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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

THE CITY AND COUNTY OF SAN
FRANCISCO,

Defendant.

Case No. 3:15-cv-03415 EMC

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

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

Trial Date: None set

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES TO BE DECIDED1

INTRODUCTION1

STATEMENT OF FACTS1

 A. Drinking Sugar-Sweetened Beverages Contributes to Obesity, Diabetes,
 and Tooth Decay1

 B. San Francisco’s Disclosure Requirement4

ARGUMENT6

 I. THE WARNING REQUIREMENT IS LAWFUL BECAUSE IT IS
 REASONABLY RELATED TO SAN FRANCISCO’S INTEREST IN
 PROMOTING PUBLIC HEALTH.....6

 A. *Zauderer* Is a Deferential Standard.....6

 B. The Health Warning Is Factual and Accurate.....7

 1. The Kahn Critique Is Based Exclusively on the Supposed
 Implications of the Warning’s Text8

 2. Plaintiffs’ Claims About What The Warning Conveys Are
 Wrong10

 C. The Warning Is Reasonably Related to San Francisco’s Interests in
 Preventing Obesity, Diabetes, and Tooth Decay and Informing
 Consumers of Health Risks.....13

 II. EVEN IF HEIGHTENED SCRUTINY APPLIES, THE WARNING
 REQUIREMENT IS CONSTITUTIONAL.....16

 A. The Ordinance Directly and Materially Advances the City’s Interests17

 B. The Ordinance Is Not More Extensive Than Necessary.....20

 III. THE ORDINANCE DOES NOT REACH SUBSTANTIAL
 NONCOMMERCIAL SPEECH.....21

 IV. PLAINTIFFS HAVE FAILED TO ESTABLISH A LIKELIHOOD OF
 IRREPARABLE HARM FAVORING THE ISSUANCE OF A
 PRELIMINARY INJUNCTION23

 V. THE REMAINING FACTORS FAVOR DENIAL OF AN INJUNCTION.....24

CONCLUSION.....25

TABLE OF AUTHORITIES

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A Woman’s Friend Pregnancy Res. Clinic v. Harris
 No. 2:15-CV-02122-KJM-AC, 2015 WL 9274116 (E.D. Cal. Dec. 21, 2015),
appeal docketed, No. 15-17517 (9th Cir. Dec. 24, 2016).....21

Am. Meat Inst. v. U.S. Dep’t of Ag.
 760 F.3d 18 (D.C. Cir. 2014).....13, 14

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 950 F.2d 1401 (9th Cir. 1991)23

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 492 U.S. 469, 480 (1989).....20, 23

Bolger v. Youngs Drug Prods. Corp.
 463 U.S. 60 (1983).....21, 22

Capital Associated Indus., Inc. v. Cooper
 No. 1:15-CV-83, 2015 WL 5178057 (M.D.N.C. Sept. 4, 2015)24

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York
 447 U.S. 557 (1980).....6, 16, 20

Charles v. City of Los Angeles
 697 F.3d 1146 (9th Cir. 2012)23

Cincinnati v. Discovery Networks, Inc.
 507 U.S. 410 (1993).....19

City of Ladue v. Gilleo
 512 U.S. 43 (1994).....24

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach
 657 F.3d 936 (9th Cir. 2011)23

Consolidated Cigar Corp. v. Reilly
 218 F.3d 30 (1st Cir. 2000).....14, 15

CTIA – The Wireless Association v. City of Berkeley
 -- F.Supp.3d ---, No. 15-cv-02529-EMC, 2016 WL 324283
 (N.D. Cal. Jan. 27, 2016), *appeal docketed*, No. 16-15141 (9th Cir. Feb. 1, 2016).....16, 21

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 674 F.3d 509 (6th Cir. 2012)8, 13, 15, 16

1 *Doe v. Harris*
772 F.3d 563 (9th Cir.2014)25

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3 762 F.3d 275 (3d Cir. 2014)14

4 *Evergreen Ass’n v. City of New York*
5 740 F.3d 233 (2d Cir. 2014).20, 21

6 *Fed. Trade Comm’n v. Affordable Media, LLC*
179 F.3d 1228 (9th Cir. 1999)25

7 *Florida Bar v. Went For It, Inc.*
8 515 U.S. 618 (1995).....6

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10 734 F.2d 1389 (9th Cir. 1984)12

11 *Frudden v. Pilling*
742 F.3d 1199 (9th Cir. 2014)7

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13 962 F.2d 1391 (9th Cir. 1992)25

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527 U.S. 173 (1999).....19

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19 *Ibanez v. Fla. Dept. of Bus. & Prof. Regulation*
20 512 U.S. 136 (1994).....14

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544 U.S. 550 (2005).....7

22 *Jordan v. Jewel Food Stores, Inc.*
23 743 F.3d 509 (7th Cir. 2014)21, 22

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431 U.S. 85 (1977).....20

25 *Lorillard Tobacco Co. v. Reilly*
26 533 U.S. 525 (2001).....14

27 *Metro Lights L.L.C. v. City of Los Angeles*
28 551 F.3d 898 (9th Cir. 2009)17, 18, 19

1 *Metromedia, Inc. v. City of San Diego*
 453 U.S. 490 (1981).....18, 19

2 *Milavetz, Gallop & Milavetz, P.A. v. United States*
 3 559 U.S. 229 (2010).....6, 7

4 *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*
 5 556 F.3d 114 (2d Cir. 2009)13

6 *Nat’l Elec. Mfrs. Ass’n v. Sorrell*
 272 F.3d 104 (2d Cir. 2001)7, 11, 13

7 *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*
 8 475 U.S. 1 (1986).....7

9 *Pharm. Care Mgmt. Ass’n v. Rowe*
 429 F.3d 294 (1st Cir. 2005).....13

10 *Planned Parenthood of Blue Ridge v. Camblos*
 11 116 F.3d 707 (4th Cir. 1997)25

12 *R.A.V. v. St. Paul*
 13 505 U.S. 377 (1992).....17

14 *Reno v. ACLU*
 521 U.S. 844 (1997).....24

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 16 810 F.3d 638 (9th Cir. 2016)16

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 18 487 U.S. 781 (1988).....23

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 514 U.S. 476 (1995).....19

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 131 S.Ct. 2653 (2011).....16

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 218 F.Supp.2d 423 (S.D.N.Y. 2002)22

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 316 F.Supp.2d 1201 (D. Utah 2004).....24

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 3 425 U.S. 748 (1976).....6, 14

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 5 539 U.S. 1134 (2003).....23

6 *Weinberger v. Romero-Barcelo*
 456 U.S. 305 (1982).....25

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 8 135 S.Ct. 1656 (2015).....17, 18

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 10 --- F.3d ---, No. 11-17634, 2016 WL 363202 (9th Cir. Jan. 27, 2016).....17

11 *World Wide Rush, LLC v. City of Los Angeles*
 606 F.3d 676 (9th Cir. 2010)17, 18

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14 **Constitutional Provisions**
 U.S. Const., amend. I *passim*

15 **Federal Statutes**
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 S.F. Health Code §§ 4200-4206 (SF BOS Ordinance No. 100-15)..... *passim*

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2
3
4
5
6
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11
12
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18
19
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21
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1
2 **STATEMENT OF ISSUES TO BE DECIDED**

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

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

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

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

12 **INTRODUCTION**

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

22 **STATEMENT OF FACTS**

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

24 Obesity and diabetes are a public health crisis. More than a third of American adults are obese,
25 and another third are overweight. Among children, a third are overweight or obese. S.F. Health Code
26 § 4201; Schillinger Rep. ¶ 8. Nearly one in seven adults, and more than one in five low-income or
27 minority adults, has type 2 diabetes, and 40% of adults are pre-diabetic, placing them at risk to
28

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

4 Rates of obesity and diabetes have climbed in the United States for decades. Schillinger Rep.
5 ¶¶ 10, 12-14. And while the last few years have seen a change in this trend—very recently, rates of
6 obesity have plateaued, and diabetes rates have slightly dropped, Willett Rep. ¶ 21—the costs of these
7 epidemics remain staggering. The national economic impact of obesity—in healthcare costs, lost
8 productivity, disability, and premature mortality—is \$227 billion annually. Schillinger Rep. ¶¶ 11.
9 The mortality costs are still more alarming; “as a result of the substantial rise in the prevalence of
10 obesity and its life-shortening complications such as diabetes, life expectancy at birth and at older
11 ages” could actually be shorter for today’s youth than their parents. *Id.* ¶ 10. And while tooth decay
12 does not have the same dramatic impact on mortality as obesity and diabetes, it, too, is a chronic
13 disease that can result in pain, infection, and tooth loss. *Id.* ¶ 23.

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

18 Obesity and diabetes are complex conditions, but obesity is widely acknowledged to be a risk
19 factor for diabetes, Willett Rep. ¶ 50; and obesity, in turn, results when the body consumes caloric
20 energy that it does not burn, *id.* ¶ 59. There is a broad consensus that reducing obesity will require
21 Americans to consume less added sugar, *i.e.* sugar that is not naturally present in foods and beverages,
22 which sweetens food but adds no nutrition. As Plaintiffs’ own expert has put it, in assessing strategies
23 to address excessive calories, a “**reduction in consumption of added sugars should head the list**
24 because they provide no essential nutrients.”¹ This recognition is also reflected in the recent official
25 recommendations of the federal agencies charged with formulating nutrition policy, *see* 7 U.S.C.
26 § 5341(a), the 2015-2020 Dietary Guidelines for Americans, which now recommends that Americans

27
28 ¹ R. Kahn & J.L. Sievenpiper, “Dietary Sugar and Body Weight: Have We Reached a Crisis in the Epidemic of Obesity and Diabetes?” *Diabetes Care* 2014; 37:961 (emphasis added).

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

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

15 Unsurprisingly in light of these consumption levels, the link between SSB consumption and
 16 obesity and diabetes is well established by empirical research, including by large observational studies
 17 and by those randomized experimental trials that are feasible to perform.³ The strength and
 18 consistency of this evidence establishes that consuming SSBs causes obesity and diabetes. Willett
 19 Rep. ¶¶ 68-69. While there is some debate about whether their contribution comes simply because
 20 they contribute so many non-nutritive calories to American diets, or whether there is *also* something
 21 especially obesity-causing about SSBs (such as that people do not compensate for soda calories by
 22 reducing calories elsewhere or because of the unique way the liver processes liquid sugar, *id.* ¶¶ 58,
 23 61-62)—there is no reasonable dispute that SSB consumption and obesity are linked. Willett Rep.
 24 ¶ 19; Schillinger Rep. ¶ 21. Indeed, even the soda industry does not dispute this. Plaintiff American

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

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

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

6 **B. San Francisco’s Disclosure Requirement**

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

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

26 In an effort to help San Franciscans make better and more informed drink choices, the City
 27 enacted Ordinance No. 100-15 (“Ordinance”) on June 25, 2015, codified at San Francisco Health Code
 28 §§ 4200-4206. Ex. D to Goldman Dec. As of July 25, 2016, the Ordinance will require SSB ads in

1 San Francisco to include the text, “WARNING: Drinking beverages with added sugar(s) contributes to
2 obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.”
3 §4203(a). This message must cover at least 20% of the ad and be set off in a rectangular border. *Id.*
4 The design, text, and size of San Francisco’s warning all comport with internationally accepted design
5 standards for health warnings, and for that reason the warning is likely to be effective at informing
6 consumers of the health risks of SSBs, changing attitudes toward SSBs, and persuading consumers to
7 adopt healthier habits. Hammond Rep. ¶¶ 38-39. A recent study showed that a significant number of
8 parents reported they would not choose SSBs for their children after viewing a similarly worded
9 warning. *Id.* ¶¶ 36-37.

10 The warning requirement applies to ads for sodas and other nonalcoholic beverages that
11 contain added sugars and more than 25 calories per 12 ounces of beverage, but it does not apply to
12 milk and 100% fruit-juice drinks. S.F. Health Code § 4202.⁴ The warning requirement applies
13 broadly to any advertisement in San Francisco that markets, promotes, or identifies an SSB for sale or
14 use, including in-store advertisements, but does not apply to advertisements on specified media that
15 are distributed both inside and outside the city: newspapers and other periodicals as well as television
16 and electronic media. *Id.*

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

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

ARGUMENT

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

A. *Zauderer* Is a Deferential Standard

The government may require a commercial speaker to disclose factual information about its product so long as the mandated disclosure is reasonably related to the government’s interests.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).⁵ This deferential standard is akin to rational basis review. *See, e.g., Safelite Group, Inc. v. Jepsen*, 764 F.3d 258, 262 (2d Cir. 2014); *CTIA – The Wireless Association v. City of Berkeley*, -- F.Supp.3d --, No. C-15-2529 EMC, 2015 WL 5569072, at *12 (N.D. Cal. Sept. 21, 2015) (*CTIA I*).

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

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

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

1 *Milavetz*, 559 U.S. at 249. *Zauderer*'s light touch reflects the principle that a commercial speaker's
 2 "constitutionally protected interest in *not* providing any particular factual information in his
 3 advertising is minimal." 471 U.S. at 651; *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104,
 4 113-14 (2d Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal
 5 First Amendment justification for protecting commercial speech, and requiring disclosure of truthful
 6 information promotes that goal.").

7 Plaintiffs pay lip service to the principle that commercial speech protections serve the listener's
 8 interest, ECF No. 50 at 18:2-3, 19:23-24, but they discard it when they argue that "being forced to
 9 speak when one would prefer to remain silent is an independent First Amendment wrong," *id.* at
 10 19:12-13. That argument only applies to noncommercial speech, *see Frudden v. Pilling*, 742 F.3d
 11 1199, 1205-06 (9th Cir. 2014) (cited by Plaintiffs; holding that motto on mandatory school uniforms
 12 violated First Amendment); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8-9
 13 (1986) (plurality) (cited by Plaintiffs; holding that it violated the First Amendment to require utility to
 14 provide access to other speakers in a noncommercial newsletter), and it has no force here.⁶ *See infra*
 15 Section III (arguing that San Francisco's warning applies only to commercial speech).

16 **B. The Health Warning Is Factual and Accurate**

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

25
 26 ⁶ To the extent Plaintiffs can claim any liberty interest in their commercial speech, that concern
 27 is allayed by the fact that San Francisco's warning clearly identifies that the message is compelled by
 28 the City. *Cf. Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557, 561-62 (2005) (First
 Amendment principle prohibiting compelled speech did not apply in compelled-subsidy case where
 the government was the speaker).

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

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

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

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

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

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

26
 27 ⁷ *See also* ECF No. 50-24 at 12 ("I do not believe that added sugar *uniquely* contributes to
 28 obesity or to related conditions like diabetes"); *id.* at 18 ("there continues to be much controversy over
 the hypothesis that added sugar in the form of solid food or sugar-sweetened beverages *uniquely*
 contributes to obesity or diabetes"); *id.* at 23 ("added sugar does not have a *uniquely* detrimental effect

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

13 But for purposes of the argument here, the Court can accept Dr. Kahn’s opinions—that there is
 14 some debate about whether SSBs pose “unique” health risks, and that they can safely be consumed in
 15 moderation without inevitably leading to obesity and diabetes—and still uphold San Francisco’s
 16 warning requirement. San Francisco’s warning simply does not claim that sugary drinks intrinsically
 17 and inevitably cause obesity and diabetes beyond their caloric contribution. Even on Dr. Kahn’s
 18 view—that total calories determine weight gain, that the source of the calories does not matter, and
 19 that “[t]here is nothing unique about added . . . sugar that may lead to obesity and diabetes more than
 20 any other source of excess calories,” ECF No. 50-24 at 3—added sugar, and the sugary beverages that
 21 deliver added sugar, contribute to weight gain yet supply no redeeming nutrients, as Dr. Kahn has
 22 admitted elsewhere when he said that reducing added sugars should head the list of nutrition strategies
 23 to address obesity. *See supra* at 2.⁸

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

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

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

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

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

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

25
 26
 27 evidence that "children who consumed [SSBs] have increased . . . body fat" and that "greater
 28 consumption of SSBs is associated with increased body weight in adults." *Id.* And the sentence that
 precedes Plaintiffs' selectively-quoted sentence says that "consumption levels of added sugars alone
 exceed the discretionary calorie recommendations of 5 to 15 percent." *Id.*

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

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

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

27 *CTIA I*, 2015 WL 5569072, at *18.

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

1 harmful than consuming other sugary foods and beverages, that SSBs cannot be consumed in any safe
2 quantity, and that consuming SSBs will outweigh all other lifestyle factors that affect whether obesity
3 or diabetes develops. Kahn Rep. ¶¶ 72-81. But Dr. Kahn’s report and C.V. establish no expertise or
4 qualifications in in the field of risk communication or in what warnings “imply” or “convey.”
5 Hammond Rep. ¶ 81. His opinions on the subject cite no relevant literature; they are bare assertions
6 unsupported by any empirical research, scientific methodology, or theoretical framework. Hammond
7 Rep. ¶ 73. Although courts may give some weight to otherwise inadmissible evidence in the
8 preliminary injunction context, *see Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984),
9 these opinions are so unrelated to any putative qualifications, and so devoid of analysis, research, or
10 other support, that they are entitled to none. *See, e.g., Sega Enterprises Ltd. v. MAPHIA*, 948 F. Supp.
11 923, 929 (N.D. Cal. 1996) (disregarding opinions outside expert’s field).

12 Plaintiffs also offer the report of marketing professor Peter Golder, who contends that the
13 presence of the warning on SSB ads but not ads for other products means that “at least some
14 consumers will take away from the City’s warning that products whose advertisements do not carry
15 the warning message are better choices even when they could contain more sugar and/or calories than
16 products whose advertisements do carry the Warning Message.” Golder Rep. ¶ 62; *see also id.* at
17 ¶¶ 47, 59. But his opinion about what “some consumers” will take away is not supported by anything
18 he cites or by the text of the warning itself (which does not say that SSBs are worse than everything
19 else); moreover, evidence from Mexico’s SSB tax suggests that people substituted bottled water for
20 SSBs when SSBs became more expensive relative to other foods. Hammond Rep. ¶ 62; Schillinger
21 Rep. ¶ 35. Of course, San Francisco has very good reasons to focus on SSBs, *see supra* 3-4—as it is
22 entitled to do under *Zauderer*—and to the extent the warning causes people to think about what those
23 reasons are, there is no basis to believe that they will misconstrue or misperceive them. But Dr.
24 Golder’s opinion does not make the warning inaccurate in any event.

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

1 57, 68-69. As Dr. Hammond’s report demonstrates, there is no evidence that people will overestimate
 2 the health risks of SSBs based on the warning. The citation that Dr. Golder offers to support his claim
 3 that consumers overestimate the risk of negative outcomes was discussing rare events that are easily
 4 imagined, but does not apply to behavioral risk factors, such as nutrition-related chronic diseases, that
 5 are neither rare nor easily imagined. *Id.* ¶ 49. Indeed, the same book Dr. Golder cites actually
 6 identifies diabetes as an “underestimated” risk and contains a chapter discussing the importance of
 7 health warnings to address underestimates of risk for behavior risk factors. *Id.* Nor does the literature
 8 on health warnings support Dr. Golder’s claim that consumers will infer that other foods, like
 9 doughnuts or candy bars, do not contribute to obesity and diabetes simply because SSB ads bear the
 10 warning but ads for other foods do not. Golder Rep. ¶ 61. As Dr. Hammond points out, Dr. Golder
 11 offers no support for this assertion. Hammond Rep. ¶¶ 59-60.

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

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

21 Although *Zauderer* is a deferential standard, it nonetheless requires that a mandatory disclosure
 22 be “reasonably related” to the government’s interests. 471 U.S. at 651.¹⁰ As the term “reasonable”
 23 signifies, this test, too, is deferential. *Discount Tobacco*, 674 F.3d at 566-67. Nonetheless, *Zauderer*

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

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

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

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

15 And Plaintiffs do not claim even that. Unlike the advertisers in *Consolidated Cigar*, Plaintiffs
16 make no claim that they will advertise less—*i.e.*, that consumers will be deprived of commercial
17 information about sodas—but merely that they will advertise less on “covered media,” ECF No. 50 at
18 16-17, because they prefer that consumers not be reminded that their products contribute to chronic
19 diseases. Yet even as to covered media, a soda company’s asseveration that it would choose not to

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

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

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

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

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

27 As for Plaintiffs’ remaining arguments that counterspeech is “infeasible” or that they will have
28 to change the “tenor and content” of their ads to accommodate the warning, these arguments amount to

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

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

7 “Laws that restrict speech are fundamentally different than laws that require disclosures, and so
 8 are the legal standards governing each type of law.” *Discount Tobacco*, 674 F.3d at 552. For that
 9 reason, the *Central Hudson* framework governing commercial speech restrictions does not apply to
 10 this case, nor does the Ninth Circuit’s recent decision increasing the scrutiny afforded some
 11 commercial speech restrictions, *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir.
 12 2016). *See id.* at 649 (heightened scrutiny appropriate where law seeks to silence truthful speech for
 13 paternalistic reasons); *CTIA – The Wireless Association v. City of Berkeley*, -- F.Supp.3d ---, No. 15-
 14 cv-02529-EMC, 2016 WL 324283, at *3 (N.D. Cal. Jan. 27, 2016), *appeal docketed*, No. 16-15141
 15 (9th Cir. Feb. 1, 2016) (*CTIA II*). But even assuming that *Retail Digital Network* or *Central Hudson*
 16 applied here, the Ordinance would nonetheless be constitutional.

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

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

1 **A. The Ordinance Directly and Materially Advances the City’s Interests**

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

7 Underinclusiveness is a problem when the exceptions to the law ensure that it will fail to
8 achieve its aim, or where it draws distinctions between different kinds of speech that bear no
9 relationship to the government’s interests. *Metro Lights L.L.C. v. City of Los Angeles*, 551 F.3d 898,
10 905-06 (9th Cir. 2009). However, as both the Supreme Court and the Ninth Circuit have recently
11 emphasized:

12 Although a law’s underinclusivity raises a red flag, the First Amendment imposes no
13 freestanding “underinclusiveness limitation.” [*R.A.V. v. St. Paul*, 505 U.S. 377, 387
14 (1992).] A State need not address all aspects of a problem in one fell swoop;
15 policymakers may focus on their most pressing concerns. We have accordingly upheld
16 laws—even under strict scrutiny—that conceivably could have restricted even greater
17 amounts of speech in service of their stated interests.

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

20 With respect to covered and exempted media, there is an obvious difference between
21 geographically fixed signs (like billboards, storefront signage, and vending machines), and media that
22 reach San Francisco but simultaneously other municipalities as well (like the internet, radio, television,
23 and newspapers). In the latter media, placing the warning only on ads viewed in San Francisco would
24 likely pose technological, logistical, or economic burdens that do not exist with fixed signs. By
25 exempting those media from the Ordinance, the City avoids potential litigation asserting that it is
26 effectively seeking to regulate outside of its jurisdiction—challenges that could jeopardize the
27 Ordinance or delay its implementation. *Cf. World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d
28 676, 685 (9th Cir. 2010) (exceptions to freeway-facing sign ban served city’s interest in removing
blight by allowing some freeway improvement projects to go forward that otherwise might not). Apart
from the potential for legal challenges, the City may reasonably conclude that, in view of the logistical

1 burdens it would impose to require the warning on multi-jurisdictional media, “its interests should
 2 yield” in those instances. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (city
 3 reasonably distinguished between onsite and offsite commercial advertising, concluding that its
 4 interests should yield in the case of the former but not the latter); *accord, Metro Lights*, 551 F.3d at
 5 908, 910-11.¹³

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

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

22
 23
 24 ¹³ Plaintiffs quote from certain discovery responses by the City, ECF No. 50, at 21, but omit
 25 the City’s response to an interrogatory about the exclusion of certain media, in which the City
 26 explained that “it may limit the scope of the warning requirement to avoid regulating outside of its
 27 geographic jurisdiction and/or to avoid imposing an excessive logistical, technological, or economic
 28 burden.” CCSF’s Response to CSOAA Interrogatory No. 2. Of course, it is the warning itself that
 directly promotes public health, but excluding certain media from the Ordinance’s scope where it
 could forestall feasibility objections and potential legal challenges is entirely consistent with the City’s
 public health interest. *See World Wide Rush*, 606 F.3d at 685 (“exceptions ... must be considered
 holistically, not in isolation.”).

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

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

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

25 Plaintiffs also suggest that, in response to the warning, consumers may substitute for SSBs
26 other foods or beverages that are just as unhealthful. But the evidence indicates that many people do
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1 make better choices (like water) to replace their consumption of SSBs. Hammond Rep. ¶ 62.¹⁴ And
 2 Plaintiffs' contention that San Francisco must explain "how total caloric intake, exercise, age, or
 3 genetics factor into the equation," ECF No. 50 at 22, would replace the warning with an essay; it is an
 4 argument calculated to preclude the government from ever requiring health or safety warnings at all.
 5 *See CTIA I*, 2015 WL 5569072, at *18. Moreover, warnings on advertisements or packages must be
 6 concise to be effective, Hammond Rep. ¶ 29, and it is neither necessary nor appropriate for consumer
 7 product warnings to address risk factors not specific to that product, Hammond Rep. ¶¶ 64, 78.

8 **B. The Ordinance Is Not More Extensive Than Necessary**

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

18 The cases Plaintiffs cite do not control the result here. *Linmark Associates, Inc. v. Willingboro*,
 19 431 U.S. 85, 97 (1977), not only predated *Central Hudson*, but involved a speech **restriction**—a ban
 20 on real estate signs—rather than a compelled disclosure. And in *Evergreen Ass'n v. City of New York*,
 21 the court found that the law compelled speech on a "contested public issue"—the morality of abortion.
 22 740 F.3d 233, 250-51 (2d Cir. 2014). Here, even if the warning were deemed to convey a message

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

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

13 **III. THE ORDINANCE DOES NOT REACH SUBSTANTIAL NONCOMMERCIAL** 14 **SPEECH**

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

20 Although the “core notion of commercial speech” is speech that does “no more than propose a
 21 commercial transaction,” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quotation
 22 marks omitted), “this definition is just a starting point,” *Jordan v. Jewel Food Stores, Inc.* 743 F.3d
 23 509, 516 (7th Cir. 2014). “Where the facts present a close question,” *Hunt v. City of Los Angeles*, 638
 24 F.3d 703, 715 (9th Cir. 2011), courts apply the three-factor test set forth in *Bolger*, 463 U.S. at 66-67:
 25 (1) whether the speech is an advertisement, (2) whether the speech refers to specific products, and
 26 (3) whether the speaker has an economic motivation for engaging in the speech. When all three
 27 factors are present, there is “ ‘strong support’ ” for the conclusion that the speech is commercial
 28 speech. *Hunt*, 638 F.3d at 715 (quoting *Bolger*, 463 U.S. at 67). An advertisement that includes

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

3 Plaintiffs’ examples of supposedly noncommercial speech covered by the Ordinance fall
4 broadly into two categories: promotions of their event sponsorships and other altruistic endeavors,
5 *see, e.g.*, ECF Nos. 50-7, 50-13, 50-14, and billboards and other signs containing commentary about
6 public issues along with their logos or depictions of their products, *see, e.g.*, ECF Nos. 50-9, 50-10,
7 50-12. Application of the *Bolger* factors to these examples demonstrates that they are commercial
8 speech. Each is conceded by Plaintiffs to be an advertisement; if they were not advertisements; they
9 would not be covered by the Ordinance at all since the Ordinance only applies to “any advertisement,
10 including . . . any logo, **that identifies, promotes, or markets** a Sugar-Sweetened Beverage for sale or
11 use.” S.F. Health Code § 4202 (emphasis added). The second *Bolger* factor is whether the
12 advertisement refers to a specific product. In most of the examples Plaintiffs offer, this factor is also
13 clearly met. But even where the ad does not reference a specific product, this “is far from dispositive,
14 especially where ‘image’ or brand advertising rather than product advertising is concerned.” *Jordan*,
15 743 F.3d at 519. The third *Bolger* factor—whether the speaker has an economic motivation for
16 engaging in the speech—is met as well. Showing support for public events like the Chinese New Year
17 Parade, informing the public that Coca-Cola is reducing beverage calories in schools, ECF No. 50-10
18 at 2, or reminding people that PepsiCo wants to “do some good,” ECF No. 50-7 at 2, “has an
19 unmistakable commercial function: enhancing the [advertiser’s] brand in the minds of consumers.”
20 *Jordan*, 743 F.3d at 519; *see also Transp. Alternatives v. City of New York*, 218 F. Supp. 2d 423, 437
21 (S.D.N.Y. 2002) (display of logos in corporate sponsorship of nonprofit’s bicycle race was
22 commercial speech). The “Mixify” ads that Plaintiffs point to—which display major soda companies’
23 logos and try to assure consumers that they can continue to drink sodas and stay healthy as long as
24 they exercise and cut calories elsewhere—are no different. Just as an eight-page pamphlet sponsored
25 by a condom seller informing the public about family planning is commercial speech, *Bolger*, 463 U.S.
26 at 67-68, so too is a soda company-sponsored billboard reassuring the public that they can continue to
27 drink soda.

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

11 Finally, even if Plaintiffs could show that the Ordinance reaches some noncommercial speech,
12 this facial challenge would nonetheless fail. Plaintiffs make no argument that the Ordinance would
13 impact “a ‘substantial’ amount of protected speech in relation to its many legitimate applications,” a
14 requirement for a facial First Amendment challenge. *Virginia v. Hicks*, 539 U.S. 113, 124 (2003); *see*
15 *also Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir.
16 2011). Nor could they; the number of Coca-Cola sponsorships or PepsiCo “do good” promotions is
17 plainly dwarfed by straightforward SSB advertisements. Exs. A-C to Goette Dec. Thus, even if the
18 Ordinance applied to some instances of noncommercial speech, Plaintiffs’ remedy would be to seek to
19 invalidate it only as applied to those instances. *Hicks*, 539 U.S. at 124.

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

22 Plaintiffs claim that they will be irreparably harmed in the absence of an injunction because the
23 Ninth Circuit has held that the loss of First Amendment freedoms constitutes irreparable injury. ECF
24 No. 50 at 23. But that principle does not support the issuance of a preliminary injunction where, as
25 here, Plaintiffs’ constitutional claim is tenuous. *Associated Gen. Contractors of Cal., Inc. v. Coal. for*
26 *Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991); *Goldie’s Bookstore, Inc. v. Superior Court of State*
27 *of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). Plaintiffs’ claim of irreparable harm is also undermined by
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1 their own contention that there are many other media in which they may communicate their message
2 without being subject to the warning requirement.¹⁵

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

9 Finally, under the terms of the Ordinance, the warning requirement does not go into effect until
10 a year after enactment. That timetable would have allowed Plaintiffs to litigate their claim in the
11 ordinary course—such as by moving for summary judgment—rather than asking this Court for
12 extraordinary relief. Indeed, Plaintiffs filed their complaint last July, but did not move for a
13 preliminary injunction until January 2016. Where the urgency is one of Plaintiffs’ own creation, —in
14 other words, where the relief is sought as a tactical litigation decision—that factor favors denial of the
15 motion. *See, e.g., Capital Associated Indus., Inc. v. Cooper*, No. 1:15-CV-83, 2015 WL 5178057, at
16 *11 (M.D.N.C. Sept. 4, 2015) (“Courts must be vigilant to ensure that this extraordinary remedy is not
17 used to manufacture a sense of urgency where none exists so as to allow the case to leapfrog earlier
18 filed actions that may be of equal or greater urgency.”).

19 **V. THE REMAINING FACTORS FAVOR DENIAL OF AN INJUNCTION**

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

22 ¹⁵ Plaintiffs cite *Reno v. ACLU*, 521 U.S. 844, 880 (1997), for the proposition that loss of even
23 one medium of communication constitutes irreparable injury. ECF No. 50, n.13. But apart from the
24 fact that *Reno* was not discussing irreparable harm, *cf. Utah Gospel Mission v. Salt Lake City Corp.*,
25 316 F.Supp.2d 1201, 1221-22 (D. Utah 2004) (no irreparable harm where plaintiffs had ample other
26 places in which to communicate their message), or a voluntary decision to speak elsewhere, its
27 reference to the “exercise of [one’s] liberty of expression” is inapplicable where, as here, the speech is
28 commercial and accordingly derives its protection not from the expressive interests of the speaker, but
from the societal interest in the free flow of commercial information. (*See supra*, Section I.A.)
Plaintiffs do not show that there will be irreparable harm to this informational function if some SSB
advertising shifts to other media. Plaintiffs cite *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994), but
that case involved a law prohibiting homeowners from displaying signs on their own property, which
the Court found had special First Amendment protection, and is not relevant here. *Id.* at 57-58.

1 Dated: February 23, 2016

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