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15 UNITED STATES DISTRICT COURT
16
17 NORTHERN DISTRICT OF CALIFORNIA

18 THE AMERICAN BEVERAGE
19 ASSOCIATION, CALIFORNIA RETAILERS
ASSOCIATION, CALIFORNIA STATE
20 OUTDOOR ADVERTISING ASSOCIATION

21 Plaintiffs,

22 v.

23 THE CITY AND COUNTY OF SAN
24 FRANCISCO,

25 Defendant.

Civil Action No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1
2 **1.** At its very core, the First Amendment forbids the government from suppressing
3 private speech that it disagrees with, and equally forbids the government from compelling private
4 speakers to express the government’s views.

5 **2.** This action addresses two ordinances recently enacted by the City and County of
6 San Francisco (“the City”) that violate these core principles. The City has banned certain
7 advertising and required on other advertising a warning label that is misleading—and, at a
8 minimum, disputed and controversial. The ordinances reflect the City’s opinion that sugar-
9 sweetened beverages have little or no value, and its value judgment that there is no place for
10 them in a healthy diet and lifestyle. No matter how zealously the City holds its views, the First
11 Amendment forbids the City from conscripting private speakers to convey them while
12 suppressing conflicting viewpoints on this controversial topic.

13 **3.** The City has tried such a scheme before. In 2010, the City required retailers to
14 warn consumers about cell phone radiation, despite those retailers’ belief that cell phone usage is
15 not hazardous to health. This Court preliminarily enjoined the enforcement of that ordinance on
16 First Amendment grounds, and the Ninth Circuit affirmed that decision, and indeed expanded the
17 scope of the preliminary injunction. *See CTIA—The Wireless Ass’n v. City & Cnty. of San*
18 *Francisco*, 827 F. Supp. 2d 1054, 1060-61 (N.D. Cal. 2011), *aff’d in part and vacated in part on*
19 *other grounds*, 494 F. App’x 752 (9th Cir. 2012). The City then agreed to a
20 permanent injunction.

21 **4.** The two ordinances at issue in this case demonstrate even less respect for free
22 speech. The ordinances not only require sugar-sweetened beverage advertisers to voice the
23 City’s controversial opinion that beverages with added sugar are uniquely harmful to health, but
24 also ban from City property advertising promoting sugar-sweetened beverages and prohibit
25 producers of sugar-sweetened beverages even from using their names on City property—even
26 when promoting events or products having nothing to do with sugar-sweetened beverages.

27 **5.** The City is free to try to persuade consumers to share its opinions about sugar-
28 sweetened beverages. It may, for instance, sponsor its own advertising campaign promoting

1 those opinions. Alternatively, it could subsidize programs that promote what the City considers
2 to be a healthy diet. Instead, the City is trying to ensure that there is no free marketplace of
3 ideas, but instead only a government-imposed, one-sided public “dialogue” on the topic—in
4 violation of the First Amendment.

5 **The Speech Ban**

6 **6.** The first ordinance (the “Speech Ban”) has two components, which suppress
7 private speech and penalize private speakers for their views on sugar-sweetened beverages. San
8 Francisco Ordinance No. 98-15, amending S.F. Admin. Code § 4.20 (June 25, 2015),
9 [https://sfgov.legistar.com/View.ashx?M=F&ID=3844152&GUID=9AEE5498-CEF5-4D66-](https://sfgov.legistar.com/View.ashx?M=F&ID=3844152&GUID=9AEE5498-CEF5-4D66-B326-48C8FD8002C4)
10 [B326-48C8FD8002C4](https://sfgov.legistar.com/View.ashx?M=F&ID=3844152&GUID=9AEE5498-CEF5-4D66-B326-48C8FD8002C4) [hereinafter “S.F. Admin. Code § 4.20” or “Ordinance 98-15” or
11 “Speech Ban”].

12 **7.** The Speech Ban’s first component prohibits advertising of sugar-sweetened
13 beverages on City property, including its buses, trains, parks, and bus stops, and other locations
14 where the City historically has allowed private parties to advertise a variety of viewpoints,
15 products, services, and events. It exempts City properties where the City allows and benefits
16 from the production or sale of sugar-sweetened beverages. And it explicitly permits
17 advertisements that criticize sugar-sweetened beverages or encourage people to stop drinking
18 them. The First Amendment flatly forbids such government-imposed viewpoint discrimination.

19 **8.** The second component of the Speech Ban goes further. It prohibits all producers
20 of sugar-sweetened beverages—beverage manufacturers, restaurants, hotels, and department
21 stores that create beverages with added sugars (including local icons like Ghirardelli Chocolate,
22 Peet’s Coffee, Jamba Juice, and Swensen’s)—from using their *names* on any City property to
23 promote *any* product or *any non-charitable event*, no matter whether commercial, athletic,
24 musical, or even political in nature.

25 **9.** This provision discriminates against certain private speakers explicitly based on
26 their identities, and prohibits them from engaging in core protected speech. It would, for
27 instance, forbid a sugar-sweetened beverage producer from using its name in a traditional public
28 forum like Civic Center Plaza to rally political opposition to laws or politicians attacking sugar-

1 sweetened beverages. It would equally prevent a sugar-sweetened beverage producer from
2 sponsoring or otherwise promoting an event completely unrelated to sugar-sweetened
3 beverages—such as a parade on city streets or a conference on an unrelated topic like water
4 sustainability or fair labor practices. Under hornbook First Amendment law, this speech restraint
5 is unlawful and irreparably overbroad.

6 **10.** The Effective Date of the Speech Ban is July 25, 2015—thirty days after its
7 enactment on June 25, 2015.

8 **The Warning Mandate**

9 **11.** The second ordinance (“the Warning Mandate”) also violates core First
10 Amendment principles, by compelling sugar-sweetened beverage advertisers to broadcast the
11 City’s controversial, negative opinions about their products. The Warning Mandate violates
12 private speakers’ constitutional right to decide for themselves what to say, and what not to say.
13 San Francisco Ordinance No. 100-15, adding art. 42, div. I, §§ 4200-4206 to San Francisco
14 Health Code (June 25, 2015), *available at*
15 [https://sfgov.legistar.com/View.ashx?M=F&ID=3844184&GUID=59549F25-8D8A-4E07-
17 BE7D-D1683A53BEAE](https://sfgov.legistar.com/View.ashx?M=F&ID=3844184&GUID=59549F25-8D8A-4E07-
16 BE7D-D1683A53BEAE) [hereinafter “S.F. Health Code §§ 4200-4206” or “Ordinance 100-15”
18 or “Warning Mandate”].

18 **12.** The Warning Mandate requires anyone who produces, distributes, or advertises
19 sugar-sweetened beverages to display prominently on many advertisements a massive message
20 stating: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes,
21 and tooth decay. This is a message from the City and County of San Francisco.” S.F. Health
22 Code § 4203(a). This warning must cover at least 20% of the advertisement and be enclosed in a
23 rectangular border the same color as the warning. *Id.* § 4203(b).

24 **13.** The Warning Mandate requires private speakers to convey, regardless of their
25 own views, the City’s controversial and misleading opinion that certain beverages with added
26 sugar are inherently hazardous, more harmful to consumers’ health than beverages with natural
27 sugar or foods with added sugar, and uniquely responsible for increasing rates of obesity
28 and diabetes.

1 **14.** This message conflicts with the findings of United States Department of
2 Agriculture researchers and other experts, who have concluded that added sugar and natural
3 sugar are metabolized in identical ways.

4 **15.** It also conflicts with the conclusions of respected health organizations such as
5 the Academy of Nutrition & Dietetics (formerly the American Dietetic Association), which have
6 issued dietary recommendations concluding that sugar-sweetened beverages—like countless
7 other foods and beverages, including pizza, cookies, apple juice, hamburgers, ice cream, and
8 burritos—may be consumed as part of a healthy diet and lifestyle.

9 **16.** The City’s mandated warning nonetheless singles out sugar-sweetened beverages
10 among all foods and beverages, and conveys the misleading and controversial view that they are
11 hazardous in any quantity and more hazardous to health than any other food or beverage about
12 which the City requires no warning.

13 **17.** The City’s mandated warning ignores the fact that, while Americans consume
14 many more calories today than in the past and rates of obesity and diabetes are on the rise, sugar-
15 sweetened beverage consumption has decreased substantially over the last 15 years.

16 **18.** The Warning Mandate exempts all newspaper, television, magazine, radio,
17 internet, circular, or other electronic media advertisements. Its narrow scope ensures that the
18 Warning Mandate will accomplish little other than harming outdoor advertisers and other
19 covered media by incentivizing those who promote sugar-sweetened beverages to switch to
20 exempt alternatives.

21 **19.** The Warning Mandate grants the Director of Public Health unlimited discretion,
22 following a publicly noticed hearing: (1) to modify the text of the Warning, (2) to set, and later
23 modify the size of the text of the Warning, (3) to modify the minimum area that the Warning
24 must cover, and (4) to issue implementing guidelines.

25 **20.** The Warning Mandate becomes operative on July 25, 2016.

26 **21.** Together, the Speech Ban and Warning Mandate seek to replace the free
27 marketplace of ideas with a single government-imposed viewpoint. Private speakers who
28 disagree with this viewpoint must stop speaking, parrot the government’s opinions, or pay a fine.

INTRADISTRICT ASSIGNMENT

1
2 **29.** Pursuant to Civil Local Rule 3-2(c), this action should be assigned to the San
3 Francisco Division of this Court because a substantial part of the events giving rise to Plaintiffs'
4 claims for relief occurred in the City.

PARTIES

5
6 **30.** The American Beverage Association (“ABA”) is a national trade organization
7 representing the non-alcoholic beverage industry, including beverage producers, distributors,
8 franchise companies, and support industries. ABA members bring to market beverages including
9 carbonated soft drinks, bottled water (including still water, mineral water, and artesian water),
10 sports drinks, energy drinks, 100% juices, juice drinks, and ready-to-drink teas. These products
11 are sold in various sizes with labels that provide nutritional information (including calories and
12 total sugar) enabling consumers to make informed beverage choices. Numerous ABA
13 members—including The Coca-Cola Company, PepsiCo, and Dr Pepper—advertise in the City
14 and use their brand names to promote events in the City, including on property owned or
15 controlled by the City. For example, ABA members maintain advertisements on numerous
16 transit shelters throughout the City, and have sponsored the Chinese New Year Festival and
17 Parade and the San Francisco Recreation & Parks Department Mobile Recreation Program. This
18 action is germane to the purpose of ABA and neither the claims asserted nor the relief requested
19 require the participation of its members.

20 **31.** The California Retailers Association (“CRA”) is a statewide trade association
21 representing all segments of the retail industry including general merchandise, department stores,
22 mass merchandisers, fast food restaurants, convenience stores, supermarkets and grocery stores,
23 chain drug, and specialty retail, such as auto, vision, jewelry, hardware and home stores. CRA
24 members advertise in the City, and use their names to promote events in the City, including on
25 property owned or controlled by the City. This action is germane to the purpose of CRA and
26 neither the claims asserted nor the relief requested require the participation of its members.

27 **32.** The California State Outdoor Advertising Association (“CSOAA”) is a statewide
28 trade association representing the interests of outdoor advertisers in the California Legislature

1 and in local governments across the state. CSOAA’s membership comprises 14 outdoor
 2 advertising companies—including OutFront Media—and more than 20 affiliate members.
 3 CSOAA members make advertising space available and exercise editorial content over
 4 advertisements, including in the City and on City property. This action is germane to the
 5 purpose of CSOAA and neither the claims asserted nor the relief requested require the
 6 participation of its members.

7 **33.** The City is a municipal corporation located in the State of California. It exercises
 8 local government powers under state law.

9 LEGAL BACKGROUND

10 **34.** The First Amendment and Due Process principles outlined in this section frame
 11 the constitutional issues central to this dispute.

12 **35.** *First*, the government cannot prohibit speech, even in a forum of its own creation,
 13 on the basis of viewpoint or where unreasonable in light of the purposes of the forum. *Seattle*
 14 *Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 496-99 (9th Cir. 2015) [hereinafter
 15 *SeaMAC*]; *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“Content-based
 16 laws—those that target speech based on its communicative content—are presumptively
 17 unconstitutional and may be justified only if the government proves that they are narrowly
 18 tailored to serve compelling state interests.”).

19 **36.** *Second*, laws compelling speech ordinarily receive strict scrutiny. *See Wooley v.*
 20 *Maynard*, 430 U.S. 705, 715-16 (1977). With the exception of required disclosures of purely
 21 factual and noncontroversial information necessary to redress what would otherwise be
 22 fraudulent or deceptive advertisements, *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S.
 23 626, 651 (1985), laws compelling commercial speech receive at least heightened scrutiny, *i.e.*,
 24 they are prohibited if they do not directly and materially advance the government’s interest, or
 25 are more extensive than necessary. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447
 26 U.S. 557, 566 (1980); *CTIA—The Wireless Ass’n*, 827 F. Supp. 2d at 1060-61; *see also Entm’t*
 27 *Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (“The sticker ultimately
 28

1 communicates a subjective and highly controversial message [Thus], we must apply strict
2 scrutiny . . .”).

3 **37.** *Third*, a law that “fails to provide a person of ordinary intelligence fair notice of
4 what is prohibited, or is so standard-less that it authorizes or encourages seriously discriminatory
5 enforcement,” is unconstitutionally vague. *United States v. Williams*, 553 U.S. 285, 304 (2008).
6 Vagueness in a law that restricts speech is particularly disfavored. “When speech is involved,” a
7 more “rigorous adherence to [the requirement that a law provides fair notice of what is
8 prohibited] is necessary to ensure that ambiguity does not chill protected speech.” *FCC v. Fox*
9 *Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

10 FACTUAL BACKGROUND

11 **38.** Over the past several decades, nutrition scientists have markedly shifted their
12 views regarding what is and is not part of a healthy diet.

13 **39.** Researchers’ continually evolving views regarding optimal diets are debated and
14 frequently revised. The dietary villains of one era frequently are revealed as the dietary saviors
15 of the next. Likewise, foods and beverages Americans were once encouraged to consume
16 become disfavored—and sometimes later favored once again.

17 **40.** In the 1980s, for example, Americans were urged to make grains—particularly
18 pasta, rice, bread, and cereal—the centerpiece of their diets, until government nutrition scientists
19 later reversed course. *See, e.g.*, Cheryl Achterberg, *Government Food Cops Are Out to Lunch*,
20 *Wall St. J.*, Feb. 26, 2015, [http://www.wsj.com/articles/cheryl-achterberg-government-food-](http://www.wsj.com/articles/cheryl-achterberg-government-food-cops-are-out-to-lunch-1424997724)
21 [cops-are-out-to-lunch-1424997724](http://www.wsj.com/articles/cheryl-achterberg-government-food-cops-are-out-to-lunch-1424997724) (noting that “people were encouraged to make bread, cereal,
22 rice, and pasta the foundation of their diets—until told not to”).

23 **41.** For several decades, dietary guidelines urged Americans to significantly reduce
24 fat consumption; but nutrition scientists have since substantially retreated from that view. *See,*
25 *e.g.*, Allison Aubrey, *Don’t Fear The Fat: Experts Question Saturated Fat Guidelines*, NPR
26 (Mar. 17, 2014), [http://www.npr.org/sections/thesalt/2014/03/17/290846811/dont-fear-the-fat-](http://www.npr.org/sections/thesalt/2014/03/17/290846811/dont-fear-the-fat-experts-question-saturated-fat-guidelines)
27 [experts-question-saturated-fat-guidelines](http://www.npr.org/sections/thesalt/2014/03/17/290846811/dont-fear-the-fat-experts-question-saturated-fat-guidelines) (“[A]uthors of a new meta-analysis published in the
28

1 *Annals of Internal Medicine* conclude that there's insufficient evidence to support the long-
2 standing recommendation to consume saturated fat in very low amounts.”).

3 **42.** Nutrition scientists also told Americans for years to avoid foods high in
4 cholesterol, like eggs and butter. But by the mid-2000s, research “showed there was no
5 association between cholesterol-containing foods and blood cholesterol content, and specifically
6 ruled out eggs as a problem.” Maryn McKenna, *No Yolk: USDA May Put Eggs Back on the*
7 *Menu*, Nat'l Geographic: The Plate (Feb. 19, 2015),
8 <http://theplate.nationalgeographic.com/2015/02/19/ok-cholesterol/>. In 2015, the government
9 “abandon[ed] its almost 40-year war against cholesterol in food.” *Id.*

10 **43.** The government long “has advised Americans that they are eating too much salt,
11 and that this excess contributes yearly to the deaths of tens of thousands of people.” Peter
12 Whoriskey, *More scientists doubt salt is as bad for you as the government says*, Wash. Post:
13 Wonkblog (Apr. 6, 2015),
14 [http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/06/more-scientists-doubt-salt-is-](http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/06/more-scientists-doubt-salt-is-as-bad-for-you-as-the-government-says/)
15 [as-bad-for-you-as-the-government-says/](http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/06/more-scientists-doubt-salt-is-as-bad-for-you-as-the-government-says/). But “according to studies published in recent years by
16 pillars of the medical community, the low levels of salt recommended by the government might
17 actually be dangerous.” *Id.*; *see id.* (noting that government's recommendation “has come under
18 assault by scientists who say that typical American salt consumption is without risk”).

19 **44.** As nutrition science evolves, “[o]netime good guys, like margarine and pasta,
20 have been recast as villains.” Other “[n]utritional bad guys that have fallen from grace in the
21 national consciousness—white potatoes, eggs, nuts, iceberg lettuce—have been redeemed years
22 later.” Heather Tirado Gilligan, *Nutritional Science Isn't Very Scientific*, Slate.com (Apr.
23 12, 2015),
24 [http://www.slate.com/articles/life/food/2015/04/nutritional_clinical_trials_vs_observational_stud](http://www.slate.com/articles/life/food/2015/04/nutritional_clinical_trials_vs_observational_studies_for_dietary_recommendations.single.html)
25 [ies_for_dietary_recommendations.single.html](http://www.slate.com/articles/life/food/2015/04/nutritional_clinical_trials_vs_observational_studies_for_dietary_recommendations.single.html); *see also* Kelsey Gee, *Butter Makes Comeback as*
26 *Margarine Loses Favor*, Wall St. J., June 25, 2014, [http://www.wsj.com/articles/butter-makes-](http://www.wsj.com/articles/butter-makes-comeback-as-margarine-loses-favor-1403745263)
27 [comeback-as-margarine-loses-favor-1403745263](http://www.wsj.com/articles/butter-makes-comeback-as-margarine-loses-favor-1403745263) (“In the 60s and 70s, before trans fats were
28 really thought to be bad, we looked at margarine and said it was healthier because it didn't have

1 **49.** A recent review of the scientific literature by scientists from the U.S. Department
2 of Agriculture and several research universities concluded that the “debates rage on, even though
3 it is clear that public policy in such an important area should not be made in the absence of
4 higher levels of proof than are currently available.” D.M. Klurfeld et al., *Lack of Evidence for*
5 *High Fructose Corn Syrup as the Cause of the Obesity Epidemic*, 37 Int’l J. of Obesity 771, 772
6 (2013), available at <http://www.nature.com/ijo/journal/v37/n6/pdf/ijo2012157a.pdf>.

7 **50.** Sustained overconsumption of calories from any source—whether sugar-
8 sweetened beverages, ice cream, pizza, hot dogs, or pasta—without offsetting physical activity
9 can contribute to weight gain and its associated negative health consequences. But the City’s
10 opinion about a unique connection between sugar-sweetened beverages and obesity, diabetes,
11 and tooth decay is controversial.

12 **51.** During hearings before the City’s Board of Supervisors, the co-sponsors of the
13 Ordinances solicited comments from various presenters in support of the bill. Among other
14 things, these presenters stated that (1) “sugary drinks are categorically different than foods with
15 some sugar,” (2) “sugary drinks ... spike blood sugar heavily and overwhelm the liver and
16 pancreas, leading to diabetes,” and (3) the scientific view that “calories in equals calorie out” is
17 “absurd.” Video of San Francisco Board of Supervisors Meeting: Health Code – Sugar-
18 Sweetened Beverage Warning for Advertisements at 21:10 (June 9, 2015), available at
19 http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=10&clip_id=23003.

20 **52.** However, researchers at the University of North Carolina Department of
21 Medicine and McMaster University Faculty of Health Sciences recently summarized the
22 literature and found “that there is no clear or convincing evidence that any dietary or added sugar
23 has a unique or detrimental impact relative to any other source of calories on the development of
24 obesity or diabetes.” Richard Kahn & John L. Sievenpiper, *Dietary Sugar & Body Weight: Have*
25 *We Reached a Crisis in the Epidemic of Obesity and Diabetes? We Have, But the Pox on Sugar*
26 *is Overwrought and Overworked*, 37 Diabetes Care 957, 961 (2014), available at
27 <http://care.diabetesjournals.org/content/37/4/957.full.pdf+html>. Instead, they concluded that
28

1 “[e]xcess total energy consumption seems far more likely to be the cause of obesity and
2 diabetes.” *Id.*

3 **53.** During the hearings, one presenter stated that “liquid sugar, as we know it, the
4 consensus would be clear, is toxic to us.”

5 **54.** However, a recent review by a leading United States Department of Agriculture
6 scientist concluded that “there is no credible evidence that added sugar or any single saccharide
7 is toxic.” David Klurfeld, *What Do Government Agencies Consider in the Debate Over Added*
8 *Sugars*, 4 *Advances in Nutrition* 257, 259 (2013), available at
9 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3649106/pdf/257.pdf>; see also Cefalu, 37
10 *Diabetes Care* at 908 (noting prominent scientists who argued that “there is no direct evidence
11 that sugar itself, in liquid or solid form, causes an increase in appetite, decreases satiety, or
12 causes diabetes”).

13 **55.** The City’s *opinion* is that added sugars contribute more to obesity, diabetes, and
14 tooth decay than sugars inherently in or naturally present in food (e.g., as in 100% fruit juice).

15 **56.** However, the Academy of Nutrition & Dietetics (formerly the American Dietetic
16 Association) has concluded that the “[h]uman metabolism does not distinguish between sugars
17 found in a food and those added to the food. . . . Fructose is absorbed, digested, and metabolized
18 in an identical manner no matter what the source.” Valerie B. Duffy, *Position of the American*
19 *Dietetic Association: Use of Nutritive and Nonnutritive Sweeteners*, 104 *J. Am. Dietetic Ass’n.*
20 255, 259 (2004), available at [http://www.andjrn.org/article/S0002-8223\(03\)01658-4/pdf](http://www.andjrn.org/article/S0002-8223(03)01658-4/pdf).

21 **57.** In addition, a review sponsored by the World Health Organization concluded that
22 “the link [of added sugars to] obesity is tenuous,” the evidence has a “high” risk of bias, studies
23 showing media-worthy effects may be more likely to be published than those showing no such
24 effects, and the quality of much of the data is “low.” Lisa Te Morenga et al., *Dietary sugars and*
25 *bodyweight: Systematic Review and Meta-Analyses of Randomised Controlled Trials and Cohort*
26 *Studies*, *Brit. Med. J.* 4-8 (2013); World Health Organization, *Draft Guidelines on Free Sugars*
27 *Released for Public Consultation, Annex 1, 2014*, available at
28 <http://www.bmj.com/content/346/bmj.e7492.full.pdf+html>; World Health Organization,

1 *Guideline: Sugars intake for adults and children*, Annex 1: GRADE evidence profiles at 21
2 (2015), available at http://apps.who.int/iris/bitstream/10665/149782/1/9789241549028_eng.pdf.

3 **58.** The City's *opinion* is that any consumption of sugar-sweetened beverages
4 contributes to obesity, diabetes, and tooth decay. The City's proposed warning label tells
5 consumers, without limitation, that "[d]rinking beverages with added sugar(s) contributes to
6 obesity, diabetes, and tooth decay." S.F. Health Code § 4203(a).

7 **59.** The United States Dietary Guidelines do not support that view. The guidelines
8 recommend only that Americans consume less than 70 teaspoons of added sugar per week. The
9 guidelines also state that in a diet where "total calorie intake [is held] constant, there is little
10 evidence that any individual food groups or beverages have a unique impact on body weight."
11 Food and Nutrition Service, USDA, *Dietary Guidelines for Americans 2010* at 15 (2010),
12 available at <http://www.health.gov/dietaryguidelines/dga2010/dietaryguidelines2010.pdf>. As the
13 City has acknowledged, a single 12-ounce can of full-calorie soda contains eight to ten teaspoons
14 of sugars.

15 **60.** Many experts believe, therefore, that sugar-sweetened beverages may be
16 consumed as part of a healthy diet and exercise regime, without contributing to negative
17 health outcomes.

18 **61.** The City's *opinion* is that sugar-sweetened beverage consumption per se is a
19 unique factor in rising rates of diabetes and obesity in America.

20 **62.** In 1970, Americans consumed an estimated 2,109 calories from all sources per
21 person per day. By 2010, they consumed an estimated 2,568 calories daily—over 20% more
22 calories each day. U.S. Department of Agriculture, Economic Research Service, *Food*
23 *Availability and Consumption: Close to half of Americans' calories come from grain products*
24 *and fats/oils*, [http://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-](http://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-availability-and-consumption.aspx)
25 [essentials/food-availability-and-consumption.aspx](http://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-availability-and-consumption.aspx) (last updated May 19, 2014). As the amount
26 of total calories consumed by Americans each day has increased, the prevalence of obesity and
27 Type II diabetes among Americans has increased.

28

1 **63.** Over the last fifteen years, however, consumption of sugar from sugar-sweetened
2 beverages has significantly decreased on a per capita basis in the United States.

3 **64.** According to federal nutrition data published in the American Journal of Clinical
4 Nutrition, between 1999 and 2008 alone, sugar intake from sugar-sweetened beverages
5 decreased by 37% among people aged two and older. Jean A. Welsh et al., *Consumption of*
6 *added sugars is decreasing in the United States*, 94 Am. J. Clinical Nutrition 726, 728 (2011),
7 available at acjn.nutrition.org/content/94/3/726.full.pdf.

8 **65.** The same study also found that “the consumption of added sugars in the United
9 States decreased between 1999-2000 and 2007-2008, primarily because of a reduction in soda
10 consumption.” *Id.* at 726.

11 **66.** During that same time period, in which sugar-sweetened beverage consumption
12 was decreasing significantly, Type II diabetes and obesity rates increased. For example, federal
13 data show that obesity rates continued to rise through 2012, the most recent year for which
14 figures are available. Lin Yang & Graham A. Colditz, Letter, *Prevalence of Overweight &*
15 *Obesity in the United States, 2007-2012*, JAMA Internal Medicine (2015).

16 **67.** Sugar-sweetened beverage consumption is also decreasing among children.

17 **68.** From 2003-2004 to 2009-2010, the percentage of calories in children’s diets from
18 sugar-sweetened beverages decreased by nearly one-third. Meghan M. Slining et al., *Trends in*
19 *Food and Beverage Sources among US Children and Adolescents: 1989-2010*, 13 J. Acad.
20 Nutrition & Dietetics 1683-94 (2013).

21 **69.** The percentage of calories in children’s diets from sugar-sweetened beverages
22 was lower in 2009-2010 than it was in 1989-1991. *See id.*

23 **70.** During that same time period, the percentage of calories in children’s diets from
24 desserts, snacks, and candy has increased by one-third. *See id.*

25 **71.** In 2009-2010, children consumed almost three times as many calories from
26 desserts, snacks, and candy as they did from sugar-sweetened beverages. *See id.*

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1 72. Although sugar-sweetened beverage consumption is declining, while overall
2 consumption of calories and other sources of sugar is increasing, the City’s Ordinances target
3 only sugar-sweetened beverages and those who produce, sell, or advertise them.

4 **The Ordinances Suppress Speech Promoting Sugar-Sweetened Beverages While**
5 **Compelling Private Speakers To Voice The City’s Negative Opinions About Sugar-**
6 **Sweetened Beverages**

7 73. The Speech Ban, Ordinance No. 98-15, amends Section 4.20 of the City’s
8 Administrative Code “to prohibit advertising of sugar-sweetened beverages on City property.” It
9 also prohibits any company that produces sugar-sweetened beverages from using its name, or the
10 name of any sugar-sweetened beverage, to promote any product or non-charitable event—
11 whether commercial, athletic, cultural, or even political—“on property owned by or under the
12 control of the City and County of San Francisco.” S.F. Admin. Code § 4.20(b). The Speech Ban
13 has no statement of purpose.

14 74. The Warning Mandate, Ordinance 100-15, amends the City Health Code “to
15 require advertisements for sugar-sweetened beverages to include a warning about the harmful
16 health effects of consuming such beverages.”

17 75. Specifically, the Warning Mandate requires anyone who produces, distributes, or
18 advertises sugar-sweetened beverages to include the following warning on many advertisements
19 in the City: “WARNING: Drinking beverages with added sugar(s) contributes to obesity,
20 diabetes, and tooth decay. This is a message from the City and County of San Francisco.” S.F.
21 Health Code § 4203(a). This warning must cover at least 20% of the advertisement and be
22 enclosed in a rectangular border the same color as the warning.

23 76. Both Ordinances define “sugar-sweetened beverage” as any “Nonalcoholic
24 Beverage sold for human consumption that has one or more added Caloric Sweeteners and
25 contains more than 25 calories per 12 ounces of beverage, or any powder or syrup with added
26 Caloric Sweetener that is used for mixing, compounding or making Sugar-
27 Sweetened Beverages.” S.F. Admin. Code § 4.20(e); S.F. Health Code § 4202(f). The City’s
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1 definition of a sugar-sweetened beverage thus would label even beverages defined as “low-
2 calorie” by FDA regulations as contributing to obesity. *See* 21 C.F.R § 101.60(i)(A).

3 77. This definition excludes milk—which the Ordinance defines to include “flavored
4 milk containing no more than 40 grams of total sugar (naturally occurring and from added
5 Caloric Sweetener) per 12 ounces”; “[m]ilk alternatives”; “[a]ny beverage that contains solely
6 100 percent Natural Fruit Juice, Natural Vegetable Juice, or a combined Natural Fruit Juice and
7 Natural Vegetable Juice”; “product[s] sold for consumption by infants”; “[m]edical [f]ood”;
8 “[a]ny product designed as supplemental, meal replacement, or sole-source nutrition”; “[a]ny
9 product sold in liquid form designed for use as an oral nutritional therapy”; and “[a]ny product
10 sold in liquid form designed for use for weight reduction.” S.F. Admin. Code § 4.20(e); S.F.
11 Health Code § 4202(e).

12 **The Speech Ban Suppresses Speech And Speakers That Contradict The City’s Views And**
13 **Favors Speech That Agrees With The City’s Views**

14 78. The Speech Ban prohibits most “advertising” of sugar-sweetened beverages on
15 property owned by or under the control of the City (“City property”). But it specifically exempts
16 any advertising designed to “communicate the health hazards of . . . Sugar-Sweetened
17 Beverages” or “encourage people . . . to stop drinking . . . Sugar-Sweetened Beverages.” S.F.
18 Admin. Code. § 4.20(b). It also exempts advertising promoting sugar-sweetened beverages on
19 City properties where the City operates or licenses restaurants, concerts, sports venues, or other
20 facilities or events where sugar-sweetened beverages are sold or produced. In effect, it prohibits
21 all favorable advertising for sugar-sweetened beverages on City property except where the City
22 allows and benefits from the sale or production of sugar-sweetened beverages.

23 79. The Speech Ban further prohibits “the placement of . . . the name of a company
24 producing Sugar-Sweetened Beverages, or the name of any . . . Sugar-Sweetened Beverages, in
25 any promotion of any event or promotion of any product or beverage on property owned by or
26 under the control of” the City, excepting solely “the inclusion of the name of a company
27 producing Sugar-Sweetened Beverages, or a charitable foundation containing any such
28 company’s name, on signage listing sponsors of a charitable event occurring on City property.”

1 *Id.* The wide variety of companies that produce (or may produce) sugar-sweetened beverages,
 2 *see infra* ¶¶ 97, 110, thus cannot advertise any product—even low-calorie or calorie-free
 3 products—on City property if the company’s name appears on the advertisement. They equally
 4 cannot promote any non-charitable political, cultural, educational, athletic, or commercial events
 5 on City property if the company’s name appears in the promotion.

6 *The City Properties Affected By The Speech Ban—Properties Used For Private Advertising—Are*
 7 *Limited Public Forums*

8 **80.** The City properties on which Plaintiffs’ speech will be banned are all either
 9 traditional public forums, in which speech is permitted virtually free of government restriction,
 10 or at least “limited public forums.”

11 **81.** When the government leases its property for private advertising, it creates at least
 12 a limited public forum. *SeaMAC*, 781 F.3d at 496-97. For example, the City allows private
 13 advertising on and in certain City properties, including its buses, light rail vehicles, trolleys,
 14 stations, garages, public benches, and cable cars, utility poles, the San Francisco International
 15 Airport (“SFO”), and the Moscone Convention Center.

16 **82.** Even in a limited public forum, any subject-matter or speaker limitations must be
 17 viewpoint neutral and reasonable. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of*
 18 *Va.*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is . . . an egregious form of content
 19 discrimination. The government must abstain from regulating speech when the specific
 20 motivating ideology or the opinion or perspective of the speaker is the rationale for the
 21 restriction. These principles provide the framework forbidding the State from exercising
 22 viewpoint discrimination, even when the limited public forum is one of its own creation.”
 23 (citation omitted)); *SeaMAC*, 781 F.3d at 496 (noting reasonableness inquiry “focuses on
 24 whether the exclusion is consistent with ‘limiting [the] forum to activities compatible with the
 25 intended purpose of the property’” (alteration in original) (citation omitted)).

26 *The Speech Ban’s Advertising Prohibition Is Not Viewpoint Neutral*

27 **83.** The Speech Ban discriminates facially between competing viewpoints, in
 28 violation of the First Amendment, by expressly prohibiting advertising on City property designed

1 to promote or encourage people to drink sugar-sweetened beverages, while expressly allowing
2 advertising designed to criticize or discourage people from drinking sugar-sweetened beverages.

3 **84.** Among other things, it prohibits advertising designed to communicate that sugar-
4 sweetened beverages may be consumed as part of a healthy diet, oral hygiene, and lifestyle,
5 while permitting advertising communicating that sugar-sweetened beverages are inherently
6 hazardous to health.

7 *The Speech Ban's Advertising Prohibition Is Not Reasonable In Light Of The Intended Purposes*
8 *Of The Covered Property*

9 **85.** The Speech Ban prohibits advertising promoting sugar-sweetened beverages in
10 properties where the City otherwise permits private advertising.

11 **86.** The City permits the consumption of sugar-sweetened beverages at most of
12 these properties.

13 **87.** The City allows and benefits from the sale of sugar-sweetened beverages in
14 certain of its properties, and the Speech Ban contains an express exemption allowing advertising
15 promoting sugar-sweetened beverages in those properties.

16 **88.** Advertising for sugar-sweetened beverages is compatible with the intended
17 purposes of the City's properties in which it otherwise permits private advertising.

18 **89.** Advertising sugar-sweetened beverages does not harm, disrupt, or interfere with
19 the purposes of the properties on which the City otherwise permits private advertising.

20 *The Speech Ban Impermissibly Discriminates Based On The Identity and Viewpoint Of The*
21 *Speaker*

22 **90.** The Speech Ban discriminates against speech based on the identity of the
23 speaker, in violation of the First Amendment, by expressly prohibiting speech that includes the
24 name of any sugar-sweetened beverage producer.

25 **91.** This name ban also violates the First Amendment by discriminating against
26 certain views—the promotion of sugar-sweetened beverages and the belief that sugar-sweetened
27 beverages may be consumed consistent with a healthy diet and lifestyle.

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1 **92.** As the Supreme Court has recognized, “[s]peech restrictions based on the
2 identity of the speaker are all too often simply a means to control content.” *Reed*, 135 S.Ct. at
3 2230 (alteration in original) (citation omitted). The Court generally has insisted that “laws
4 favoring some speakers over others demand strict scrutiny when the [government’s] speaker
5 preference reflects a content preference.” *Id.* (citation omitted). The Speech Ban’s prohibition
6 on sugar-sweetened beverage producers’ use of their own names facially discriminates against
7 their speech based on their identities, in violation of the First Amendment, by expressly
8 prohibiting speech that includes the name of any sugar-sweetened beverage producer.

9 *The Speech Ban’s Prohibition On Sugar-Sweetened Beverage Producers’ Use Of Their Own*
10 *Names Is Not Reasonable In Light Of The Covered Properties’ Purposes*

11 **93.** Use of sugar-sweetened beverage producers’ names in promotions of events on
12 City property is not incompatible with the intended purposes of the covered properties on which
13 the City otherwise permits private advertising.

14 **94.** The City permits the consumption of sugar-sweetened beverages on City
15 properties where the Speech Ban applies.

16 **95.** Use of sugar-sweetened beverage producers’ names in promotions of events on
17 City property does not harm, disrupt, or interfere with the purposes of the properties on which
18 the City otherwise permits private advertising or promotions.

19 *The Speech Ban’s Prohibition On Sugar-Sweetened Beverage Producers’ Use Of Their Own*
20 *Names Imposes An Unconstitutional Prior Restraint*

21 **96.** The Speech Ban prohibits the placement of the name of any company producing
22 sugar-sweetened beverages “in *any* promotion of any event” on City property—exempting only
23 “the inclusion of the name of a company producing Sugar-Sweetened Beverages, or the name of
24 a charitable foundation containing any such company’s name, on signage listing sponsors of a
25 charitable event occurring on City property.” S.F. Admin. Code § 4.20(b) (emphasis added).

26 **97.** The Speech Ban thus prohibits companies such as The Coca-Cola Company,
27 PepsiCo, Dr Pepper, Starbucks, Peet’s Coffee and Tea, Seven-Eleven, Jamba Juice, or
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1 Ghirardelli Chocolate from using their names to sponsor events in the City’s parks, streets, and
2 public plazas.

3 **98.** The Speech Ban prohibits these companies from using their names in those
4 forums to promote a wide variety of events, including events featuring core political speech, such
5 as a rally in opposition to laws targeting sugar-sweetened beverages or a political event for
6 candidates opposed to laws targeting sugar-sweetened beverages. It would even prevent sugar-
7 sweetened beverage producers from using their names to sponsor or otherwise promote events
8 completely unrelated to sugar-sweetened beverages—including parades on city streets and
9 conferences on unrelated topics like water sustainability or fair labor practices.

10 **99.** The Speech Ban also prohibits named sponsorship of countless other non-
11 commercial events—prohibiting companies that produce sugar-sweetened beverages from using
12 their names to promote athletic events in City parks, cultural, professional or political events in
13 City-owned buildings, and more, unless the City determines—in the exercise of its discretion—
14 to permit the sale or production of sugar-sweetened beverages at those events.

15 **100.** The Speech Ban also prohibits other core non-commercial speech. For instance, it
16 prohibits anyone from advocating in an advertisement on City property the viewpoint that
17 consumption of sugar-sweetened beverages is compatible with a healthy lifestyle. Such speech
18 is entitled to heightened First Amendment protection. *See, e.g., Riley v. Nat’l Fed’n of the Blind*
19 *of N.C., Inc.*, 487 U.S. 781, 796 (1988) (applying “test for fully protected expression” where
20 commercial speech is “inextricably intertwined with otherwise fully protected speech”).

21 **101.** By preventing Plaintiffs from using their names to sponsor products and events,
22 and preventing them from promoting their views about the compatibility of sugar-sweetened
23 beverages with a healthy lifestyle, the Speech Ban imposes an unlawful prior restraint that will
24 significantly infringe on Plaintiffs’ non-commercial speech rights.

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1 The Speech Ban's Prohibition On Sugar-Sweetened Beverage Producers' Use Of Their Own
2 Names Impermissibly Restricts Commercial Speech In Traditional Public Forums

3 **102.** The Speech Ban unreasonably prohibits companies producing sugar-sweetened
4 beverages from engaging in commercial speech at events (like product giveaways and contests)
5 in traditional public forums throughout the City, such as its public plazas and parks.

6 **103.** The Speech Ban is not limited to commercial speech relating to sugar-sweetened
7 beverages. Rather, it prohibits companies producing sugar-sweetened beverages from using their
8 names to promote events relating to products with no added sugars, such as bottled water, 100%
9 juice and diet soda.

10 **104.** The Speech Ban will significantly infringe on Plaintiffs' commercial
11 speech rights.

12 The Speech Ban Also Fails Intermediate Scrutiny Under Central Hudson

13 **105.** Even under *Central Hudson*, the Speech Ban would violate the First Amendment.

14 a. The City lacks a substantial interest in suppressing on certain City
15 properties speech promoting sugar-sweetened beverages that it permits on other City properties
16 where it allows and benefits from the production or sale of such beverages.

17 b. By exempting advertisements for numerous other foods and beverages
18 containing the same or more sugar from the scope of the Speech Ban, and excluding significant
19 amounts of City property from the operation of the Speech Ban, the law does not directly and
20 materially advance the government's interest.

21 c. The Speech Ban is also more extensive than is necessary to serve the
22 government's interest. Rather than effectively communicating its own opinions about sugar-
23 sweetened beverages, the City has imposed through the Speech Ban an excessive restraint on
24 private speech protected by the First Amendment.

25 The Speech Ban Is Overbroad

26 **106.** Even if the Speech Ban's restrictions were constitutional as applied to some of
27 Plaintiffs' speech, it would nonetheless be invalid in total because its unlawful applications are
28 substantial in relation to any legitimate sweep, and that overbreadth deters and chills

1 constitutionally protected speech. *See Comite de Jornaleros de Redondo Beach v. City of*
2 *Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011).

3 *The Speech Ban Is Void For Vagueness*

4 **107.** The Speech Ban is impermissibly vague in violation of the Due Process Clause of
5 the Fourteenth Amendment.

6 **108.** Several of the Speech Ban’s principal terms are not defined or are
7 otherwise vague.

8 **109.** For example, although the Speech Ban prohibits the placement of the “name of a
9 company producing Sugar-Sweetened Beverages” in “any promotion of any event or promotion
10 of any product” on City property except for, *inter alia*, a “charitable event,” or on “City property
11 used for operation of a restaurant, concert or sports venue, or other facility or event where the
12 sale or production of Sugar-Sweetened Beverages is permitted,” the Speech Ban leaves uncertain
13 (1) what constitutes “producing sugar-sweetened beverages” (2) what constitutes a “charitable
14 event” exempt from the Ban; and (3) how the exemption for “City property used for operation of
15 a restaurant, concert or sports venue, or other facility or event where the sale or production of
16 Sugar-Sweetened Beverages is permitted” operates. S.F. Admin. Code § 4.20(b), (d).

17 **110.** *First*, the Speech Ban does not define what is meant by “producing sugar-
18 sweetened beverages.”

19 a. Numerous restaurants produce products that would appear to constitute
20 sugar-sweetened beverages within the meaning of the Speech Ban. For instance, McDonalds and
21 Burger King sell milkshakes and smoothies. Wendy’s sells Frosties. Sonic sells Slushes. 7-
22 Eleven sells Slurpees. Similarly, Super Duper Burger sells organic shakes, fountain drinks,
23 organic iced tea, and fresh lemonade. Roam Artisan Burgers sells house-made sodas. Likewise,
24 In-And-Out Burger makes ice-cream based shakes. Those drinks appear to constitute sugar-
25 sweetened beverages within the meaning of the Speech Ban.

26 b. Many other companies own restaurants or coffee bars that produce sugar-
27 sweetened beverages arguably within the meaning of the Speech Ban. Nordstrom’s Espresso
28 Bar, for instance, sells smoothies and “Ice Storms.” Many hotel restaurants and companies with

1 their own cafeterias also sell frozen coffee, smoothie, or ice-cream based drinks with added sugar
2 that might qualify as sugar-sweetened beverages within the meaning of the Speech Ban.

3 c. Oxford Dictionary defines “producer” as “[a] person, company, or country
4 that makes, grows, or supplies goods or commodities for sale.” *Producer Definition*, Oxford
5 Dictionaries (2015),
6 http://www.oxforddictionaries.com/us/definition/american_english/producer. Black’s Law
7 Dictionary defines “produce” as “[t]o bring into existence; to create.” *Black’s Law Dictionary*
8 (10th online ed. 2014). Under some dictionary definitions of “produce,” therefore, any company
9 that possesses a soda fountain, and therefore, “bring[s]” a sugar-sweetened beverage “into
10 existence,” produces sugar-sweetened beverages. Under other definitions, any company that
11 “supplies” a sugar-sweetened beverage “for sale”—whether or not it manufactured the drink—
12 would produce sugar-sweetened beverages.

13 d. The Speech Ban leaves uncertain whether such companies will be viewed
14 as producing sugar-sweetened beverages and thus be prohibited from using their names in any
15 promotion of any event on property owned by the City or under the City’s control.

16 **111.** *Second*, although the Speech Ban exempts “signage listing sponsors of a
17 charitable event occurring on City property,” the Speech Ban does not define what constitutes a
18 charitable event.

19 **112.** *Third*, although the Speech Ban exempts “City property used for operation of a
20 restaurant, concert or sports venue, or other facility or event where the sale or production of
21 Sugar-Sweetened Beverages is permitted,” it leaves unclear how that exemption operates. For
22 instance, the Speech Ban leaves unclear whether, if a cafe in the Moscone Center or a restaurant
23 at SFO makes sugar-sweetened beverages available for sale, advertising everywhere within the
24 greater facility is permitted.

25 **113.** For all of these reasons, the Speech Ban fails to provide a person of ordinary
26 intelligence fair notice of what is prohibited by the Speech Ban, and is so standardless that it
27 authorizes or encourages seriously discriminatory enforcement of the Speech Ban.

28

1 **114.** Because the Speech Ban is vague, it will chill protected speech and violates due
2 process.

3 **The Warning Mandate Unlawfully Compels Non-Factual And Controversial Speech**

4 **115.** As noted above, *supra* ¶¶ 11-20, 74-75, the Warning Mandate requires any
5 advertiser who posts a sugar-sweetened beverage advertisement in the City after its Operative
6 Date to place a large warning on the advertisement.

7 **116.** The Warning Mandate applies, however, only to a relatively narrow subset of
8 advertisements.

9 **117.** The Warning Mandate exempts any advertisement in any national or local
10 newspaper, magazine, periodical, advertisement circular or other publication, or on national or
11 local television or radio, the internet, or other electronic media.

12 **118.** The Warning Mandate also exempts all advertising on containers or packages for
13 sugar-sweetened beverages.

14 **119.** The Warning Mandate also exempts any menus or handwritten listings or
15 representations of foods and/or beverages that may be served or ordered for consumption in a
16 retailer's establishment.

17 **120.** The Warning Mandate also exempts any display or representation of, or other
18 information about, a sugar-sweetened beverage, including, without limitation, any logo on a
19 vehicle, if the vehicle is being used by any Person who is in the business of manufacturing,
20 distributing or selling the sugar-sweetened beverage in the performance of such business.

21 **121.** The Warning Mandate also exempts any logo that occupies an area that is less
22 than 36 square inches and is unaccompanied by any display, representation, or other information
23 identifying, promoting, or marketing a sugar-sweetened beverage.

24 **122.** The Warning Mandate also exempts any shelf tag or shelf label that states the
25 retail price, order code, description, or size of a product for sale.

26 **123.** The Warning Mandate also exempts all existing advertisements of any kind other
27 than "general advertising signs" permitted by the City before the Operative Date. The Warning
28 Mandate therefore exempts all point-of-sale advertisements permitted before July 25, 2016.

1 **124.** The Warning Mandate also exempts any general advertising sign that has not been
2 substantially altered for 50 years.

3 *The Warning Mandate Is Subject To And Fails First Amendment Scrutiny*

4 **125.** The Warning Mandate is subject to at least heightened scrutiny because it
5 constitutes, on its face, a content-based regulation—requiring City-mandated speech on certain
6 advertisements based on the content of the advertisement and the identity of the speaker. *See,*
7 *e.g., Reed*, 135 S. Ct. at 2227, 2231. Government regulations that discriminate in this way on the
8 basis of viewpoint or identity are rightly subject to strict scrutiny. *See, e.g., Rosenberger*, 515
9 U.S. at 829; *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

10 **126.** Even though courts generally apply *Central Hudson*'s intermediate scrutiny to
11 commercial speech regulations, numerous Supreme Court Justices have indicated disagreement
12 or discomfort with that precedent. *See, e.g., Sorrell*, 131 S. Ct. at 2672 (suggesting limits on
13 government's ability to regulate based on content with respect to commercial speech); *44*
14 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and
15 in the judgment) ("I do not see a philosophical or historical basis for asserting that 'commercial'
16 speech is of 'lower value' than 'noncommercial' speech."). The Ninth Circuit has reserved
17 decision on whether strict scrutiny would apply to a compelled disclosure of non-factual or
18 controversial information about a commercial product. *See Video Software Dealers Ass'n v.*
19 *Schwarzenegger*, 556 F.3d 950, 966 n.20 (9th Cir. 2009) (noting application of strict scrutiny on
20 similar facts in *Entertainment Software Association v. Blagojevich*, 469 F.3d 641, 651-52 (7th
21 Cir. 2006), *aff'd sub nom. Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011)).

22 **127.** Regardless, the Warning Mandate cannot even survive intermediate scrutiny.

23 **128.** The Warning Mandate burdens protected speech that concerns lawful activity and
24 is not misleading.

25 **129.** The Warning Mandate does not directly and materially advance the government's
26 interest in reducing obesity, diabetes, and tooth decay.

27 **130.** A law compelling speech will not directly and materially advance the
28 government's interest—when the law either (a) contains numerous exceptions that undercut the

1 government's purpose; or (b) makes distinctions among different kinds of speech that are
2 unrelated to the government's stated interest. *See Metro Lights, LLC v. City of Los Angeles*, 551
3 F.3d 898, 905 (9th Cir. 2009).

4 **131.** The Warning Mandate regulates one source of purported harm while specifically
5 exempting the vast majority of others. For example:

6 a. The Warning Mandate exempts "any advertisement that is in any
7 newspaper, magazine, periodical, advertisement circular or other publication, or on television,
8 the internet, or other electronic media." S.F. Health Code § 4202(a).

9 b. The Warning Mandate thus will not require a warning with respect to the
10 vast majority of advertising that reaches the City's consumers with respect to sugar-sweetened
11 beverages. Far from achieving the City's goal, the Warning Mandate will largely redirect
12 advertising from media covered by the warning requirement, like billboards, to media exempted
13 from the warning, like newspapers, magazines, circulars, or television.

14 c. The Warning Mandate also exempts every existing advertisement that is
15 not a "general advertising sign," or a sign that draws attention to a commodity or product apart
16 from the on-site business. All existing advertisements promoting the consumption of drinks with
17 added sugar at an on-site business will be exempt from the law. S.F. Health Code § 4203(d).

18 d. The Warning Mandate thus singles out specific forms of advertising that
19 represent a small fraction of speech related to sugar-sweetened beverages. It particularly and
20 disproportionately injures members of CSOAA, whose speech is disfavored relative to
21 other media.

22 e. The Ordinance will reduce the ability of CSOAA members to exercise
23 editorial control over their speech and make it more difficult for them to compete with other
24 forms of advertising that are exempted from the Warning Mandate.

25 f. The Warning Mandate also excludes advertising for myriad other products
26 that could contribute over the long term to obesity, diabetes, or tooth decay if consumed to
27 excess, as part of an unbalanced diet and lifestyle.

28

1 **132.** In addition, Warning Mandate exemptions impose distinctions among media in a
2 manner that are unrelated to the interest that the City purportedly is attempting to advance.

3 a. For example, the Warning Mandate’s exclusion of television, newspaper,
4 electronic media, and certain other categories of media is unrelated to the health interest that the
5 City purportedly is attempting to advance.

6 b. During hearings regarding the Warning Mandate, the author of the
7 Warning Mandate admitted that the exemptions for certain forms of media were unrelated to the
8 City’s asserted interests.

9 **133.** Moreover, efforts to discourage individuals from drinking sugar-sweetened
10 beverages may have unintended consequences at odds with the City’s purported purpose. *See,*
11 *e.g.,* Brian Wansink et al., *From Coke to Coors: A Field Study of a Fat Tax and its Unintended*
12 *Consequences*, J. Nut. Education & Behavior (2013), available at
13 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079840.

14 **134.** The Warning Mandate also fails intermediate First Amendment scrutiny under
15 *Central Hudson* because, for the reasons detailed *supra* ¶¶ 128-33, it is more extensive and more
16 burdensome than necessary to achieve the City’s purported purpose.

17 a. The City need does not need to compel private parties to speak against
18 their will on its behalf to achieve this end. Nothing prevents the City from delivering this
19 message itself, through its own advertisements or messaging—especially on property that the
20 City owns or controls. Indeed, given the Warning Mandate’s haphazard reach, the City could
21 reach more consumers with its own advertising or messaging than through the Warning Mandate.
22 Compelling sugar-sweetened beverage producers, distributors, sellers, or advertisers to carry a
23 message with which they disagree is unnecessary and unduly burdensome.

24 b. In any event, sugar-sweetened beverage packages already disclose the
25 total amount of sugar in each serving.

26 **135.** For all the reasons that the ordinance fails intermediate scrutiny under *Central*
27 *Hudson*, it necessarily fails strict scrutiny as well.

28 *The Warning Mandate Is Not Subject To The Lesser Scrutiny Of Zauderer*

1 **136.** The Warning Mandate is not subject to the lesser scrutiny of *Zauderer* because
2 the required warning is not aimed at curing and does not cure or mitigate any consumer
3 deception. There is no misleading speech for the City to remedy. The City made no suggestion
4 and adduced no evidence of consumer deception at the hearings on the Ordinances, and the City
5 does not assert any interest in remedying consumer deception in the Warning Mandate’s findings
6 and purpose.

7 **137.** The Warning Mandate also is not subject to the lesser scrutiny of *Zauderer*
8 because the required warning is not purely factual and uncontroversial.

9 **138.** *First*, the Warning Mandate is non-factual and controversial because it is intended
10 to and does communicate that consuming beverages with added sugar is unsafe and hazardous
11 to health.

12 a. Supervisor Scott Wiener, who authored the bill, explained that
13 “[r]equiring health warnings on soda ads also *makes clear* that these drinks aren’t harmless —
14 indeed, quite the opposite.” Scott Wiener, Democrat for State Senate, Press Release, San
15 Francisco Board of Supervisors Unanimously Passes First in the Nation Legislation to Combat
16 Soda Advertising (June 9, 2015) (emphasis added), *available at*
17 [http://www.scottwiener.com/san_francisco_board_of_supervisors_unanimously_passes_first_in](http://www.scottwiener.com/san_francisco_board_of_supervisors_unanimously_passes_first_in_the_nation_legislation_to_combat_soda_advertising_and_prohibit_city_spending_on_sugar_sweetened_beverages)
18 [the_nation_legislation_to_combat_soda_advertising_and_prohibit_city_spending_on_sugar_swe](http://www.scottwiener.com/san_francisco_board_of_supervisors_unanimously_passes_first_in_the_nation_legislation_to_combat_soda_advertising_and_prohibit_city_spending_on_sugar_sweetened_beverages)
19 [etened_beverages](http://www.scottwiener.com/san_francisco_board_of_supervisors_unanimously_passes_first_in_the_nation_legislation_to_combat_soda_advertising_and_prohibit_city_spending_on_sugar_sweetened_beverages). In the view of the Warning Mandate’s author, “[t]hese drinks are making
20 people sick, and we need to make that clear to the public.” *Id.*

21 b. The message that the warning communicates to consumers on this topic is
22 misleading, incomplete and controversial. It reflects the City’s opinion, not scientific consensus.

23 c. Many experts believe that—like pizza, steak, burritos, Ghirardelli
24 chocolate, ice cream, Caesar salads, doughnuts, milkshakes, and sourdough bread—beverages
25 with added sugar, including soft drinks, sports drinks, juice drinks, and coffee drinks, can be
26 consumed as part of a healthy diet and active lifestyle and without “making people sick.” *See*
27 *supra* ¶¶ 46-49, 52, 54, 56-57.

28

1 **139.** *Second*, the Warning Mandate is non-factual and controversial because it is
2 intended to and does communicate that any and all consumption of beverages with added sugar
3 contributes to obesity, diabetes, and tooth decay.

4 a. The City’s message is misleading, incomplete, and controversial.
5 Consumption of beverages with added sugar does not in and of itself contribute to obesity,
6 diabetes, or tooth decay. Reputable scientists have concluded that, when consumed as part of a
7 balanced diet and active lifestyle, beverages with added sugar do not contribute to obesity or
8 diabetes. *See, e.g.,* Jeane H. Freeland-Graves & Susan Nitzke, *Position of the academy of*
9 *nutrition and dietetics: total diet approach to healthy eating*, 113 J. Acad. Nutrition & Dietetics
10 307, 307 (2013), available at <http://www.ncbi.nlm.nih.gov/pubmed/23351634> (“It is the position
11 of the Academy of Nutrition and Dietetics that the total diet or overall pattern of food eaten is the
12 most important focus of healthy eating. All foods can fit within this pattern if consumed in
13 moderation with appropriate portion size and combined with physical activity.”).

14 b. Likewise, dental experts have found that drinking sugar-sweetened
15 beverages in moderation, while brushing and flossing daily, minimizes the risk of tooth decay.
16 For instance, while recommending that patients avoid “[h]eavy soda consumption,” the
17 Wisconsin Dental Association explains that “[t]his doesn’t mean a person should never drink
18 soda. In fact, drinking it in moderation may represent no harm at all.” Wisconsin Dental
19 Association, *Sip All Day, Get Decay*, <http://www.wda.org/your-oral-health/sip-all-day> (last
20 visited July 24, 2015).

21 c. Consumers will take away the misleading, incomplete, and controversial
22 message that any and all consumption of beverages with added sugar contributes to obesity,
23 diabetes, and tooth decay.

24 **140.** *Third*, the required warning is non-factual and controversial because it is intended
25 to and does communicate that consumption of beverages with *added* sugar contributes more to
26 obesity, diabetes, and tooth decay than does consumption of beverages with *natural* sugar.

27 a. The required warning applies only to advertisements for beverages with
28 added sugar, and excludes advertisements for beverages with natural sugar, like 100% fruit juice.

1 b. The City’s stated purpose in requiring warnings for sugar-sweetened
2 beverages is “to inform the public of the presence of added sugars” and to “help ensure that San
3 Franciscans make a more informed choice about the consumption of drinks that are a primary
4 source of added dietary sugar.” S.F. Health Code Art. § 4201.

5 c. The message that consumption of beverages with added sugar contributes
6 more to obesity, diabetes, and tooth decay than consumption of beverages with natural sugar is
7 inaccurate, or at minimum, controversial. *See* Duffy, 104 J. Am. Dietetic Ass’n at 259 (“Human
8 metabolism does not distinguish between sugars found in a food and those added to the food. . . .
9 Fructose is absorbed, digested, and metabolized in an identical manner no matter what the
10 source.”); Klurfeld, 4 *Advances in Nutrition* at 258 (noting that products with added sugar “are
11 not metabolically different from those containing intrinsic sugar”).

12 d. A 12-oz serving of a full-calorie soft drink and a 12-oz serving of many
13 100% fruit juice products have roughly the same amount of sugar—some 100% apple juice
14 products have more sugar than a 12-oz full-calorie soft drink. Yet the Warning Mandate applies
15 only to the soft drinks.

16 e. Advertisements for “mid-cal” sodas such as Coke Life (90 calories, 24
17 grams of sugar) and Pepsi True (60 calories, 16 grams of sugar) are also required to contain the
18 City’s warning even though these beverages have far less sugar than most exempt 100%
19 fruit juices.

20 f. Consumers will take away the misleading, incomplete, and controversial
21 message that consuming beverages with added sugar contributes more to obesity, diabetes, and
22 tooth decay than does consumption of beverages with natural sugar.

23 **141.** *Fourth*, the required warning is non-factual and controversial because it is
24 intended to and does communicate that beverages with added sugar contribute more to obesity,
25 diabetes, and tooth decay than do foods with added sugar.

26 a. The required warning applies only to advertisements of beverages with
27 added sugar, and excludes advertisements promoting foods with added sugar, like cookies,
28 doughnuts, cereals, flavored yogurts, ketchup, spaghetti sauce, and ice cream.

1 **144.** *First*, although the Warning Mandate applies only to “advertisers,” and defines
2 that term, the ordinance leaves uncertain who qualifies as an advertiser.

3 a. The Warning Mandate defines an advertiser to include anyone who (a) is
4 “in the business of manufacturing, distributing, or selling sugar-sweetened beverages, including
5 without limitation, a Retailer; (b) is in the business of placing or installing advertisements, or
6 who provides space for the display of advertisements; or (c) is an agent or contractor of a Person
7 described in (a) or (b), assisting such Person with the manufacture, distribution or sale of sugar-
8 sweetened beverage, the placement or installation of advertisements, or the provision of space
9 for advertisements.” S.F. Health Code § 4202.

10 b. The Warning Mandate leaves substantially uncertain what it means to be
11 “in the business of manufacturing, distributing, or selling sugar-sweetened beverages.”

12 c. For instance, the Warning Mandate leaves unclear whether every business
13 that makes available to their employees vending machines that distribute sugar-sweetened
14 beverages is an advertiser under the law.

15 d. The Warning Mandate leaves unclear whether every gym, university, or
16 sports camp that makes available Gatorade or Powerade to those engaged in exercise are
17 “advertisers” under the law.

18 e. The Warning Mandate exempts “menus” from the definition of an “–
19 sugar-sweetened beverage] ad,” but fails to define “menus,” leaving unclear whether signs
20 promoting special prices for depicted meals including sugar-sweetened beverages at specified
21 restaurants are subject to the law.

22 **145.** *Second*, although the Warning Mandate applies only to an “advertisement that
23 identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use,” the ordinance
24 leaves substantially uncertain what conduct qualifies.

25 a. For instance, the ordinance leaves uncertain whether every use in an
26 advertisement of an advertiser’s name or corporate logo, if greater than 36 square inches, will
27 render the advertisement one that must carry the required warning.

28

COUNT IV

**(VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH
AMENDMENT TO THE UNITED STATES CONSTITUTION)**

176. The foregoing Paragraphs are incorporated by reference as if set forth in full herein.

177. The Warning Mandate violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

178. The Warning Mandate leaves impermissibly vague core terms of the ordinance.

179. The Warning Mandate fails to provide a person of ordinary intelligence fair notice of what is prohibited by the ordinance.

180. The Warning Mandate is so standardless that it authorizes or encourages seriously discriminatory enforcement of the ordinance.

181. Because the Warning Mandate is vague, it will impermissibly chill Plaintiffs' and their members' protected speech and violates their due process rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendant The City and County of San Francisco as follows:

(1) A declaration, pursuant to 28 U.S.C. § 2201 that the Ordinances and any of their implementing regulations violate the First Amendment to the United States Constitution.

(2) A declaration, pursuant to 28 U.S.C. § 2201 that the Ordinances and any of their implementing regulations violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(3) An injunction prohibiting the City or any of its officers, employees, or agents from enforcing or threatening to enforce the Ordinances and any of their implementing regulations

(4) All costs, attorneys' fees, and expenses that Plaintiffs reasonably incur, *see* 42 U.S.C. § 1988; and

(5) Such other and further relief as this Court deems just and proper.

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Dated: July 24, 2015

Respectfully submitted,

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¹ I hereby attest that concurrence in the filing of this document has been obtained from each of the other Signatories.

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