened by the Ordinance on covered media in the City.”); Fox Decl.  
27 ¶ 27 (“[I]f the ordinance is allowed to take effect, DPSG [*i.e.*, Dr. Pepper] intends to cease  
28 advertising that is burdened by the Ordinance.”). Notably, Coke does not appear to make such a  
statement in its declaration, although it does state (as do PepsiCo and Dr. Pepper) that it “does not  
expect to enter into contracts for future advertisements on covered media . . . unless the Company  
knows with certainty that such advertisements would not be subject to the mandated warning.”  
Kelly Decl. ¶ 28; *see also* Johnson Decl. ¶ 29; Fox Decl. ¶ 29.

1 21. If allowed to take effect, the Ordinance will force PepsiCo to  
2 either convey the City's warning or cease advertising on covered  
3 media.

4 22. PepsiCo is concerned that displaying the City's large,  
5 mandated Warning on PepsiCo's own billboards, posters, and  
6 similar media would distort PepsiCo's intended messages.

7 23. Because of its size, format, and content – including its all-  
8 capitals "WARNING" – PepsiCo is concerned that the required  
9 Warning would substantially overwhelm PepsiCo's intended  
10 messages on advertisements impacted by the Ordinance.

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

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

20 26. The Warning Mandate would also make advertising on  
21 covered media within City limits significantly more costly to  
22 PepsiCo. Although PepsiCo likely would be required to pay for  
23 100% of its advertising space, it would be entitled to utilize only  
24 80% of that space, effectively making each square foot of usable  
25 advertising space 25% more expensive, while subsidizing and  
26 underwriting 100% of the cost of the City's message.

27 27. Generally speaking, PepsiCo believes that the harm to  
28 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.

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.

Johnson Decl. ¶¶ 21-28.

Based on the above statements, the PepsiCo declaration arguably suggests that there would be *no* benefit at all to an advertisement with the warning. However, that claim, to the extent made, is not especially credible given that tobacco companies have still profited even with the required warnings on the tobacco products themselves. To the extent the PepsiCo declaration simply states that the burden of the warning outweighs the benefit of the advertising with the warning, that claim, while plausible, is not sufficiently substantiated. Plaintiffs do not substantiate what kind of revenue covered media advertising has generated in the past (*i.e.*, pre-warning) and the level of

1 revenue which is expected if covered media advertising would be required to have the warning.  
2 Without specifics, it is difficult to evaluate the claim that the burden exceeds the benefit and  
3 credibility of the claim that Plaintiffs will cease affected advertising. Notably, PepsiCo's  
4 professed willingness to completely abandon the covered media seems at odds with its claim that  
5 the covered media is of significant value. *See* Johnson Decl. ¶ 10 ("PepsiCo believes that utilizing  
6 different forms of media allows it to most effectively convey its message to consumers."). The  
7 bottom line is that the beverage companies' assertion that they would altogether stop advertising  
8 in the covered media (rather than, *e.g.*, reducing advertising or even run test advertising) is of  
9 questionable credibility.<sup>17</sup>

10 c. Summary

11 For the foregoing reasons, the Court concludes that Plaintiffs are not likely to succeed on  
12 the merits of their First Amendment claim. The warning required by the City ordinance is factual  
13 and accurate, and the City had a reasonable basis for requiring the warning given its interest in  
14 public health and safety. Plaintiffs' arguments of chilling effect are not sufficiently substantiated  
15 but, even if there were an arguable chilling effect, *Zauderer* dictates that a compelled disclosure  
16 need only be reasonably related to the government's interest in order for the advertiser's rights to  
17 be adequately protected.

18 This is not to say that Plaintiffs' constitutional argument is not without force. The Court

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<sup>17</sup> In this regard, the Court notes that pharmaceutical companies still advertise even though their advertisements are required to include information about side effects, contraindications, and effectiveness. *See* 21 C.F.R. § 202.1(e)(1) (requiring prescription drug advertisements to "present a true statement of information in brief summary relating to side effects, contraindications (when used in this section, 'side effects, contraindications' include side effects, warnings, precautions, and contraindications and include any such information under such headings as cautions, special considerations, important notes, etc.) and effectiveness"; adding that "[a]dvertisements broadcast through media such as radio, television, or telephone communications systems shall include information relating to the major side effects and contraindications of the advertised drugs in the audio or audio and visual parts of the presentation and unless adequate provision is made for dissemination of the approved or permitted package labeling in connection with the broadcast presentation shall contain a brief summary of all necessary information related to side effects and contraindications"). Although the regulation specifies that only a "brief summary" is required, as anyone who has witnessed a television advertisement for pharmaceutical products will know, the scope of the information required about potential adverse side effects often makes the disclosure seemingly as long as the advertising message itself. This apparently has not deterred pharmaceutical companies from advertising.

1 acknowledges that the size requirement of 20% and the burden it imposes on advertisers makes  
2 this case a closer question, in the Court’s view, compared to *CTIA I* and *CTIA II*. Nonetheless,  
3 under rational basis review applicable under *Zauderer*, Plaintiffs are not likely to succeed on the  
4 merits of their First Amendment claim.

5 C. Likelihood of Irreparable Harm and Balance of Equities

6 As to irreparable harm, much of Plaintiffs’ claim is dependent on the success of their First  
7 Amendment claim – *i.e.*, if the claimed irreparable harm is a violation of Plaintiffs’ First  
8 Amendment rights, then there is no such irreparable harm if Plaintiffs do not prevail on that claim.

9 Plaintiffs also identify harm to goodwill and reputation as another irreparable harm.  
10 However, Plaintiffs’ showing is not particularly convincing. Many consumers are likely to be  
11 familiar with the high sugar content of soft drinks and other SSBs, and many are aware of  
12 potential weight gain due to calories therefrom and risk of tooth decay. And Plaintiffs may engage  
13 in counterspeech to combat the asserted harm, not only in the advertisement containing the  
14 warning itself but also through other means and media.

15 Finally, the Court notes that, to the extent Plaintiffs rely on their expert, Dr. Golder, to  
16 substantiate the alleged harm that the warning would cause, *see generally* Golder Rpt. ¶ III.9  
17 (opining that the warning will “weaken, neutralize, or even counteract [the advertiser’s] intended  
18 messages” and further will harm “companies’ brand names and brand associations”), Dr. Golder is  
19 not particularly persuasive. His opinion does not rely on, *e.g.*, any survey evidence particular to  
20 the issue here.

21 Accordingly, the Court concludes that Plaintiffs have not adequately shown that  
22 irreparable harm is likely, nor that the balance of equities weighs in their favor.

23 D. Public Interest

24 As for the public interest, this factor does not weigh in Plaintiffs’ favor either, largely  
25 because of the weakness of their First Amendment claim on the merits. Moreover, as indicated  
26 above, the public interest weighs in favor of the City, as the City is taking legitimate action to  
27 protect public health and safety.

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1 E. Serious Questions Going to the Merits and Balance of Hardships

2 For the foregoing reasons, the Court concludes that the four-element *Winter* test counsels  
3 against a preliminary injunction. Furthermore, even when the Court evaluates Plaintiffs' motion  
4 under the alternative "serious questions" approach that survived *Winter*, Plaintiffs do not fare any  
5 better. The Court again acknowledges that, arguably, Plaintiffs have raised serious questions  
6 going to the merits, in particular, given the 20% size of the mandated warning. Nevertheless, to  
7 prevail under the "serious questions" approach, Plaintiffs must show that the balance of hardships  
8 tips *sharply* in their favor. *See Alliance for the Wild Rockies*, 632 F.3d at 1132. Plaintiffs have  
9 not met this rigorous showing. San Francisco has shown it has a legitimate interest in advancing  
10 public health, and the health problem facing San Francisco attributable in part to SSBs, as noted  
11 above, is a serious one. As set forth in the Schillinger expert report, obesity is a problem not only  
12 at a national but also at a local level: "A 2011 report measured obesity rates among 5th, 7th and  
13 9th graders and found that 32% of San Francisco youth were overweight or obese. In San  
14 Francisco, 46.4% of adults are obese or overweight, including 61.7% of Hispanics and 51.3% of  
15 African Americans." Schillinger Rpt. ¶ 9. In contrast, Plaintiffs' claim of chilling effect and  
16 severe hardship is not convincing. Thus, even if Plaintiffs have raised serious questions on the  
17 merits, they have not demonstrated the balance of hardships falls sharply in their favor.

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1 **III. CONCLUSION**

2 For the foregoing reasons, the Court **DENIES** Plaintiffs' motion for a preliminary  
3 injunction. Plaintiffs are not likely to succeed on the merits of their First Amendment claim, and it  
4 is unlikely that they would suffer irreparable harm if the ordinance were to go into effect. Even if  
5 Plaintiffs had established serious questions going to the merits, balancing of hardships does not tip  
6 sharply in their favor.

7 This order disposes of Docket No. 50.

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9 **IT IS SO ORDERED.**

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11 Dated: May 17, 2016



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13 EDWARD M. CHEN  
14 United States District Judge  
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