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8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11

12 THE AMERICAN BEVERAGE
ASSOCIATION, CALIFORNIA RETAILERS
13 ASSOCIATION, CALIFORNIA STATE
OUTDOOR ADVERTISING
14 ASSOCIATION,

15 Plaintiffs,

16 vs.

17 THE CITY AND COUNTY OF SAN
FRANCISCO,

18 Defendant.
19

Case No. 3:15-cv-03415 EMC

**DEFENDANT CITY AND COUNTY OF SAN
FRANCISCO'S NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Hearing Date: May 20, 2021
Time: 1:30 p.m.
Place: Courtroom 5, 17th Floor
Trial Date: October 25, 2021

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HRR	Expert Rebuttal Report of David Hammond, Ph.D., September 18, 2020 Goldman Decl. Ex. F
ScR	Expert Report of Carol A. Scott, Ph.D., June 12, 2020 Goldman Decl. Ex. B
ScRR	Expert Rebuttal Report of Carol A. Scott, Ph.D., September 18, 2020 Goldman Decl. Ex. G
SR	Expert Report of Hilary Seligman, June 12, 2020 Goldman Decl. Ex. D
SRR	Expert Rebuttal Report of Hilary Seligman, September 18, 2020 Goldman Decl. Ex. H
WR	Expert Report of Walter Willett, February 22, 2016, Dkt. No. 56-1.
WSR	Expert Report of Walter Willett, June 11, 2020 Goldman Decl. Ex. E
WRR	Expert Rebuttal Report of Walter Willett, September 18, 2020 Goldman Decl. Ex. I

Plaintiffs' Expert Reports

GR	Expert Report of Peter Golder N. Golder, January 12, 2016, Dkt. No. 50-25.
GRR	Rebuttal Report of Peter N. Golder, March 15, 2016, Dkt. No. 61-2.
GSR	Supplemental Report of Peter N. Golder, June 12, 2020.
KSR	Supplemental Expert Report of Dr. Richard A. Kahn, June 12, 2020.
IRR	Expert Rebuttal Report of Dr. Bruce Isaacson, September 18, 2020.

Technical Terms

2015 DGA	2015-2020 Dietary Guidelines for Americans Goldman Decl. Ex. J (excerpts)
2020 DGA	2020-2025 Dietary Guidelines for Americans Goldman Decl. Ex. L (excerpts)
2020 SRDGAC	Scientific Report of the 2020 Dietary Guidelines Advisory Committee Goldman Decl. Ex. K (excerpts)
CDC	Centers for Disease Control and Prevention
DGAC	Dietary Guidelines Advisory Committee
FDA	United States Food and Drug Administration
SSB	Sugar-Sweetened Beverage
T2D	Type 2 Diabetes

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT on May 20, 2021, at 1:30 p.m., or as soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, Courtroom 5, before the Honorable Edward Chen, Defendant City and County of San Francisco (“the City”) will and hereby does move the Court for an order granting summary judgment in favor of the City under Rule 56 of the Federal Rules of Civil Procedure. This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the other documents filed in connection with this motion, the papers and records on file in this action, and such other written and oral argument as may be presented to the Court.

**MEMORANDUM OF POINTS AND AUTHORITIES
ISSUE TO BE DECIDED**

Whether the warning that San Francisco requires advertisements for sugar-sweetened beverages (“SSBs”) to display (1) provides factual and uncontroversial information that is reasonably related to its substantial interest in public health, and (2) is not unjustified or unduly burdensome.

INTRODUCTION

People who drink SSBs generally gain weight. This proposition has been established by studies of prevailing dietary patterns; it has been recognized by federal health authorities, and has served as the basis for their actions to protect public health. Even one serving of SSBs supplies a large amount of empty calories and more added sugars than most children, teenagers, and adults alike can accommodate in a diet that meets nutrient needs within calorie limits. People who gain weight are at higher risk of developing obesity and type 2 diabetes (“T2D”). These scientific findings underlie the City’s requirement that advertisements for SSBs display a warning that drinking them “can cause weight gain, which increases the risk of obesity and type 2 diabetes.” S.F. Health Code §§ 4201, 4203. The warning is factually accurate and uncontroversial, and serves the City’s substantial interest in protecting public health. It also is not unduly burdensome: At half the size of the federally mandated warning that must appear on tobacco advertisements, the warning leaves 90% of the ad’s display area for the advertiser’s message. Because SSBs advertisers have no First Amendment right not to display the warning, the Court should grant the City’s motion for summary judgment.

STATEMENT OF UNDISPUTED FACTS

A. San Francisco's SSB Warning Law

In February 2020, the City passed Ordinance No. 26-20, which amends sections 4201-4204 of the San Francisco Health Code. The Ordinance begins with findings about SSB consumption and marketing, rates of overweight, obesity, and T2D, and their local health impact and costs. *See* S.F. Health Code § 4201. It then explains that

[t]he City's purpose in requiring warnings for SSBs is to advance its strong interest in promoting the health of all San Franciscans, including children and adolescents and members of disadvantaged communities who more often lack access to important health facts, by ensuring they receive information about the health risks of SSBs as they make beverage choices. Advertising warnings afford consumers the opportunity to consider health information while they also process other information about a product. This information can help consumers reduce caloric intake and improve diet and health, thereby reducing illnesses to which SSBs contribute and associated economic burdens.

Id. SSBs are defined as nonalcoholic beverages with one or more added caloric sweeteners and containing more than 25 calories per 12 ounces, excluding milk or milk alternatives, 100% natural fruit or vegetable juice, infant formula, medical foods, or beverages designed for supplemental nutrition, nutritional therapy, or weight reduction. *Id.* § 4202.

The law applies to SSB ads on fixed media in the City, but not in magazines, newspapers or other publications, on electronic media (including the internet and television), or on packaging, shelf tags, or unaccompanied logos that occupy an area less than 36 square inches. *Id.* § 4202. Ads on covered media must display a warning, occupying 10% of the ad's display area, that states: "SAN FRANCISCO GOVERNMENT WARNING: Drinking beverages with added sugar(s) can cause weight gain, which increases the risk of obesity and type 2 diabetes." *Id.* § 4203. The text must appear in conspicuous and legible type contrasting with other material in the ad, and must be surrounded by a matching border that is "the width of the first downstroke of the capital 'W' of the word 'WARNING.'" *Id.*

B. SSBs Supply Large Amounts of Empty Calories to People's Diets

SSBs are the greatest contributor to intake of added sugar in the U.S. diet and the third and fourth leading source of calories in the diets of children and adults respectively. (WR ¶¶ 8, 18; WRR ¶¶ 22.) Notwithstanding a decline in SSB consumption, the average amount of added sugar that

1 Americans consume from soda alone—without accounting for the many other sources of added sugar
2 in their diets—still exceeds the recommendation in the federal Dietary Guidelines for Americans
3 (published jointly by the U.S. Department of Health and Human Services and U.S. Department of
4 Agriculture every five years) that people consume no more than 10% of total energy from added sugar.
5 (WR ¶ 18.) Half the U.S. adult population consumes soda on a daily basis, with one in four
6 consuming more than one 12-oz serving per day. (WR ¶¶ 8, 17.)¹ Consumption levels are higher
7 among African-Americans, Hispanics and low-income individuals, the groups with disproportionately
8 high prevalence of obesity and obesity-related chronic conditions. (*Id.*) Adults consume on average
9 145 calories per day from SSBs, equivalent to around 12 ounces. (*Id.* ¶ 17.) Men and women aged
10 20-39 consume on average 249 and 160 calories per day from them, already exceeding the daily
11 recommendation for *all* added sugar. (*Id.*) Children obtain 143 calories per day from SSBs on
12 average, which is over 7% of their daily caloric intake, with almost two-thirds consuming at least one
13 SSB on a given day. (*Id.*) On average boys and girls ages 6-11 years consume 133 and 104 calories
14 per day from SSBs, while boys and girls ages 12-19 consume 232 and 162 calories per day from SSBs.
15 (*Id.*) Yet it should be noted that averages—including Dr. Kahn’s statement that “on average” people
16 obtain approximately 4.5% of total calories from SSBs (KSR ¶ 41)—include people who do not
17 consume SSBs at all, and therefore understate the role of SSBs in the diets of people who consume
18 them. (For example, one can calculate the average number of cigarettes individual Americans smoke
19 each day by dividing the total number of cigarettes smoked by the entire population of the country, but
20 the average would be considerably higher if the divisor were limited to people who actually smoke
21 cigarettes.) Among SSB consumers, for example, five percent of young children, 16 percent of
22 adolescents, and 20 percent of young adults consume more than 500 calories per day from soda—the
23 equivalent of 40 ounces. (WR ¶ 17.)

24 The portion sizes of sodas have increased substantially, from a 6.5 oz standard soft drink bottle
25 in the 1950s to a typical 20-oz bottle today. Coca-Cola itself reports that 12-ounce cans, 2-liter

27 ¹ In California, approximately 75% consume SSBs on a given day, with around 25%
28 consuming one or more servings per day and 50% consuming more than 0 but less than one serving
per day. (WRR ¶ 47.)

1 bottles, and 20-ounce single serving bottles represent more than 70 percent of the volume of bottles
 2 and cans of Coca-Cola sold in North America. (WR ¶ 15.) A 20-ounce single serving bottle contains
 3 240 calories and, for most people, alone exceeds the ten percent limit for added sugar. (*Id.*) A 12-oz
 4 serving contains 140-150 calories and 35 to 40 grams of sugar. (SR ¶ 24; WRR ¶ 12.)

5 **C. SSBs Not Only Can, but Do, Cause Weight Gain Under Prevailing Dietary**
 6 **Patterns**

7 The scientific evidence has demonstrated a link between consumption of SSBs and weight gain
 8 under prevailing dietary patterns—a relationship that does not exist (or does not exist to the same
 9 extent) for other foods and beverages. Studies of the relationship between SSBs and weight gain fall
 10 principally into two different categories, isocaloric and hypercaloric. In an isocaloric study, caloric
 11 consumption is held constant, either by precisely controlling caloric intake (in a randomized controlled
 12 trial (“RCT”)) or by statistically adjusting for caloric intake (in prospective cohort studies). (WR ¶¶
 13 24, 37.)² Isocaloric studies seek to evaluate whether SSBs cause weight gain *independently* of their
 14 caloric contribution to the diet. (WR ¶¶ 25, 38, 46.) Hypercaloric trials, by contrast, evaluate the
 15 effect of adding SSBs to the diet, because in the real world, people do not precisely reduce equal
 16 amounts of calories from other sources (or automatically increase their physical activity) when they
 17 consume SSBs, and accordingly such studies most realistically simulate what happens in actual diets.
 18 (WR ¶ 37; WRR ¶ 25.)

19 Notably, while all caloric foods and beverages can cause weight gain, they are not all equally
 20 likely to do so under normal dietary patterns. (WR ¶ 63; WRR ¶ 21; SRR ¶ 13-14.)³ Hypercaloric

21 _____
 22 ² Prospective cohort studies examine a group of people over time, and are considered the
 23 strongest non-randomized study design, able to capture long-term diet and disease relationships. By
 24 contrast, RCTs are often limited in their ability to capture long-term relationships and disease. (WR ¶
 25 23.) Regulatory authorities frequently rely on properly conducted prospective cohort studies to
 26 formulate public health policy—as they did in establishing the association between smoking and risks
 of lung cancer, cardiovascular disease, and premature death, when randomized trials generally came to
 the misleading conclusion that smoking cessation has no benefit. (WR ¶ 35.) The FDA relied on
 prospective cohort studies in deciding to require manufacturers to disclose the amount of added sugars
 in beverages and foods, *see, e.g.*, 81 Fed. Reg. at 33806, as did the DGAC in providing advice for the
 Dietary Guidelines. (WR ¶ 69; *see also* 2015 DGA, ch. 1, p. 31.)

27 ³ In a third kind of study—hypocaloric trials—the participants reduce their SSB consumption.
 28 (WR ¶ 39.) These trials predominantly evaluate the effectiveness of behavioral modification, since
 their findings are affected by the intensity of the intervention in participants’ diets and the degree of
 participants’ compliance. (*Id.*) A 2013 meta-analysis of eight trials found that, while there was no

1 studies have demonstrated that consumption of SSBs not only can—but does—cause weight gain in
2 many people. (WR ¶ 24; SR ¶ 25; WRR ¶ 19.) The results of RCTs where study participants do not
3 precisely restrict calories from other sources or increase physical activity show that consuming SSBs
4 causes weight gain. (WR ¶ 37; WRR ¶ 25.) According to a meta-analysis of different studies, the
5 cohort studies showed that a daily 12-oz serving per day increase of SSBs was associated with 0.12kg
6 (0.65 pounds) weight gain in adults over one year, and the RCTs showed that adding SSBs to the diet
7 caused weight gain of 0.85 kg (1.87 pounds) compared to the control groups. (WR ¶ 28; SR ¶ 25.)
8 These results are significant because weight gain is a gradual process, occurring over decades and
9 averaging about one pound a year. (WR ¶ 28.) Plaintiffs’ proffered expert, Dr. Richard Kahn,
10 acknowledges that most trials in which caloric intake is not controlled show overall weight gain when
11 individuals consume SSBs. (KSR ¶¶ 53, 97.)

12 Weight gain—and elevated risk of obesity and type 2 diabetes—occur at typical SSB
13 consumption levels. (WR ¶ 66.) A study of 120,877 U.S. men and women found that SSBs were the
14 largest contributor to weight gain because of the combination of the effect per serving and frequency
15 per serving, ahead of other obesogenic foods such as desserts, potato chips, and red and processed
16 meats. (WR ¶ 29; WRR ¶ 21.) By contrast, greater consumption of fruit, vegetables, whole grains,
17 nuts, and yogurt was associated with less weight gain. (*Id.*) Unlike with SSBs, the scientific evidence
18 does not support a link between weight gain and foods that contain natural sugars (like fruit,
19 vegetables, and dairy). (WRR ¶ 32.) Based on dietary patterns and the epidemiological evidence, the
20 foods and drinks that deliver calories are not all the same in their likely impact on energy imbalance,
21 and SSBs are more likely to cause weight gain than are other foods or beverages. (WR ¶ 63; WRR ¶¶
22 30-31.) Not only is there an elevated risk of weight gain with one serving of SSBs per day, but many
23 people—both children and adults—consume multiple servings daily (which is rare for other
24 obesogenic foods like potato chips). (WR ¶ 29; WRR ¶ 21.) Plaintiffs’ expert, Dr. Kahn, himself has
25 written that added sugars should “head the list” of reduced consumption to address weight gain
26 because they provide no essential nutrients. (SRR ¶ 12 (quoting R. Kahn & J.L. Sievenpiper, “Dietary

27 _____
28 overall effect on subjects’ body mass index, a significant benefit was observed among individuals who
were initially overweight. (*Id.* ¶¶ 39-40.)

1 Sugar and Body Weight: Have We Reached a Crisis in the Epidemic of Obesity and Diabetes?”
 2 *Diabetes Care* 2014; 37:961.)

3 There are different reasons why SSBs are more problematic than other foods and beverages in
 4 their effect on weight gain. The standard serving sizes will cause most people to exceed the daily
 5 allowance for added sugars with just one serving, making it unlikely that they will be able to meet
 6 nutrient needs within calorie limits. Significant numbers of people consume more than one serving
 7 per day. Moreover, evidence suggests that liquids are less likely to induce satiety than solid foods,
 8 making it less likely that people will compensate for the calories in SSBs by reducing caloric intake
 9 elsewhere. (WR ¶ 61; WRR ¶ 13.) As noted in the Scientific Report of the 2020 Dietary Guidelines
 10 Advisory Committee (“2020 SRDGAC”), which provides scientific advice for the formulation of the
 11 2020-2025 Dietary Guidelines for Americans (*see* 2020 SRDGAC, Part B Ch. 1, at 1), SSBs “may
 12 evoke a weaker energy compensation response compared to solid foods, so are more apt to add to,
 13 rather than displace, other energy sources.” (WRR ¶ 34.) Sugars in liquids are rapidly absorbed, and
 14 their high concentration in SSBs makes it easy to consume excess. (WR ¶ 62; WRR ¶ 13.) But
 15 whatever the confluence of factors that explains why SSB consumption is particularly likely to cause
 16 weight gain, the evidence is clear that such a relationship exists. (WRR ¶ 38.)

17 It would take 4 miles of walking or 50 minutes of running for a 110-pound adolescent to burn
 18 off the calories contained one typical 20-ounce soda. (WRR ¶ 23.) Only 54.2% of US adults and
 19 26.1% of US adolescents meet minimum aerobic physical activity guidelines established by the
 20 Centers for Disease Control and Prevention (“CDC”) (150 minutes per week). (SR ¶ 36.) Yet even
 21 this amount of exercise is insufficient to expend the calories consumed with a daily SSB. (*Id.*) And
 22 those who consume SSBs are less likely to exercise than those who do not. (*Id.*)

23 **D. Public Health Authorities Rely on Dietary Patterns to Recommend Limits on**
 24 **Added Sugars in General and SSBs in Particular**

25 **1. The 2015-2020 Dietary Guidelines for Americans**

26 The 2015-2020 US Dietary Guidelines for Americans (“2015 DGA”) recommends that
 27 Americans consume no more than ten percent of their daily calories in the form of added sugar. (WR
 28 ¶ 9.) These recommendations are based on evidence linking intake of added sugar and SSBs to

1 adverse health outcomes, including obesity and T2D, and on the fact that SSBs typically provide no
 2 counterbalancing nutritional benefit. (WR ¶ 9; *see, e.g.*, 2015 DGA, p. xiv (consumers should
 3 “choos[e] nutrient-dense foods and beverages in place of less healthy choices.”).) The 2015 DGA
 4 treats naturally occurring sugars (such as occur in milk or fruit) differently from added sugars because
 5 the latter displace nutrient-dense foods and beverages and make it difficult for people to remain within
 6 calorie limits. (2015 DGA, ch. 1, p. 28; WR ¶ 57 (allowing that half of the daily recommended intake
 7 of fruit may come from fruit juice, which contains some fiber, vitamins, and nutrients).)

8 **2. The Scientific Report of the 2020 Dietary Guidelines Advisory Committee**

9 The DGAC issued its Scientific Report in June 2020, with advice for formulating the 2020-
 10 2025 Dietary Guidelines. With respect to added sugars, the Report recommended reducing the limit
 11 from ten to six percent of daily calories—which even one 12-oz can of soda would exceed for a 2000
 12 calorie diet. (WRR ¶¶ 12, 22; 2020 SRDGAC, Part A, Exec. Summ. at 11.) The Report noted that
 13 “[e]vidence suggests that adverse effects of added sugars, *particularly from SSB*, may contribute to
 14 unhealthy weight gain and obesity-related health outcomes.” (2020 SRDGAC, Part A, Exec. Summ.
 15 at 11 (emphasis added).) Addressing SSBs specifically, the report states:

16 Sweetened beverages, not including coffee and tea with added sugar, account for
 17 approximately one-third of total beverage consumption and contribute approximately
 18 30 percent, 50 percent, and 60 percent of added sugars to the diet of young children,
 19 adolescents, and adults, respectively. Among the beverages examined, only SSB intake
 20 was associated with adiposity [body fat], and this was true for both children and adults.
 21 Because of their low nutrient to energy content ratio and the high prevalence of
 22 overweight and obesity in the population, it is important to continue encouraging only
 23 limited intake of SSB.

24 (*Id.*, Part A, Exec. Summ., at 10.)

25 **3. The 2020-2025 Dietary Guidelines**

26 In December 2020 (after the close of expert discovery in this case), the U.S. Department of
 27 Health and Human Services and U.S. Department of Agriculture issued the 2020-2025 Dietary
 28 Guidelines for Americans (“2020 DGA”). The 2020 DGA adheres to the recommendation that people
 consume no more than 10% of daily calories from added sugar, but adds that “[m]ost Americans have
 less than 8 percent of calories available for added sugars, including the added sugars inherent to a
 healthy dietary pattern,” and “an individual who needs 2,000 calories per day (based on age, sex, and
 physical activity level) has less than 7 percent of calories available for added sugars.” (2020 DGA, ch.

1 1, pp. 41-42.)⁴ Noting that SSBs are a “top contributor” of added sugars in children and adolescents,
 2 the 2020 DGA states:

3 Decreasing consumption of sugar-sweetened beverages to reduce added sugars intake
 4 will help youth achieve a healthy dietary pattern. Beverages that contain no added
 5 sugars should be the primary choice for children and adolescents.... Consuming
 6 beverages with no added sugars is particularly important for young children ages 2
 7 through 8, when only a small number of calories remains for other uses after meeting
 8 food group and nutrient needs with nutrient-dense choices. The number of calories
 available for other uses increases slightly as energy needs increase throughout
 adolescence to support growth and development. However, most adolescents do not
 consume foods and beverages in their nutrient-dense forms, meaning they have few or
 no calories remaining for added sugars.

9 (*Id.*, ch. 3, p. 87 (citations omitted).) Similarly, with respect to adults, the 2020 DGA notes that SSBs
 10 “contribute over 40 percent of daily intake of added sugars” and explains that “most adults’ diets
 11 include choices across multiple food groups that are not in nutrient-dense forms and therefore cannot
 12 accommodate excess calories from sweetened beverages.” (*Id.*, ch. 4, p. 103.)

13 4. The Food and Drug Administration

14 Like the Dietary Guidelines, the FDA has also relied on evidence linking SSB consumption to
 15 weight gain. In May 2016, the FDA adopted a rule modifying the nutrition label on food and beverage
 16 packaging to include an “added sugars declaration”—*i.e.*, a disclosure of the amount of added sugars
 17 in the product. *See* 81 Fed. Reg. 33742 (May 27, 2016). The FDA explained that it was requiring the
 18 declaration based on evidence of the effects of actual consumption patterns in the population:

19 We are relying on information related to overconsumption of added sugars, the
 20 reduction of the nutrient density of the diet when substantial amounts of added sugars
 21 are present, evidence showing the consumption of sugar-sweetened beverages is
 22 associated with increased body weight and adiposity, and evidence showing that
 consumption of healthy dietary patterns characterized, in part, by lower consumption of
 sugar-sweetened foods and beverages is associated with a decreased risk of CVD
 [cardiovascular disease].

23 *Id.* at 33814; *see also id.* at 33803 (“the evidence on sugar-sweetened beverages and body
 24 weight/adiposity is strong and consistent.”).

25 _____
 26 ⁴ Seven percent of 2000 calories is 140 calories, which the amount of calories in a typical 12-
 27 oz can of soda alone exceeds. Like the 2015 DGA, the 2020 DGA distinguishes between added and
 28 naturally occurring sugars in their effects on dietary patterns. (*Id.*, ch. 1, p. 32 (half of recommended
 daily fruit intake may come from fruit juice); *see also id.*, ch. 2, p. 62 (“Drinks labeled as fruit drinks
 ... are not the same as 100% fruit juice and contain added sugars. These beverages displace nutrient-
 dense beverages and foods in the diet of young children.”).)

1 The FDA expressly rejected arguments that it should not require a declaration of added sugars
 2 “because they do not have a unique role in causing weight gain,” or that “with respect to weight loss,
 3 reducing total caloric intake is more important than the source of calories.” *Id.* at 33802-03. When it
 4 proposed the rule, it noted that the “sole source of calories in many sugar-sweetened beverages (e.g.,
 5 soda) is added sugars” and that the 2010-2015 Dietary Guidelines for Americans “specifically suggest
 6 that reducing intake of sugar-sweetened beverages may help individuals control their total calorie
 7 intake and manage their body weight.” 79 Fed. Reg. 11879, 11903 (Mar. 3, 2014); *see also* 81 Fed.
 8 Reg. at 33764 (“While it is true that excess calories from any source leads to weight gain, we know
 9 that the U.S. general population consumes added sugars in excess of the recommended limit of less
 10 than 10 percent of calories. Moreover, we have additional support for the declaration of added sugars,
 11 as lower intakes of sugar-sweetened foods and beverages were part of a healthy dietary pattern....”).

12 The FDA similarly disagreed with comments arguing that added sugars should not be
 13 distinguished from natural sugars because of a “lack of difference in the way the body processes added
 14 versus naturally occurring sugars” 81 Fed. Reg. at 33772. It explained:

15 The addition of added sugars to foods provides additional calories which can make it
 16 difficult for consumers to meet nutrient needs within calorie limits and can lead to
 17 issues with weight management. Sugars, added in excess, do not provide any health
 18 benefits. In addition, foods high in added sugars tend to be lower in beneficial
 19 nutrients.... Moreover, the intake of added sugars from sugar-sweetened foods and
 beverages needs to be reduced as part of a healthy dietary pattern.... The intake of
 foods with naturally occurring sugars, such as fresh fruits and vegetables, is encouraged
 as part of a healthy dietary pattern and not recommended to be reduced.

20 81 Fed. Reg. at 33814; *see also id.* at 33762 (rejecting the contention that there is “no material
 21 difference between added sugars and intrinsic sugars for purposes of achieving a healthy dietary
 22 pattern to avoid excess discretionary calories from added sugars and reduced risk of chronic disease”),
 23 33767, 33758.

24 **E. Weight Gain Increases the Risk of Obesity and Type 2 Diabetes, Both of Which**
 25 **Are Serious Public Health Issues**

26 Weight gain is a prerequisite for the development of obesity and increases the risk of obesity.
 27 (SR ¶ 26.) A meta-analysis found that SSBs were associated a 55% higher odds of overweight or
 28 obesity among the highest SSB consumers compared with those who consumed the lowest amounts.

1 (*Id.*) Similarly, there is no dispute in the scientific literature that weight gain increases the risk of
 2 T2D. (WR ¶ 64; KSR ¶ 35.)⁵ A meta-analysis found that individuals with the highest SSB
 3 consumption (about 1-2 servings per day) were found to have a 26% higher risk of T2D than those
 4 with the lowest SSB consumption. (WR ¶ 51.)

5 45.8% of adults in San Francisco are overweight or obese, including 63.2% of Hispanics and
 6 68.1% of African Americans; 30 percent of fifth grade students in the San Francisco Unified School
 7 District are overweight or obese. (SR ¶ 11.) Obesity increases the risk of death: Compared to
 8 individuals with healthy weight, mortality rates are 45% higher with class 1 obesity, 94% higher with
 9 class 2 obesity, and almost three times higher with class 3 obesity. (SR ¶ 12.)

10 Nearly 1 in 7 U.S. adults has T2D; in minority and low-income subgroups, the percentage rises
 11 to 1 in 5. (SR ¶ 14.) More than a third of Americans have pre-diabetes, and are at high risk of
 12 transitioning to T2D over the next 5-10 years. (*Id.* ¶ 15.) Moreover, T2D is affecting younger and
 13 younger people, and minority youth are at particularly high risk. (*Id.* ¶ 16.) Prevalence of pre-diabetes
 14 is 18% among adolescents and 24% among young adults. (*Id.* ¶ 17.) As in most U.S. cities, in San
 15 Francisco the health consequences of T2D disproportionately affect minority populations and those
 16 with lower educational attainment; hospitalization rates in those neighborhoods are 3 to 4 times higher
 17 than in other neighborhoods. (*Id.* ¶ 21 & Fig. 1.) T2D is the 8th leading cause of death, and that
 18 figure excludes deaths from heart disease even though it is often a result of T2D. (*Id.* ¶ 21.) San
 19 Franciscans with T2D have an eight-year reduction in life expectancy. (*Id.*) SSBs are directly related
 20 to 25,000 deaths per year in the US; among adults under 45 years old, 12.5% of men's deaths and
 21 9.6% of women's deaths may be attributable to SSBs. (*Id.* ¶ 23.) There is widespread agreement
 22 among governmental and public health agencies—including the CDC, the Surgeon General, the
 23 American Diabetes Association, the American Medical Association, The Obesity Society, and the
 24 American Academy of Pediatrics—that SSB consumption should be reduced or eliminated to lower
 25 the risk of obesity and T2D. (*Id.* ¶¶ 28-29, 42.)

26 _____
 27 ⁵ While there are mechanisms by which SSBs can lead to both obesity and T2D independently
 28 of weight gain (WR ¶¶ 64-65) and the Scientific Report of the 2015 DGAC found that SSBs increase
 the risk of T2D in ways not fully explained by increased body weight (SRR ¶ 15), the warning refers
 only to risks from weight gain.

1 **F. Many of the Highest Consumers of SSBs Lack Information About The Health**
2 **Risks of SSB Consumption**

3 At the San Francisco General Hospital General Medicine Clinic, the clinical home of over
4 2300 patients with T2D and 2000 patients with pre-diabetes, nearly 50% of patients are health
5 illiterate, which means that they lack adequate information to make appropriate or informed decisions
6 related to health, health behaviors and healthcare on their own behalf, and for their children and
7 dependents. (SR ¶¶ 40-41.) While some diabetes patients understand that SSBs are bad for them,
8 others believe a couple of servings a day is fine, comparing themselves to family members who drink
9 even more. (SR ¶ 42.) Many T2D patients in San Francisco have consumed high quantities of SSBs
10 without understanding the health consequences of doing so. (SR ¶ 8.) Health illiteracy is
11 independently associated with obesity and T2D and may be the strongest predictor of whether an
12 individual consumes SSBs; those with the lowest level of health literacy consume about 230 more
13 calories from SSBs than those in the highest level of health literacy. (SR ¶ 42.)

14 **G. SSB Warning Labels Provide Helpful Information to Consumers**

15 Consumers have limited ability to understand and apply the numeric values displayed on
16 nutrition labels, particularly individuals with lower socioeconomic status. (HSR ¶ 41.) Studies have
17 shown that the current nutrition label is difficult for consumers to use; in one study, approximately a
18 quarter of the participants could not identify the calorie content of a full ice cream container, and over
19 40% were unable to calculate the percentage daily value in a single serving, or the effect on daily
20 calorie intake of forgoing one serving. (SRR ¶ 16.) Moreover, the labels appear only on pre-packaged
21 beverages and not on SSBs served without packaging, such as fountain drinks. (HSR ¶ 41.)

22 San Francisco's warning contains information that the nutrition label does not—the connection
23 to weight gain and the associated risks of obesity and T2D. (HSR ¶ 41; SRR ¶ 16.) A study that
24 tested the City's amended warning language compared to a control warning that directed consumers to
25 “Always read the Nutrition Facts Panel” found that the City's warning led more people to consider the
26 harms of SSB consumption and was perceived as more effective than the control. (HSR ¶ 46.) A
27 recent meta-analysis reviewed 23 experimental studies (that together included 16,241 participants) of
28 the effectiveness of SSB health warnings, and found that warning labels caused people to think more
29 about the health effects of sugary drinks, including the healthfulness of the products and the risks of

1 disease, and reduced consumption and purchasing behavior. (HSR ¶¶ 44-45.) Additional studies
2 conducted since the meta-analysis, with thousands of additional participants, showed similar results.
3 (HSR ¶ 46.) Studies have shown that warning labels also increase attention to the Nutrition Facts
4 Label. (SR ¶ 43; *see also* ScRR ¶ 77 (“by referring specifically to added sugar, the Amended Warning
5 may heighten consumers’ interest in checking the nutrition fact panels for other products they may
6 consider purchasing”).) Similarly, studies have shown that SSB warning labels better communicate
7 health information to consumers than do labels displaying only the calorie content. (SRR ¶ 16.)
8 Health warnings on advertisements are unique among public education efforts because they are
9 integrated with a product’s promotional materials, ensuring a reach as broad as the advertisement
10 itself. (HSR ¶ 38.) Warning labels also ensure that consumers are exposed to health information at
11 the time and in the setting in which purchase decisions are made, increasing the warning’s
12 effectiveness. (HSR ¶ 39.)

13 **H. Health Warnings Must Be Salient, Legible, and Concise in Order to Convey** 14 **Information to Consumers**

15 In order to be effective, a health warning must be salient enough to be noticed and attended to
16 by consumers. (HSR ¶ 16.) Larger warnings are more effective, allowing for larger print and greater
17 legibility. (HSR ¶ 20.) The City’s warning is required to appear on a wide variety of advertising
18 channels, including outdoor billboards, posters in stores, and signs in stadiums, where, unlike with
19 product packaging and publications like newspapers and magazines, consumers have limited control
20 over the distance at which they view them. While branded elements and images in ads are identifiable
21 at greater distances, text must be sufficiently large to be legible at standard viewing distances. (HSR ¶
22 25.) Health warnings that occupy less than 10% of outdoor advertisements have low levels of
23 legibility under most conditions, as do other advertisements that are viewed at a distance, such as a
24 poster behind a sales counter. (HSR ¶ 25.)⁶ Given the range of settings to which the warning
25 requirement applies, a coverage requirement of less than 10% would fail to ensure that the warning is
26

27 ⁶ In one study of health warnings that occupied less than ten percent of billboard
28 advertisements, the warnings on “street billboards” were legible to fewer than half the participants,
while warnings on “highway billboards” were legible to only five percent of participants. (HSR ¶ 25.)

1 legible. (HSR ¶ 26.) The 10% requirement is below existing standards for other health warnings; for
 2 example, federal regulations require that health warnings occupy 20% of cigarette advertisements, and
 3 prescription drug advertisements must devote half their space to required disclosures.⁷ The formatting
 4 requirements for the warning—text surrounded by a matching border and a contrasting background—
 5 follow standard practice for health warnings to ensure that they are visible and legible. (HSR ¶ 27.)
 6 Likewise in accordance with standard practice, the introductory phrase—“SAN FRANCISCO
 7 GOVERNMENT WARNING”—identifies the government as the source of the message, enhancing its
 8 credibility, and uses a signal word to identify the existence of a health risk. (HSR ¶¶ 30, 36-38.)

9 Health warnings should be brief in order to be processed by consumers. (HSR ¶ 33.) Their
 10 purpose is to provide concise information on the risks of a product, not to provide complete
 11 epidemiological information. (HSR ¶ 35.) No other health warnings (such as tobacco or alcohol) refer
 12 to quantity or other lifestyle factors—even though those factors may impact health risks—because, as
 13 with SSBs, the risks occur at the levels at which the products are commonly consumed. (HSR ¶ 35;
 14 HRR ¶ 57; SRR ¶ 15.) Studies of the word “can” in health warnings (*i.e.*, “can cause,” or “can
 15 contribute to”) have demonstrated that consumers understand it to refer to the possibility, rather than
 16 the certainty, of the outcome, and that they view “can cause” as a weaker statement than “causes” or
 17 “contributes to.” (HRR ¶¶ 42-43, 58.)

18 **I. Advertising for SSBs Is Ubiquitous, With Highly Salient Features**

19 Beverage companies spend over a billion dollars annually to advertise SSBs, and advertising
 20 on media outside consumers’ homes is almost ubiquitous on billboards, store windows, sports venues,
 21 and other similar locations. (ScRR ¶ 20 & n.18.) In San Francisco, advertising is particularly
 22 prominent in minority communities like the Tenderloin and Mission neighborhoods, where people
 23 tend to drink more soda. (SR ¶ 21 & pp. 8-10; Goldman Decl. Ex. M [Goette Decl. & Ex. A].)

24 _____
 25 ⁷ See HSR ¶ 26. Smokeless tobacco ads must include warnings covering 20% of their space.
 26 15 U.S.C. § 4402(b). The FDA has proposed a rule for cigarette advertisements that would require the
 27 warning to occupy 20% of the space *at the top* of the ad. 84 Fed. Reg. 42754, 42755 (Aug. 16, 2019).
 28 Prescription drug advertisements are required to devote about half of their space to warnings and
 disclosures. 21 C.F.R. § 202.1(e)(7)(viii) (presentation of negative information must be “reasonably
 comparable with the presentation of information relating to effectiveness of the drug”). As discussed
 below, the survey evidence showed that a warning occupying 10% of the display area was not even
 noticed by 30% of participants.

1 Advertising messages can be carried by bright colors, highly impactful pictures, or video; even
2 print advertising can be designed to create attention-capturing images that create perceptions of
3 movement. (ScRR ¶ 19.) Advertisers are also able to change their advertisements frequently to
4 prevent consumer “wearout” whereas changes to the warning require a complex governmental process.
5 (ScRR ¶¶ 19, 46, 73.) The content of an advertisement, and in particular the choice of visual
6 illustrations, can impact the degree to which consumers pay attention to a warning message. (ScRR ¶
7 42.)⁸ Research has consistently demonstrated that pictorial information and brand imagery contained
8 in typical SSB advertising is far more salient compared to text-only information, such as the health
9 warning. (HSR ¶ 52; HRR ¶ 34.) Eye-tracking studies have consistently demonstrated that over 90%
10 of the time is spent viewing the advertising elements rather than the warning. (HSR ¶ 50; ScRR ¶ 39.)

11 **J. Dr. Carol Scott’s Consumer Survey**

12 The City retained Dr. Carol Scott to conduct a consumer survey to evaluate, first, whether the
13 presence of the City’s warning on a poster advertising SSBs is likely to prevent the manufacturer from
14 conveying its own product message; and second, whether the warning would lead consumers to
15 believe that SSBs are different from sugar-sweetened foods in their effects, or that SSBs cause weight
16 gain regardless of other dietary and lifestyle factors. (ScR ¶ 7.) Dr. Scott conducted an online survey
17 of 400 U.S. consumers in June 2020. (*Id.* ¶ 12.) Participants were divided between “test” and
18 “control” groups, each of which was shown three soda advertising posters that Plaintiffs had offered as
19 examples earlier in the case. (*Id.* ¶¶ 21-22 & App. A.) Respondents in the test group saw posters with
20 a warning that complied with the requirements of the Ordinance; those in the control group saw the
21 same posters without a warning label. (*Id.* ¶ 21.)

22 After seeing each poster, respondents were asked to write, in their own words, “what
23 message(s), if any, are being communicated by the poster”; an option to click “Don’t know/Not sure”
24 was also provided. That question was followed by a single, general probe: “Any other message(s)
25 communicated by this poster?” There was a space to type an answer, and also an option to click

26
27 ⁸ While warnings provide consumers with information about health risks, studies have found
28 that they do not affect perceptions of product attributes such as attractiveness, taste, and quality.
(ScRR ¶¶ 52-56; HSR ¶ 48.)

1 “No/Nothing else.” While these questions were presented, a thumbnail image of the poster was visible
2 and the respondent could click to enlarge it. (ScR ¶ 26.) The open-ended responses were analyzed
3 and grouped into categories. Taking the responses to the two questions together, approximately 70%
4 of respondents in the test group mentioned the warning or something related to its contents. (ScR ¶ 8
5 & Table 7-2A.) 82.5% of respondents in that group mentioned brand messages, as did 93% of
6 respondents in the control. (ScR ¶ 33 & Ex. 7-2A.)

7 Respondents were then given a list of seven to nine messages tailored for the particular brand
8 and poster product message and asked to indicate which of them (along with “other” and “don’t
9 know/not sure” options) were communicated by the poster. Two of the messages pertained to the
10 warning; four were general positive messages that were not explicitly stated in the advertisement but
11 which could be inferred; one was a message not likely conveyed by the poster (to act as a type of
12 attention check), and the remaining were messages explicitly stated in the poster. (ScR ¶ 27.) 81% of
13 respondents in the test group selected at least one warning message; 88.5% selected positive brand
14 messages; in the control, the figure was 98.5%. (ScR ¶ 34 & Ex. 7-3A.)

15 In the portion of the survey testing whether the warning is likely to cause consumers to form
16 certain beliefs, respondents were asked, first, to rate their agreement or disagreement (on a 5-point
17 scale) with the statement: “The calories in sugar-sweetened beverages would make one gain weight in
18 a different way than calories in sugar-sweetened foods, that is a calorie consumed in a sugar-
19 sweetened beverage has a different effect than a calorie consumed in sugar-sweetened foods.” (*Id.* ¶
20 39.) There was no significant difference in agreement with that question between the control and test
21 groups; approximately 40% of respondents in both groups agreed with the statement. (*Id.* & Ex. 7-
22 5A.) Moreover, 29 percent of respondents in the test group disagreed with the statement, whereas only
23 22 percent of respondents in the control group disagreed with it. (*Id.*) Second, half of respondents
24 were asked to rate their agreement or disagreement (on a 1-5 scale) with the statement, “You can
25 offset the effects of sugar-sweetened beverages on weight gain by reducing the quantity you drink,
26 doing more exercise to burn the calories, and/or reducing the calories you consume in other foods”; the
27 other half were asked the same question phrased negatively (*i.e.*, “You cannot offset...”). (*Id.* ¶ 40.)
28 For the positively-worded version, more people in the test than the control—69.7% versus 58.4%—

1 agreed with the statement; for the negatively-worded version, more people in the test than in the
 2 control—39.6% versus 32.3%—disagreed with it. (*Id.* ¶ 41 & Exs. 7-5B, 7-5C.) Thus, the survey
 3 showed that the warning does not cause consumers to hold the beliefs alleged by Plaintiffs.

4 **K. Dr. David Hammond’s Consumer Perceptions Experiment**

5 Dr. Hammond conducted a study to test empirically opinions by Plaintiffs’ advertising expert,
 6 Peter Golder, that the warning will overwhelm consumer attention to SSB advertisements, and will
 7 mislead consumers and create incorrect beliefs about the “unique” contribution of SSBs to weight
 8 gain, the health risks of other sugary foods and drinks, and the importance of other risk factors on
 9 weight gain, such as exercise. (HRR ¶ 13.) It was conducted with 1,064 respondents in the United
 10 States, randomly divided between test (“warning”) and control groups. Both groups viewed nine
 11 ads—six for SSBs and three for other foods (Oreos, chocolate milk, and McDonald’s fries).⁹
 12 Participants in the test group saw SSB ads with the warning as required by the Ordinance, whereas
 13 participants in the control group saw the same ads without any warning; in both groups, the food ads
 14 carried no warning. (HRR ¶ 10 & Ex. A p. 31.)¹⁰ The viewing time of each advertisement was not
 15 restricted. (App. A p. 31.)

16 After viewing the nine ads, the participants were asked, “Did you notice a health warning
 17 message on any of the ads we showed you?” Approximately one-third of respondents in the test group
 18 did not recall seeing any health warning. (HRR ¶ 35 & App. A Table 2 p. 34.) Participants in the test
 19 group who noticed a warning spent significantly more time viewing the ads compared to participants
 20 who viewed the ads without the warning, whereas those who did not notice the warning spent
 21 significantly less time viewing the ads compared to the average participant in the control. (HRR ¶ 38
 22 & App. A Table 3, pp. 34-35.)

23 Participants were next asked the following three questions: (1) “Please think about the last
 24 advertisement we showed you. What soda brand did you see in the last advertisement?”; (2) “In the

25 ⁹ The order of the first eight ads was randomly selected, but was the same in both the control
 26 and test groups. The last ad was randomly selected to be either Coca Cola or Pepsi. (HRR App. A p.
 31.) The ads shown to the participants appear on pp. 41-43. (HRR App. A1.)

27 ¹⁰ In light of the national sample of participants, the phrase “SURGEON GENERAL’S
 28 WARNING” was substituted for “SAN FRANCISCO GOVERNMENT WARNING,” but the size,
 wording, and format otherwise complied with the Ordinance. (HRR App. A p. 31.)

1 other advertisements we showed you, what other brands do you remember seeing?"; and (3) Please
2 describe all of the pictures and images you remember seeing in the last ad." (HRR App. A p. 36.)
3 Participants who noticed the warning recalled the same number of brands from the nine
4 advertisements as those who viewed the ads without warnings, and were just as likely to recall specific
5 attributes from the last ad they viewed, including the images and statements shown in the ad. (HRR ¶
6 36 & App. A, Tables 4-5, pp. 35-36.)

7 Participants were next shown an ad for a fictional SSB brand to ensure that responses were not
8 based on pre-existing associations. Participants in the test group saw an ad with the warning, and
9 participants in the control saw the same ad with no warning. (HRR App. A, pp. 31, 37, 44.) They
10 were asked, "Who does this ad target?" and could select "men," "women," "neither," "both," or "don't
11 know." The next question was, "What age group does this ad target?" and participants could select
12 "kids," "teenagers," "younger adults," "older adults," "seniors," or "don't know." Finally, they were
13 asked "how much do you think you would like or dislike the taste of this product?" and could select
14 "dislike a lot," "dislike a little," "neither like nor dislike," "like a little," "like a lot," or "don't know."
15 (HRR App. A pp. 37-38.) The responses to these questions showed that the presence of the warning
16 had no significant impact on perceptions of the ad: People in the test group were equally likely to
17 perceive that the ad targeted the same consumer groups, with no difference in perceptions of taste.
18 (HRR ¶ 37 & App. A Tables 6-7.)

19 A final series of questions explored whether exposure to the warning would mislead consumers
20 in the ways hypothesized by Professor Golder. Participants were asked: (1) "George drinks 1 can of
21 sugary soda per day. Samuel drinks 5 cans of sugary soda per day. Which person is more likely to
22 gain weight from drinking sodas?"; and (2) "Anna and Carmen both drink sugary sodas every day.
23 Anna does not exercise at all. Carmen exercises a lot. Which person is more likely to gain weight?"
24 There were no significant differences in the responses between those in the control group and those in
25 the test group who noticed the warning; however, participants in the test group who nonetheless failed
26 to notice the warning were less likely to select the correct responses of "Samuel" and "Anna." (HRR ¶
27 45 & App. A, Table 8 pp. 38-39.) Participants were then asked to indicate their level of agreement
28 with the following statements: (1) "Foods high in sugar (e.g., cookies, doughnuts, flavored yogurts, ice

1 cream) can lead to weight gain.”; (2) “Foods high in calories (e.g., pizza, hamburgers, burritos) can
 2 lead to weight gain.”; and (3) “Milk drinks high in sugar (e.g., chocolate milk) can lead to weight
 3 gain.” (HRR App. A pp. 39-40.)¹¹ No differences were observed between participants in the test
 4 group who noticed the warning and participants in the control group about foods high in sugar and
 5 calories, and participants who noticed the warning were slightly *more* likely to agree that milk drinks
 6 high in sugar can lead to weight gain. (HRR ¶ 46 & App. A, Table 9 pp. 39-40.) In short, the warning
 7 had no impact on beliefs about the relevance of quantity or exercise to the health effects of SSBs and
 8 did not change beliefs about the health effects of other foods that are not subject to the ordinance.

9 PROCEDURAL HISTORY

10 The City’s first SSB warning ordinance, Ordinance No. 100-15, required that SSB ads display
 11 the following text: “WARNING: Drinking beverages with added sugar(s) contributes to obesity,
 12 diabetes, and tooth decay. This is a message from the City and County of San Francisco.” The
 13 warning was required to occupy 20% of the advertisement’s display area. Plaintiffs moved for a
 14 preliminary injunction enjoining enforcement of the ordinance, which this Court denied. *Am. Bev.*
 15 *Ass’n v. City & Cty. of San Francisco*, 187 F. Supp. 3d 1123 (N.D. Cal. 2016) [hereafter “*ABA I*”]
 16 (Dkt. No. 68). The Court found that there was “no real dispute as to the literal accuracy” of the
 17 warning, noting that “both sides agree that, at the very least, SSBs can contribute to weight gain
 18 because they provide calories, and that weight gain can lead to obesity and diabetes.” *Id.* at 1139. It
 19 rejected Plaintiffs’ claims that the warning inaccurately or misleadingly implied that drinking SSBs is
 20 “dangerous regardless of one’s diet or lifestyle,” or “necessarily and inevitably contributes to obesity
 21 [and] diabetes,” because “the required disclosure only says that SSBs ‘contribute’ to obesity and
 22 diabetes, not that they will necessarily result in diabetes or obesity in any particular case; nor does the
 23 disclosure state that SSBs are the sole or even dominant cause.” *Id.* It also rejected Plaintiffs’
 24 contention that the warning was inaccurate or misleading because all caloric foods and beverages,
 25 including those with added sugars, may contribute to weight gain, or because the warning would imply
 26 that SSBs “uniquely” contribute to obesity and diabetes. The Court found that the City had a

27
 28 ¹¹ The options were “strongly agree,” “agree,” “neither agree nor disagree,” “disagree,”
 “strongly disagree,” and “don’t know.” (*Id.*)

1 “reasonable basis” for requiring the warning on advertisements for SSBs because even one standard
2 serving “represents a substantial number of calories” that, moreover, alone could cause a person to
3 exceed the recommended daily allowance of 10% of calories from added sugar; SSBs contribute a
4 significant portion of calories in children; rates of consumption are particularly high in communities
5 that suffer from higher rates of obesity and diabetes, including African Americans, Hispanics, and
6 low-income communities; and SSBs have no nutritive value. *Id.* at 1140-41.

7 The Court also found that the warning was not unduly burdensome, noting that the force of a
8 pictorial advertisement would be unlikely to be overcome by a textual warning, and that research has
9 shown that recall of brand information “remained very high” in the presence of a health warning. *Id.*
10 at 1143. While the Court stated that the 20% requirement was “not insubstantial” and presented a
11 “close question,” it noted that such a requirement was not unprecedented and left 80% of the space
12 available, including for any counter-speech in which the advertiser might wish to engage. *Id.* The
13 court also found unconvincing Plaintiffs’ claim that they would withdraw advertising from covered
14 media. *Id.* at 1143-44.

15 Plaintiffs then sought an injunction staying enforcement of the law pending appeal, which this
16 Court granted on the grounds that the Ninth Circuit had “not squarely decided whether and
17 how *Zauderer* applies to the context of this case: *i.e.*, a compelled disclosure in the context of
18 commercial speech where the government interest is not consumer deception, but public health and
19 safety,” and that there was “at least a close question as to whether Plaintiffs have raised serious
20 questions on the merits, particularly because the compelled disclosure has a 20% size requirement
21 which is ‘not insubstantial.’” *Am. Beverage Ass’n v. City & Cty. of San Francisco*, No. 15-CV-03415-
22 EMC, 2016 WL 9184999, at *2 (N.D. Cal. June 7, 2016) (Dkt. No. 77).

23 On appeal of the order denying the motion for a preliminary injunction, a panel of the Ninth
24 Circuit reversed. *Am. Beverage Ass’n v. City & Cty. of San Francisco*, 871 F.3d 884 (9th Cir. 2017).
25 Judge Ikuta, joined by Judge Seabright (D. Haw., sitting by designation), concluded that the City
26 failed to establish that the warning was factual and uncontroversial, and not unduly burdensome. *Id.* at
27 893-98. Judge Nelson concurred on the ground that the City did not establish that the 20%

1 requirement was not unduly burdensome, but stated that she would not make the majority’s “tenuous
2 conclusion” that the warning was controversial or misleading. *Id.* at 899 (Nelson, J., concurring).

3 The Ninth Circuit granted the City’s petition for rehearing en banc. *Am. Beverage Ass’n v.*
4 *City & Cty. of San Francisco*, 880 F.3d 1019, 1020 (9th Cir. 2018). In its subsequent decision, the en
5 banc majority held that the City failed on the existing record to establish that the requirement that the
6 warning occupy 20% of the display area was justified, and declined to reach Plaintiffs’ claims that the
7 warning was not factual or uncontroversial. *Am. Beverage Ass’n v. City & Cty. of San Francisco*, 916
8 F.3d 749, 757 (9th Cir. 2019) [hereafter “*ABA II*”]. Judge Christen, joined by Judge Thomas,
9 concluded that the warning was inaccurate, but only because it referred to diabetes generally rather
10 than specifically to type 2 diabetes. *Id.* at 765-67 (Christen, J., concurring). Judge Ikuta adhered to
11 her view that the warning was inaccurate or controversial, writing that she found it contrary to
12 statements by the FDA that added sugars are generally recognized as safe and can be part of a healthy
13 dietary pattern when not consumed in excess. *Id.* at 761 (Ikuta, J., concurring). Finally, Judge
14 Nguyen concurred in the judgment but disagreed with the majority’s holding that *Zauderer* applies to
15 commercial speech that is not false, deceptive, or misleading. *Id.* at 767-68 (Nguyen, J., concurring).

16 After the case was remanded, this Court entered a preliminary injunction against enforcement
17 of the original warning requirement (Dkt. No. 134), and the City passed Ordinance No. 26-20, which,
18 as described in subsection A of the statement of facts above, modified the text of the required warning
19 and reduced the size from 20% to 10% of the display area.

20 ARGUMENT

21 In its en banc opinion, the Ninth Circuit held that the test set forth in *Zauderer v. Office of*
22 *Disciplinary Counsel*, 471 U.S. 626 (1985) applies to the warning in this case. *ABA II*, 916 F.3d at
23 756. Under *Zauderer*, the government may require a commercial speaker to disclose factual
24 information about its product when the requirement is “reasonably related” to a substantial
25 governmental interest. 471 U.S. at 651; *CTIA - The Wireless Ass’n v. City of Berkeley, California*, 928
26 F.3d 832, 842 (9th Cir. 2019). The required disclosure must be “(1) purely factual, (2)
27 noncontroversial, and (3) not unjustified or unduly burdensome.” *ABA II*, 916 F.3d at 756.

1 As described in detail below, all of the elements of the *Zauderer* test are satisfied here. First,
 2 the warning is reasonably related to the City’s interest in protecting public health, because many
 3 consumers lack the information the warning provides, and studies have shown that warnings can
 4 effectively convey such information. Second, the warning is purely factual, because SSB consumption
 5 can cause weight gain by adding excess calories to the diet; indeed, the scientific research has
 6 established a link between SSB consumption and weight gain that does not exist for other foods and
 7 beverages, and there is no dispute that weight gain increases the risk of obesity and T2D. Third, the
 8 warning is uncontroversial: public health authorities agree that Americans are obtaining too many
 9 empty calories from SSBs and that consumption should be limited to manage weight gain and its
 10 associated health risks. Finally, the warning is neither unjustified nor unduly burdensome: Its
 11 requirements are reasonably necessary to convey information to consumers and it does not drown out
 12 advertisers’ speech.

13 **I. THE WARNING IS REASONABLY RELATED TO THE CITY’S SUBSTANTIAL**
 14 **INTEREST IN PROTECTING PUBLIC HEALTH**

15 “[P]rotecting the health and safety of consumers is a substantial governmental interest.” *CTIA*,
 16 928 F.3d at 845. Obesity and T2D are serious public health problems, in San Francisco as elsewhere,
 17 and individuals with higher SSB consumption are more likely to develop them. (Facts, *supra* § E.) As
 18 the FDA has observed, “Americans are consuming too many calories from added sugars,” 81 Fed.
 19 Reg. at 33802, of which SSBs are the leading source. (Facts, *supra* § B.) SSB consumption is even
 20 higher among certain groups, including teenagers, African Americans, and Hispanics. *See* 81 Fed.
 21 Reg. at 33817 (noting that consumption patterns among children and young adults further justified the
 22 FDA’s decision to require the declaration of added sugars, even if those subpopulations did not make
 23 up a majority of the population). Many of the highest consumers of SSBs are unaware of their health
 24 risks. (Facts, *supra* § F.) Many people find nutrition labels difficult to understand or use, and studies
 25 have shown that warning labels are effective—and more effective than calorie or nutrition labels—at
 26 helping consumers to consider health risks, and supply information that the nutrition label lacks. (SR
 27 ¶¶ 31, 43; SRR ¶ 16.) A warning on ads also affords consumers the opportunity to consider health
 28 information while they also process other information about a product. Accordingly, the warning is

1 reasonably related to the City’s substantial interest in protecting health and safety. *See* S.F. Health
 2 Code § 4201; *see also, e.g., CTIA*, 928 F.3d at 845 (requiring cell phone retailers to make disclosure
 3 regarding SAR limits for RF radiation was reasonably related to city’s interest in protecting health and
 4 safety); *Disc. Tobacco & Lottery, Inc. v. United States*, 674 F.3d 509, 564 (6th Cir. 2012) (reasonable
 5 relationship between tobacco warnings and governmental interest in “promoting greater public
 6 understanding of the risks”); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001)
 7 (rational relationship between state’s goal of reducing mercury contamination and required label
 8 disclosures on mercury-containing light bulbs).

9 Plaintiffs’ disagreements about whether the warning will reduce rates of obesity or T2D are
 10 irrelevant. Studies have shown that SSB warnings can effectively convey health information to
 11 consumers. (Facts, *supra* § G.) Even under the higher standard of *Central Hudson Gas & Electric*
 12 *Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), which applies to commercial
 13 speech restrictions rather than mandatory disclosures, *see ABA II*, 916 F.3d at 755, there need only be
 14 a “reasonable fit” between the government’s objectives and the means chosen; “[w]ithin those
 15 bounds,” courts “leave it to governmental decisionmakers to judge what manner of regulation may
 16 best be employed.” *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989). The
 17 warning provides consumers with health information they would not otherwise receive, and provides it
 18 at the same time they process other information about these beverages. *See* S.F. Health Code § 4201;
 19 *see also* 81 Fed. Reg. at 33763-64 (government need not show that specific changes in consumer
 20 behavior will occur in order to justify providing consumers with additional information). The City’s
 21 decision to require a warning label to inform consumers about the health risks of SSB consumption
 22 lies within the permissible exercise of its discretion.

23 **II. THE WARNING IS PURELY FACTUAL AND UNCONTROVERSIAL**

24 **A. The Warning Is Factually Accurate and Not Misleading**

25 The text of the warning is fully supported by scientific evidence. (WR ¶ 73; SR ¶ 25.) Weight
 26 gain increases the risk of obesity and type 2 diabetes. (*See* Facts, *supra* § E.) And as this Court noted
 27 in its prior opinion, *ABA I*, 187 F. Supp. 3d at 1139, there is no dispute that drinking beverages with
 28 added sugar can cause weight gain by adding excess calories to a person’s diet. (Facts, *supra* §§ C, D;

1 KSR ¶¶ 46 (“the best available scientific evidence shows that sugar-sweetened beverage consumption
2 has no impact on weight gain or loss *apart from its caloric content*”) (emphasis added), 92 (“the only
3 way in which SSBs ‘cause’ weight gain is through the calories they provide”).) Moreover, research
4 has established a link between weight gain and SSB consumption in particular. In the FDA’s words,
5 “the evidence on sugar-sweetened beverages and body weight/adiposity is strong and consistent,” 81
6 Fed. Reg. at 33803; *see also id.* at 33814 (“the consumption of sugar-sweetened beverages is
7 associated with increased body weight and adiposity”), and the 2010-2015 DGA “specifically
8 suggest[ed] that reducing intake of sugar-sweetened beverages may help individuals control their total
9 calorie intake and manage their body weight.” 79 Fed. Reg. at 11903; *see also* 2020 SRDGAC
10 Section A, Exec. Summ. at 10 (“Among the beverages examined, only SSB intake was associated with
11 adiposity, and this was true for both children and adults.”). The fact that other caloric foods and
12 beverages can cause weight gain does not make it inaccurate to say that SSBs can do so.

13 The warning is also not misleading. *See CTIA*, 928 F.3d at 847 (“We recognize, of course, that
14 a statement may be literally true but nonetheless misleading and, in that sense, untrue.”). As before,
15 Plaintiffs contend that the warning will lead people to believe that SSBs will invariably lead to weight
16 gain, regardless of other factors. (*See, e.g.*, Dkt. No. 154 ¶ 114.) But that contention is inconsistent
17 with the text of the warning. *See CTIA*, 928 F.3d at 847 (“We read the text differently.”). The
18 warning uses the phrase “can cause,” which in plain language describes a potential outcome rather
19 than a certain one; indeed, studies have shown that consumers view it as a contingent phrase, and
20 weaker than “contributes to.” (HSR ¶ 32; HRR ¶¶ 42-43, 58.) Likewise, because the warning refers
21 expressly to weight gain, consumers are unlikely to infer that the quantity of SSBs consumed or
22 dietary and lifestyle factors are irrelevant. The Scott and Hammond surveys both found that the
23 warning did not cause consumers to hold such beliefs. (ScR ¶ 41; HRR ¶ 45.) But even if consumers
24 were to infer that SSB consumption is likely to result in weight gain, the warning would not be
25 misleading because SSBs are associated with weight gain under typical consumption patterns (WR ¶
26 66), the current level of added sugars consumption “exceeds what can reasonably be consumed within
27 calorie limits,” 81 Fed. Reg. at 33804, most people do not have room in their diets for the excess
28 calories supplied by SSBs (2020 DGA, pp. 87, 103), and people who drink SSBs are particularly

1 unlikely to engage in the amount of physical activity that would be required to offset the calories from
 2 SSBs (SR ¶ 36). The federally mandated alcohol warning says that “[c]onsumption of alcoholic
 3 beverages impairs your ability to drive a car or operate machinery, and may cause health problems”
 4 without disclaiming that there are levels that can be consumed before driving is dangerous or health
 5 problems are likely. 27 U.S.C. § 215(a). The statement takes into account typical serving sizes and
 6 consumption patterns; in the same way, weight gain is likely based on standard serving sizes and
 7 consumption patterns of SSBs. (SRR ¶ 15.)

8 Plaintiffs also contend that the warning misleadingly implies that SSBs are uniquely or more
 9 likely to result in weight gain than other sources of calories or added sugars. (*E.g.*, Dkt. No. 154 ¶¶
 10 83, 114-18.) Here, too, Plaintiffs’ claims are not borne out by the evidence. (ScR ¶ 39; HRR ¶ 46.)
 11 And when the ABA pressed a similar argument against the added sugars declaration—claiming it
 12 would convey that added sugars are inherently worse than naturally occurring sugars¹²—the FDA
 13 rejected it: “[W]e disagree that a separate declaration [of added sugars] necessarily implies a chemical
 14 or physiological distinction.” 81 Fed. Reg. at 33815.

15 But even if consumers were to infer from the warning that SSBs are more likely to cause
 16 weight gain than are other sources of calories or added sugars, it would not mean that the warning is
 17 misleading, because that proposition is true in real world contexts. (WR ¶ 63; WRR ¶¶ 12, 21, 30, 31;
 18 SRR ¶¶ 13-15.) The contention that the source of calories is irrelevant to weight gain is contrary to the
 19 scientific evidence that has served as the basis for advice from public health authorities, including the
 20 Dietary Guidelines and the FDA. That evidence shows that the sources from which people obtain
 21 calories make a difference when actual dietary patterns are taken into account. (Facts, *supra* §§ C, D.)
 22 Given that SSBs—in standard serving sizes and under typical dietary patterns—are likely to lead to
 23 weight gain, while the same is not equally true of other sources of calories or added sugars, the
 24 warning would not be misleading if consumers were to draw such an inference from it, and the City’s
 25

26 ¹² The ABA asserted that an added sugars declaration would “only confuse consumers,” would
 27 “create a deceptive halo” around products with natural sugars, and was “intended to punish companies
 28 that activists think should not be in business.” (Goldman Decl. Ex. N [American Beverage
 Association, “The Facts About Added Sugars Labeling” (March 30, 2015), *at*
<https://www.ameribev.org/education-resources/blog/post/the-facts-about-added-sugars-labeling/>].)

1 decision to identify SSB consumption as a causal factor in weight gain is entirely appropriate. *ABA I*,
2 187 F. Supp. 3d at 1140-41; *see also, e.g., New York State Rest. Ass'n v. New York City Bd. of Health*,
3 556 F.3d 114, 135 (2d Cir. 2009) (City could require chain restaurants to disclose calorie content on
4 menus because, among other reasons, “in just one meal ordered in a fast food restaurant, [a person]
5 might consume more than the advised daily caloric intake,” “chain restaurants serve food that is
6 associated with excess calorie consumption and weight gain,” and “studies have linked obesity to
7 eating out”).¹³ The City is not requiring a warning based on evidence that SSBs can cause weight gain
8 independently of their caloric contribution to the diet; the Ordinance’s findings refer solely to evidence
9 from patterns of consumption and the fact that SSBs supply empty calories with no meaningful
10 nutrition. *See* S.F. Health Code § 4201. The warning’s text makes no claim about whether SSBs can
11 cause weight gain independently of their caloric contribution.¹⁴ Whether or not SSBs can also cause
12 weight gain independently of their caloric contribution, public health authorities cannot (and do not)
13 ignore evidence of serving sizes and dietary patterns. (WSR ¶ 12; SRR ¶ 15; KSR ¶ 83 n.75.)

14 The Supreme Court has reaffirmed the validity of health and safety warnings. *See National*
15 *Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2376 (2018) [hereafter “*NIFLA*”]
16 (“we do not question the legality of health and safety warnings long considered permissible”). That
17 reaffirmation means that courts must not apply unrealistic standards that would require such warnings
18 to be struck down. For example, Plaintiffs’ own expert, Peter Golder, stated earlier in this case that
19 “[s]tudies on the effects of warning messages in other industries have confirmed that consumers
20 overestimate risks that they derive from warning messages,” such as those that appear on
21 pharmaceuticals. (GR ¶ 60.) Although there is no evidence of such misunderstandings here, in any

22 ¹³ As this Court previously found, the City’s decision to focus on one source—a leading
23 source—driving weight gain does not make the warning misleading because *Zauderer* expressly
24 permits underinclusive disclosures. *ABA I*, 187 F. Supp. 3d at 1140; *see Zauderer*, 471 U.S. at 651
25 n.14; *New York State Rest. Ass'n*, 556 F.3d at 134. And in any event, the evidence shows that SSBs
are more likely to result in weight gain than are other sources of calories, and the 2020 DGA
specifically identifies them as a product that cannot be accommodated within most diets while
remaining within calorie limits and satisfying nutritional needs.

26 ¹⁴ Since Dr. Kahn’s disagreement with the warning is based on isocaloric conditions, it is
27 irrelevant. In much the same way, the FDA rejected as irrelevant comments arguing that an added
28 sugars declaration was not justified by still-evolving science about a specific relationship between
added sugars and disease risk, because its rationale for requiring the declaration was not based on
evidence about dietary patterns. 81 Fed Reg at 33767; *see also* 79 Fed. Reg. at 11904.

1 event it has never been the rule that a health warning is invalid unless it leads consumers to form
2 medically accurate estimates of the level of risk. Moreover, because consumers are unlikely to read
3 lengthy health warnings on advertisements, it is not possible to include extensive detail and
4 explanation without compromising the purpose of providing the warning. (HSR ¶¶ 33-35.)

5 Where, as here, the text itself is accurate and not misleading, a disclosure is not invalidated by
6 the potential for misunderstanding or for inferences that people may draw based on their own
7 preconceptions. *See, e.g., CTIA*, 928 F.3d at 847 (rejecting argument that disclosure was misleading
8 because “the phrase ‘RF radiation’ is ‘fraught with negative associations’”); *Nationwide Biweekly*
9 *Admin., Inc. v. Owen*, 873 F.3d 716, 733 (9th Cir. 2017) (“Saying that a solicitation is not authorized
10 by a particular person does not imply that the solicitation is therefore unlawful or improper,”
11 notwithstanding any “possible negative connotation”). As the FDA has explained, “regardless of how
12 well a label is designed, there is always a certain proportion of consumers who encounter challenges in
13 understanding and using the label.” 81 Fed. Reg. at 33754; *see also id.* at 33761 (“A consumer’s lack
14 of understanding about what added sugars are or how to use the added sugars declaration to limit
15 added sugars intake does not mean the factual declaration of the amount of added sugars in a serving
16 of food is misleading.”). The FDA pointed out that consumers’ perceptions of the declaration could be
17 influenced by their own preexisting beliefs, opinions, and exposure to information (whether “grounded
18 in scientific evidence or not”), any of which could lead some consumers to interpret it to mean that “a
19 food, which can be part of a healthy dietary pattern for the day, is not ‘healthful’ simply because it has
20 a certain amount of added sugars.” 81 Fed. Reg. at 33822. But, in the first place, the FDA pointed out
21 that such an understanding is not necessarily incorrect because “the term ‘unhealthful’ when
22 describing a food with added sugars is a relative term and must be viewed in the context of the day’s
23 total dietary intake. For example, a food with a high amount of added sugars may be understandably
24 viewed as ‘unhealthful’ because, if consumed, it may result in overconsumption of added sugars for
25 the day.” 81 Fed. Reg. at 33761. This is particularly likely to be the case with SSBs. (Facts, *supra* §§
26 B, D.) And in the second place, the FDA explained that the real risk of consumer harm comes from
27 not providing the information; the possibility that consumers might construe it in different ways does
28 not justify the withholding of accurate information from the public. *Id.* at 33823. Plaintiffs’

1 arguments that the warning is misleading because consumers will not properly estimate their risk of
2 gaining weight or of becoming obese or developing type 2 diabetes, or that they will misunderstand a
3 statement based on evidence from actual dietary patterns for one based on isocaloric studies, would
4 not establish that the warning is inaccurate or controversial under *Zauderer* even if they were
5 supported by the evidence—which they are not.

6 **B. The Warning Is Uncontroversial**

7 Because the warning is not misleading, it cannot be controversial based on Plaintiffs' claims
8 that it is misleading. *CTIA*, 928 F.3d at 848 (required disclosure was uncontroversial where it was not
9 misleading). Moreover, a required disclosure is not controversial under *Zauderer* because the
10 commercial speaker would prefer not to make it, because it could harm the speaker's reputation, or
11 because it could result in fewer people purchasing the product. *Nationwide Biweekly*, 873 F.3d at 732.
12 Nor is it controversial simply because it can be tied to a controversial issue. *CTIA*, 928 F.3d at 845. In
13 *CTIA*, the Ninth Circuit found that controversy about "whether radio-frequency radiation from cell
14 phones can be dangerous if the phones are kept too close to a user's body over a sustained period" did
15 not make Berkeley's required disclosure "controversial" within the meaning of *NIFLA* because it did
16 not "force cell phone retailers to take sides in a heated political controversy." *Id.* at 848.¹⁵

17 There is no heated political controversy—or indeed any controversy—over whether SSBs are
18 causing weight gain by supplying excess calories to American diets (as demonstrated by the evidence
19 relied upon by the Dietary Guidelines, the FDA, and the DGAC), or over whether reducing intake of
20 SSBs—which supply huge amounts of empty calories—is recommended to reduce weight gain and its
21 attendant health risks, including obesity and T2D. The agencies and organizations advising a
22 reduction in SSB consumption to address weight gain include not only the FDA and the U.S.
23 Department of Health and Human Services and U.S. Department of Agriculture (through the Dietary
24 Guidelines), but also the Centers for Disease Control and Prevention, the U.S. Surgeon General, the

25 _____
26 ¹⁵ The Berkeley ordinance required cell phone retailers to post the following notice: "To
27 assure safety, the Federal Government requires that cell phones meet radio-frequency (RF) exposure
28 guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the
phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure
to RF radiation. Refer to the instructions in your phone or user manual for information about how to
use your phone safely." *Id.* at 838.

1 American Medical Association, the American Heart Association, the American Diabetes Association,
 2 the Obesity Society, the American Academy of Pediatrics, the American Public Health Association,
 3 and the American Association of Diabetes Educators. (SR ¶¶ 28-30.)

4 As this Court wrote earlier in the case:

5 The factual and uncontroversial requirement ... should not “be so easily manipulated
 6 that it would effectively bar any compelled disclosure by the government,” particularly
 7 “where public health and safety are at issue.” [*CTIA v. City of Berkeley*, 139 F. Supp.
 8 3d 1048, 1071-1072 (N.D. Cal. 2015)]. As this Court emphasized in *CTIA II*, “[a]
 ‘controversy’ cannot automatically be deemed created any time there is a disagreement
 about the science behind a warning because science is almost always debatable at some
 level.” *See* [*CTIA v. City of Berkeley*, 158 F. Supp. 3d 897, 904 (N.D. Cal. 2016)].

9 *ABA I*, 187 F. Supp. 3d at 1136.¹⁶ The Court’s observation is particularly apposite in light of efforts
 10 by the SSB industry to create controversy (or at least the appearance of it) through the funding of
 11 research that subsequent studies have shown to exhibit systematic bias. (WRR ¶ 28; SRR ¶ 6.)¹⁷ Such
 12 a strategy is hardly unprecedented. *See, e.g., Burton v. R.J. Reynolds Tobacco Co.*, 208 F. Supp. 2d
 13 1187, 1203 (D. Kan. 2002) (“The evidence showed that despite clear indications that smoking was
 14 harmful, defendants engaged in a publicity campaign telling the public that whether there were
 15 negative health consequences from smoking remains an ‘open question.’”); *Bullock v. Philip Morris*
 16 *USA, Inc.*, 159 Cal. App. 4th 655, 677 (2008) (“Philip Morris for many years engaged in a broad-based
 17 public campaign to disseminate misleading information and create a false controversy concerning the
 18 adverse health effects of smoking with the intention of causing smokers and potential smokers to rely
 19 on the substance of that misinformation”). Arguments put forth by Plaintiffs’ expert—that it is
 20 controversial or inaccurate to say that sugary beverages “can cause” weight gain because they will not
 21 cause weight gain if people carefully match their intake to their energy expenditure (KSR ¶ 77)—

22
 23 ¹⁶ As the Supreme Court wrote in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590
 24 (1993), “it would be unreasonable to conclude that the subject of scientific testimony must be ‘known’
 to a certainty; arguably, there are no certainties in science.”

25 ¹⁷ It was not until August 2015—a month after this lawsuit was filed—that the Coca-Cola
 26 Company’s Chairman and CEO committed to disclosing the research activities it was funding,
 27 expressing regret that “some actions we have taken to fund scientific research and health and well-
 28 being programs have served only to create more confusion and mistrust.” (Goldman Decl. Ex. O
 [Muhtar Kent, “Coca-Cola: We’ll Do Better,” *Wall Street Journal*, Aug. 19, 2015].) Several months
 later, Coca-Cola announced that it would no longer “provide all of the funding for well-being
 scientific research.” (Goldman Decl. Ex. P [Coca-Cola Company, “Scientific Research Guiding
 Principles,” Jan. 31, 2016].)

1 border on frivolous; the word “can” in the phrase “can cause” means there are conditions under which
2 weight gain may not occur. But in any event, despite scattered industry messaging that people simply
3 need to “balance” what they “eat, drink, & do” (Dkt. No. 50-2), people who consume SSBs generally
4 do not compensate for those empty calories with additional exercise, and it is unrealistic to expect that
5 most would do so given the amount of physical activity that would be required. (SR ¶ 36; WR ¶ 23.)
6 Scientific research has not only shown that drinking SSBs *can* cause weight gain; it has shown that
7 drinking them *does* cause weight gain under prevailing consumption patterns and that, as explained by
8 the 2020 DGA, people simply do not have room in their diets for the empty calories provided by
9 SSBs. The warning is not controversial.

10 **III. THE WARNING IS NOT UNJUSTIFIED OR UNDULY BURDENSOME**

11 **A. The Warning Does Not Drown Out Advertising Messages or Effectively Rule Out** 12 **the Possibility of Advertising**

13 A mandatory disclosure is unjustified or unduly burdensome when it “drowns out” the
14 advertiser’s messages and “‘effectively rules out’ the possibility of having [an advertisement] in the
15 first place.” *NIFLA*, 138 S.Ct. at 2378; *ABA II*, 916 F.3d at 757; *Nationwide Biweekly*, 873 F.3d at
16 734; *Ibanez v. Fla. Dept. of Bus. & Prof. Regulation*, 512 U.S. 136, 146-47 (1994). The warning
17 requirement is not unjustified—it is reasonably related to the City’s substantial interest in protecting
18 public health (*see supra* Section I) and imposes reasonable standards to ensure that the warning can
19 actually convey information to consumers—and it does not drown out advertisers’ own speech.

20 At 10% of the display area, the coverage requirement is half of what is required for warning
21 labels on tobacco advertisements, and one-fifth of what is required for prescription drug
22 advertisements. (*Supra*, Facts § H.) A smaller size would unreasonably compromise the warning’s
23 ability to deliver information to the public. The surveys conducted by Drs. Scott and Hammond (as
24 well as by Plaintiffs’ own expert, Dr. Isaacson) found that nearly a third of consumers failed to notice
25 the City’s warning at this size—even though participants in the Hammond survey viewed *six* separate
26 SSB ads displaying the warning before being asked whether they recalled seeing it, and even though
27 the warning that appeared in the Isaacson survey was surrounded by a border many times wider than
28

1 what the Ordinance requires.¹⁸ And because the warning is textual rather than graphical, it must be
2 legible on the range of media covered by the Ordinance at the distances at which they are likely to be
3 viewed. When warnings drop below 10%, they are often illegible and will fail to be noticed by even
4 greater numbers of consumers. The other requirements—that the text appear on a plain background
5 surrounded by a black border—are consistent with minimum standards that research has shown is
6 necessary to ensure that warnings are salient and legible. (*See* Facts, *supra* § H.)

7 Hammond’s Consumer Perceptions Experiment found that the presence of the warning did not
8 interfere with advertising messages. First, the warning did not come at the expense of attention to
9 advertising messages because participants who noticed the warning spent more total time viewing the
10 ads compared to participants in the control group. Second, participants who noticed the warning
11 recalled the same number of brands from the nine ads they had viewed as did those who viewed the
12 ads without warnings, and they were just as likely to recall specific attributes from the last ad they
13 viewed, including the images and statements shown in the ad. (HRR ¶ 36.) Third, after viewing a
14 fictional SSB ad, participants in the test and control groups were equally likely to perceive that the ad
15 targeted the same consumer groups, and the presence of the warning did not alter participants’
16 perceptions of the product’s taste. (HRR ¶ 37.)

17 Dr. Scott’s survey (and, for that matter, Dr. Isaacson’s) found that between 80 and 90 percent
18 of participants perceived brand messages on ads displaying the warning. The warning cannot be said
19 to “drown out” brand messages when they are received by the vast majority of consumers; the warning
20 plainly does not “effectively rule[] out the possibility of having [an advertisement] in the first place.”
21 *ABA II*, 916 F.3d at 757 (alterations supplied by the court). The approximately 10-point reduction in
22 the percentage of respondents who identified brand messages compared to a control group that viewed
23 ads without a warning does not change the fact that most consumers received advertising messages.
24 “All mandatory disclosures impose some burden on commercial speech.” *Nationwide Biweekly*, 873
25

26
27 ¹⁸ Dr. Isaacson’s survey showed respondents advertisements in which the warning was
28 surrounded by a border “the same width as the ‘W’ in ‘WARNING’.” (IRR ¶ 42 & Fig. 1.) He
misread the Ordinance: It requires a border that is “the width of the first downstroke of the capital ‘W’
of the word “WARNING.”” S.F. Health Code, § 4203(b) (emphasis added).

1 F.3d at 734. Such a reduction in the percentage of people who identify brand messages (while almost
2 a third of participants fail to notice the warning at all) does not make the burden “undue.”

3 It is well established that even non-commercial speech, which receives the highest level of
4 protection, may be subject to restrictions that have as their effect that fewer people hear the speaker’s
5 message. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989) (“That the city’s
6 limitations on volume may reduce to some degree the potential audience for respondent’s speech is of
7 no consequence, for there has been no showing that the remaining avenues of communication are
8 inadequate.”); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789,
9 803 (1984) (“The ordinance [prohibiting posting of signs on public property] prohibits appellees from
10 communicating with the public in a certain manner, and presumably diminishes the total quantity of
11 their communication in the City.”); *Int’l Women’s Day Mar. Planning Comm. v. City of San Antonio*,
12 619 F.3d 346, 372 (5th Cir. 2010) (“an alternative venue for speech may still be constitutionally
13 adequate, even when there is a reduction in the potential audience for speech in the alternative venue”)
14 (internal quotation marks omitted); *Sullivan v. City of Augusta*, 511 F.3d 16, 44 (1st Cir. 2007) (noting
15 that courts have upheld “alternative means of communication despite diminution in the quantity of
16 speech, a ban on a preferred method of communication, and a reduction in the potential audience.”).
17 Commercial speech cases likewise have upheld restrictions that may reduce the number of people a
18 commercial speaker will reach. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511
19 (1981) (prohibition on offsite outdoor advertising); *Contest Promotions, LLC v. City & Cty. of San*
20 *Francisco*, 874 F.3d 597, 603 (9th Cir. 2017) (prohibition on new commercial billboards); *Get*
21 *Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 894 (9th Cir. 2007) (regulations on size
22 and height of billboards); *cf. Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 468 (1978) (prohibition
23 on in-person solicitation).

24 Moreover, there is no reason to believe that the effect of the City’s warning on SSB advertising
25 messages would be greater than the effect of health warnings that are required to appear on ads for
26 other products. Indeed, because tobacco warnings must occupy at least twice as much of the
27 advertising space as the City’s warning, and pharmaceutical disclosures five times as much, they are
28 likely to have a more significant impact on advertising messages. A rule that any reduction in the

1 receipt of brand messages constitutes an “undue” burden—even when most consumers continue to
 2 receive them—would impermissibly invalidate *all* health warnings. *See NIFLA*, 138 S.Ct. at 2376;
 3 *ABA II*, 916 F.3d at 756 n.4 (under *NIFLA*, “required health and safety warnings, which have long
 4 been permitted, are still allowed.”). Such warnings serve important governmental interests, and it has
 5 never been the rule that any consequent diminution in the reach of advertising messages constitutes a
 6 First Amendment violation.

7 Finally, it should be noted that, even though the survey evidence supports the conclusion that
 8 the warning is not unduly burdensome, this evidence overstates any impact the warning would have on
 9 advertising messages in the real world. First, because San Francisco’s ordinance is the first such law
 10 to be enacted and has yet to go into effect, the only context in which survey respondents have seen
 11 such a warning is in the survey itself. Consumers pay more attention to a warning when it is novel or
 12 unfamiliar to them; over time, as consumers become habituated to the warning and grow familiar with
 13 what it says, they are likely to attend less closely to it. (HSR ¶ 49; ScRR ¶ 46.) Second, in the
 14 surveys, the warning was placed on existing ads that were not designed to display such a warning. In
 15 practice, advertisers will be able to design ads knowing that the warning will appear on them, and thus
 16 to choose design elements that maximize the ads’ effectiveness; they also have the ability to alter their
 17 ads to keep them “fresh” while the warning wears out over time. (ScRR ¶¶ 46, 73.)

18 **B. Plaintiffs’ Claim That the Warning “Interferes” With Their Advertising Messages**
 19 **By Causing People to Consider Health Risks Does Not Establish That the Warning**
 20 **Is Unduly Burdensome**

21 A warning cannot be considered an “undue burden” because of the potential effects of
 22 consumers receiving the information it provides—including a reduction in the number of people who
 23 purchase the product or harm to the manufacturer’s reputation. *See Nationwide Biweekly*, 873 F.3d at
 24 732. Plaintiffs contend that the warning interferes with the messages advertisers wish to convey by
 25 changing consumers’ information processing, such as by leading them to think about the health risks
 26 of SSBs. (*E.g.*, GSR ¶¶ 16, 28, 84, 89-96.) But a commercial speaker’s “constitutionally protected
 27 interest in *not* providing any particular factual information in his advertising is minimal.” *Zauderer*,
 28 471 U.S. at 651; *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010)
 (petitioner’s preference not to refer to itself as a debt relief agency “lacks any constitutional basis”); 44

1 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (“When a State ... requires the disclosure
 2 of beneficial consumer information, the purpose of its regulation is consistent with the reasons for
 3 according constitutional protection to commercial speech....”) (plurality opn.); *Sorrell*, 272 F.3d at
 4 113-14 (“Protection of the robust and free flow of accurate information is the principal First
 5 Amendment justification for protecting commercial speech, and requiring disclosure of truthful
 6 information promotes that goal.”). The addition of health information may lead some consumers to
 7 view the advertiser or its product differently, or to be unpersuaded by its messages, particularly when
 8 consumers view such information as important to their purchasing decision. (HRR ¶¶ 25-31.) But the
 9 First Amendment does not protect commercial speakers from the effects of providing consumers with
 10 accurate information; otherwise, the only health warnings that could pass constitutional muster would
 11 be those that consumers do not notice. (*See* HRR ¶¶ 47-53.)

12 **C. Plaintiffs’ Claim That SSB Advertisers Would Cease Advertising on Covered**
 13 **Media Does Not Establish That the Warning Is Unduly Burdensome**

14 The parties dispute whether SSB advertisers would withdraw their advertising from covered
 15 media in San Francisco. *See ABA I*, 187 F. Supp. 3d at 1143-45; *Consolidated Cigar Corp. v. Reilly*,
 16 218 F.3d 30, 55 (1st Cir. 2000) (rejecting the “difficult-to-believe proposition” that cigar companies
 17 would stop advertising if they had to display health warning), *rev’d in part on other grounds sub nom.*
 18 *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).¹⁹ However, that dispute is irrelevant for the
 19 purposes of this motion because, even if Plaintiffs’ claim were credited, it would not establish that the
 20 warning is unduly burdensome.

21 Because a warning is not rendered unduly burdensome by the effects of providing consumers
 22 with accurate information (*see supra*, Section III.B), a decision not to advertise in order to avoid those
 23 effects likewise cannot establish that a warning is unduly burdensome. Earlier in this case, industry
 24 executives submitted declarations stating that they would withdraw advertising from covered media

25 _____
 26 ¹⁹ As discussed above, not only can advertisers reach consumers on existing ads modified to
 27 show the warning in survey experiments, but in the real world they can design ads to enhance their
 28 impact even as consumer attention to the warning decreases over time. Moreover, according to
 industry executives themselves, retailers in San Francisco may continue to display ads subject to the
 warning requirement even if SSB manufacturers decided to withdraw their own advertising. (Dkt.
 Nos. 50-5 ¶ 34; 50-11 ¶ 33; 50-18 ¶ 31.)

1 because they believed the warning’s reference to disease risks (which some said they considered
2 misleading) would “distort” or “negate” their intended messages. (*See, e.g.*, Dkt. Nos. 50-1 ¶¶ 17, 22-
3 30; 50-5 ¶¶ 22-27; 50-11 ¶¶23-27; 50-18 ¶¶ 21-26.) But the warning is not misleading (*see supra*,
4 Section II), and there is no First Amendment right to avoid disclosing factual and uncontroversial
5 information. Accordingly, any advertising decision the executives may make based on their opinion
6 that the warning is misleading, or how they believe it would impact the effectiveness of their own
7 messages, “lacks any constitutional basis.” *Milavetz*, 559 U.S. at 251.

8 In other First Amendment contexts, courts do not defer to the speaker’s subjective beliefs in
9 this way. For example, in assessing the validity of time, place, or manner restrictions, which requires
10 the court to determine whether the regulation leaves open ample alternative channels, courts do not
11 accept the challengers’ say-so but conduct an objective inquiry into whether there is still a “reasonable
12 opportunity” for communication. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1138-42 (9th Cir.
13 2005); *see also Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1298
14 n.6 (9th Cir. 2015) (“The pertinent question for our purposes, however, is whether Ordinance 2401 left
15 open ample alternative channels of communication; it does not matter whether the Committee actually
16 availed itself of those alternative channels.”). The evidence shows that advertisers are able to reach
17 consumers on ads that display the warning. (*See supra*, Section III.A.) The law does not give
18 advertisers a veto over any disclosure requirement by the simple expedient of claiming that they would
19 choose not to advertise on any media subject to the requirement.

20 As discussed above, an undue burden exists only when a disclosure requirement renders
21 advertising effectively impossible. The fact that tobacco companies have continued to advertise for
22 decades is evidence that, in the view of advertisers themselves, health warnings do not render
23 advertisements effectively impossible. *See also ABA I*, 187 F. Supp. 3d at 1145 n.17 (noting that
24 pharmaceutical companies have continued to advertise with mandatory disclosures). If SSB
25 advertisers shift their advertising to noncovered media, that choice does not establish that no
26 advertisement is reasonably possible on media where the warning must be displayed; according to
27 Plaintiffs’ own advertising expert, such a decision means only that they believe they can effectively
28 reach San Francisco consumers through advertising on noncovered media. (*See GRR* ¶¶ 61-62

1 (contending that the fact that tobacco companies continued advertising notwithstanding that they were
 2 required to display a health warning was attributable to the fact that they “had limited alternatives
 3 available for product promotion,” whereas here advertisers have noncovered media as alternatives).)
 4 As this Court previously found, the exceptions to the City’s warning requirement reflect practical
 5 limitations as well as jurisdictional constraints inherent in local government regulation. *ABA I*, 187 F.
 6 Supp. 3d at 1131 n.8; *see also Consol. Cigar Corp.*, 218 F.3d at 56 (the Commerce Clause prevents
 7 states and localities from imposing disclosure requirements in some media, such as national
 8 magazines).²⁰ If the existence of advertising channels outside the scope of the regulator’s authority
 9 makes it easier for advertisers to withdraw from covered media, their decision to do so plainly does
 10 not establish that advertising on covered media is effectively impossible, and affording such a decision
 11 constitutional significance would unjustifiably and impermissibly invalidate all disclosures other than
 12 those mandated by the federal government.

13 CONCLUSION

14 For the foregoing reasons, the City respectfully requests that the Court grant its motion for
 15 summary judgment.

16 Dated: January 22, 2021

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 CITY AND COUNTY OF SAN FRANCISCO

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 23 ²⁰ For media that reach San Francisco but simultaneously other municipalities as well, placing
 24 the warning only on ads viewed in San Francisco would pose technological, logistical, or economic
 25 burdens that do not exist with fixed signs. By exempting those media, the City also avoids potential
 26 litigation asserting that it is effectively seeking to regulate outside of its jurisdiction—challenges that
 27 could jeopardize the Ordinance or delay its implementation. *Cf. World Wide Rush, LLC v. City of Los*
 28 *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); *Metromedia*, 453 U.S. at 512 (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 L.L.C. v. City of Los Angeles*, 551 F.3d 898, 908, 910-11 (9th Cir.
 2009).