IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

PASTOR WILLIAM H. LAMAR IV, PASTOR DELMAN L. COATES, and THE PRAXIS PROJECT, on behalf of themselves and the general public, Plaintiffs, v. THE COCA-COLA COMPANY, and the AMERICAN BEVERAGE ASSOCIATION, Defendants.	Case No. 2017 CA 004801 B Honorable Judge Elizabeth C. Wingo Next Event: Motions Hearing March 15, 2018 at 11:00 AM

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT AMERICAN BEVERAGE ASSOCIATION'S SPECIAL MOTION TO DISMISS PURSUANT TO THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT, D.C. CODE §§ 16-5501 *ET SEQ.*

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INTRODUCTION

Both Plaintiffs and the American Beverage Association (the "ABA") are active participants in the ongoing debate over the relationship between beverages with added sugar and health. Plaintiffs believe that drinking such beverages is uniquely harmful and increases a consumer's health risks regardless of her overall diet and physical activity. *See, e.g.*, Compl. ¶¶ 41-65, Dkt. No. 1. The ABA disagrees. And as explained in the ABA's Rule 12(b)(6) Memorandum of Law, which is incorporated fully herein, many respected scientists and federal scientific and regulatory authorities—including the United States Food and Drug Administration ("FDA") and the Centers for Disease Control and Prevention ("CDC")—side with the ABA's view.

Plaintiffs of course are still entitled to their contrary view, and are entitled to engage on these issues in the court of public opinion. But Plaintiffs instead want this Court to stop the public debate altogether by enjoining the ABA from further participation. *See* Compl. at 39-40 (Prayer for Relief). Plaintiffs' attempt to muzzle the ABA is exactly the type of action that the District of Columbia Anti-SLAPP Act of 2010, D.C. Code §§ 16-5501 *et seq.*, is meant to deter and remedy: a strategic lawsuit against public participation ("SLAPP") "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (quoting D.C. Council, Report of the Committee on Public Safety and the Judiciary on Bill 18-893 (Nov. 18, 2010) ("Comm. Report"), at 1, Declaration of George C. Chipev ("Chipev Decl.") Ex. A).

The Anti-SLAPP Act is designed to ensure meritless suits filed to silence a defendant's speech on matters of public interest are subject to expedited dismissal before the plaintiff can impose substantial discovery costs and chill the speech at issue. Under the Anti-SLAPP Act, a claim that attacks "act[s] in furtherance of the right of advocacy on issues of public interest" must be dismissed unless the plaintiff can "demonstrate[] that the claim is likely to succeed on the

merits." D.C. Code § 16-5502(b). This Court should grant the ABA's special motion to dismiss because the ABA's speech on issues of public health is protected by the Anti-SLAPP Act, and Plaintiffs cannot show that their claim for relief under the D.C. Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901 *et seq.*, is likely to succeed on the merits for three independent reasons: (1) the ABA is not a proper defendant under the CPPA; (2) the ABA's speech is not actionable under the CPPA; and (3) Plaintiffs lack standing to bring this action.

BACKGROUND

A. The ABA Is A Nonprofit Trade Association That Neither Makes, Nor Sells, Nor Is Otherwise Involved In The Supply Chain For Beverages With Added Sugar

The ABA is a nonprofit, national trade association representing the non-alcoholic beverage industry, including hundreds of beverage producers, distributors, franchise companies, and support industries. *See* Declaration of Mark Hammond ("Hammond Decl.") ¶ 3; *see* Am. Beverage Ass'n, *Our Mission & History*, http://www.ameribev.org/about-us/our-mission-history/ (last visited October 20, 2017), Chipev Decl. Ex. E.[1] Its members bring to market beverages including carbonated soft drinks, bottled water, sports drinks, energy drinks, 100% juices, juice drinks, and ready-to-drink teas. Hammond Decl. ¶ 4. Unlike its members, the ABA itself does not make or sell beverages with added sugar, and it is not otherwise involved in the supply chain for such

[1] In deciding this motion, the Court may consider the facts alleged in the Complaint, documents incorporated by reference in the Complaint, and documents in the public record. *See* Rule 12(b)(6) Memorandum, at 4 n.2. The Court may also consider "evidence that has been produced or proffered in connection with the motion." *Mann*, 150 A.3d at 1232. Although the ABA, as a defendant, is not required to adduce evidence to support its arguments in support of dismissal under the Anti-SLAPP Act, this Court may consider the ABA's evidence, including affidavits, to determine whether it defeats Plaintiffs' case at this juncture as a matter of law. *See, e.g.*, Hrg. Tr. at 46:23-47:1, *Simpson v. Johnson & Johnson*, No. 2016 CA 1931 B (D.C. Super. Ct. Jan. 13, 2017) (hereinafter "*PCPC* Hrg. Tr."), Chipev Decl. Ex. B; *Traditional Cat Ass'n v. Gilbreath*, 13 Cal. Rptr. 3d 353, 357 (Cal. Ct. App. 2004) (considering defendant's evidence in support of motion to dismiss under California's Anti-SLAPP Act).

products (or any other products). *Id.* ¶ 5. As an *industrywide* trade association, moreover, the ABA does not promote the sale or use of any *particular* products. *Id.* No content on the ABA's website directs readers to purchase specific products or services, nor does the website provide any online functionality to facilitate the purchase of products or services from its member companies. *Id.* Plaintiffs do not allege otherwise. *See* Rule 12(b)(6) Memorandum, at 4-5.

B. The ABA Publicly Communicates Its Views About The Relationship Between Beverages With Added Sugar And Health

The ABA is an active participant in the ongoing public debate over the relationship between beverages with added sugar and health. Among other things, the ABA has developed and participated in initiatives including Clear on Calories, the School Beverage Guidelines, and the Balance Calories Initiative, to reduce calories consumed from beverages in the American diet; educate consumers about the calories contained in soft drinks; encourage families to balance what they "eat, drink, and do"; address the importance of staying hydrated; and highlight the need to offer meaningful solutions to problems such as childhood obesity.[2] The ABA utilizes different forms of media for its speech, including on its website, through press releases, and on public displays. *See, e.g.*, Compl. ¶¶ 104–07.

Plaintiffs claim that the ABA's speech violates the CPPA by "obscur[ing]" the link between the beverages and disease (*id.* ¶ 2) and distracting consumers from Plaintiffs' preferred views. In particular, Plaintiffs challenge three categories of statements made by the ABA: that (a)

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[2] Am. Beverage Ass'n, *Putting Calorie Info Up Front* http://www.balanceus.org/en/industry-efforts/putting-calorie-info-up-front/ (last visited Oct. 20, 2017), Chipev Decl. Ex. F; *Finding a Balance that Works for You*, http://www.balanceus.org/en/ (last visited Oct. 20, 2017), Chipev Decl. Ex. G; *Staying Hydrated With Bottled Water During Summer* (June 7, 2016), http://www.ameribev.org/education-resources/blog/post/staying-hydrated-with-bottled-water-during-summer/, Chipev Decl. Ex. H; *Meaningful Solutions to Complex Challenges* (Apr. 26, 2016), http://www.ameribev.org/education-resources/blog/post/meaningful-solutions-to-complex-challenges/, Chipev Decl. Ex. I.

calories from beverages with added sugar do not contribute to obesity-related chronic diseases differently from other sources of calories, Compl. ¶¶ 106, 169; (b) balancing calories in and calories out helps prevents obesity and related health risks, *id.* ¶ 114-15, 127; and (c) beverages with added sugar, like many other beverages, are a potential source of hydration, *id.* ¶¶ 129, 135-36; *see* Rule 12(b)(6) Memorandum, at 6. The ABA's stated views on these important public health issues are consistent with conclusions reached by the FDA and respected scientists upon whom the agency relied in reaching its conclusions. They are thus well within the mainstream of the ongoing debate over the relationship between beverages with added sugar and health.

First, the FDA agrees with the ABA that "added sugars, including sugar-sweetened beverages, are no more likely to cause weight gain in adults than any other source of energy." *See, e.g.*, 79 Fed. Reg. 11,880, 11,904 (Mar. 3, 2014); *see also* 81 Fed. Reg. 33,742, 33,829 (May 27, 2016) (rejecting proposal that products with added sugar carry a warning asserting they are "linked to obesity, Type II Diabetes, cardiovascular disease, [and other health risks]," because, *inter alia*, such a statement is "not consistent with [the FDA's] review of the evidence"). Other leading scientists, including the former longtime Chief Scientific Officer of the American Diabetes Association, concur that "[t]here is no scientific consensus that added sugar (including added sugar in beverages) plays a unique role in the development of obesity and diabetes." Expert Report of Dr. Richard Kahn at ¶ 14, *Am. Beverage Ass'n. v. City & Cty. of San Francisco*, No. 3:15-cv-03415-EMC (N.D. Cal. Jan. 12, 2016), ECF No. 50-24, Chipev Decl. Ex. C.

Second, the ABA's belief that consumption of beverages with added sugar can be balanced in a healthful way with physical activity and other dietary choices is consistent with prevailing nutrition science. *See* Rule 12(b)(6) Memorandum, at 8-9. The CDC has explained that "[w]eight management is all about balancing the number of calories you take in with the number your body

uses or 'burns off.'" Centers for Disease Control and Prevention, The Caloric Balance Equation (last updated Nov. 16, 2016), http://www.cdc.gov/healthyweight/calories/, Chipev Decl. Ex. J. For that reason, among others, the Ninth Circuit recently preliminarily enjoined a San Francisco ordinance requiring advertisements for beverages with added sugar to warn that "drinking beverages with added sugar contribute[s] to obesity, diabetes, and tooth decay"; the court agreed with the ABA that this warning would be "misleading" and "deceptive in light of the current state of research on this issue." *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 871 F.3d 884, 888, 895 (9th Cir. 2017). As the court explained, even San Francisco's own experts "d[id] not directly challenge the conclusion of the [ABA's] expert that 'when consumed as part of a diet that balances caloric intake with energy output, consuming beverages with added sugar does not contribute to obesity or diabetes." *Id.* at 895; *see also* 81 Fed. Reg. at 33,829 ("[S]ome added sugars can be included as part of a *healthy* dietary pattern." (emphasis added)).

Third, the propositions that consuming beverages with added sugar contributes to hydration and that hydration is essential to human health are factually uncontroversial. *See, e.g.*, Amby Burfoot, *Milk and Other Surprising Ways to Stay Hydrated*, N.Y. Times, June 30, 2016, https://well.blogs.nytimes.com/2016/06/30/milk-and-other-surprising-ways-to-stay-hydrated/?_r=0, Chipev Decl. Ex. K; Rule 12(b)(6) Memorandum, at 9.

ARGUMENT

SLAPPs "masquerade as ordinary lawsuits, but a SLAPP plaintiff's true objective is to use litigation as a weapon to chill or silence speech." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014) (internal quotation marks and citation omitted). That is Plaintiffs' goal here. Their Complaint strikes at the heart of speech the Anti-SLAPP Act protects, namely, statements by the ABA on its website, in press releases, and in other public forums about a topic of public interest—the relationship between beverages with added sugar and health. *See* D.C. Code § 16-5501(3).

This is not Plaintiffs' first attempt to silence the ABA from participating in the ongoing public debate on this issue. Earlier this year, Praxis filed an almost identical action in the U.S. District Court for the Northern District of California, seeking to enjoin the ABA from communicating its views. *See The Praxis Project v. The Coca-Cola Co. & Am. Beverage Ass'n*, No. 4:17-cv-00016 (N.D. Cal. Jan. 4, 2017). The ABA devoted substantial time, energy, and resources in preparations to defeat that suit. But shortly after the ABA informed Praxis that the ABA planned to file a special motion to dismiss under California's Anti-SLAPP law, Praxis abruptly withdrew its complaint—only to reemerge months later in this Court.

This kind of abusive serial litigation, which at its core is meant to harass and deter the exercise of the ABA's First Amendment rights, is exactly what the Anti-SLAPP Act is intended to address. *See, e.g.*, *Mann*, 150 A.3d at 1226 ("[T]he goal of a SLAPP 'is not to win the lawsuit but to punish the opponent and intimidate them into silence.'" (quoting Comm. Report, at 4)); *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 974 (C.D. Cal. 1999) ("SLAPP suits are often brought for 'purely political purposes' …, not to vindicate a legally cognizable right of the plaintiff.'" (citations omitted)); *Wilcox v. Superior Ct. (Peters)*, 27 Cal. App. 4th 809, 816 (Cal. Ct. App. 1994) ("[L]ack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished." (citations omitted)).

Plaintiffs are entitled to their views on the relationship between beverages with added sugar and health. But the ABA is equally entitled to hold and communicate its contrary views on this important public issue—particularly as the ABA's views are supported by the findings of federal

regulators and other respected scientists. Because this lawsuit triggers the Anti-SLAPP Act's protections and Plaintiffs cannot show a likelihood of success, this Court should reject Plaintiffs' meritless attempt to "punish the [ABA] and intimidat[e] [it] into silence," Comm. Report, at 4, and dismiss Plaintiffs' claim against the ABA with prejudice pursuant to D.C. Code § 16-5502(b).

I. THE ANTI-SLAPP ACT COMPELS THE DISMISSALL OF PLAINTIFFS' CLAIM

The Anti-SLAPP Act provides that "[a] party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). The Act establishes a two-step process. First, the moving party must make a prima facie showing that the claim "arise[s] from an act in furtherance of the right of advocacy on issues of public interest." *Id.* § 16-5502(b). The burden of proof to make this prima facie showing is "not onerous." *Doe No. 1*, 91 A.3d at 1043 (quoting *Little v. United States*, 613 A.2d 880, 885 (D.C. 1992)). Second, if the moving party meets that burden, the burden shifts to the non-moving party to establish that the claim is "likely to succeed on the merits." D.C. Code § 16-5502(b). This two-step analysis requires dismissal of Plaintiffs' claim.

A. Plaintiffs' Claim Arises From Speech Protected By The Anti-SLAPP Act

1. The ABA's Speech Is Protected Under D.C. Code § 16-5501(1)

The ABA's speech about the relationship between beverages with added sugar and health unquestionably constitutes an "act in furtherance of the right of advocacy on issues of public interest" protected by the Anti-SLAPP Act. The term "acts" is defined broadly to include (1) "[a]ny written or oral statement" made "[i]n a place open to the public or a public forum in connection with an issue of public interest," D.C. Code § 16-5501(1)(A)(ii), or (2) "[a]ny other expression or expressive conduct that involves … communicating views to members of the public

in connection with an issue of public interest," *id.* § 16-5501(1)(B). The ABA's speech qualifies in both respects under any straightforward application of this definition.[3]

Courts consistently recognize that speech in the fora utilized by the ABA—including its website, press releases, and billboards, among other media—falls within the scope of the Anti-SLAPP Act. *See, e.g.*, *Mann*, 150 A.3d at 1227 (finding that Act applies "because the lawsuit is based on articles that appeared on [defendants'] websites that concern the debate over the existence and causes of global warming"); *Abbas v. Foreign Policy Grp.*, 975 F. Supp. 2d 1, 11 (D.D.C. 2013) (finding statement was "[i]n a place open to the public or a public forum," because "anyone with a working internet connection or access to one can view it"), *aff'd in part on other grounds*, 783 F.3d 1328 (D.C. Cir. 2015); *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 37, 38 (D.D.C. 2012) (applying Act to online blog post), *aff'd*, 728 F.3d 528 (D.C. Cir. 2013).

The ABA's speech in these public fora, moreover, easily qualify as statements on "issues of public interest." D.C. Code § 16-5501(3) defines an "issue of public interest" expansively to include any "issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." The ABA's speech about the relationship between beverages with added sugar and health or hydration,

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[3] An "act in furtherance of the right of advocacy on issues of public interest" also includes any written or oral statement made "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." D.C. Code § 16-5501(1)(A)(i). The ABA's speech falls under this category as well to the extent Plaintiffs' claim encompasses statements the ABA has made related to enacted or pending legislation or regulations regarding beverages with added sugar. *See, e.g.*, Am. Beverage Ass'n, *The Evidence is Clear, Taxes Are Not the Solution to Obesity* (June 29, 2016), http://www.ameribev.org/education-resources/blog/post/the-evidence-is-clear-taxes-are-not-the-solution-to-obesity/, Chipev Decl. Ex. L; *Beverage Companies Respond to FDA Announcement on Nutrition Facts Panel* (May 20, 2016), http://www.ameribev.org/education-resources/blog/post/beverage-companies-respond-to-fda-announcement-on-nutrition-facts-panel/, Chipev Decl. Ex. M; *see also* The Coca-Cola Company's Special Motion to Dismiss, at Background § A (discussing public debate).

and the importance of balancing caloric intake with physical activity, *see* Compl. ¶¶ 103-07, relate directly to "health," "community well-being," and "good[s] … in the market place." D.C. Code § 16-5501(3). Indeed, Plaintiffs' Complaint concedes that the ABA's representations concern "the characteristics of sugar-sweetened beverages and their effect on human health." Compl. ¶ 102. And the wealth of scientific research, articles, government advocacy, and rulemaking related to these issues attest to the substantial public interest in this subject matter. *See, e.g.*, *Farah*, 863 F. Supp. 2d at 36-37 (applying "public interest" definition according to its terms).

2. No Exception Withdraws The ABA's Speech From The Act's Protections

Plaintiffs may argue that the ABA's speech falls into one of the two exceptions to the Anti-SLAPP Act. Any such attempt should fail.

First, D.C. Code § 16-5505 provides that the Anti-SLAPP Act "shall not apply to any claim for relief brought *against a person primarily engaged in the business of selling or leasing goods or services*, if the statement or conduct from which the claim arises is: (1) [a] representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, *the person's* goods or services; and (2) [t]he intended audience is an actual or potential buyer or customer" (emphasis added)). The ABA's speech does not fall within the scope of this exception, both because the ABA is a nonprofit trade association not primarily engaged in the business of selling or leasing consumer goods or services, and because the ABA's statements do not relate to *its* goods or services. *See, e.g.*, Hammond Decl. ¶ 5. This is indisputable, as the ABA does not sell or lease any consumer goods or services at all.[4] *See id.*

[4] The closest that Plaintiffs' Complaint comes to suggesting that the ABA is engaged in the sale of goods or services is a fly-by reference to a section of the ABA's homepage stating: "We are America's beverage companies…. We make American products," Compl. ¶ 96. In context, that

Second, Section 16-5501(3) excludes from the scope of "issue[s] of public interest" certain "private interests, such as statements directed primarily toward protecting *the speaker's* commercial interests rather than toward commenting on or sharing information about a matter of public significance" (emphasis added). Although the ABA's *members* who make and sell products undeniably possess certain commercial interests, the ABA itself does not. Consequently, its speech is not—and cannot be—"directed primarily toward protecting [its own] commercial interests."

D.C. courts—like courts in other jurisdictions interpreting similar anti-SLAPP statutes—have consistently recognized that speech by a nonprofit trade association like the ABA addressing a category of products made by its members is not excluded from anti-SLAPP protection simply because its member entities have for-profit, commercial interests in those products. The Superior Court addressed this issue squarely in its oral ruling in *PCPC* (Chipev Decl. Ex. B), a case where the plaintiffs had argued that speech by a nonprofit trade association (the "Personal Care Products Council" or "PCPC") was designed to advance PCPC's "private interests and the commercial interests of [its] members." *See* Plaintiff's Statement of Points and Authorities in Opposition to Defendant Personal Care Products Council's Special Motion to Dismiss, *PCPC*, at 5 (filed May 19, 2016), Chipev Decl. Ex. D. Judge Demeo rejected that argument, holding that a nonprofit trade organization that "does not manufacture, design or sell any products … does not have … a commercial interest to protect." *PCPC* Hrg. Tr., at 39:22-24. In so holding, the court also "distinguish[ed] between when a trade association is promoting a specific product or the benefits of a specific product versus when a trade association is speaking more generally about products

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is obviously and only a description of the ABA's membership. Plaintiffs do not seriously allege that *the ABA itself* sells or leases goods or services or that the ABA's speech pertains to goods or services made or offered *by the ABA*.

and the health and safety of those products as opposed to a specific commercial product named." *Id.* It concluded that PCPC's speech "about the safety of talc in general" fit "squarely within the plain meaning of the statute of issues of public interest." *Id.* at 39-40; *see id.* (noting that "[t]he statute defines public interest to mean, an issue related to health or safety"); *see id.* (distinguishing "PCPC's own speech" from that of "profit-seeking corporations," like Johnson & Johnson, which were PCPC's members, and concluding that "PCPC's own speech is not commercial in nature"). For these reasons, the court held that PCPC's speech was not excluded by the commercial-interests exception from protection under the Anti-SLAPP Act.

The same considerations should produce the same outcome here. Like PCPC, the ABA does not "manufacture, design, or sell any product" and "[a]s a result [it] does not have … a commercial interest to protect." *Id.* at 39:23-24. And like PCPC's speech, the challenged ABA statements are not designed or oriented towards the sale, marketing, or promotion of a specific product sold by a member entity—such as Sprite, Mountain Dew, or Dr Pepper—as opposed to general commentary about a category of products. Rather, just as the challenged PCPC statements addressed "the safety of talc in general," the challenged ABA statements broadly address "the link between sugar-sweetened beverages and obesity," Compl. ¶ 104; "discussions of high fructose corn syrup," *id.* at ¶ 105; whether beverages with added sugar contribute to weight gain or diabetes differently from other caloric sources, *id.* at ¶ 106-07; and whether drinking beverages with added sugar contributes to hydration, *id.* at ¶ 130. Thus, the ABA's challenged statements are well within what the plain language of the Anti-SLAPP Act defines to be an issue of public interest: an "issue related to health or safety" and an issue related to "a good, product, or service in the market place." D.C. Code § 16-5501(3). The commercial-interest exception is inapplicable to the ABA's speech

about the relationship of sugar-sweetened beverages to health, just as it was inapplicable to PCPC's speech about the safety of talc.[5]

The ABA thus amply satisfies the requisite showing that Plaintiffs' claim arises from the ABA's "act[s] in furtherance of the right of advocacy on issues of public interest."

B. Plaintiffs Cannot Establish Their Claim Is Likely To Succeed On The Merits

Because the ABA's speech is prima facie protected by the Anti-SLAPP Act, this special motion to dismiss must be granted unless Plaintiffs meet their burden to demonstrate that their CPPA claim is "likely to succeed on the merits." D.C. Code § 16-5502(b). This burden requires Plaintiffs "to present legally sufficient evidence substantiating the merits"; mere allegations are insufficient. *Mann*, 150 A.3d at 12337. For the reasons explained in greater detail in the ABA's Rule 12(b)(6) Memorandum and substantiated further by the Hammond Declaration submitted herewith, Plaintiffs cannot come close to meeting that burden for three independent reasons.

First, the ABA is not a proper defendant under the CPPA. It is settled law that only "merchants" can be held liable under the CPPA. *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 708-09 & n.9 (D.C. 1981). Because the ABA is not the actual seller of the beverages with added sugar about which Plaintiffs complain (or any other products) and the ABA is not otherwise "connected with the 'supply' side of a consumer transaction," *see* Hammond Decl. ¶ 5, the ABA is not a merchant within the scope of the CPPA. 432 A.2d at 708-09 & n.9; *see also* Rule 12(b)(6) Memorandum, at 10-13. In addition, the CPPA provides a right of action against a nonprofit only where the claim arises from the purchase or sale of the nonprofit's own consumer goods or services

[5] Plaintiffs' allegations that the ABA is "influenc[ed]" by or "functions in concert with" Coca-Cola, *e.g.*, Compl. ¶¶ 97, 99, should not affect this conclusion. The ABA is a distinct defendant in this suit, and its relationship with Coca-Cola is legally irrelevant to whether the ABA speech at issue here is protected by the Anti-SLAPP Act.

in the ordinary course of business. D.C. Code § 28-3901(a)(3); *see also id.* § 28-3905(k)(5) (dispute must arise from the purchase or sale of consumer goods in ordinary course of business). That condition is not satisfied here either, because the ABA is a nonprofit trade association that does not produce or sell any goods or services in the ordinary course of its business. Hammond Decl. ¶ 5. For that reason as well, the ABA is not a proper CPPA defendant. *See Dahlgren v. Audiovox Commc'ns Corp.*, No. 2002 CA 007884 B, 2010 WL 2710128, at *14-15 (D.C. Super. Ct. July 8, 2010) (application of CPPA to nonprofits intended to "provide consumers *who purchase from nonprofit businesses* with the same legal protections as consumers who purchase from for-profit businesses" (citing Letter from Anthony A. Williams, Mayor, Dist. of Columbia, to Linda W. Cropp, Chairman, Council of the Dist. of Columbia (May 4, 2006)) (emphasis added)); Rule 12(b)(6) Memorandum, at 13-14. Because the CPPA provides no cause of action against the ABA, the Court need go no further to conclude that Plaintiffs cannot establish their claim is likely to succeed on the merits.

Second, the particular ABA speech challenged by Plaintiffs is not actionable under the CPPA. The CPPA does not cover noncommercial speech like the ABA's, a constitutionally necessary limitation that the CPPA shares with other federal and state consumer protection statutes. *See* Rule 12(b)(6) Memorandum, at 15-16. The CPPA's limitation to commercial speech is fatal to Plaintiffs' claim because the ABA's participation in the ongoing scientific and public debate about the relationship between beverages and health, in public forums and through communications that do not promote any particular product or brand, is (or at minimum is inextricably intertwined with) core noncommercial speech and thus beyond the CPPA's reach. *See id.* at 16-20.

Even if the ABA's speech were construed to be commercial and thus within the scope of the CPPA, Plaintiffs' claim would still fail because, as a matter of law, Plaintiffs cannot establish that the ABA's stated views are false or misleading. To the contrary, the ABA's views are consistent with conclusions of the FDA, the CDC, and many respected scientists, and fall well within the scope of legitimate ongoing scientific debate. Courts interpreting similar consumer protection statutes have recognized that speech by even a commercially invested private party addressing genuinely debated scientific questions, premised on non-fraudulent data, cannot be punished as false or misleading. *See, e.g.*, *In re GNC*, 789 F.3d 505, 516 (4th Cir. 2017) (health representations made on packaging of joint health dietary supplements could not be "false" under state consumer protection acts because plaintiffs could not allege that all reasonable experts in the field agreed representations were false); *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 498 (2d Cir. 2013) (reaching similar conclusion regarding statements in scientific journals that were based on non-fraudulent data); *Tibau v. Am. Dental Ass'n*, No. 322100, 2003 Cal. Super. LEXIS 1486, at *43 (Cal. Super. Ct. Aug. 8, 2003) (granting anti-SLAPP motion to dismiss claim under California's Unfair Competition Law based on statements regarding dental amalgam, because evidence showed "a healthy scientific debate regarding the safety and efficacy of dental amalgam" and FDA had recently approved dental amalgam as restorative device); Rule 12(b)(6) Memorandum at 20-26. Indeed, the CPPA cannot constitutionally render actionable as false or misleading statements like the ABA's that echo the views of federal regulators and other respected scientists, because for First Amendment purposes "[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false." *United*

States ex rel. Morton v. A Plus Benefits, Inc., 139 F. App'x 980, 983 (10th Cir. 2005) (citation omitted). This is dispositive of Plaintiffs' claims as well.[6]

Third, for the same reasons set forth in Coca-Cola's Rule 12(b) Motion to Dismiss, Plaintiffs lack standing to bring their claim against the ABA. *See* D.C. Super. Ct. R. 12(b)(1).

CONCLUSION

For all of the reasons set forth above, the ABA's special motion to dismiss should be granted, the claim for relief against the ABA should be dismissed with prejudice, and the ABA should be allowed to move for fees and costs.

Dated: October 23, 2017

Respectfully submitted,

/s/ Richard P. Bress

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Counsel for Defendant American Beverage Association

[6]To the extent that Plaintiffs' real complaint is that the ABA's participation in the nutritional debate makes it harder for Plaintiffs to persuade the public of their views than it would be if the ABA ceded the field, that concern cannot support a claim under the CPPA.

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2017, I caused a copy of the foregoing Special Motion to Dismiss to be served by CaseFileXpress on the following:

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By: */s/ Richard P. Bress*
Richard P. Bress

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

PASTOR WILLIAM H. LAMAR IV, PASTOR DELMAN L. COATES, and THE PRAXIS PROJECT, on behalf of themselves and the general public, Plaintiffs, v. THE COCA-COLA COMPANY, and the AMERICAN BEVERAGE ASSOCIATION Defendants.	Case No. 2017 CA 004801 B Honorable Judge Elizabeth C. Wingo

(PROPOSED) ORDER GRANTING DEFENDANT AMERICAN BEVERAGE ASSOCIATION'S SPECIAL MOTION TO DISMISS PURSUANT TO THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT, D.C. CODE §§ 16-5501 *ET SEQ.*

Before the Court is Defendant American Beverage Association's Special Motion to Dismiss Pursuant to the District of Columbia Anti-SLAPP Act, D.C. Code §§ 16-5501 *et seq.* Upon consideration of the Special Motion, and good cause having been shown, it is hereby

ORDERED that the Special Motion is granted and the claim for relief against Defendant American Beverage Association is hereby DISMISSED with prejudice and without leave to amend; and

ORDERED that Defendant American Beverage Association is authorized to move for fees and costs pursuant to D.C. Code § 16-5504.

SO ORDERED.

DATE: _____ _____

Judge Elizabeth C. Wingo

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

PASTOR WILLIAM H. LAMAR IV, PASTOR DELMAN L. COATES, and THE PRAXIS PROJECT, on behalf of themselves and the general public Plaintiffs, v. THE COCA-COLA COMPANY, 1 Coca-Cola Plaza, Atlanta, GA 30301, and the AMERICAN BEVERAGE ASSOCIATION, 1275 Pennsylvania Ave., NW, Suite 1100, Washington, D.C. 20004, Defendants.	Case No. 2017 CA 004801 B Honorable Judge Elizabeth C. Wingo

DECLARATION OF MARK HAMMOND IN SUPPORT OF AMERICAN BEVERAGE ASSOCIATION'S MOTION TO DISMISS AND SPECIAL MOTION TO DISMISS

I, Mark Hammond, being duly sworn, depose and state as follows:

1. I am an adult over the age of eighteen, and if called to testify in this matter, I could and would testify as follows:

2. I am Executive Vice President & Chief Financial Officer at the American Beverage Association ("ABA"), and I am familiar with ABA's structure and activities. The information set forth below is based on my personal knowledge, information, and belief.

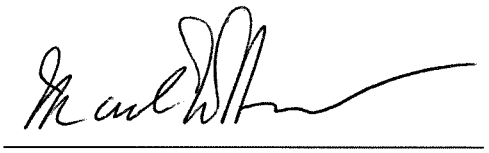
3. ABA is a 501(c)(6) national nonprofit trade association representing America's non-alcoholic beverage industry, including beverage producers, distributors, franchise companies, and support industries.

4. ABA members bring to market beverages including carbonated soft drinks, bottled water (including still water, mineral water, and artesian water), sports drinks, energy drinks, 100% juices, juice drinks, and ready-to-drink teas. These products are sold in various sizes with FDA-required labels that provide nutritional information (including calories and total sugar).

5. ABA is a nonprofit trade association. ABA does not manufacture, design, distribute, or sell beverages with added sugar. In fact, ABA is not involved in the supply chain for such products at all. ABA does not manufacture, distribute, design, or sell *any* products or services at all, nor is it involved in the supply chain for any products or services. The ABA's website does not offer products or services from its member companies for sale, nor direct readers to purchase specific products or services.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: October 21, 2017



Mark Hammond

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

PASTOR WILLIAM H. LAMAR IV, PASTOR DELMAN L. COATES, and THE PRAXIS PROJECT, on behalf of themselves and the general public, Plaintiffs, v. THE COCA-COLA COMPANY, and the AMERICAN BEVERAGE ASSOCIATION, Defendants.	Case No. 2017 CA 004801 B Honorable Judge Elizabeth C. Wingo

DECLARATION OF GEORGE C. CHIPEV IN SUPPORT OF AMERICAN BEVERAGE ASSOCIATION'S SPECIAL MOTION TO DISMISS PURSUANT TO THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT, D.C. CODE §§ 16-5501 *ET SEQ.*

Pursuant to D.C. Superior Court Rule of Civil Procedure 43(e), I, George C. Chipev, declare as follows:

1. I am counsel in this matter for Defendant American Beverage Association (the "ABA"). I submit this Declaration in Support of the ABA's Special Motion to Dismiss Pursuant to the District of Columbia Anti-SLAPP Act, D.C. Code §§ 16-5501 *et seq.* I have personal knowledge of the facts stated herein, and if called as a witness, I could and would competently testify thereto.

2. Attached as Exhibit A is a true and correct copy of the Report on Bill 18-893, the "Anti-SLAPP Act of 2010," by the Committee on Public Safety and the Judiciary of the Council of the District of Columbia, http://dcclims1.dccouncil.us/images/00001/20110120184936.pdf.

3. Attached as Exhibit B is a true and correct copy of the transcript of the January 13, 2017 hearing in *Simpson v. Johnson & Johnson*, No. 2016 CA 1931 B (D.C. Super. Ct. Jan. 13, 2017), https://www.leclairryan.com/communications/files/PCPC_Oral_Ruling.pdf.

4. Attached as Exhibit C is a true and correct copy of the Expert Report of Dr. Richard Kahn, *Am. Beverage Ass'n. v. City & Cty. of San Francisco*, No. 3:15-cv-03415-EMC (N.D. Cal. Jan. 12, 2016) (hereinafter "*ABA-SF*"), ECF No. 50-24.

5. Attached as Exhibit D is a true and correct copy of Plaintiff Denise Simpson's Statement of Points and Authorities in Opposition to Defendant Personal Care Products Council's Special Motion to Dismiss Pursuant to the District of Columbia Anti-SLAPP Act (D.C. Code § 16-5501, et seq.) (dated May 19, 2016).

6. Attached as Exhibit E is a true and correct copy of the ABA's webpage, "Our Mission & History," http://www.ameribev.org/about-us/our-mission-history/.

7. Attached as Exhibit F is a true and correct copy of the ABA's and its member companies' webpage, "Putting Calorie Info Up Front," http://www.balanceus.org/en/industry-efforts/putting-calorie-info-up-front/.

8. Attached as Exhibit G is a true and correct copy of the ABA's and its member companies' website, "Finding a Balance That Works For You," http://www.balanceus.org/en/.

9. Attached as Exhibit H is a true and correct copy of the ABA's June 7, 2016 blog post, "Staying Hydrated With Bottled Water During Summer," http://www.ameribev.org/education-resources/blog/post/staying-hydrated-with-bottled-water-during-summer/.

10. Attached as Exhibit I is a true and correct copy of the ABA's April 26, 2016 blog post, "Meaningful Solutions to Complex Challenges," http://www.ameribev.org/education-resources/blog/post/meaningful-solutions-to-complex-challenges/.

11. Attached as Exhibit J is a true and correct copy of the Centers for Disease Control and Prevention's webpage, "The Caloric Balance Equation," http://www.cdc.gov/healthyweight/calories/.

12. Attached as Exhibit K is a true and correct copy of Amby Burfoot, *Milk and Other Surprising Ways to Stay Hydrated*, N.Y. Times, June 30, 2016, https://well.blogs.nytimes.com/2016/06/30/milk-and-other-surprising-ways-to-stay-hydrated/?_r=0.

13. Attached as Exhibit L is a true and correct copy of the ABA's June 29, 2016 blog post, "The Evidence is Clear, Taxes Are Not the Solution to Obesity," http://www.ameribev.org/education-resources/blog/post/the-evidence-is-clear-taxes-are-not-the-solution-to-obesity/.

14. Attached as Exhibit M is a true and correct copy of the ABA's May 20, 2016 blog post, "Beverage Companies Respond to FDA Announcement on Nutrition Facts Panel," http://www.ameribev.org/education-resources/blog/post/beverage-companies-respond-to-fda-announcement-on-nutrition-facts-panel/.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: October 23, 2017

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I hereby certify that on October 23, 2017, I caused a copy of the foregoing Declaration and the attached Exhibits to be served by CaseFileXpress on the following:

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EXHIBIT A

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: All Councilmembers

FROM: Councilmember Phil Mendelson,
Chairman, Committee on Public Safety and the Judiciary

DATE: November 18, 2010

SUBJECT: Report on Bill 18-893, "Anti-SLAPP Act of 2010"

The Committee on Public Safety and the Judiciary, to which Bill 18-893, the "Anti-SLAPP Act of 2010" was referred, reports favorably thereon with amendments, and recommends approval by the Council.

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I. BACKGROUND AND NEED

Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation -- or SLAPPs -- have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantially amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

History of Strategic Lawsuits against Public Participation:

In what is considered the seminal article regarding SLAPPs, University of Denver College of Law Professor George W. Pring described what was then (1989), considered to be a growing litigation "phenomenon":

> Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.[1]

These lawsuits, Pring noted, are typically an effort to stop a citizen from exercising their political rights, or to punish them for having already done so. To further identify the problem, and be able to draw possible solutions, Pring engaged in a nationwide study of SLAPPs with University of Denver sociology Professor Penelope Canan.

Pring and Canan's study established the base criteria of a SLAPP as: (1) a civil complaint or counterclaim (for monetary damages and/or injunction); (2) filed against non-governmental individuals and/or groups; (3) because of their communications to a government body, official or electorate; and (4) on an issue of some public interest or concern.[2] The study of 228 SLAPPs found that, despite constitutional, federal and state statute, and court decisions that expressly protect the actions of the defendants, these lawsuits have been allowed to flourish because they appear, or are camouflaged by those bringing the suit, as a typical tort case. The vast majority of the cases identified by the study were brought under legal charges of defamation (such as libel and slander), or as such business torts as interference with contract.[3]

In identifying possible solutions to litigation aimed at silencing public participation, Pring paid particular attention to a 1984 opinion of the Colorado Supreme Court establishing a new rule for trial courts to allow for dismissal motions for SLAPP suits.[4] In recognition of the

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[1] George W. Pring, *SLAPPS: Strategic Lawsuits against Public Participation*, Pace Env. L. Rev, Paper 132, 1 (1989), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1122&context=envlaw (last visited Nov. 17, 2010).

[2] *Id.* at 7-8.

[3] *Id.* at 8-9.

[4] Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984). The three-prong test develop by the court requires:

> When [ ] a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the

growing problem of SLAPPs, a number of jurisdictions have, legislatively, created a similar special motion to dismiss in order to expeditiously, and more fairly deal with SLAPPs. According to the California Anti-SLAPP Project, a public interest law firm and policy organization dedicated to fighting SLAPPs in California, as of January 2010 there are approximately 28 jurisdictions in the United States that have adopted anti-SLAPP measures. Likewise, there are nine jurisdictions (not including the District of Columbia) that are currently considering legislation to address the issue. Also, one other jurisdiction has joined Colorado in addressing SLAPPs through judicial doctrine.[5]

This issue has also recently been taken up by the federal government, with the introduction of the H.R. 4363, the Citizen Participation Act of 2009. This legislation would provide certain procedural protections for any act in furtherance of the constitutional right of petition or free speech, and specifically incorporate a special motion to dismiss for SLAPPs.[6]

SLAPPs in the District of Columbia:

Like the number of jurisdictions that have sensed the need to address SLAPPs legislatively, the District of Columbia is no stranger to SLAPPs. The American Civil Liberties Union of the Nation's Capital (ACLU), in written testimony provided to the Committee (attached), described two cases in which the ACLU was directly involved, as counsel for defendants, in such suits against District residents.[7]

The actions that typically draw a SLAPP are often, as the ACLU noted, the kind of grassroots activism that should be hailed in our democracy. In one of the examples provided, the ACLU discussed the efforts of two Capitol Hill advocates that opposed the efforts of a certain developer. When the developer was unable to obtain a building permit, the developer sued the activists and the community organization alleging they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media."[8] Such activism, however, was met with years of litigation and, but for the ACLU's assistance, would have resulted in outlandish legal costs to defend. Though the actions

---

plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

Id. at 1369.

[5] California Anti-SLAPP Project (CASP) website, Other states: Statutes and cases, *available at* http://www.casp.net/statutes/menstate.html (last visited Nov. 11, 2010).

[6] http://www.thomas.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdLBBX:@@@L&summ2=m&|/home/LegislativeData.php|

[7] *Bill 18-893, Anti-SLAPP Act of 2010: Public Hearing of the Committee on Public Safety and the Judiciary*, Sept. 17, 2010, at 2-3 (written testimony Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital).

[8] *Id.* at 2 (quoting from lawsuit in *Father Flanagan's Boys Home v. District of Columbia et al.*, Civil Action No. 01-1732 (D.D.C)).

of these participants should have been protected, they, and any others who wished to express opposition to the project, were met with intimidation.

What has been repeated by many who have studied this issue, from Pring on, is that the goal of the litigation is not to win the lawsuit but punish the opponent and intimidate them into silence. As Art Spitzer, Legal Director for the ACLU, noted in his testimony "[*l*]*itigation itself* is the plaintiff's weapon of choice."[9]

District Anti-SLAPP Act:

In June 2010, legislation was introduced to remedy this nationally recognized problem here in the District of Columbia. As introduced, this measure closely mirrored the federal legislation introduced the previous year. Bill 18-893 provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest.

Following the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions, Bill 18-893 extends substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court. To ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish, the legislation tolls discovery while the special motion to dismiss is pending. Further, in recognition that SLAPP plaintiffs frequently include unspecified individuals as defendants -- in order to intimidate large numbers of people that may fear becoming named defendants if they continue to speak out -- the legislation provides an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for certain costs and fees to be awarded to the successful party of a special motion to dismiss or a special motion to quash.

Bill 18-893 ensures that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates. To prevent the attempted muzzling of opposing points of view, and to encourage the type of civic engagement that would be further protected by this act, the Committee urges the Council to adopt Bill 18-893.

II. LEGISLATIVE CHRONOLOGY

June 29, 2010	Bill 18-893, the "Anti-SLAPP Act of 2010," is introduced by Councilmembers Cheh and Mendelson, co-sponsored by Councilmember M. Brown, and is referred to the Committee on Public Safety and the Judiciary.

[9] *Id.* at 3.

July 9, 2010	Notice of Intent to act on Bill 18-893 is published in the *District of Columbia Register.*
August 13, 2010	Notice of a Public Hearing is published in the *District of Columbia Register.*
September 17, 2010	The Committee on Public Safety and the Judiciary holds a public hearing on Bill 18-893.
November 18, 2010	The Committee on Public Safety and the Judiciary marks-up Bill 18-893.

III. POSITION OF THE EXECUTIVE

The Executive provided no witness to testify on Bill 18-893 at the September 17, 2010 hearing. The Office of the Attorney General provided a letter subsequent to the hearing stating the need to review the legislation further.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee received no testimony or comments from Advisory Neighborhood Commissions.

V. SUMMARY OF TESTIMONY

The Committee on Public Safety and the Judiciary held a public hearing on Bill 18-893 on Friday, September 17, 2010. The testimony summarized below is from that hearing. A copy of submitted testimony is attached to this report.

Robert Vinson Brannum, President, D.C. Federation of Civic Associations, Inc., testified in support of Bill 18-893.

Ellen Opper-Weiner, Public Witness, testified in support of Bill 18-893. Ms. Opper-Weiner recounted her own experience in SLAPP litigation, and suggested several amendments to strengthen the legislation.

Dorothy Brizill, Public Witness, testified in support of Bill 18-893. Ms. Brizill recounted her own experience in SLAPP litigation. She stated that the legislation is the next step in advancing free speech in the District of Columbia.

Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital, provided a written statement in support of the purpose and general approach of Bill 18-

893, but suggested several changes to the legislation as introduced. A copy of this statement is attached to this report.

Although no Executive witness presented testimony, Attorney General for the District of Columbia, Peter Nickles, expressed concern that certain provisions of the bill might implicate the Home Rule Act prohibition against enacting any act with respect to any provision of Title 11 of the D.C. Official Code. A copy of his letter is attached to this report.

VI. IMPACT ON EXISTING LAW

Bill 18-893 adds new provisions in the D.C. Official Code to provide an expeditious process for dealing with strategic lawsuits against public participation (SLAPPs). Specifically, the legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditiously, to delay burdensome discovery while the motion to dismiss is pending, and to provide an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for the costs of litigation to be awarded to the successful party of a special motion to dismiss created under this act.

VII. FISCAL IMPACT

The attached November 16, 2010 Fiscal Impact Statement from the Chief Financial Officer states that funds are sufficient to implement Bill 18-893. This legislation requires no additional funds or staff.

VIII. SECTION-BY-SECTION ANALYSIS

Several of the changes to the Committee Print from Bill 18-893 as introduced stem from the recommendations of the American Civil Liberties Union of the Nation's Capital (ACLU). For a more thorough explanation of these changes, see the September 17, 2010 testimony of the ACLU attached to this report.

Section 1	States the short title of Bill 18-893.
Section 2	Incorporates definitions to be used throughout the act.
Section 3	Creates the substantive right of a party subject to a claim under a SLAPP suit to file a special motion to dismiss within 45 days after service of the claim.

Subsection (a) Creates a substantive right of a defendant to pursue a special motion to dismiss for a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (b) Provides that, upon a prima facie showing that the activity at issue in the litigation falls under the type of activity protected by this act, the court shall dismiss the case unless the responding party can show a likelihood of succeeding upon the merits.

Subsection (c) Tolls discovery proceedings upon the filing of a special motion to dismiss under this act. As introduced the legislation permitted an exemption to this for good cause shown. The Committee Print has tightened this language in this provision so that the court may permit specified discovery if it is assured that such discovery would not be burdensome to the defendant.

Subsection (d) Requires the court to hold an expedited hearing on a special motion to dismiss filed under this act.

As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While the Committee agrees with and supports the purpose of this provision, a recent decision of the DC Court of Appeals states that the Council exceeds its authority in making such orders reviewable on appeal.[10] The dissenting opinion in that case provides a strong argument for why the Council should be permitted to legislate this issue. However, under the majority opinion the Council is restricted from expanding the authority of District's appellate court to hear appeals over non-final orders of the lower court. The provision that has been removed from the bill as introduced would have provided an immediate appeal over a non-final order (a special motion to dismiss).

Section 4 Creates a substantive right of a person to pursue a special motion to quash a subpoena aimed at obtaining a persons identifying information relating to a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (a) Creates the special motion to quash.

Subsection (b) Provides that, upon a prima facie showing that the underlying claim is of the type of activity protected by this act, the court shall grant the special

[10] *See* Stuart v. Walker, 09-CV-900 (DC Ct of App 2010) at 4-5.

motion to quash unless the responding party can show a likelihood of succeeding upon the merits.

Section 5 — Provides for the awarding of fees and costs for prevailing on a special motion to dismiss or a special motion to quash. The court is also authorized to award reasonable attorney fees where the underlying claim is determined to be frivolous.

Section 6 — Provides exemptions to this act for certain claims.

Section 7 — Adopts the Fiscal Impact Statement.

Section 8 — Establishes the effective date by stating the standard 30-day Congressional review language.

IX. COMMITTEE ACTION

On November 18, 2010, the Committee on Public Safety and the Judiciary met to consider Bill 18-893, the "Anti-SLAPP Act of 2010." The meeting was called to order at 1:50 p.m., and Bill 18-893 was the fourth item on the agenda. After ascertaining a quorum (Chairman Mendelson and Councilmembers Alexander, Cheh, and Evans present; Councilmembers Bowser absent), Chairman Mendelson moved the print, along with a written amendment to repeal section 3(e) of the circulated draft print, with leave for staff to make technical changes. After an opportunity for discussion, the vote on the print was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). Chairman Mendelson then moved the report, with leave for staff to make technical and editorial changes. After an opportunity for discussion, the vote on the report was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). The meeting adjourned at 2:15 p.m.

X. ATTACHMENTS

1. Bill 18-893 as introduced.
2. Written testimony and comments.
3. Fiscal Impact Statement
4. Committee Print for Bill 18-893.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Memorandum

To: Members of the Council

From: Cynthia Brock-Smith, Secretary to the Council

Date: July 7, 2010

Subject: (Correction)
Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Legislative Meeting on Tuesday, June 29, 2010. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Anti-SLAPP Act of 2010", B18-0893

INTRODUCED BY: Councilmembers Cheh and Mendelson

CO-SPONSORED BY: Councilmember M. Brown

The Chairman is referring this legislation to the Committee on Public Safety and the Judiciary.

Attachment

cc: General Counsel
Budget Director
Legislative Services

Councilmember Phil Mendelson

Councilmember Mary M. Cheh

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Councilmembers Mary M. Cheh and Phil Mendelson introduced the following bill, which was referred to the Committee on _____.

To provide a special motion for the quick and efficient dismissal of strategic lawsuits against public participation (SLAPPs), to stay proceedings until the motion is considered, to provide a motion to quash attempts to seek personally identifying information; and to award the costs of litigation to the successful party on a special motion.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this Act, the term:

(1) "Act in furtherance of the right of free speech" means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest.

(2) "Issue of public interest" means an issue related to health or safety; environmental, economic or community well-being; the District government; a public figure; or a good, product or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(3) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

(4) "Government entity" means the Government of the District of Columbia and its branches, subdivisions, and departments.

Sec. 3. Special Motion to Dismiss.

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of free speech within 45 days after service of the claim.

(b) A party filing a special motion to dismiss under this section must make a prima facie showing that the claim at issue arises from an act in furtherance of the right of free speech. If the moving party makes such a showing, the responding party may demonstrate that the claim is likely to succeed on the merits.

(c) Upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until notice of entry of an order disposing of the motion, except that the court, for good cause shown, may order that specified discovery be conducted.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

(e) The defendant shall have a right of immediate appeal from a court order denying a special motion to dismiss in whole or in part.

Sec. 4. Special Motion to Quash.

(a) A person whose personally identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with an action arising from an act in furtherance of the right of free speech may make a special motion to quash the discovery order, request, or subpoena.

(b) The person bringing a special motion to quash under this section must make a prima facie showing that the underlying claim arises from an act in furtherance of the right of free speech. If the person makes such a showing, the claimant in the underlying action may demonstrate that the underlying claim is likely to succeed on the merits.

Sec. 5. Fees and costs.

(a) The court may award a person who substantially prevails on a motion brought under sections 3 or 4 of this Act the costs of litigation, including reasonable attorney fees.

(b) If the court finds that a motion brought under sections 3 or 4 of this Act is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney fees and costs to the responding party.

Sec. 6. Exemptions.

(a) This Act shall not apply to claims brought solely on behalf of the public or solely to enforce an important right affecting the public interest.

(b) This Act shall not apply to claims brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 7. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 8. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Testimony of the
American Civil Liberties Union
of the Nation's Capital

by

Arthur B. Spitzer
Legal Director

before the

Committee on Public Safety and the Judiciary
of the
Council of the District of Columbia

on

Bill 18-893, the
"Anti-SLAPP Act of 2010"

September 17, 2010

The ACLU of the Nation's Capital appreciates this opportunity to testify on Bill 18-893. We support the purpose and the general approach of this bill, but we believe it requires some significant polishing in order to achieve its commendable goals.

Background

In a seminal study about twenty years ago, two professors at the University of Denver identified a widespread pattern of abusive lawsuits filed by one side of a political or public policy dispute—usually the side with deeper pockets and ready access to counsel—to punish or prevent the expression of opposing points of view. They dubbed these "Strategic Lawsuits Against Public Participation," or "SLAPPs." *See* George W. Pring and Penelope Canan, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press 1996). They pinpointed several criteria that identify a SLAPP:

— The actions complained of "involve communicating with government officials, bodies, or the electorate, or encouraging others to do so." *Id.* at 150.

— The defendants are "involved in speaking out for or against some issue under consideration by some level of government or the voters." *Id.*

— The legal claims filed against the speakers tend to fall into predictable categories such as defamation, interference with prospective economic advantage, invasion of privacy, and conspiracy. *Id.* at 150-51.

— The lawsuit often names "John or Jane Doe defendants." *Id.* at 151. "We have found whole communities chilled by the inclusion of Does, fearing 'they will add my name to the suit.'" *Id.*

The authors "conservatively estimate[d] that ... tens of thousands of Americans have been SLAPPed, and still more have been muted or silenced by the threat." *Id.* at xi. Finding that "the legal system is not effective in controlling SLAPPs," *id.*, they proposed the adoption of anti-SLAPP statutes to address the problem. *Id.* at 201.

Responding to the continuing use of SLAPPs by those seeking to silence opposition to their activities, twenty-six states and the Territory of Guam have now enacted anti-SLAPP statutes.[1]

The ACLU of the Nation's Capital has been directly involved, as counsel for defendants, in two SLAPPs involving District of Columbia residents.

In the first case, a developer that had been frustrated by its inability promptly to obtain a building permit sued a community organization (Southeast Citizens for Smart Development) and two Capitol Hill activists (Wilbert Hill and Ellen Opper-Weiner) who had opposed its efforts. The lawsuit claimed that the defendants had violated the developer's rights when they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media," and when they created a web site that urged people to "call, write or e-mail the mayor" to ask him to stop the project. The defendants' activities exemplified the kind of grassroots activism that should be hailed in a democracy, and the lawsuit was a classic SLAPP. The case was eventually dismissed, and the dismissal affirmed on appeal.[2] But the litigation took several years, and during all that time the defendants and their neighbors were worried about whether they might face liability. Because the ACLU represented the citizens and their organization at no charge, they were not financially harmed. But had they been required to retain paid counsel, the cost would have been substantial, and intimidating.

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[1] Links to these statutes can be found at http://www.casp.net/menstate.html.

[2] *Father Flanagan's Boys Home v. District of Columbia, et al.*, Civil Action No. 01-1732 (D.D.C.), *aff'd*, 2003 WL 1907987 (No. 02-7157, D.C. Cir. 2003).

In the second case we represented Dorothy Brizill, who needs no introduction to this Committee. She was sued in Guam for defamation, invasion of privacy, and "interference with prospective business advantage," based on statements she made in a radio interview broadcast there about the activities of the gambling entrepreneur who backed the proposed 2004 initiative to legalize slot machines in the District of Columbia. This lawsuit was also a classic SLAPP, filed against her in the midst of the same entrepreneur's efforts to legalize slot machines on Guam, in an effort to silence her. And to intimidate his opponents, twenty "John Does" were also named as defendants. With the help of Guam's strong anti-SLAPP statute, the case was dismissed, and the dismissal was affirmed by the Supreme Court of Guam.[3] But once again, the litigation lasted more than two years, and had Ms. Brizill been required to retain paid counsel to defend herself, it would have cost her hundreds of thousands of dollars.

As professors Pring and Canan demonstrated, a SLAPP plaintiff's real goal is not to win the lawsuit but to punish his opponents and intimidate them and others into silence. *Litigation itself* is the plaintiff's weapon of choice; a long and costly lawsuit is a victory for the plaintiff even if it ends in a formal victory for the defendant. That is why anti-SLAPP legislation is needed: to enable a defendant to bring a SLAPP to an end quickly and economically.

Bill 18-893

Bill 18-893 would help end SLAPPs quickly and economically by making available to the defendant a "special motion to dismiss" that has four noteworthy features:

- The motion must be heard and decided expeditiously.
- Discovery is generally stayed while the motion is pending.
- If the motion is denied the defendant can take an immediate appeal.
- Most important, the motion is to be granted if the defendant shows that he or she was engaged in protected speech or activity, unless the plaintiff can show that he or she is nevertheless likely to succeed on the merits.

Speaking generally, this is sensible path to the desired goal, and speaking generally, the ACLU endorses it. If a lawsuit looks like a SLAPP, swims like a SLAPP, and quacks like a SLAPP, then it probably is a SLAPP, and it is fair and reasonable to put the burden on the plaintiff to show that it isn't a SLAPP.

We do, nevertheless, have a number of suggestions for improvement, including a substantive change in the definition of the conduct that is to be protected by the proposed law.

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[3] *Guam Greyhound, Inc. v. Brizill,* 2008 Guam 13, 2008 WL 4206682.

Section 2(1). The bill begins by defining the term "Act in furtherance of the right of free speech," which is used to signify the conduct that can be protected by a special motion to dismiss. In our view, it would be better to use a different term, because the "right of free speech" is already a term in very common use, with a broader meaning than the meaning given in this bill, and it will be impossible, or nearly so, for litigants, lawyers and even judges (and especially the news media) to avoid confusion between the common meaning of the "right of free speech" and the special, narrower meaning given to it in this bill. It would be akin to defining the term "fruit" to mean "a curved yellow edible food with a thick, easily-peeled skin." This specially-defined term deserves a special name that will not require a struggle to use correctly. We suggest "Act in furtherance of the right of advocacy on issues of public interest."

Section 2(1)(A). Because there is no conjunction at the end of section 2(1)(A)(i), the bill is ambiguous as to whether sections 2(1)(A)(i) and (ii) are conjunctive or disjunctive. That is, in order to be covered, must a statement be made "In connection with an ... official proceeding" *and* "In a place open to the public or a public forum in connection with an issue of public interest," or is a statement covered if it is made *either* "In connection with an ... official proceeding," *or* "In a place open to the public or a public forum in connection with an issue of public interest"?

We urge the insertion of the word "or" at the end of section 2(1)(A)(i) to make it clear that statements are covered in either case. A statement made "In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" certainly deserves anti-SLAPP protection whether it is made in a public place or in a private place. For example, a statement made to a group gathered by invitation in a person's living room, or made to a Councilmember during a non-public meeting, should be protected. Likewise, a statement made "In a place open to the public or a public forum in connection with an issue of public interest" deserves anti-SLAPP protection whether of not it is also connected to an "official proceeding." For example, statements by residents addressing a "Stop the Slaughterhouse" rally should be protected even if no official proceeding regarding the construction of a slaughterhouse has yet begun.[4]

[4] It appears that these definitions, along with much of Bill 18-893, were modeled on the Citizen Participation Act of 2009, H.R. 4364 (111th Cong., 1st Sess.), introduced by Rep. Steve Cohen of Tennessee (*available at* http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.4364.IH:). In that bill it is clear that speech or activity that falls under any one of these definitions is covered.

Section 2(1)(B). Section 2(1)(B) expands the definition of protected activity to include "any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest." We fully agree with the intent of this provision, but we think it fails as a definition because it is backwards—it requires a court *first* to determine whether given conduct is protected by the Constitution *before* it can determine whether that conduct is covered by the Anti-SLAPP Act. But if the conduct is protected by the Constitution, then there is no need for the court to determine whether it is covered by the Anti-SLAPP Act: a claim arising from that conduct must be dismissed because the conduct is protected by the Constitution. And yet the task of determining whether given conduct is protected by the Constitution is often quite difficult, and can require exactly the kinds of lengthy, expensive legal proceedings (including discovery) that the bill is intended to avoid.

This very problem arose in the *Brizill* case, where the Guam anti-SLAPP statute protected "acts in furtherance of the Constitutional rights to petition," and Mr. Baldwin argued that the statute therefore provided no broader protection for speech than the Constitution itself provided. *See* 2008 Guam 13 ¶ 28. He argued, for example, that Ms. Brizill's speech was not protected by the statute because it was defamatory, and defamation is not protected by the Constitution. As a result, the defendant had to litigate the constitutional law of defamation on the way to litigating the SLAPP issues. This should not be necessary, as the purpose of an anti-SLAPP law is to provide broader protection than existing law already provides. Bill 18-893 should be amended to avoid creating the same problem here.[5]

We therefore suggest amending Section 2(1)(B) to say: "Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest."

Section 2(4). Section 2(4) defines the term "government entity." But that term is never used in the bill. It should therefore be deleted.[6]

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[5] The Supreme Court of Guam ultimately rejected the argument that "Constitutional rights" meant "constitutionally protected rights," *see id.* at ¶ 32, but that was hardly a foregone conclusion, and the D.C. Court of Appeals might not reach the same conclusion under Section 2(1)(B).

[6] The same term is defined in H.R. 4364, but it is then used in a section providing that "A government entity may not recover fees pursuant to this section."

Section 3(b). We agree with what we understand to be the intent of this provision, setting out the standards for a special motion to dismiss. But the text of this section fails to accomplish its purpose because it never actually spells out what a court is supposed to do. We suggest revising Section 3(b) as follows:

> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

Section 3(c). We agree that discovery should be stayed on a claim as to which a special motion to dismiss has been filed. This is an important protection, for discovery is often burdensome and expensive. Because expression on issues of public interest deserves special protection, a plaintiff who brings a claim based on a defendant's expression on an issue of public interest ought to be required to show a likelihood of success on that claim without the need for discovery.

A case may exist in which a plaintiff could prevail on such a claim after discovery but cannot show a likelihood of success without discovery, but in our view the dismissal of such a hypothetical case is a small price to pay for the public interest that will be served by preventing the all-but-automatic discovery that otherwise occurs in civil litigation over the sorts of claims that are asserted in SLAPPs.

As an exception to the usual stay of discovery, Section 3(c) permits a court to allow "specified discovery" after the filing of a special motion to dismiss "for good cause shown." We agree that a provision allowing some discovery ought to be included for the exceptional case. But while the "good cause" standard has the advantage of being flexible, it has the disadvantage of being completely subjective, so that a judge who simply feels that it's unfair to dismiss a claim without discovery can, in effect, set the Anti-SLAPP Act aside and allow a case to proceed in the usual way. In our view, it would be better if the statute spelled out more precisely the circumstances under which discovery might be allowed, and also included a provision allowing the court to assure that such discovery would not be burdensome to the defendant. For example: "...except that the court may order that specified discovery be conducted when it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery."

Finally, we note that this section provides that discovery shall be stayed "until notice of entry of an order disposing of the motion." That language tracks H.R. 4364, but "notice of entry" of court orders is not part of D.C. Superior Court procedure. We suggest that the bill be amended to provide that "... discovery proceedings on the claim shall be stayed until the motion has been disposed of, including any appeal taken under section 3(e), ..."

Sections 3(d) and (e). We agree that a special motion to dismiss should be expedited and that its denial should be subject to an interlocutory appeal. The Committee may wish to consider whether the Court of Appeals should also be directed to expedite its consideration of such an appeal. The D.C. Court of Appeals often takes years to rule on appeals.

Section 4. Section 4 is focused on the fact that SLAPPs frequently include unspecified individuals (John and Jane Does) as defendants. As observed by professors Pring and Canan, this is one of the tactics employed by SLAPP plaintiffs to intimidate large numbers of people, who fear that they may become named defendants if they continue to speak out on the relevant public issue.

There can be very legitimate purposes for naming John and Jane Does as defendants in civil litigation. The ACLU sometimes names John and Jane Does as defendants when it does not yet know their true identities—for example, when unknown police officers are alleged to have acted unlawfully.[7] It is therefore necessary to balance the right of a plaintiff to proceed against an as-yet-unidentified person who has violated his rights, and to use the court system to discover that person's identity, against the right of an individual not to be made a defendant in an abusive SLAPP that was filed for the purpose of retaliating against, or chilling, legitimate civic activity.

We believe that Section 4 strikes an appropriate balance by making available to a John or Jane Doe a "special motion to quash," protecting his or her identity from disclosure if he or she was acting in a manner that is protected by the Anti-SLAPP Act, and if the plaintiff cannot make the same showing of likely success on the merits that is required to defeat a special motion to dismiss.

Like Section 3(b), however, Section 4(b) never actually spells out what a court is supposed to do. We therefore suggest revising Section 4(b) in the same manner we suggested revising Section 3(b):

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[7] *See, e.g., YoungBey v. District of Columbia, et al.*, No. 09-cv-596 (D.D.C.) (suing the District of Columbia, five named MPD officers, and 27 "John Doe" officers in connection with an unlawful pre-dawn SWAT raid of a District resident's home).

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personally identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

Section 6(a). Section 6(a) provides that "This Act shall not apply to claims brought solely on behalf of the public or solely to enforce an important right affecting the public interest." This language is vague and tremendously broad. Almost any plaintiff can and will assert that he is bringing his claims "to enforce an important right affecting the public interest," and neither this bill nor any other source we know gives a court any guidance regarding what "an important right affecting the public interest" might be. The plaintiffs in the two SLAPP suits described above, in which the ACLU of the Nation's Capital represented the defendants, vigorously argued that they were seeking to enforce an important right affecting the public interest: the developer argued that it was seeking to provide housing for disadvantaged youth; the gambling entrepreneur argued that he was seeking to prevent vicious lies from affecting the result of an election.

Thus, this provision will almost certainly add an entire additional phase to the litigation of every SLAPP suit, with the plaintiff arguing that the anti-SLAPP statute does not even apply to his case because he is acting in the public interest. To the extent that courts accept such arguments, this provision is a poison pill with the potential to turn the anti-SLAPP statute into a virtually dead letter. At a minimum, it will subject the rights of SLAPP defendants to the subjective opinions of more than 75 different Superior Court judges regarding what is or is not "an important right affecting the public interest."

Moreover, we think the exclusion created by Section 6(a) is constitutionally problematic because it incorporates a viewpoint-based judgment about what is or is not in the public interest—after all, what is in the public interest necessarily depends upon one's viewpoint.

—Assume, for example, that D.C. Right To Life (RTL) makes public statements that having an abortion causes breast cancer. Assume Planned Parenthood sues RTL, alleging that those statements impede its work and cause psychological harm to its members. RTL files a special motion to dismiss under the Anti-SLAPP Act, showing that it was communicating views to members of the public in connection with an issue of public interest. But Planned Parenthood responds that its lawsuit is not subject to the Anti-SLAPP Act because it was

"brought ... solely to enforce an important right affecting the public interest," to wit, the right to reproductive choice.

—Now assume that Planned Parenthood makes public statements that having an abortion under medical supervision is virtually risk-free. RTL sues Planned Parenthood, alleging that those statements impede its work and cause psychological harm to its members. Planned Parenthood files a special motion to dismiss under the Anti-SLAPP Act, showing that it was communicating views to members of the public in connection with an issue of public interest. But RTL responds that its lawsuit is not subject to the Anti-SLAPP Act because it was "brought ... solely to enforce an important right affecting the public interest," to wit, the right to life.

Are both lawsuits exempt from the Anti-SLAPP Act? Neither? One but not the other? We fear that the result is likely to depend on the viewpoint of the judge regarding which asserted right is "an important right affecting the public interest." But the First Amendment requires the government to provide evenhanded treatment to speech on all sides of public issues. We see no good reason for the inclusion of Section 6(a), and many pitfalls. Accordingly, we urge that it be deleted.[8]

Thank you for your consideration of our comments.

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[8] Section 10 of H.R. 4364, on which Section 6(a) of Bill 18-893 is modeled, begins with the catchline "Public Enforcement." It therefore appears that Section 10 was intended to exempt only enforcement actions brought by the government.

Even if that is true, we see no good reason to exempt the government, as a litigant, from a statute intended to protect the rights of citizens to speak freely on issues of public interest. To the contrary, the government should be held to the strictest standards when it comes to respecting those rights. *See, e.g., White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) (holding that the advocacy activities of neighbors who opposed the conversion of a motel into a multi-family housing unit for homeless persons were protected by the First Amendment, and that an intrusive eight-month investigation into their activities and beliefs by the regional Fair Housing and Equal Opportunity Office violated their First Amendment rights).

We therefore urge the complete deletion of Section 6(a), as noted above. However, if the Committee does not delete Section 6(a) entirely, its coverage should be limited to lawsuits brought by the government.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

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ATTORNEY GENERAL

September 17, 2010

The Honorable Phil Mendelson
Chairperson
Committee on Public Safety & the Judiciary
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Ste. 402
Washington, D.C. 20004

Re: Bill 18-893, the "Anti-SLAPP Act of 2010"

Dear Chairperson Mendelson:

I have not yet had the opportunity to study in depth Bill 18-893, the "Anti-SLAPP Act of 2010" ("bill"), which will be the subject of a hearing before your committee today, but I do want to register a preliminary concern about the legislation.

To the extent that sections 3 (special motion to dismiss) and 4 (special motion to quash) of the bill would impact SLAPPs filed in the Superior Court of the District of Columbia, the legislation may run afoul of section 602(a)(4) of the District of Columbia Home Rule Act, approved December 24, 1973, Pub. L. 93-198, 87 Stat. 813 (D.C. Official Code § 1-206.02(a)(4) (2006 Repl.)), which prohibits the Council from enacting any act "with respect to any provision of Title 11 [of the D.C. Code]." In particular, D.C. Official Code § 11-946 (2001) provides, for example, that the Superior Court "shall conduct its business according to the Federal Rules of Civil Procedure...unless it prescribes or adopts rules which modify those Rules [subject to the approval of the Court of Appeals]." As you know, the Superior Court subsequently adopted rules of procedure for civil actions, including Rules 12(c) (Motion for judgment on the pleadings), 26-37 (Depositions and Discovery), and 56 (Summary judgment), which appear to afford the parties to civil actions rights and opportunities that sections 3 and 4 of the bill can be construed to abrogate. Thus, the bill may conflict with the Superior Court's rules of civil procedure and, consequently, violate section 602(a)(4) of the Home Rule Act insofar as that section preserves the D.C. Courts' authority to adopt rules of procedure free from interference by the Council. Accordingly, I suggest that – if you have not already done so – you solicit comments concerning the legislation from the D.C. Courts.

Sincerely,

Peter J. Nickles
Attorney General for the District of Columbia

cc: Vincent Gray, Chairman, Council of the District of Columbia
Yvette Alexander, Council of the District of Columbia

Government of the District of Columbia
Office of the Chief Financial Officer

Natwar M. Gandhi
Chief Financial Officer

MEMORANDUM

TO: **The Honorable Vincent C. Gray**
Chairman, Council of the District of Columbia

FROM: **Natwar M. Gandhi**
Chief Financial Officer

DATE: **November 16, 2010**

SUBJECT: **Fiscal Impact Statement – "Anti-SLAPP Act of 2010"**

REFERENCE: **Bill Number 18-893, Draft Committee Print Shared with the OCFO on November 15, 2010**

Conclusion

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation.

Background

The proposed legislation would provide a special motion for the quick dismissal of claims "arising from an act in furtherance of the right of advocacy on issues of public interest,"[1] which are commonly referred to as strategic lawsuits against public participation (SLAPPs). SLAPPs are generally defined as retaliatory lawsuits intended to silence, intimidate, or punish those who have used public forums to speak, petition, or otherwise move for government action on an issue. Often the goal of SLAPPs is not to win, but rather to engage the defendant in a costly and long legal battle. This legislation would provide a way to end SLAPPs quickly and economically by allowing for this special motion and requiring the court to hold an expedited hearing on it.

In addition, the proposed legislation would provide a special motion to quash attempts arising from SLAPPs to seek personally identifying information, and would allow the courts to award the costs of litigation to the successful party on a special motion.

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[1] Defined in the proposed legislation as (A) Any written or oral statement made: (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (ii) In a place open to the public or a public forum in connection with an issue of public interest; or (B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

Lastly, the proposed legislation would exempt certain claims from the special motions.

Financial Plan Impact

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation. Enactment of the proposed legislation would not have an impact on the District's budget and financial plan as it involves private parties and not the District government (the Courts are federally-funded). If effective, the proposed legislation could have a beneficial impact on current and potential SLAPP defendants.

COMMITTEE PRINT

Committee on Public Safety & the Judiciary

November 18, 2010

A BILL

18-893

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To provide a special motion for the quick and efficient dismissal of strategic lawsuits against public participation, to stay proceedings until the motion is considered, to provide a motion to quash attempts to seek personally identifying information; and to award the costs of litigation to the successful party on a special motion.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this act, the term:

(1) "Act in furtherance of the right of advocacy on issues of public interest" means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest.

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

(2) "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(3) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

Sec. 3. Special Motion to Dismiss.

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

(c)(1) Except as provided in paragraph (2), upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specialized discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

Sec. 4. Special Motion to Quash.

(a) A person whose personally identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personally identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

Sec. 5. Fees and costs.

(a) The court may award a person who substantially prevails on a motion brought under sections 3 or 4 of this Act the costs of litigation, including reasonable attorney fees.

(b) If the court finds that a motion brought under sections 3 or 4 of this Act is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney fees and costs to the responding party.

Sec. 6. Exemptions.

This Act shall not apply to claims brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 7. Fiscal impact statement.

The Council adopts the attached fiscal impact statement as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 8. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

EXHIBIT B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

DENISE CECELIA SIMPSON, et al Plaintiffs, v.	Civil Action No. 2016 CA 1931 B
JOHNSON & JOHNSON, et al, Defendant.	

Washington, DC
January 13, 2017

The above-entitled action came on for a hearing before the Honorable MARISA DEMEO, Associate Judge, in Courtroom Number 311, commencing at approximately 2:35 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Plaintiff:
James Green, Esquire
Patrick Lyons, Esquire

On behalf of Defendant PCPC:
James Billings-Kang, Esquire

On Behalf of Defendant Imerys:
Angela Hart-Edwards, Esquire

On Behalf of Defendant Johnson & Johnson:
Chad Coots, Esquire

Sherry T. Lindsay, RPR (202) 879-1050
Official Court Reporter

P R O C E E D I N G S

THE DEPUTY CLERK: This is calling Denise Cecelia Simpson versus Johnson & Johnson, 2016 CA 1931 B. Parties please --

THE COURT: Parties can you state your names for the record.

MR. LYONS: Good morning, Your Honor. My name is Patrick Lyons and I represent the plaintiff, Ms. Denise Simpson.

MR. GREEN: Good afternoon, Your Honor. My name is James Green. I also represent Ms. Simpson.

THE COURT: All right. Good afternoon.

MR. BILLINGS-KANG: And good afternoon, Your Honor.

Oh, if you will, please.

MS. HART-EDWARDS: Good afternoon, Your Honor. Angela Hart-Edwards for Imerys.

Is it okay if we sit --

THE COURT: Sure. That is fine.

MR. COOTS: Good afternoon. Chad Coots representing Johnson & Johnson.

THE COURT: Okay. Good afternoon.

MR. BILLINGS-KANG: Good afternoon, Your Honor. James Billings-Kang on behalf of the Personal Care Products Council.

discovery, so we could certainly brief this issue further. But I'd say, I do not believe that the burden has shifted to the plaintiff to proving its causes of action because PCPC has not met that prima facie burden, which is in the statute. Thank you, Your Honor.

THE COURT: All right. There were just a couple of points that I want to go back to my chambers to take a quick look at. And then I will be back. If the parties can just return in 20 minutes, at a quarter to 4:00. We'll stand in recess until then.

MR. LYONS: Thank you, Your Honor.

MR. BILLINGS-KANG: Thank you, Your Honor.

(Recess taken.)

THE DEPUTY CLERK: Calling Denise Cecelia Simpson versus Johnson & Johnson 2016 CA 1931.

THE COURT: All right. Good afternoon. All parties are present. Thank you for your patience. All right. So just for the record, the Court is, of course, using the statutory language, DC Code 16-5502 on special motion to dismiss, specifically looking at subsection B, "If a party filing a special motion to dismiss under the section makes a prima facie showing that the claim at issue arises from an act in furtherance of a right of advocacy on issues of public interest, then the motion shall be granted, unless the responding party demonstrates that the claim is likely

to succeed on the merits, in which case the motion shall be denied."

So one of the issues that didn't come out as strongly in the briefs, but clearly came out in terms of the arguments is burden, who has the burden. And so the Court just wants to cite to the case that the parties have referenced, the Competitive Enterprise Institute versus Mann case, which came out in December of 2016 by the DC Appellate Court, 2016 DC.App Lexis 435, which states under the District's Anti-SLAPP Act, the party filing a special motion to dismiss must first show entitlement to the protections of the act by making a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, citing to the code. Once that prima facie showing is made, the burden shifts to the nonmoving party, usually the plaintiff, who must demonstrate that the claim is likely to succeed on the merits. If the plaintiff cannot meet that burden, the motion to dismiss must be granted and the litigation is brought to a speedy end. So the Court is using that statute and that framework as interpreted by the Court of Appeals in terms of the process of where the analysis starts and where it goes in terms of burden. If, in fact, the prima facie showing is established.

The Court also noted during oral argument -- so I

wanted to just make sure I made a point of addressing it -- there was back and forth about the use of California law. And so -- the Abbas District Court case had language in it that said, "In construing the Act, the Court cannot rely on guidance from the DC Court of Appeals, which has not yet published an opinion in interpreting the statute." Of course, this was I believe a 2013 case, so this was prior to some of the more recent litigation and decisions that have come up by the Court of Appeals. And then the District Court had said, Where, as here, the substantive law of the forum state is uncertain or ambiguous, the job of federal court is carefully to predict how the highest court of the forum state would resolve the uncertainty or ambiguity. With this in mind, the Court notes that the committee report prepared on the Anti-SLAPP Act emphasize that the statute followed the model set forth in a number of other jurisdictions. The DC Court of Appeals has accorded great weight to such reports in interpreting other DC statutes. Therefore, where necessary and appropriate, the Court will look to decisions from other jurisdictions, particularly California, which has a well developed body of case law interpreting a similar California statute for guidance and predicting how the DC court of Appeals would interpret the District's Anti-SLAPP statute.

Of course, the plaintiff points out that the

Circuit Court actually affirmed on different grounds and specifically said that the first issue before the Court is whether a Federal Court exercising diversity jurisdiction may apply the DC Anti-SLAPP Act's special motion to dismiss provision. The answer is no. Federal Rules of Civil Procedure 12 and 56 establish the standards for granting pretrial judgment to defendants in cases in Federal Court. A Federal Court must apply those Federal Rules instead of the DC Anti-SLAPP Act's special motion to dismiss provision. So technically as a matter of law, this Court would not cite to the District Court case. First of all, it wouldn't be precedent for this Court anyway, as the parties know. If anything, it would be persuasive, since they are not an appellate court to this Court. And then in light of the fact that the Circuit Court said District Court really shouldn't have ruled on the issue of Anti-SLAPP anyway. This Court doesn't decide this matter based on the District Court Abbes language. Nevertheless, I read it. And the Court actually agrees with what the District Court said. I understand that I have no basis to cite to it, since in essence, it was reversed, it was abrogated by the Circuit Court. But what this Court does know is what the DC Court of Appeals ordinarily does do and as it did in Mann itself when it was looking at the issues that were raised in the Mann case that was decided in 2016. For example, in

footnote 31, it did an analysis of what Colorado has done. It also talked about what other states have done. For example, the Mann case said other -- the Appellate Court, said other states have adopted similar approaches. California's Anti-SLAPP statute, which requires a showing that there is a probability that the plaintiff will prevail on the claim has been interpreted as requiring the plaintiff to state and substantiate a legally sufficient claim, et cetera. I am not going to cite the full language, because, obviously, there was a really different issue that was being contested in Mann, separate and apart from what is the really contested issue here. The point being that to the extent that this DC Court of Appeals has not specifically ruled on the legal issue that is facing this trial Court, this Court does look to other jurisdictions where this Court finds language to be similar, although not identical. The Court concedes that and plaintiff makes that point. But I found the language of the California Anti-SLAPP statute to be sufficiently similar. And the amount of litigation on Anti-SLAPP challenges at the California courts to be of such volume that this Court did find California court interpretations of California's Anti-SLAPP statute to be beneficial and persuasive, recognizing again it is not identical language. But it was similar enough that this Court did look to California law to be of help to this Court

in terms of trying to determine what the DC Court of Appeals ultimately, would interpret. Obviously, the DC Court of Appeals is the only ones who can tell me, ultimately, how they would interpret it. All I can do is do my best to make a proper interpretation and then the Court of Appeals can instruct this Court whether it got it right or got it wrong.

So the Court just -- this Court just wanted to highlight a couple of issues related to the burden and the California law because those were matters that I had not focused on extensively in preparing for today's hearing.

All right. Give me just a moment.

So turning first to whether the defendant PCPC, who is the party who has filed this special motion to dismiss has made a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, the Court focuses first on -- while the Court understands that full phrase must be analyzed, much of the debate, both in the briefs and in the oral arguments, focused on the definition of "on issues of public interest." And as I just a moment ago explained, since the DCCA has not yet ruled on the specific issue, this Court -- our statute when looking at the committee report has been modeled after Anti-SLAPP statutes in other jurisdictions. And the Court -- this Court found California's Anti-SLAPP statute to be sufficiently similar

to provide this Court some analysis that this Court found to be helpful. So I turned to the California courts for guidance on the issue, finding the language to be similar and similar enough to provide guidance. In Choose Energy versus American Petroleum Institute 87 F.Supp.3d 1218, Northern District of California 2015, the US District for the Northern District of California held that the defendant trade association's conduct fell within the protection of Anti-SLAPP because its conduct was noncommercial in nature and addresses energy policy, an issue that is currently the subject of pending legislative efforts and one of public concern. The Court further noted that an issue of public interest is an issue in which the public is interested. In LA Taxi Cooperative Inc. versus Independent Taxi Owners' Association of Los Angeles, 239 Cal.App.4th at 918, the Court held that commercial speech about a specific product or service is not a matter of public interest within the meaning of the Anti-SLAPP statute even if the product category is the subject of public interest and the products are regulated by public agencies. That was citing to Consumer Justice Center versus TriMedica International, 107 Cal.App4th at 595.

In this case, the LA Taxi case, the Court found that commercial speech was not protected by the Anti-SLAPP statute, because it was about a specific taxicab company,

not general public transportation by taxi companies. As the Court has listened very carefully to each side of the argument, it really -- plaintiff's arguments focused primarily on this -- call it logical thinking which is if the trade association is representing members and the members have commercial interests, therefore the Court must conclude that the trade association is a commercial interest, as opposed to a public interest. However, the Court distinguishes between when a trade association is promoting a specific product or the benefits of a specific product versus when a trade association is speaking more generally about products and the health and safety of those products as opposed to a specific commercial product named.

The Court does find in this case that PCPC has made a prima facie showing that its alleged acts were made in furtherance of the right of advocacy on issues of public interest. So I am focusing now on the public interest component. This is because plaintiff's complaint does not allege that PCPC made any representations regarding a particular product, only about the safety of talc in general. Further, defendant PCPC is a nonprofit trade association. It does not manufacture, design or sell any products. As a result, PCPC does not have, this Court concludes, a commercial interest to protect. While plaintiff argues that PCPC does represent the commercial

organizations, that is Johnson & Johnson and Imerys, which are profit-seeking corporations, this Court finds that PCPC's own speech is not commercial in nature. Further, PCPC's alleged acts fit squarely within the plain meaning of the statute of issues of public interest. The statute defines public interest to mean, an issue related to health or safety. Here, the safety of talc is clearly an issue related to health or safety.

I analyzed the public interest component first, because I actually think that was of most import in terms of the debate between the parties. That, obviously, is the issue that would need to be resolved by the Court of Appeals should this matter be appealed. All of the issues would need to be resolved, but that one is clearly an issue of first impression.

The Court now moves backwards in terms of the -- whether it is the -- this is an issue that arises from an act in furtherance of the right of advocacy. I took it a little bit out of order, just so that the Court could address the most contentious issue first. And now I turn to the first part.

In the briefs, the Court would conclude that the plaintiff concedes that if PCPC's advocacy was based on issues of public interest rather than on issues of private commercial interest, then at least some of the advocacy of

PCPC would meet this element. Although, in its briefs, plaintiff further argues that statements and actions among PCPC and its members, the other defendants, would not meet the element.

The statute defines act in furtherance of the right of advocacy on issues of public interest in three ways, as the parties have noted. One, a written or oral statement made in connection with an issue under consideration or review by a legislative or judicial body or any other official proceeding authorized by law. This is under the section 16-5501(1)(A)(i). Here, the complaint alleges that PCPC formed the talc interested party task force, a lobbying group regarding the safety of talc in response to a study regarding the safety of talc and that PCPC submitted scientific reports to government agencies. Defendant argues that this allegation clearly constitutes an act in furtherance of the right of advocacy in accordance with the first potential definition of what qualifies and the Court agrees. The Court finds that the alleged act meets the definition as PCPC submitted reports to government agencies.

The Court looks at the second manner in which it might be established that the issue arises from an act in furtherance of the right of advocacy, a written -- that is number two, a written or oral statement made in a place open

to the public or public forum in connection with an issue of public interest. This is section 16-5501 (1)(A)(ii). The complaint alleges that PCPC released information regarding the safety of talc to the public. The defendant argues that this constitutes an act in furtherance of the right of advocacy. Under the second definition, the Court does agree with defendant. The Court finds that the alleged acts meet the definition, as PCPC did release this information about the safety of talc to the public.

Looking at the third potential way that this part of the element can be established, any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public issues. The complaint alleges PCPC petitioned the government and communicated with the public regarding the safety of talc. The defendant argues this is an act in furtherance of the right of advocacy. Under this third catchall definition, the Court agrees, PCPC's actions fall within the catchall definition. So under any of the three, the Court finds that plaintiff meets the elements. The Court finds that the allegations in plaintiff's complaint fit within the definition of act in furtherance of the right of advocacy. And further having found that they are on issues of public interest, I find that the entire prima facie showing has been established by

the plaintiff. While plaintiff does argue both in her briefs and oral arguments and in her complaint that PCPC and the other defendants acted in concert to collectively defend talc use and that these statements, in which they were directed to the other defendants, that is, PCPC's statements to the other defendants, that those would not be acts in furtherance of a right of advocacy. The plaintiff fails to show what these statements were or how they would further her underlying claims. This Court find that plaintiff's additional argument fails.

This Court, in light of the full analysis of the elements that are required for the prima facie showing, which is the plaintiff's burden initially, this Court does conclude that the prima facie showing that a claim -- that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest has been met. The burden has been met by the plaintiff. That brings the Court to then the motion shall be granted, unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

So the -- going back to the Mann case for a moment -- again, citing to the Mann case, 2016 DC.App. Lexis 435, decided on December 22nd, 2016, the Court of Appeals said that we conclude that in considering a special motion

to dismiss, the Court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion. This standard achieves the Anti-SLAPP Act's goal of weeding out meritless litigation by ensuring early legal review of the legal sufficiency of the evidence, consistent with First Amendment principles while preserving the claimant's right to a jury trial. The Court also said that our analysis begins with the language of the statute, which requires that to prevail in opposing a special motion to dismiss, the opponent must demonstrate that the claim is likely to succeed on the merits, as neither the phrase nor any of its components is defined in the statute, we look to the language of the statute by itself to see if the language is plain and admits of no more than one meaning. Although we can be confident that on the merits refers to success on the substance of the claim, the meaning of the requirement that the opponent demonstrate that the claim is likely to succeed is more elusive. Use of the word demonstrate indicates that once the burden has shifted to the claimant. The statute requires more than mere reliance on allegations in the complaint and mandates the production or proffer of evidence that supports the claim. This interpretation is

supported by another provision in the act, section 16-5502(C) that states discovery upon the filing of a special motion to dismiss until the motion has been disposed of, unless it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome. If evidence were not required to successfully oppose a special motion to dismiss under section 16-5502(B), there would be no need for a provision allowing targeted discovery for that purpose. Moreover, unless something more than argument based on the allegations in the complaint is required, the special motion to dismiss created by the Act would be redundant in light of the general availability in all civil proceedings, regardless of the nature of the claim of motions to dismiss under Rule 12(B)(6).

The precise question the Court must ask, therefore, is whether a jury properly instructed on the law, including any applicable heightened fault and proof requirements could reasonably find for the claimant on the evidence presented. So the Court turns to the claims here, that is, the -- because the burden now shifts to whether the responding party has demonstrated that the claim is likely to succeed on the merits, as I have defined it by the Court of Appeals, how the Court of Appeals tells this Court how I must analyze it. The plaintiff here must offer evidence on

the negligence claim, that is the first claim, of the existence of a duty, violation of a standard of care, and injury resulting as a proximate cause of the violation. Here, plaintiff alleges that PCPC voluntarily undertook a duty of care to plaintiff by promulgating standards, norms and bylaws that govern control or inform the manufacturing, design, labeling of its member companies. That is the complaint, paragraph 79. Plaintiff further alleges that PCPC had the means and authority to control the safety, standards of the other defendants but breached its duty by failing to ensure that they complied with the standards. Defendant argues that the allegations are unsupported and the Court agrees with the defendant's position.

The plaintiff has failed to establish if the jury was properly instructed on the law, including any applicable heightened fault and proof requirements, the Court has to ask could a jury reasonably find for the claimant on the evidence presented? Here, the plaintiff has failed to establish that PCPC had any duty of care to her. Furthermore, defendant submits an affidavit by showing that PCPC has no authority to regulate its members and thus it could not have prevented the sale of products. Plaintiff presents nothing to counter that. Using the standard from the Mann decision, the Court finds that on the claim of negligence a jury properly instructed on the law could not

reasonably find for the claimant on the evidence presented.

Turning to the fraud claim. Plaintiff must offer evidence establishing, one, a false representation; two, in reference to a material fact; three, made with knowledge of its falsity; four, with intent to deceive; and, five, action is take in reliance upon representation. Plaintiff has failed to address the specific elements and how she would succeed on the merits. Defendant has argued both its actions were protected under the First Amendment under Noerr-Pennington doctrine and, further, plaintiff has no evidence that defendant made any representations with the knowledge of its falsity and is unlikely to have any evidence that she relied on statements made by PCPC prior to using talc. The Court agrees that plaintiff has not put forward sufficient evidence on the two elements of fraud highlighted by defendant to establish a likelihood of success on the fraud claim, specifically that there needs to be sufficient evidence where a jury properly instructed on the law, could reasonably find for the claimant on evidence presented on the issue of the element of -- that PCPC made with knowledge of its falsity, whatever statement it was. And there is not sufficient evidence that a reasonable juror could find for the claimant on that element. And, further, there is not sufficient evidence presented by the plaintiff on the element where a reasonable juror could -- a jury

could reasonably find for the claimant on the element of -- that action was taken in reliance upon the representation, by -- that is, action taken by the plaintiff in reliance upon the representation by defendant PCPC. So the Court finds using the standard taken from Mann that a jury properly instructed on the law, could not reasonably find on the fraud claim for the claimant on the evidence presented.

This brings the Court to the conspiracy claim. Plaintiff must offer evidence establishing an agreement between two or more persons to participate in an unlawful act or in a lawful act in an unlawful manner, an injury caused by an unlawful overt act or performed by one of the parties to the agreement, pursuant to and in furtherance of the common scheme. In addition, civil conspiracy depends on the performance of some underlying tortious act. It is thus not an independent action. It is rather a means for establishing a vicarious liability for the underlying tort.

Plaintiff has failed to address the specific elements of conspiracy. Defendant argues plaintiff cannot present any admissible evidence that PCPC either performed an unlawful act or a lawful act in an unlawful manner or reached an agreement with one or more of the other defendants, which was part of a common scheme for one of the codefendants to commit an unlawful overt act against the plaintiff. The Court agrees with the defendant. Plaintiff

has not presented sufficient evidence on the conspiracy claim to establish a likelihood of success on the merits. In other words, should a -- if a jury properly instructed on the law were presented with the evidence that the plaintiff has presented to this Court at this stage of this motion, the jury could not reasonably find for the claimant on the claim of conspiracy.

In essence, in plaintiff's brief, it just seems to have foregone any argument on these points on the issue of likelihood of success. But the Court is obligated, in my opinion, to go through the entire analysis. Instead plaintiff argues that she would be prejudiced without additional limited discovery as provided for under the Act, which, the Act does clearly provide that when it appears -- and this is under 16-5502(C)(2), when it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the Court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery. Here, plaintiff -- it is this Court's assessment that plaintiff has not demonstrated what targeted discovery would be needed to defeat the motion. Further, defendant states and plaintiff not only did not oppose the statement in its briefs but in court acknowledged that plaintiff has

already received thousands upon thousands of pages of discovery in other similar litigation and even in this very litigation. And despite having received all of that discovery, there doesn't appear to this Court to be any demonstration by the plaintiff of what additional targeted discovery would assist the plaintiff in defeating the motion. Seeing that the plaintiff did not oppose the defendant's arguments that it could not succeed under the claims, but instead requested additional discovery, the Court finds that plaintiff cannot establish likelihood of success on the underlying claims and the Court is not ordering additional discovery as plaintiff has not demonstrated what targeted discovery would be necessary to defeat the motion, nor that additional discovery will likely enable the plaintiff to defeat the motion.

So looking at the statute as whole, again, the Court first found that the plaintiff did establish its -- and presented its prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, the motion to dismiss must be granted unless the responding party demonstrates that the claim is likely to succeed on the merits. I have found that the responding party has not demonstrated that the claim is likely to succeed on the merits. So it is mandatory that the motion be granted. The exception being

if it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the Court may order that specified discovery be conducted, however, this Court has concluded that it will not approve targeted discovery finding for the reasons that I have already stated. That presents the Court with the one outcome that the statute tells me to do and that is I am granting the special motion to dismiss by PCPC.

So let's turn briefly in light of that to the question of attorneys' fees. I will take brief argument on that. I will hear from PCPC first.

MR. BILLINGS-KANG: Thank you, Your Honor. I think that point is very clear in terms of a presumptive award of attorneys' fees. It is mandated by the statute and that is a question that was considered by the Court of Appeals in Doe against Burke, not the 2014 opinion, but the 2016 opinion, in which the Court interpreted the statute to entitle the moving party who prevails to a presumptive award of reasonable attorney fees on request. And, Your Honor, we have made that request respectfully. And we would ask that the Court grant that motion. Thank you.

THE COURT: All right.

Plaintiff.

MR. LYONS: Your Honor, there is a provision that -- there is presumptive award of attorney fees in cases

in which motion to dismiss is granted, unless special circumstances exist. I do believe -- and plaintiff's position is that this is a special circumstance. This is an issue, as Your Honor mentioned, of first impression, has not been litigated before. And plaintiff in filing its complaint had no idea that a motion to dismiss based on the Anti-SLAPP statute would be filed, did not anticipate this issue. And we are not specifically filing this lawsuit with the SLAPP provisions in mind. And we do believe there are special circumstances given that this is the first time this issue has been brought before the Court and a matter of first impression and that attorneys' fees should not be granted in this case.

THE COURT: Okay.

MR. LYONS: Thank you, Your Honor.

THE COURT: So the Court notes the standards the attorneys cited to is the same standard the Court has referenced in making a decision here, DC Code 16-5504, "The Court may award a moving party who prevails in whole or in part on a motion brought under section 16-5502 or section 16-5503, the cost of litigation, including reasonable attorneys' fees." And cited to by defendant, Doe v. Burke and the language referenced by plaintiff, that Court has held that DC Code 16-6504(A) entitles the moving party who prevails on a special motion to quash or dismiss to a

presumptive award of reasonable attorneys' fees on request unless special circumstances would render such an award unjust.

In the Doe case itself, the Court of Appeals did not find special circumstances to render such an award unjust, despite noting that the losing parties' attorneys were employed by a public interest organization, that the losing party was represented pro bono and that the losing party had rejected an earlier settlement offer. The Court awarded the prevailing party its attorneys' fees. So I have heard the argument by plaintiff that this is a matter of first impression, but this Court does not find that that falls under this Court's interpretation of what would constitute special circumstances. And so the Court is going to follow the presumptive nature of the award and I am granting an award of reasonable attorneys' fees, since it has been requested by defendant. And defendant, you can have -- how many -- do you need ten days?

MR. BILLINGS-KANG: Ten days, Your Honor, is sufficient.

THE COURT: Ten days from today to make a filing so that the Court can determine whether what you are requesting are reasonable attorney fees.

All right. As you noted, I do have a court reporter. I know you have been writing furiously, but if

anyone needs the transcript, I have asked her to be here in light of the unique nature of my ruling. Okay.

Anything further from plaintiff at this time?

MR. LYONS: Nothing further, Your Honor.

THE COURT: Anything further from defendant?

MR. BILLINGS-KANG: Nothing further, Your Honor. Thank you very much.

THE COURT: Thank you. Parties are excused and thank you for accommodating my schedule.

MR. BILLINGS-KANG: Thank you, Your Honor.

(Proceedings adjourned.)

EXHIBIT C

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE AMERICAN BEVERAGE ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION, Plaintiffs, v. THE CITY AND COUNTY OF SAN FRANCISCO, Defendant.	Case No.: 3:15-cv-03415-EMC

EXPERT REPORT OF DR. RICHARD A. KAHN

January 12, 2016

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I. QUALIFICATIONS

1. From 1985 until my retirement in June 2009, I was the Chief Scientific and Medical Officer of the American Diabetes Association ("ADA"). My position included senior staff oversight for the ADA's research grant program, two certification programs, all clinical guidelines and scientific position statements, professional education programs, and general information resources. At the ADA, I was involved with the development of communications to the public, health care professionals, and others about scientific issues.

2. I am currently an independent consultant, researcher, and a clinical professor. I consult primarily on diabetes, obesity, and nutrition for health-related organizations. In addition, I facilitate the development of scientific consensus statements and assist health-related organizations in their professional activities. I also perform independent research and hold the position of Clinical Professor of Medicine at the University of North Carolina.

3. I served on the National Diabetes Quality Improvement Alliance from 2000 to 2007, National Diabetes Education Program Steering Committee from 1995 to 1997, and the Center for Disease Control's Diabetes, Technical Advisory Committee from 1992 to 1998, among other advisory boards and national organizations.

4. From 1978 to 1985, I was the Chief of Scientific Affairs for the American Red Cross. From 1978 to 1985, I was an Associate Professor of Pathology at the Washington University School of Medicine, in St. Louis, Missouri.

5. A copy of my curriculum vitae, including publications I have authored, is attached as Appendix A.

6. In the last four years, I have not testified in any trials or depositions, or served as a testifying expert witness. I have not testified since the mid-1980s.

7. A list of documents I have considered in forming my opinion is included in Appendix B. However, this list cannot be exhaustive as my opinions are based on the cumulative knowledge over the course of my entire career.

8. I reserve the right to amend or supplement my opinion in response to information and testimony that is submitted in this matter as well as any scientific developments that may impact my opinion.

9. I am not being compensated in any fashion for my time or effort for rendering an opinion in this matter. I am being reimbursed for travel costs (transportation, hotel, meals, etc.) I may incur as a result of this matter. Furthermore, I have never received any form of compensation or funding from the beverage industry.

II. SUMMARY OF OPINIONS

10. Counsel for the American Beverage Association ("ABA") have asked me to address whether:

1. Beverages with added sugar play a role in the development of obesity and diabetes, including whether those questions are a matter of scientific debate and controversy.

2. The City and County of San Francisco's warning – "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay" (the "Warning") – is scientifically vague, misleading, or controversial.

11. There is no scientific consensus that added sugar (including added sugar in beverages) plays a unique role in the development of obesity and diabetes. Rather, there is a vigorous and ongoing scientific debate over the potential role of added sugar per se – including added sugar in beverages – in the development of obesity and diabetes. Added sugar is not alone: a recent review by a prominent Stanford Prevention Research Center researcher noted that "[a]lmost every single nutrient imaginable has peer reviewed publications associating it with

almost any outcome," even though very few hypotheses have withstood rigorous trials.[1] Indeed, more broadly, there is no consensus on the cause(s) or contributing factor(s) of obesity and diabetes. Various hypotheses that have been put forth include the consumption of calories in excess of energy expenditure (from various sources), an increase in sedentary lifestyles, genetic factor(s), chemicals in the environment and/or in food, and/or other factor(s) that could be responsible for the high rates of obesity and diabetes in the U.S. and Westernized world.

12. Although I recognize there is significant debate over the subject, based on my review of the available scientific data and findings in the literature, I do not believe that added sugar uniquely contributes to obesity or to related conditions like diabetes, which tends to develop subsequent to chronic obesity. I believe that consuming an amount of calories that exceeds one's energy output is the major factor that leads to obesity and, consequently, may lead to Type 2 diabetes. The data show that if total caloric intake is kept constant and the only difference is the source of some of those calories – some individuals receive more added sugar while others receive less – there is no weight gain. It is only when total calories are increased or decreased, whether through the addition or subtraction of added sugar or any other source of calories, and the remainder of an individual's diet and physical activity are kept constant, that individuals gain or lose weight. There is nothing unique about added, or natural, sugar that may lead to obesity and diabetes more than any other source of excess calories. As far as metabolism is concerned, all sugars are treated in the same way, regardless of source or whether it is in solid food or in a liquid.

13. I also do not believe that added sugar uniquely contributes to diabetes. Type 2 diabetes – by far the most prevalent type of diabetes – is a complex disease, the cause(s) of

[1] Ioannidis JP. Implausible Results in Human Nutrition Research. BMJ. 2013; 347:f6698.

which are not fully understood. The available evidence does not establish that added sugar in and of itself, in liquid or solid form, causes diabetes. In addition, there is no evidence that a reduced consumption of added sugar can prevent the onset of diabetes. If there is any adverse effect from the consumption of added sugar, it is most likely due entirely to the calories it provides, which makes it indistinguishable from any other source of calories.

14. In sum, based on the available scientific data, when consumed as part of a diet that balances caloric intake with energy output, consuming beverages with added sugar does not contribute to obesity or diabetes.

15. The Warning is scientifically inaccurate, misleading, unhelpful to consumers, and undermines the scientific process. The Warning implies that consuming beverages with added sugar will uniquely contribute to obesity and diabetes without any regard to how much is consumed, or the consumer's overall dietary and exercise pattern, or genetic makeup. The Warning also implies that there is no safe amount of sugar-sweetened beverages that can be consumed, which is contrary to the views of many scientists (including me) and organizations, including the U.S. Food and Drug Administration ("FDA") and the most recent 2015-2020 Dietary Guidelines for Americans. In addition, the Warning implies that the body metabolizes added sugar differently – and in a more harmful way – than natural sugar, which is biologically incorrect. The human body does not distinguish between sugars found in a food and those added to a food, or between sugar added to solid food and sugar added to a beverage. Based on the available scientific data, when consumed as part of a diet that balances caloric intake with energy expenditure, consuming beverages with added sugar does not contribute to obesity or diabetes.

III. SCIENTIFIC CONTEXT

A. Obesity And Diabetes

16. Obesity in adults is defined as a body mass index ("BMI" – a standard measure of body fatness which is based on height and weight) over 30. An individual with a BMI of 25 to 29.9 is considered overweight. A BMI between 18.5 and 24.9 is considered normal or healthy weight.[2] Approximately 35% of adults in the United States are obese.[3] Obese individuals are generally at risk for many chronic diseases including diabetes.[4] Obesity is a complex condition, the cause(s) of which are unclear, other than the consumption of calories in excess of expenditure over an extended period of time.[5] Moreover, it is unclear why some individuals consume more calories than are expended or conversely expend fewer calories (less energy) than are consumed. To maintain body weight, energy (calorie) intake must equal energy (calorie) expenditure, which is the concept of energy balance.

17. Diabetes is also a complex disease, the cause(s) of which we do not fully understand. Approximately 9% of Americans have been diagnosed with diabetes.[6] There are two major types of diabetes. Type 1 diabetes, which affects approximately 5% of those affected with the disease, is an auto-immune condition in which the body destroys its own insulin-

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[2] Defining Adult Overweight and Obesity. Centers For Disease Control And Prevention. http://www.cdc.gov/obesity/adult/defining.html. Last updated April 27, 2012.

[3] Adult Obesity Facts. Centers For Disease Control And Prevention. http://www.cdc.gov/obesity/data/adult.html. Last updated September 21, 2015.

[4] What Are the Health Risks of Overweight and Obesity? National Institute Of Health, National Heart Lung And Blood Institute. https://www.nhlbi.nih.gov/health/health-topics/topics/obe/risks Last updated July 13, 2012.

[5] Kahn R, Sievenpiper JL, Dietary sugar and body weight: have we reached a crisis in the epidemic of obesity and diabetes? We have, but the pox on sugar is overwrought and overworked. Diabetes Care. 2014; 37:957-962 at 962.

[6] 2014 National Diabetes Statistics Report. Centers For Disease Control And Prevention. http://www.cdc.gov/diabetes/data/statistics/2014statisticsreport.html.

producing cells in the pancreas. Without insulin, a hormone that regulates blood sugar, there is an abnormal elevation of blood sugar levels.

18. Type 2 diabetes, constituting approximately 95% of individuals with the disease, results from a combination of defective insulin action and decreased insulin secretion. Both Type 1 and Type 2 diabetes have genetic component(s) and environmental component(s), albeit different from one another, and the exact nature of each is unclear. The vast majority of people with Type 2 diabetes are obese or overweight, which is the primary risk factor for the disease.[7] When referring to diabetes in this report, I am referring to Type 2 diabetes. However, I note that the Warning does not distinguish between Type 1 and Type 2 diabetes. Of importance, there is no evidence to my knowledge that Type 1 diabetes is associated with obesity.

19. The number of people with (prevalence of) obesity and diabetes in the United States and in other Westernized countries has increased over the last several decades, as I explain in more detail below. In adults, there was a significant increase in obesity among adults until about 2011, after which time the prevalence has remained stable.[8] There was a significant increase in obesity among youth from 1999 until 2003, at which time the prevalence plateaued through 2012.[9]

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[7] Your Weight and Diabetes. Obes Soc. http://www.obesity.org/content/weight-diabetes. Last updated February 2015; Abdullah A, Peeters, A, de Courten, M, Stoelwinder J. The Magnitude of Association Between Overweight and Obesity and the Risk of Diabetes: A Meta-Analysis of Prospective Cohort Studies. Diabetes Res Clin Pract. 2010; 89:309-19

[8] Ogden CL, Carroll MD, Fryar, CD, Flegal KM. Prevalence of obesity among adults and youth: United States 2011-2014. NCHS Data Brief. 2015; :1-8 at 5.

[9] Ogden CL, Carroll MD, Kit BK, Flegal KM. Prevalence of Obesity and Trends in Body Mass Index Among US Children and Adolescents 1999-2010. JAMA. 2012; 307:483-490. http://jama.jamanetwork.com/article.aspx?articleid=1104932; Ogden CL, Carroll MD, Kit BK, Flegal KM. Prevalence of Childhood and Adult Obesity in the United States 2011-2012. JAMA. 2014; 311:806-814. http://jama.jamanetwork.com/article.aspx?articleid=1832542.

B. Types Of Sugar

20. There are many types of sugar. They are all carbohydrates, composed of carbon, hydrogen, and oxygen. Simple sugars – including glucose, fructose, and galactose – are monosaccharides. Disaccharides include sucrose, maltose, and lactose. Scientists who study the relationship between sugars and obesity and Type 2 diabetes focus predominantly on sucrose – which is composed of one molecule of glucose and one molecule of fructose. The focus on sucrose is because it is the most commonly consumed sugar.[10] Fructose is not found in isolation in nature and is rarely, if ever, consumed by itself. It is important to note that the metabolism of fructose differs considerably when glucose is present or when it is absent. Thus studies where the effects of consuming pure fructose are evaluated, in the absence of glucose, cannot be assumed to apply to normal eating situations where both glucose and fructose are consumed together. In addition, studies in which pure fructose is given in amounts well in excess or at the extreme levels of normal consumption, do not realistically convey how the body metabolizes this sugar under ordinary circumstances.

21. Sucrose occurs naturally in many plants, is commonly obtained from sugarcane or sugar beets, and is often known as table sugar. High fructose corn syrup ("HFCS") is derived from the starch in corn and is composed largely of glucose and fructose, sugars that are present in many other plants and ingredients in the diet.[11]

22. HFCS is primarily made in two forms: (1) HFCS-55; and (2) HFCS-42. HFCS-55 is the more common type of HFCS and is comprised of 55% fructose, 42% glucose, and 3%

[10] Kahn R, Sievenpiper JL, Dietary sugar and body weight: have we reached a crisis in the epidemic of obesity and diabetes? We have, but the pox on sugar is overwrought and overworked. Diabetes Care. 2014; 37:957-962 at 959-60.

[11] Kahn R, Sievenpiper JL, Dietary sugar and body weight: have we reached a crisis in the epidemic of obesity and diabetes? We have, but the pox on sugar is overwrought and overworked. Diabetes Care. 2014; 37:957-962 at 957.

glucose polymers. HFCS-42 is composed mainly of 42% fructose, 53% glucose, and 5% glucose polymers.[12]

23. Contrary to popular belief, sucrose and HFCS-55 are very similar. Sucrose and HFCS-55 (the most common form) are both about half glucose and half fructose. Honey is also similarly about half glucose and half fructose. There are two primary differences between HFCS and sucrose. First, HFCS contains water and sucrose does not. Second, in sucrose, a chemical bond joins the glucose and fructose; in HFCS, no bond joins the glucose and fructose – the two molecules are free in solution, similar to the free glucose and fructose in honey or the free glucose and fructose in foods without added forms of these sugars. HFCS has some different properties that are beneficial in food and drink preparations. For example, because HFCS is in liquid form, it allows for easier handling compared to sucrose, which is generally transported in solid form. These benefits are why HFCS is commonly used as a sweetener. It should also be noted that in an acidic liquid environment, such as a soft drink, the bond that joins the fructose and glucose of sucrose is broken fairly rapidly. This means both HFCS sweetened beverages and sucrose sweetened beverages have what is called "free" glucose and fructose, which is another reason why both HFCS and sucrose-sweetened beverages are virtually the same. Most important of all, sucrose and HFCS at the same concentration have no known metabolic differences.

24. When sucrose or HFCS is used as an ingredient in food, that food is commonly referred to as having "added sugar." From a biological perspective, the terms "sugar," "total sugar," "added sugar," and "caloric sweetener," almost always mean a mixture of glucose and

[12] Klurfeld DM, Foreyt J, Angelopoulos TJ, Rippe JM. Lack of Evidence For High Fructose Corn Syrup As The Cause Of The Obesity Epidemic. Int J Of Obes. 2013; 37:771-773. http://www.nature.com/ijo/journal/v37/n6/full/ijo2012157a.html.; White JS. Straight talk about high-fructose corn syrup: what it is and what it ain't. Am J Clin Nutr. 2008; 88(suppl):1716S-21S.

fructose, either as sucrose, HFCS, or some other source of these sugars. As noted above, sugars, including glucose and fructose, are also naturally occurring in many foods and beverages.

25. There is no difference between how humans metabolize "added sugar" and how they metabolize sugar that is naturally present in a food or beverage.[13] This means that there is no difference between added sugar or naturally-occurring sugar in food or beverages and their impacts on health – including whether they contribute to obesity or Type 2 diabetes. As mentioned above, the metabolism of sucrose, whether added or not, is the same as the metabolism of HFCS. There is also no material difference in caloric contribution or taste between sucrose and HFCS. Thus, the sugars in sucrose and in HFCS are essentially the same in all regards.

C. Average Daily Calorie And Sugar Consumption

26. Added sugar is used in various foods and beverages to add taste, texture, and shelf life, among other reasons. Adults consume an average of about 13% of their daily calories from added sugars in foods and beverages.[14] On average, about two-thirds of those calories, or 8.5% of adults' total daily energy intakes, come from added sugar in foods (excluding beverages), which means that, on average, about one third of those calories (or 4.5% of total calories), come from added sugar in beverages, including self-sweetened beverages like coffee and tea.[15] It is important to note from these statistics that the vast majority of total energy consumption (greater

[13] Klurfeld DM. What Do Government Agencies Consider In The Debate Over Added Sugars? Adv Nutr. 2013; 4:257-261.

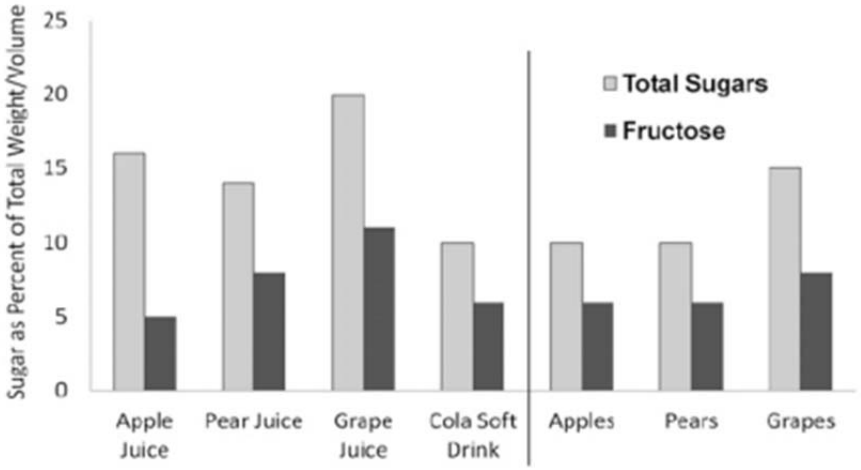
[14] Ervin RB, Ogden CL. Consumption of added sugars among U.S. adults, 2005–2010. NCHS Data Brief. 2013; :1-8. http://www.cdc.gov/nchs/data/databriefs/db122.htm.

[15] *Id.*; *see also* DeSalvo KB, Olsen R, Casavale KO. Dietary Guidelines for Americans [statement by the US Department of Health and Human Services]. JAMA. Published online January 7, 2016.

than 95%) comes from sources other than sugar-sweetened beverages. Consumption patterns are similar in children.[16]

27. Also, as shown in Figure 1, fruit juice and popular fruits (apples, pears) can have the same or more sugar than sugar-sweetened beverages.[17]

Figure 1: Total Sugars And Fructose In Raw Fruits, Fruit Juices, And Colas.



Total sugars and fructose in raw fruits, 100% fruit juices, and cola soft drink (g/100 mL or g).[18]

28. On average, Americans today consume more calories overall than they did in prior decades. According to the U.S. Department of Agriculture's data, the average American consumed 2,039 calories in 1970, and 2,544 calories in 2010.[19] That is a 25% increase over a

[16] Ervin RB, Kit BK, Carroll MD, Ogden CL. Consumption of added sugar among U.S. children and adolescents, 2005-2008. NCHS Data Brief. 2012; :1-8 http://www.cdc.gov/nchs/data/databriefs/db87.htm.

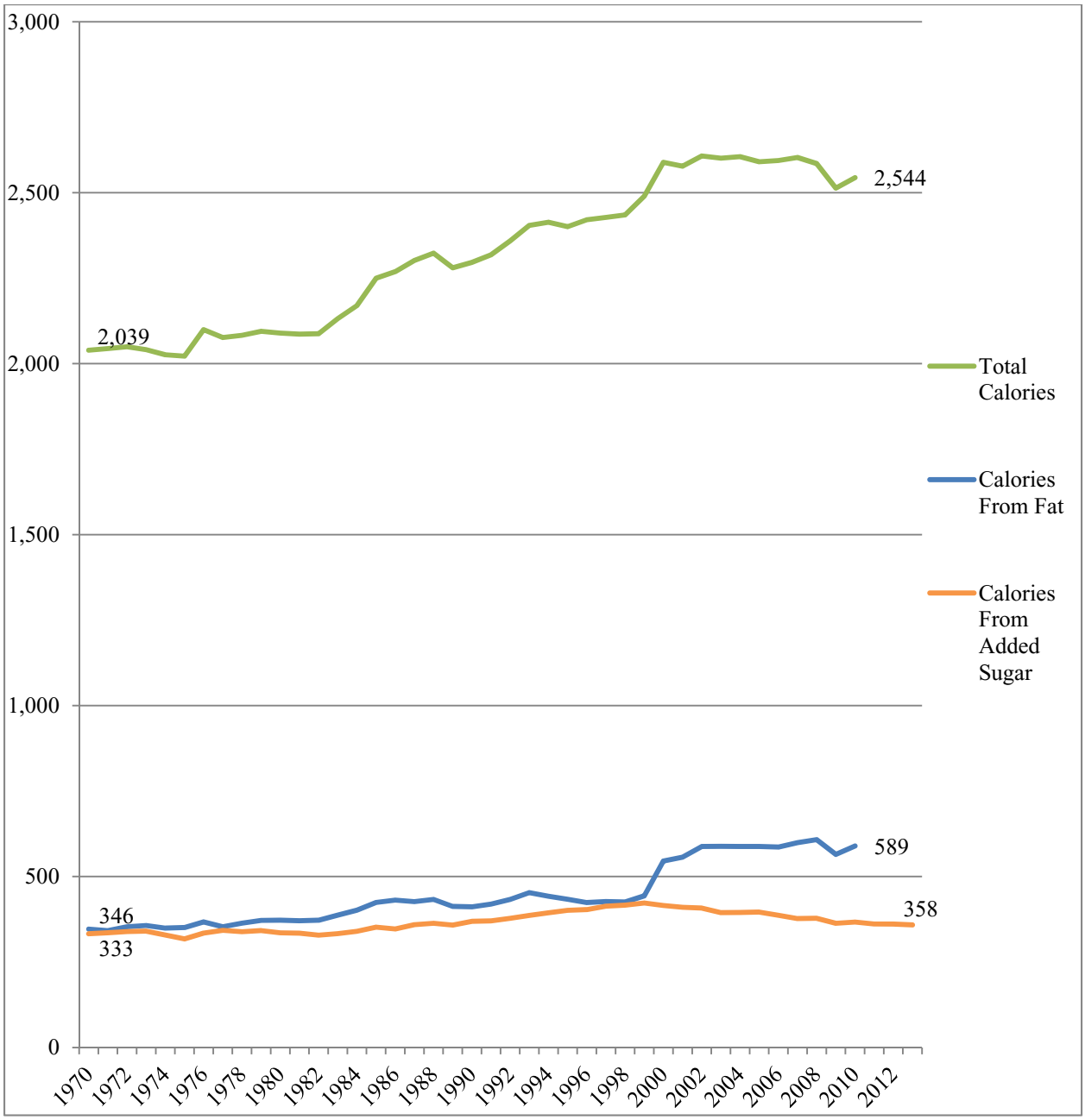
[17] Klurfeld Adv Nutr. 2013.

[18] *Id.*

[19] Food Availability (Per Capita) Data System. United States Department of Agriculture Economic Research Service. http://www.ers.usda.gov/data-products/food-availability-%28per-capita%29-data-system/.aspx. Last updated February 1, 2015. The USDA uses a proxy method for consumption, which is derived from food availability data and adjusted in various ways to approximate consumption.

relatively short period and, importantly, it is the period of time during which rates of obesity and diabetes increased dramatically.

Figure 2: Comparison Of Total Calories Consumed To The Sources Of Those Calories From 1970 To 2012[20]



[20] Food Availability (Per Capita) Data System. United States Department of Agriculture Economic Research Service. http://www.ers.usda.gov/data-products/food-availability-%28per-capita%29-data-system/.aspx. Last updated February 1, 2015.

29. In Figure 2, you can see that added sugar consumption began to increase around 1982 until 1999, and fat consumption increased during the same period. Thereafter, however, added sugar consumption decreased whereas fat consumption increased dramatically. Total calorie consumption from 1970 to 2012 increased by approximately 500 calories, and only roughly 5% of that increase (about 25 calories) came from an increase in added sugar consumption. About 95% of total calorie consumption increase during this time came from other sources, about half of which was from an increased consumption of fats.

30. Average per capita added sugar consumption has been declining in the United States since at least 1999.[21] Between 1999 and 2008 alone, average per capita added sugar consumption decreased from about 100 grams per day to about 77 grams per day – a 23% decline over the decade.[22] Two-thirds of that decrease came from decreased regular soft drink consumption – from approximately 37 grams per day to 23 grams per day, for a 37% decrease in sugar-sweetened beverage consumption.[23] Of note, obesity rates have not declined despite the dramatic decline in added sugar and sugar-sweetened beverage consumption since 2003:[24]

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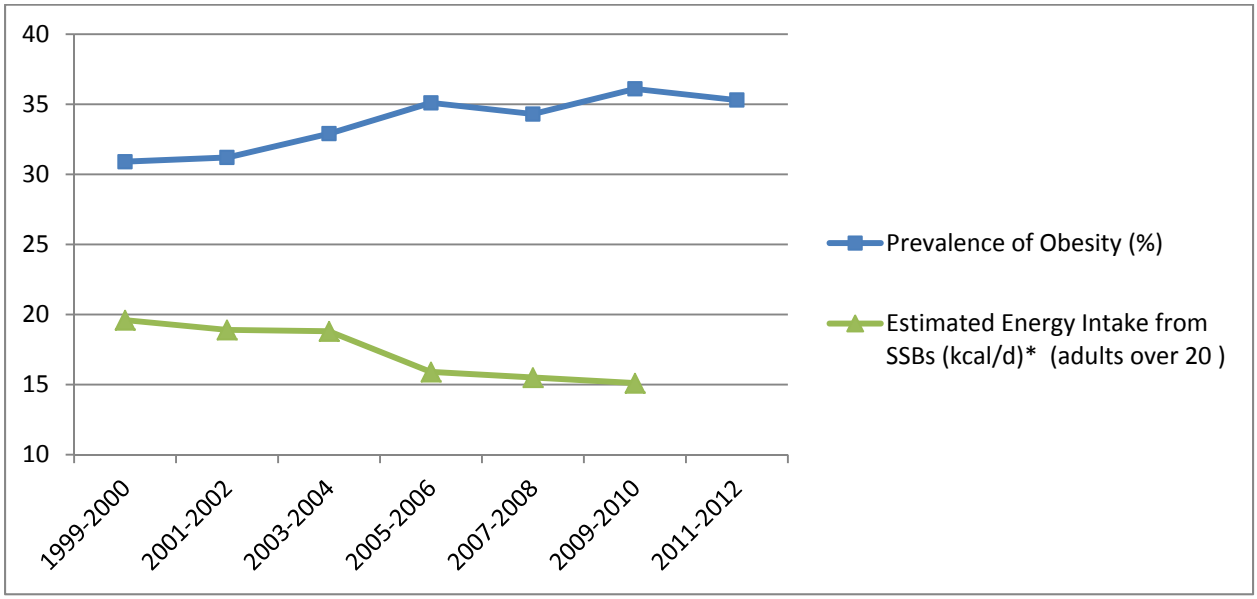
[21] Welsh JA, Sharma AJ, Grellinger L, Vos MB. Consumption of Added Sugars is Decreasing in the United States. Am J Clin Nutr. 2011; 94:726-734.

[22] *Id.*

[23] *Id.*; Kit BK, Fakhouri, THI, Park S, Nielsen SJ, Ogden DL. Trends In Sugar-Sweetened Beverage Consumption Among Youth And Adults In The United States: 1999-2010. Am J Clin Nutr. 2013; 98:180-188. http://ajcn.nutrition.org/content/98/1/180.full.pdf+html.

[24] Fryar CD, Carroll MD, Odgen CL. Prevalence of Overweight, Obesity, and Extreme Obesity Among Adults: United States, 1960-1962 Through 2011-2012. Centers For Disease Control And Prevention. http://www.cdc.gov/nchs/data/hestat/obesity_adult_11_12/obesity_adult_11_12.htm. Last updated September 19, 2014.

Figure 3: Adult U.S. Obesity Rates And Sugar-Sweetened Beverage Consumption



* Energy Intake Rates shown as 1 kcal/d = 10 kcal/d.[25]

31. These trends indicate that, at the population level, the large and sustained reduction in sugar-sweetened beverage consumption over the last 10+ years has not reduced obesity rates.

D. Descriptions Of Scientific Studies Related To Sugar Consumption

32. Different types of scientific studies can be, and are, used to study the effects of sugar consumption. These include randomized controlled trials ("RCTs"), prospective cohort studies, and ecological reports.

33. RCTs are the most reliable type of study to ascertain the effect of a specific food because their design can reduce the effects of factors other than the food being tested, *i.e.* confounding factors. In RCTs, researchers test whether an intervention (such as modifying sugar-sweetened beverage consumption) has an effect on an outcome (such as weight change). One group of subjects, called the intervention arm, receives the intervention. Changes in those

[25] Kahn & Sievenpiper 2014; Kit 2013.

subjects are measured against changes, if any, in control subjects, who do not receive the intervention. Randomly placing subjects in either the intervention or control arm eliminates any and all differences between the subjects in the intervention or control arms, assuming that the only difference between the groups is the intervention itself. Also, in virtually all RCTs, the exact design of the study, the outcomes to be determined, and the statistical analyses are almost always (as they should be) pre-specified, which means that they are decided upon prior to the initiation of the study. This eliminates many potential biases that are commonly found in other study designs, where the methodology is almost always not pre-specified.

34. Evidence from prospective cohort studies is not as strong as that derived from RCTs. In a prospective cohort study, a population of individuals is followed for a period of time and outcomes of interest are documented. These outcomes are then related to one or more characteristics of the population. Such characteristics could be the body weight of the subjects, specific foods consumed over time, education levels, race, gender, or other variables. Thus, cohort studies describe whether there is an *association* between two variables, *e.g.*, body weight and heart attacks. The design of cohort studies precludes a definitive answer to the question of *why* the variables appear to be related. One variable may actually cause a change in another variable, or the relationship between the variables may be influenced to the same extent by yet a third (possibly unknown) variable; this is known as confounding. Or the relationship between the variables may be spurious, which can result from biases and flaws in the study design and analysis. Therefore, in a cohort study one cannot conclude that a particular variable *causes* or *contributes to* a particular outcome.[26] Instead, they only reflect *associations*. For these reasons,

[26] Kaiser KA, Shikany, JM, Keating KD, Allison DB. Pro v Con Debate: Role of sugar sweetened beverages in obesity: Will reducing sugar-sweetened beverage consumption reduce

prospective cohort studies provide a secondary level of evidence but do not, by themselves, establish causation.[27] They generate associations that should be studied in RCTs.

35. Ecological reports describe high-level changes at the population level, like the obesity and sugar-sweetened beverage consumption rates discussed above. These studies compare trends in a large population but do not measure changes in individuals. The data are often derived from population-wide survey measures and have little or no ability to control for important variables. Ecological reports are viewed as the least reliable source of information about the influence of a risk factor on an outcome.

IV. THERE IS CONSIDERABLE DEBATE OVER WHETHER SUGAR-SWEETENED BEVERAGES UNIQUELY CONTRIBUTE TO OBESITY OR DIABETES

36. Whether or not there actually is a meaningful link between sugar-sweetened beverages and obesity and diabetes is the subject of controversy and ongoing significant debate.

37. For example, a colleague from the University of Toronto's Department of Nutritional Science and I recently participated in a written debate in the American Diabetes Association's journal *Diabetes Care*. The debate centered around the "controversy in regards to sugar-sweetened drinks and the increased dietary intake of glucose and high-fructose corn syrup as a major contributor of obesity and metabolic syndrome."[28] As the journal explained:

> In the point narrative, Drs. Bray and Popkin report that 'consumption of soft drinks has increased fivefold since 1950' and that 'consumption of sugar-sweetened beverages (SSBs) is related

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obesity? Evidence supporting conjecture is strong, but evidence when testing effect is weak. Obesity Reviews. 2013; 14:620-633.

[27] Kaiser KA, Shikany, JM, Keating KD, Allison DB. Pro v Con Debate: Role of sugar sweetened beverages in obesity: Will reducing sugar-sweetened beverage consumption reduce obesity? Evidence supporting conjecture is strong, but evidence when testing effect is weak. Obesity Reviews. 2013; 14:620-633.

[28] Cefalu WT. A "Spoonful of Sugar" and the Realities of Diabetes Prevention. Diabetes Care. 2014; 37:906-908.

> to the risk of diabetes, the metabolic syndrome, and cardiovascular disease…Thus, from their report, SSBs may be considered a culprit in the epidemic of obesity and the metabolic syndrome. In the counterpoint narrative, Drs. Kahn and Sievenpiper suggest that 'there is no direct evidence that sugar itself, in liquid or solid form, causes an increase in appetite, decreases satiety, or causes diabetes.' Thus, they state 'if there are any adverse effects of sugar, they are due entirely to the calories it provides, and it is therefore indistinguishable from any other caloric food.'[29]

The *Diabetes Care* journal editor explained that "both author groups clearly defend their positions, and in this regard, it is obvious we have more work to do to fully understand this area of research."[30]

38. As a U.S. Department of Agriculture ("USDA") scientist and several researchers from Tufts University School of Medicine, Baylor College of Medicine, and the University of Central Florida wrote recently in *The International Journal of Obesity*, the "debates rage on, even though it is clear that public policy in such an important area should not be made in the absence of higher levels of proof than are currently available."[31] They continued, "[t]his debate is by no means settled. More and longer randomized controlled trials are clearly needed to establish an appropriate knowledge base related to sugar sweetened beverage consumption and its alleged link to obesity."[32]

39. As USDA's Dr. Klurfeld explained in his article – "*What Do Government Agencies Consider In The Debate Over Added Sugars?"* – the "place of sugars in the U.S. diet is vigorously debated with much attention on added sugars, those added during processing or preparation of foodstuffs, particularly as they relate to obesity." Dr. Klurfeld also noted that "the

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[29] *Id.*

[30] *Id.*

[31] Klurfeld Int J Obes. 2013.

[32] *Id.*

list of foods associated with obesity includes many commonly eaten items, and it is not likely that they are all causally related."[33]

40. *The Nutrition & Health* series recently published a treatise dedicated to the debate, entitled *Fructose, High Fructose Corn Syrup, Sucrose and Health*. The editor opened the book, which contains opinions by two dozen scientists, by explaining that "[t]he metabolic and health effects of both nutritive and non-nutritive sweeteners are controversial and subjects of intense scientific debate."[34] The Foreword of that book also describes "a growing number of authors [who] are pointing out that the fever pitch reached about certain obesity issues, especially sugar sweetened beverages and sugar in general, appears to be leading to exaggerations and distortions of the evidence base and dialogue around these issues in the scientific and public health literature."[35]

41. In a 2014 regulatory statement, the FDA explained that "U.S. consensus reports have determined that inadequate evidence exists to support the direct contribution of added sugars to obesity or heart disease."[36] The FDA also noted the view that "there is a lack of scientific agreement on the effects of added sugars on health outcomes independent of the effects

[33] Klurfeld DM. What Do Government Agencies Consider In The Debate Over Added Sugars? Adv Nutr. 2013 4:257-261.

[34] Rippe JM. Fructose, High Fructose Corn Syrup, Sucrose, and Health: Modern Scientific Understandings. Chapter 1. Fructose, High Fructose Corn Syrup, Sucrose and Health, Nutrition and Health. 2014; 3-12.

[35] Cope MB, Koenings M, Allison DB. Sugar, Sugar-Sweetened Beverages, and Obesity: Separating Supposition from Demonstrated Fact, Misinformation. Forward. Fructose, High Fructose Corn Syrup, Sucrose And Health, Nutrition And Health. 2014; vii-x.

[36] Food Labeling: Revision of the Nutrition and Supplement Facts Labels. Fed Reg. 79:11880-11987 at 11904. Proposed March 3, 2014. To be codified at 21 C.F.R. pt. 101. https://federalregister.gov/a/2014-04387.

of total sugar" and that the "effects of some carbohydrates are not fully understood and are the subject of debate in the scientific community."[37]

42. Dr. Kimber L. Stanhope, an Associate Researcher in the Department of Molecular Biosciences, School of Veterinary Medicine and Department of Nutrition at the University of California, Davis, recently acknowledged that this controversy continues. In Dr. Stanhope's article "Sugar consumption, metabolic disease and obesity: The state of the controversy," she explains that "[t]he impact of sugar consumption on health continues to be a controversial topic."[38] Dr. Stanhope discusses a number of "evidence gaps," which "allows the controversy to continue[.]"[39]

43. In view of the above, it is clear that 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. A significant amount of additional scientific research is needed to reach any reliable conclusions. However, based on the evidence currently available, I do not believe that sugar-sweetened beverages uniquely contribute to obesity or diabetes. The FDA offered a similar view recently, explaining that "under isocaloric controlled conditions [i.e., on a calorie-equivalent basis] added sugars, including sugar-sweetened beverages, are no more likely to cause weight gain in adults than any other source of energy."[40]

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[37] *Id*. at 11901, 11903. The FDA supplemented this rulemaking in 2015 to propose a daily reference value for added sugars (10% of daily calories).

[38] Stanhope KL. Sugar consumption, metabolic disease and obesity: The state of the controversy. Crit Rev Clin Lab Sci. 2015; Sep 17:1-16. [Epub ahead of print].

[39] *Id.*

[40] Food Labeling: Revision of the Nutrition and Supplement Facts Labels. Fed Reg. 79:11880-11987 at 11904. Proposed March 3, 2014. To be codified at 21 C.F.R. pt. 101. https://federalregister.gov/a/2014-04387.

44. This is consistent with the 2015-2020 Dietary Guidelines for Americans, which the federal government released this month. The Guidelines explain that the evidence between added sugars and health outcomes is "still developing" and recognize that "[a]ll foods consumed as part of a healthy eating pattern fit together like a puzzle to meet nutritional needs without exceeding limits, such as those for saturated fats, added sugars, sodium, and total calories."[41] In other words, all sources of calories should be consumed in balance with energy expenditure, while meeting nutritional requirements for vitamins and the like. Calories from added sugar may be part of that balance without leading to obesity or related conditions.

V. SUGAR-SWEETENED BEVERAGES DO NOT UNIQUELY CONTRIBUTE TO OBESITY OR DIABETES

A. Sugar-Sweetened Beverages Do Not Uniquely Contribute To Obesity

45. To summarize the data I will review below, virtually all studies show that sugar-sweetened beverage consumption does not lead to weight gain in the context of a diet in which energy intake is equal to energy expenditure. The data indicate that even changing one's diet by consuming more sugar-sweetened beverages does not lead to weight gain if total energy consumption is kept constant (*i.e.*, by decreasing the amount of calories consumed from another food(s)).[42] Of course, increasing or decreasing overall caloric consumption – whether by consuming more/fewer sugar-sweetened beverages or any other caloric source – may lead to changes in weight. The data strongly suggest that it is the consumption of *excess* calories relative to one's caloric output that leads to increases in weight, not whether those calories are composed of sugar-sweetened beverages or any other source of calories.

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[41] 2015-2020 Dietary Guidelines for Americans. U.S. Dept. of Health and Human Services and U.S. Dept. of Agriculture. Eighth Edition. 2015. http://health.gov/dietaryguidelines/2015/guidelines/.

[42] E.g., Reid M, Hammersley R, Duffy M. Effects of sucrose drinks on macronutrient intake, body weight, and mood state in overweight women over 4 weeks. Appetite. 2010; 55:130-136.

1. Randomized Controlled Trials Show That Sugar-Sweetened Beverages Do Not Uniquely Contribute To Obesity

46. Four different research groups conducted meta-analyses of randomized controlled trials on added sugar, including sugar in sugar-sweetened beverages, and all reached similar conclusions that added sugar per se does not lead to weight gain.[43] There are essentially three analyses that have been performed: (1) **isocaloric** trials, in which all subjects receive the same number of total calories, but different levels of added sugar; (2) **hypercaloric** trials, in which intervention subjects receive additional calories from added sugar; and (3) **hypocaloric** trials, in which intervention subjects receive fewer calories from added sugar.

47. The isocaloric trials, which isolate the potential effect of added sugar, show no unique effect on weight. A meta-analysis sponsored by the World Health Organization ("WHO") concluded that isocaloric "replacement of sugars with other carbohydrates did not result in any change in body weight."[44] Focusing on fructose, a group of Canadian researchers similarly concluded that "[f]ructose does not seem to cause weight gain when it is substituted for

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[43] Te Morenga L, Mallard S, Mann J. Dietary sugars and body weight: systematic review and meta-analyses of randomised controlled trials and cohort studies. BMJ. 2013; 345:e7492. http://www.bmj.com/content/346/bmj.e7492.full.pdf+html; Sievenpiper JL, de Souza RJ, Cozma AI, Chiavaroli L, Ha V, Mirrahimi A. Fructose vs. Glucose and Metabolism: Do the Metabolic Differences Matter? Curr Opin Lipidol. 2014; 25:8-19; Sievenpiper JL, de Souza RJ, Mirrahimi A, Yu ME, Carleton AJ, Beyene J, Chiavaroli L, Di Buono M, Jenkins AL, Leiter LA, Wolever TM, Kendall CW, Jenkins DJ. Effect of Fructose on Body Weight in Controlled Feeding Trials: A Systematic Review and Meta-Analysis. Ann Intern Med. 2012; 156:291-304; Kaiser KA, Shikany, JM, Keating KD, Allison DB. Pro v Con Debate: Role of sugar sweetened beverages in obesity: Will reducing sugar-sweetened beverage consumption reduce obesity? Evidence supporting conjecture is strong, but evidence when testing effect is weak. Obesity Reviews. 2013; 14:620-633; Malik VS, Popkin BM, Bray GA, Despres JP, Hu FB. Sugar-Sweetened Beverages, Obesity, Type 2 Diabetes Mellitus, and Cardiovascular Disease Risk. Circulation. 2010; 121:1356-1364.

[44] Te Morenga L, Mallard S, Mann J. Dietary sugars and body weight: systematic review and meta-analyses of randomised controlled trials and cohort studies. BMJ. 2013; 345:e7492.

other carbohydrates in diets providing similar calories."[45] This group updated their findings last year with new data and reached the same conclusion.[46]

48. Results from hypercaloric trials, which were only done in adults, were mixed. Some trials show that individuals fed a hypercaloric diet gained weight but this outcome was not seen in all trials. Furthermore, it was not possible in all trials, particularly those in which the subjects gained weight when fed a hypercaloric diet, to separate out the effects of the increase in total calories versus the *source* of the increase in total calories.[47] As the WHO-sponsored review explained, "the change in body fatness that occurs with modifying intakes seems to be mediated via changes in energy intakes."[48]

49. Results from hypocaloric trials, which were done in children and adults, were also mixed. As with the limitation described in the hypercaloric trials, although the individuals who consumed less added sugar and fewer total calories did lose weight, whether the weight loss was due to a reduction of total calories consumed or a reduction of added sugar was not determined.

50. Two studies in children, which are controversial but the largest and longest-term trials that have been reported, merit discussion. In Ebbeling et al., subjects in the intervention group were given water and diet beverages as a replacement for sugar-sweetened beverages and received encouragement to consume the former through repeated check-in visits, "motivational"

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[45] Sievenpiper JL, de Souza RJ, Mirrahimi A, Yu ME, Carleton AJ, Beyene J, Chiavaroli L, Di Buono M, Jenkins AL, Leiter LA, Wolever TM, Kendall CW, Jenkins DJ. Effect of Fructose on Body Weight in Controlled Feeding Trials: A Systematic Review and Meta-Analysis. Ann Intern Med. 2012; 156:291-304.

[46] Sievenpiper JL, de Souza RJ, Cozma AI, Chiavaroli L, Ha V, Mirrahimi A. Fructose vs. Glucose and Metabolism: Do the Metabolic Differences Matter? Curr Opin Lipidol. 2014; 25:8-19.

[47] Malik VS, Pan A, Willett WC, Hu FB. Sugar sweetened beverages and weight gain in children and adults: a systematic review and meta-analysis. Am J Clin Nutr 2013; 98:1084–1102.

[48] Te Morenga L, Mallard S, Mann J. Dietary sugars and body weight: systematic review and meta-analyses of randomised controlled trials and cohort studies. BMJ. 2013; 345:e7492.

calls, and mailed instructions.[49] The control subjects maintained their current diet but in contrast did not receive any added attention. The intervention subjects decreased their average caloric intake by about 450 calories per day from all sources, not necessarily just sugar-sweetened beverages. There was no significant weight difference at the end of the two-year study period, which was the primary pre-specified analysis. However, the authors took the liberty of also conducting another analysis (*i.e.*, weight loss at one year) and found modest weight differences between the two arms. This additional analysis raises the question of whether the investigators were looking for data to support their desired position; this is the primary reason why in RCTs all the analyses must be pre-specified. In a further sub-group analysis, the authors found that the modest weight differences observed at one year were limited to the Hispanic participants only, which raises the question whether the results of the trial can be generalized to all children. In any event, it was impossible to determine whether the children in the intervention arm lost weight because of a reduction in the consumption of added sugar, a reduction in total energy consumed, or because they received much more attention and encouragement than the children in the control arm. Of importance, once the intensive intervention ceased, weight gain tended to increase even though added sugar consumption remained low in the intervention group. This is consistent with the intervention (a reduction of total calories consumed and/or intensive encouragement), not sugar-sweetened beverages per se, playing the key role in weight loss.

51. In another study, by De Ruyter et al., children were randomized to receive non-caloric beverages or caloric beverages provided by the researchers. The authors did not collect data on total energy intake. Many students dropped out because they did not like the beverages,

[49] Ebbeling CB, Feldman HA, Chomitz VR, Antonelli TA, Gortmaker SL, Osganian SK, Ludwig DS. A Randomized Trial of Sugar-Sweetened Beverages and Adolescent Body Weight. N Engl J Med. 2012; 367:1407-1416.

and a significant percentage of students in the non-caloric arm were able to guess that they were drinking non-caloric beverages, limiting the attempt at blinding. After eighteen months, there was a statistically significant reduction in the group consuming fewer sugar-sweetened beverages although the weight loss was very modest. In any event, because the researchers failed to collect data on total caloric intake, it is not possible to know whether the findings are related to a reduction in calories from added sugar or a reduction in total caloric consumption.[50]

52. These results contrast with another trial in children, in which control children who actually increased their sugar-sweetened beverage consumption over the study period had no difference in body fat compared to children who almost entirely replaced sugar-sweetened beverages with milk. This comparison illustrates how manipulating caloric intake may affect weight, while merely manipulating the source of calories does not.[51]

53. In summary, if there is any weight gain or weight loss from an increase or decrease in calories from sugar-sweetened beverages, the totality of the evidence indicates the changes in weight reflect total calories consumed, not added sugar per se. Therefore, added sugar does not have a uniquely detrimental effect on health; any change in weight gain is likely due to total caloric intake relative to energy expenditure.

54. A similar effect has been reported for other foods and nutrients, including fats, proteins, and carbohydrates of various sources: increasing net calories leads to weight gain, and

[50] De Ruyter JC, Olthof MR, Seidell JC, Katan MB. A trial of sugar-free or sugar-sweetened beverages and body weight in children. N Engl J Med. 2012; 367:1397-1406.

[51] Albala C, Ebbeling CB, Cifuentes M, Lera L, Bustos N, Ludwig DS. Effects of replacing the habitual consumption of sugar-sweetened beverages with milk in Chilean children. Am J Clin Nutr. 2008; 88:605-611.

decreasing net calories leads to weight loss.[52] This is consistent with standard nutritional theory: all else being equal, reducing calorie intake will lead to weight loss and increasing caloric intake will lead to weight gain regardless of macronutrient composition.[53] A large and widely-referenced trial of reduced-calorie diets emphasizing different percentages of protein, fats, or carbohydrates found that all "[r]educed-calorie diets result in clinically meaningful weight loss regardless of which macronutrients they emphasize," and concluded that "the specific macronutrient content is of minor importance."[54] Similarly, a recent meta-analysis found comparable weight loss between low-fat and low-carbohydrate diets with reduced calories.[55]

55. These findings have important clinical and policy implications because they suggest that merely reducing consumption of added sugar does not lead to meaningful, long-term weight loss or avoidance of obesity and related conditions. Only if reduced added sugar consumption is part of a net reduced calorie diet are people likely to lose weight – which would be true for a reduction in any caloric food or beverage.

56. It is also important to note that weight loss efforts targeting a single food or beverage are unlikely to be successful at meaningfully reducing weight, particularly over the

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[52] Bray GA, Smith SR, de Jonge L, Xie H, Rood J, Martin CK, Most M, Brock C, Mancuso S, Redman LM. Effect of Dietary Protein Content on Weight Gain, Energy Expenditure, and Body Composition During Overeating: A Randomized Controlled Trial. JAMA. 2012; 307:47-55; Iggman D, Rosqvist F, Larsson A, Arnlov J, Beckman L, Rudling M, Riserus U. Role of Dietary Fats in Modulating Cardiometabolic Risk During Moderate Weight Gain: A Randomized Double-Blind Overfeeding Trial (LIPOGAIN Study). J Am Heart Assoc. 2014; 3:e001095.

[53] Finding a Balance. Centers For Disease Control And Prevention. http://www.cdc.gov/healthyweight/calories/. Last updated May 15, 2015.

[54] Sacks FM, Bray GA, Carey VJ, Smith SR, Ryan DH, Anton SD, McManus K, Champagne CM, Bishop LM, Laranjo N, Leboff MS, Rood JC, de Jonge L, Greenway FL, Loria CM, Obarzanek E, Williamson DA. Comparison of Weight-Loss Diets with Different Compositions of Fat, Protein, and Carbohydrates. N Engl J Med. 2009; 360:859-873.

[55] Boaz M, Raz O, Wainstein J. Low Fat vs. Low Carbohydrate Diet Strategies for Weight Reduction: A Meta-Analysis. J Obes Weight Loss Ther. 2015; 5:5.

long term. Individual foods and beverages, included sugar-sweetened beverages, tend to constitute a relatively small percentage of the diet on average. Even if removing one food or beverage leads to a net calorie reduction, the effect would likely be small in most individuals – an insubstantial reduction of calories is unlikely to have an effect on the prevention of obesity and certainly not the prevention of diabetes which requires substantial weight loss. And there may be no real-world effect whatsoever, because people will often substitute one food for another over time or add calories from foods already being consumed, leading to no net calorie decrease. Even highly motivated and encouraged participants in long-term clinical weight loss trials have great difficulty maintaining weight loss for more than a year, even in the presence of an intensive weight loss intervention.

2. Prospective Cohort Studies Do Not Demonstrate That Sugar-Sweetened Beverages Uniquely Contribute To Obesity

57. Data from prospective cohort studies are mixed, with some showing that increasing added sugar intake (including that in sugar-sweetened beverages) is associated with obesity, and others showing no association.[56] However, prospective cohort studies, as discussed above, suffer from significant design flaws and dependence on limited, self-reported information on diet and lifestyle characteristics. Also, in most of the studies, total caloric intake could not be accounted for. Thus, once again, any weight gain may be due to increased amounts of calories consumed. Studies that do control for caloric intake tend not to find an association between added sugar consumption and weight.

58. Unfortunately, the very basis of prospective studies – how much food and in what categories were consumed over a long period of time – is itself suspect. Generally, subjects are asked to estimate what and how much they ate over the last day or year, and are asked to

[56] Te Morenga 2013.

estimate how much they exercise, and so on. There are large and well-known discrepancies between what people report they ate and what they actually ate, which can distort results in wide variety of ways.[57] As one review explained, dietary measures based on recall have "astonishingly poor measurement" when compared to objective measures, and "[a]lthough painful to admit, it is possible that epidemiologists have been deluded in their acceptance" of recall-based methods.[58]

59. Also, these studies cannot control for all possible factors that could contribute to weight gain because of their design. For example, they cannot fully control for all other foods and beverages consumed by soda consumers as a dietary pattern, as well as all cultural, social, and environmental factors that may contribute to weight gain. To illustrate how this can occur, some observational studies have shown that subsequent children are more likely to have Down Syndrome than the first child. This could lead to the conclusion that birth order causes Down Syndrome. However, these findings are confounded by maternal age – mothers are older when they give birth to subsequent children than for the first, which is what is actually causing the increased risk. Unlike maternal age, which is fairly straightforward to measure and control for, dietary and lifestyle confounders are notoriously difficult to measure and control for. Thus, simply because two or more factors may have a similar trend does not at all mean that the rise or fall of one is causing the rise or fall of the other. The design limitations of prospective cohort studies preclude a finding that a reported association is causal.

60. In addition, prospective cohort studies generally do not publicly pre-specify how exposure would be defined, the number of analyses that will be performed, or the statistical tests

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[57] Kahn & Sievenpiper 2014 at 959.

[58] Kristal AR, Peters U, Potter JD. Is It Time to Abandon the Food Frequency Questionnaire? Cancer Epidemiology Biomarkers & Prevention. 2005; 14:2826-2828.

to be used, and the results are not adjusted for repeated tests of significance. Any of these problems could easily lead to spurious results. In other words, the failure to pre-specify publicly the data analysis to be conducted may enable researchers to mine the data until they find an association worthy of publication.

61. In conclusion, cohort studies in adults and children provide inconsistent results and do not, for the most part, adjust for total caloric intake. When there is an adjustment for total caloric intake, the results tend to show no relationship between added sugar consumption and body weight, suggesting the reason for any increase or decrease in weight is due to an increase or decrease in total caloric intake (as also seen in the RCTs).

62. Interestingly, other foods have shown a similar or greater increase in weight compared to sugar-sweetened beverages when not adjusted for energy intake in prospective cohort studies. For example, Mozaffarian et al. combined three large cohorts and found that on a per serving basis, increasing consumption of meats, potatoes, desserts, fried foods, and some dairy foods, are associated with about as much, if not more, weight gain than increasing consumption of sugar-sweetened beverages.[59]

63. Thus, the prospective cohort studies do not establish that sugar-sweetened beverages play a unique role in the development of obesity.

B. Sugar-Sweetened Beverages Do Not Uniquely Contribute To Diabetes

64. The etiology (cause(s)) of Type 2 diabetes are complex and not understood, but excess energy intake relative to energy expenditure leading to overweight and obesity appears to be the primary risk factor for Type 2 diabetes.

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[59] Mozaffarian D, Hao T, Rimm EB, Willett WC, Hu FB. Changes in diet and lifestyle and long term weight gain in women and men, N Engl J Med. 2011; 364:2392-2404.

65. As I have previously written, "[t]here is no direct evidence that sugar itself, in liquid or solid form, causes an increase in appetite, decreases satiety, or causes diabetes. If there are any adverse effects of added sugar, they are due entirely to the calories it provides, and it is therefore indistinguishable from any other caloric food. Excess total energy consumption seems far more likely to be the cause of obesity and diabetes."[60] Whether or not the consumption of added sugar causes diabetes has not been addressed in any RCT where non-diabetic subjects are randomized to diets differing only in sugar content (*i.e.*, isocaloric) and followed for the development of diabetes. Thus, whether sugar *causes* the ultimate development of diabetes is not known.

66. A prominent research group recently summarized the available data, however, and concluded that "[h]igh quality evidence from longer-term randomized controlled trials, prospective cohorts, and systematic reviews and meta-analyses of these studies generally does not support the link between fructose alone and fructose-containing sugars and the development or aggravation of type 2 diabetes."[61]

67. As I and others have noted, trials investigating the potential effects of added sugar on various intermediate metabolic parameters associated with the development of diabetes have not shown consistent results. A major design flaw in these studies is that subjects were given unrealistically high doses of sugar or purified fructose.[62] In addition, the adverse effects were

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[60] Kahn & Sievenpiper 2014.

[61] Cozma AI, Ha V, Jayalath VH, de Souza RJ, Sievenpier JL. Sweeteners and Diabetes. Chapter 19. Fructose, High Fructose Corn Syrup, Sucrose And Health, Nutrition And Health. 2014; 309-323.

[62] Kahn & Sievenpiper 2014; Cozma AI, Ha V, Jayalath VH, de Souza RJ, Sievenpier JL. Sweeteners and Diabetes. Chapter 19. Fructose, High Fructose Corn Syrup, Sucrose And Health, Nutrition And Health. 2014; 309-323.

not observed at all levels of sugar consumption and, in particular, at levels normally consumed in the population.

68. An additional important limitation of studies that examined the relationship between increased sugar consumption and various metabolic factors is that diabetes takes many years to develop and requires a substantial defect in both insulin action and insulin secretion. Many people can have mild to moderate abnormalities in one or both of these variables as well as components of these variables and not develop diabetes in their lifetime. Thus, a finding that there is an intermediate metabolic defect in a study in which subjects consumed extraordinarily high levels of sugar over a very short period of time, does not at all substitute for direct evidence that added sugar consumption increases the incidence of diabetes.

69. Results from prospective cohort studies are also inconsistent. Some studies report small associations between the highest levels of added sugar consumption and the development of diabetes, but these associations are most often absent at moderate levels of sugar consumption. In all studies, the authors acknowledge that the results may be due to confounding by lifestyle or other food related factors that relate to sugar consumption.[63] Other prospective cohort studies have not found associations between sugar-sweetened beverage consumption and diabetes.[64] It is worth noting that many foods and behaviors have been similarly associated with diabetes in prospective cohorts, ranging from eating white rice, meat, and fried food, to watching television and driving.[65]

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[63] Cozma AI, Ha V, Jayalath VH, de Souza RJ, Sievenpier JL. Sweeteners and Diabetes. Chapter 19. Fructose, High Fructose Corn Syrup, Sucrose And Health, Nutrition And Health. 2014; 309-323.

[64] *Id.*

[65] E.g., Hu FB, Li TY, Colditz GA, Willett WC, Manson JE. Television Watching and Other Sedentary Behaviors in Relation to Risk of Obesity and Type 2 Diabetes in Women. JAMA.

70. In summary, there is no direct or strong evidence that sugar-sweetened beverages play a unique role in the development of diabetes or contribute in any distinctive way.

VI. THE WARNING IS SCIENTIFICALLY MISLEADING, VAGUE, INACCURATE, AND CONTROVERSIAL

71. The City of San Francisco's requirement that advertisements for certain types of sugar-sweetened beverages have a Warning stating that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay" is scientifically vague, misleading, inaccurate, and controversial. As the scientific debate shows, however, these issues are nuanced and complex and cannot whatsoever be viewed as "decided" upon in such a summary manner.

A. The Warning Is Misleading

72. The Warning is scientifically misleading and provides confusing information to consumers. The Warning implies that consuming beverages with added sugar will always contribute to obesity and diabetes without any regard to the consumer's overall dietary and exercise pattern, two factors which strongly influence weight gain and related conditions. And even if one knows all of that information, one cannot single out a specific food or beverage as *the* source of calories that tipped the scale, which is what the Warning incorrectly signals to consumers.

73. The Warning also misleadingly conveys that there is no safe amount of sugar-sweetened beverages that can be consumed, which is contrary to the views of many scientists and

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2003; 289:1785-91; Pan A, Sun Q, Bernstein AM, Schulze MB, Manson JE, Willett WC, Hu FB., Red meat consumption and risk of type 2 diabetes: 3 cohorts of US adults and an updated meta-analysis. Am J Clin Nutr. 2011; 94:1088-1096; Hu, E, Pan A, Malik, V, Sun Q. White rice consumption and risk of type 2 diabetes: meta-analysis and systematic review, BMJ. 2012; 344:e1454; Halton T, Willett WC, Liu S, Manson JE, Stampfer MJ, Hu FB. Potato and french fry consumption and risk of type 2 diabetes in women. Am J Clin Nutr. 2006; 83:284-290; Pan A, Sun Q, Bernstein AM, Manson JE, Willett WC, Hu FB. Changes in Red Meat Consumption and Subsequent Risk of Type 2 Diabetes Mellitus Three Cohorts of US Men and Women. JAMA. 2013; 173:1328-1335

organizations. For example, the Dietary Guidelines and the FDA's proposed added sugar daily reference value recognize that consumers may consume sugar-sweetened beverages.[66] The American Dietetic Association has similarly noted that "all foods can fit into healthful diets, even those high in added sugars."[67]

1. The Warning Leads To Misleading Comparisons

74. The fact that the Warning is required only on advertisements for sugar-sweetened beverages creates the misleading impression that these beverages are meaningfully different from all other foods and beverages containing sugar that do not have the Warning requirement. The available scientific research suggests that weight gain and conditions related to weight gain, such as diabetes, are caused by the consumption of excess calories relative to one's energy expenditure, not by consumption of any specific nutrient. By requiring a warning only for beverages with added sugar – and then even only some beverages with added sugar – but not for the vast array of other foods or beverages containing sugar, San Francisco is distorting the scientific data. The City's Warning gives consumers the false impression that beverages with added sugar are "worse" than other beverages, or desserts, snacks and other foods that could well be regarded as equal if not stronger "contributors" to obesity and diabetes.

75. For example a consumer may choose to avoid a beverage with the Warning and then consume frequent servings of a bacon double cheeseburger, French fries and ice cream for dessert – which do not contain any warning – and believe they have made a healthier choice to

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[66] Food Labeling: Revision of the Nutrition and Supplement Facts Labels. Fed. Reg. 79:11880-11987. Proposed March 3, 2014. To be codified at 21 C.F.R. pt. 101. https://federalregister.gov/a/2014-04387.

[67] Position of the American Dietetic Association: Use of Nutritive and Nonnutritive Sweeteners. J Am Diet Assoc. 2004; 104:255-275 at 261, 269.

reduce the possibility of becoming obese or develop diabetes.[68] Alternatively, an individual could choose to consume a 100% fruit juice, containing more sugar and more calories than a sugar-sweetened beverage, and again think they have made the better choice to avoid obesity and the development of diabetes.[69] The line drawn by the City in terms of which products must contain the Warning and which are exempt is scientifically unfounded. Consumers could easily make less informed choices that promote the excess consumption of calories.

76. Nutritional bodies like the Academy of Nutrition & Dietetics warn against this kind of "classification of specific foods as good or bad" because it is "overly simplistic and can foster unhealthy eating behaviors."[70] Instead, their view is that "the total diet or overall pattern of food eaten is the most important focus of healthy eating. All foods can fit within this pattern if consumed in moderation with appropriate portion size and combined with physical activity."[71] The Warning encourages the opposite, which is confusing and potentially harmful to overall efforts at weight management.

77. Of course, encouraging a shift toward a more healthy lifestyle overall (defined as more exercise, consumption of more fruits, vegetables, well-balanced meals, and fewer total calories) may have important benefits. And, if an individual needs to reduce his or her caloric intake, replacing some beverages containing calories with those that do not is a good start, as is reducing other sources of foods eaten in excess.

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[68] Klurfeld Adv Nutr. 2013.

[69] Indeed, 100% fruit juices tend to have more sugar per serving than colas do, and similar associations have been reported between fruit juice, obesity, and diabetes. Muraki I, Imamura F, Manson JE, Hu FB, Willett WC, van Dam RM. Fruit consumption and risk of type 2 diabetes: results from three prospective longitudinal cohort studies. BMJ. 2013; 347:f5001. http://www.bmj.com/content/347/bmj.f5001.

[70] Freeland-Graves JH, Nitzke S. Position of the Academy of Nutrition & Dietetics: Total Diet Approach to Healthy Eating. J Acad Nutr & Dietetics. 2013; 113:307-317.

[71] Position of the American Dietetic Association at 259.

78. That is not to say that sugar-sweetened beverages should not or cannot be consumed at all. The Dietary Guidelines emphasize "the importance of focusing not on individual nutrients or foods in isolation, but on everything we eat and drink — healthy eating patterns as a whole." This is the rationale for the Dietary Guidelines' recommendation to limit added sugars to less than 10% calories per day, which is a "target to help the public achieve a healthy eating pattern — meeting nutrient and food group needs through nutrient-dense foods while staying within calorie limits."[72] This contradicts the Warning's message that beverages with added sugar inherently and uniquely cannot be consumed as part of an overall balanced diet.

2. The Warning Misleadingly Implies That The Human Body Metabolizes Added Sugar Differently Than Natural Sugar

79. The Warning also implies that the body metabolizes added sugar differently than "natural" sugar, like that found in fruit and fruit juice. That is biologically incorrect. According to the American Dietetic Association, "Human metabolism does not distinguish between sugars found in a food and those added to the food."[73]

B. The Warning Is Vague

80. The Warning is vague and does not help consumers make better informed purchasing decisions because it does not provide the consumer with accurate information. It does not tell the consumer that they need to only consume the amount of calories equal to or less than the calories they expend to prevent weight gain, *i.e.*, maintain a healthy weight. Instead, the Warning singles out one source of calories as contributing to obesity and diabetes and does not

[72] DeSalvo KB, Olsen R, Casavale KO. Dietary Guidelines for Americans [statement by the US Department of Health and Human Services]. JAMA. Published online January 7, 2016.

[73] Position of the American Dietetic Association: Use of Nutritive and Nonnutritive Sweeteners, Journal of the American Dietetic Association. 2004 at 259.

specify how much an individual needs to consume before the sugar-sweetened beverage(s) *will* (if at all) contribute to obesity and diabetes.

C. The Warning Is Inaccurate And At A Minimum Controversial

81. The Warning conveys the simplistic and inaccurate message that consuming a single type of food item, at any level, will contribute to obesity and diabetes. Obesity and diabetes are complex, multi-factorial disease states that develop over years, and there is much we do not know about their biological and environmental causes. What we do know is that it is possible to consume beverages with added sugar without developing these conditions. In sum, based on the available scientific data, when consumed as part of a diet that balances energy intake with energy expenditure (no weight gain), consuming beverages with added sugar does not contribute to obesity or diabetes. Nor is there evidence that consuming sugar-sweetened beverages in excess versus any other food in excess, will more likely lead to weight gain.

Richard A. Kahn

Richard A. Kahn

Jan. 11, 2016

Date

APPENDIX A
CURRICULUM VITAE

APPENDIX A
CURRICULUM VITAE

RICHARD ALLEN KAHN

PROFESSIONAL EXPERIENCE

INDEPENDENT CONSULTANT / RESEARCHER AND, UNIVERSITY OF NORTH CAROLINA, DEPARTMENT OF MEDICINE, CHAPEL HILL, NC

Professor of Medicine 2009-Present

Dr. Kahn's interests are in the areas of the science and medicine of diabetes, obesity, health care reform, and health services research.

AMERICAN DIABETES ASSOCIATION 1985-2009
National Center, Alexandria, VA
Chief Scientific and Medical Officer 1988-2009
Assistant Executive Vice President 1985-1988

Senior executive staff responsibility for the Association's scientific and medical activities. This included the Association's clinical practice guidelines, research program, all professional education activities, two certification programs, program publications, and scientific and medical information resources.

AMERICAN RED CROSS 1976-1985
St. Louis, MO
Chief, Scientific Affairs 1982-1985
Scientific Director 1976-1985

Senior manager for all health-related programs and services in nation's sixth largest Red Cross unit. Greatly expanded the number and diversity of programs offered to the public. Co-managed operations of the regional blood collection facility (The facility had a budget of $25 million with over 300 employees, and collected, processed and distributed 185,000 units of blood per year). Developed and initiated the first tissue bank facility in the entire Red Cross system and the first interstate tissue bank; the tissue bank quickly became the largest in the U.S. Led the development of an integrated organ and tissue procurement effort for the metropolitan St. Louis area. Managed a $1.1 million research laboratory.

AMERICAN RED CROSS NATIONAL RESEARCH LABORATORY 1972-1976
Washington, DC

Performed basic and clinical research on the function and preservation of blood cells, and the prevention of transfusion-transmitted diseases. Led the development of new techniques to store or freeze-preserve blood platelets for subsequent transfusion.

PRIOR ACADEMIC APPOINTMENT

WASHINGTON UNIVERSITY SCHOOL OF MEDICINE, St. Louis, MO 1978-1985
Associate Professor of Pathology

HONORS, AWARDS, AND OTHER PROFESSIONAL ACTIVITIES

U.S. Patent - "Biocompatible Method for In Situ Production of Functional Platelets and Product Produced Thereby Lacking Immunogenicity." #4,608,255---1986

Outstanding Young St. Louisan, St. Louis Magazine, St. Louis, Missouri---1985

Official United States Representative to International Conferences on "Tissue Banking in Asia and the Far East."--- 1983-1984

Washington Heart Association Research Fellowship---1973-1974

Author of original in-depth analysis on the future of the blood collection/transfusion industry for the Office of Technology Assessment, U.S. Congress---1985

Health Care Financing Administration Award for Sustained Contributions to the Welfare of Medicare Beneficiaries with Diabetes---2000

The Sir Allister McIntrye Distinguished Award for Outstanding Services Internationally in the Field of Diabetes, University of the West Indies---2003

Charles H. Best Medal for Distinguished Service in the Cause of Diabetes, American Diabetes Association---2009

Albert Renold Medal for Distinguished Service, European Association for the Study of Diabetes---2009

Author of over 65 original publications (excluding abstracts) and numerous book chapters

ADVISORY BOARDS AND NATIONAL ORGANIZATIONS

Board of Directors, St. Louis Regional Transplant Association	1977-1983
Member, American Association of Tissue Banks	1979-1985
Treasurer, American Association of Tissue Banks	1979-1983
American Red Cross Transplantation Services Advisory Committee	1985-1993
Board of Directors, United Network for Organ Sharing (UNOS)	1988-1994
National Cholesterol Education Program Committee	1988-1993
National High Blood Pressure Education Committee	1988-1992

National Eye Health Education Program Steering Committee	1990-1994
Centers for Disease Control Diabetes, Technical Advisory Committee	1992-1998
National Diabetes Education Program Steering Committee	1995-1997
NCQA Committee on Performance Measurement	2002-2007
National Diabetes Quality Improvement Alliance	2000-2007

EDUCATION

A.B., University of Missouri, Columbia, MO (Major - Zoology)	1966
M.S., University of Missouri, Columbia, MO (Major - Physiology)	1968
Ph.D., Georgetown University, Washington, DC (Major – Physiology/Hematology)	1972

PUBLICATIONS

Richard A. Kahn

Original Research Publications and Editorials

Cooper, RG, Kahn, RA, Cornell, CN, Muhrer, ME. Erythrocyte mechanical fragility test. J Clin Path. 21:781-782, 1969.

Cornell, CN, Cooper, RG, Kahn, RA, Garb, S. Platelet adhesiveness in normal and bleeder swine as measured in a celite system. Am J Physiol. 216:1170-1175, 1969.

Kahn, RA, Cooper, RG, Cornell, CN, Muhrer, ME. Electron microscopy of bleeder swine platelets. Am J Vet Res. 31:679-684, 1970.

Kahn, RA, Johnson, SA, DeGraff, AF. The effects of sodium warfarin on capillary ultrastructure. Am J Path. 65:149-156, 1971.

Kahn, RA. Alteration in optical density of platelets exposed to hypertonic solutions. Proc So Exp Biol Med. 143:1094-1097, 1973.

Kahn, RA, Meryman, HT. Effects of various solutes on platelets exposed to hypertonic stress. Am J Physiol. 225:770-775, 1973.

Kahn, RA, Flinton, LJ. Evaluation of ethylene glycol as a cryoprotective agent for blood platelets. Cryobiology 10:148-151, 1973.

Kahn, RA. Factors influencing the recovery of platelets following freezing. In: Platelets: Production, Function, Transfusion and Storage. (M.G. Baldini andS. Ebbe, eds.) Grune and Stratton. 355-360, 1974.

Kahn, RA, Flinton, LJ. The relationship between platelets and bacteria. Blood 44:715-721, 1974.

Kahn, RA, Syring, RL. The fate of bacteria introduced into whole blood from which platelet concentrates were prepared and stored at 22°C and 4°C. Transfusion. 15:363-3677, 1975.

Meryman, HT, Kahn, RA. Bacteriological and biological quality of frozen red cells 72 hours following deglycerolization. In: Frozen Red Cell Outdating. (P.B. Sherer, ed.) DHEW Publ. No. (NIH) 76-1004, 1975.

Kahn, RA, Meryman, HT. Storage of Platelet concentrates. Transfusion 16:1, 13-16,1976.

Kahn, RA, Cossett, I, Friedman, LI. Optimum centrifugation conditions for the preparation of platelet and plasma products. Transfusion 16:2, 162-165, 1976.

Kahn, RA, Meryman, HT, Syring, RL, Flinton, LJ. The fate of bacteria in frozen blood. Transfusion 16:215-220, 1976.

Alter, HJ, Tabor, E, Meryman, HT, Hoffnagle, JH, Kahn, RA., Holland, P.V., Gerety, R.J.,Barker, L.F. Failure of frozen – deglycerolized red blood cells to prevent the transmission of hepatitis B virus infection. N Engl J Med. 298:637-642, 1978.

Kahn, RA, Auster, M, Miller, WV. The effect of refreezing previously frozen- deglycerolized red blood cells. Transfusion 18:204-205, 1978.

Kahn, RA, McDonough, B, Rowe, A, Ellis, FR, Pino, B. The impact of converting to an all frozen blood program in a large regional blood center. Transfusion 118:304-311, 1978.

Aach, RD, Lander, JJ, Sherman, LA, Miller, WV, Kahn, RA, et al. Transfusion transmitted viruses: Interim analysis of hepatitis among transfused and non-transfused patients. Transfusion Transmitted Viruses Study Group. Proceedings of the Second Symposium on Viral Hepatitis, G.N. Vyas, S.N. Cohen, R. Schmid, Eds. Franklin Press Philad.,383-396, 1978.

Kahn, RA, Staggs, SD, Miller, WV, Ellis, FR. Use of plasma products with whole blood and packed RBC's. JAMA. 242:2087-2090, 1979.

Kahn, RA, Johnson, RK, Heaton, AWL. Effects of prolonged room temperature holding of whole blood intended for preparation of components. Transfusion 119:539-541, 1979.

Aach, RD, Kahn, RA. Post-transfusion hepatitis: Current perspectives. Ann Intern Med. 92:539-546, 1980.

Kahn, RA, Staggs, SD, Miller, WV, Heaton, AWA. Recovery, lifespan and function of CPD-Adenine (CPDA-1) platelet concentrates stored for up to 72 hours at 4°C. Transfusion 20:498-503, 1980.

Aach, RD, Szmuness, W, Mosely, JW, Hollinger, FB, Kahn, RA, Stevens, CE, Edwards, VM.,Werch, J. Serum alanine aminotransferase of donors in relation to the risk of hepatitis in recipients. N Engl J Med. 304:989-994, 1981.

Lasky, LC, Lin, A, Kahn, RA, McCullough, J. Donor platelet response and product quality assurance in plateletpheresis. Transfusion 21:247-260, 1981.

Kahn, RA, Staggs, SD, Phillips, GL. Recovery, lifespan, and function of stored plateletpheresis units. Vox Sang. 40:253-259, 1981.

Newman, PJ, Kahn, RA, Hines, A. Detection and characterization of monoclonal antibodies to platelet membrane proteins. J Cell Biol. 90:249-253, 1981.

Kahn, RA. Clinical evaluation of platelet transfusions in thrombocytopenic patients: methods and interpretation. Vox Sang. 40: Suppl.1, 87-97, 1981.

Kahn, RA, Johnson, G, Aach, RD, Hines, A, Ellis, FR, Miller, WV. The distribution of serum alanine aminotransferase levels in a blood donor population. Amer J Epid. 115:929-940, 1982.

Murphy, S., Kahn, R.A., Holm, S.,Phillips, G.L., Sherwood, W., Davisson, W., Buchholz, D.H. Improved storage of platelets for transfusion in a new container. Blood. 60:194-200, 1982.

Hollinger, FB, Mosely, JW, Szmuness, W, Aach, RD, Melnick, JL, Afifi, A, Stevens, CE, Kahn, RA. Non-A, non-B hepatitis following blood transfusion: risk factors associated with donor characteristics. Proceedings of the Third Symposium on Viral Hepatitis, W. Szmuness, H.J. Alter, and J.E. Maynard, Eds. Franklin Press, Philad., 361-376, 1982.

Newman, PJ, Knipp, MA, Kahn, RA. Extraction and identification of human platelet integral membrane proteins using Triton X-114. Thromb Res. 27:221-224, 1982.

McEvoy, PM, Kahn, RA, Miller, WV. Impact of the anticoagulant-preservative citrate-phosphate-adenine (CPDA-1) on blood services. Transfusion 22:532-534, 1982.

Newman, PJ, Kahn, RA. Purification of human platelet membrane glycoproteins IIb and IIIa using high performance liquid chromatography gel filtration. Anal Biochem. 32:215-218, 1983.

Moroff, G, Morse, EE, Katz, AJ, Kahn, RA, Dende, D, Swartman, L, Staggs, SD. Survival and biochemical characteristics of stored red blood cells prepared from CPDA-1 and CPDA-2 whole blood maintained at 20-24°C for eight hours following phlebotomy. Transfusion 24:115-119, 1984.

Stevens, CE, Aach, RD, Hollinger, FB., Mosely, JW, Szmuness, W, Kahn, RA, Werch, J, Edwards, V. Relation of hepatitis-B virus antibody status of blood donors to the occurrence of non-A, non-B hepatitis in their recipients. Ann Int Med. 101:733-738, 1984.

Newman, PJ, Allen, RW, Kahn, RA, Kunicki, TJ. Quantification of membrane glycoprotein IIIa on intact human platelets using the monoclonal antibody, AP-3. Blood. 65:227-232, 1985.

Storch, GA, Perrillo, R.P., Miller, J.P., Benz, B., Kahn, R.A. Prevalence of hepatitis B antibodies in personnel at a childrens hospital. Pediatrics 76:1, 29-35, 1985.

Baldassare, JJ, Kahn, RA, Knipp, MA, Newman, PJ. Reconstitution of platelet proteins into phospholipid vesicles:functional proteoliposomes. J Clin Invest 75:35-39, 1985.

Newman, PJ, Martin, LS, Knipp, MA, Kahn, RA. Studies on the nature of the human platelet alloantigen, PL$_{A1}$: localization to a 17,000 dalton polypeptide. Mol Immunol. 22:6, 719-729, 1985.

Kahn, RA, Duffy, BE, Rodney, GE. UV irradiation of platelet concentrate abrogates lymphocyte activation without affecting platelet function in vivo. Transfusion 25:6, 547-550, 1985.

Greenfield, S, Kaplan, SH, Kahn, RA, Ninomiya, J, Griffith, JL. Profiling care provided by different groups of physicians:effects of Patient case-mix (bias) and physician-level clustering on quality assessment results. Ann Intern Med 136:111-121, 2002.

Nesto RW, Bell D, Bonow RO, Fonseca V, Grundy SM, Horton ES, Winter M, Porte D, Semenkovich CF, Smith S, Young LH, Kahn R. Thiazolidinedione use, fluid retention, and congestive heart failure:a consensus statement from the American Heart Association and American Diabetes Association. Circulation 108:2941-2948, 2003.

Kahn, R. Dealing with complexity in clinical diabetes. The value of Archimedes. Diabetes Care 26:3168-3171, 2003.

Rizza RA, Vigersky RA, Rodbard HW, Ladenson PW, Young WF, Surks MI, Kahn R, Hogan PF. A model to determine the workforce needs for endocrinologists in the United States until 2020. J Clin Endocrinol Metab 88:1979-1987, 2003.

Grundy SM, Hansen B, Smith SCJr, Cleeman JI, Kahn RA. Clinical management of metabolic syndrome: report of the American Heart Association/National Heart, Lung, and Blood Institute/American Diabetes Association conference on scientific issues related to management. Circulation 109:551-556, 2004.

Eyre, H, Kahn, R., Robertson, R.M. Preventing cancer, cardiovascular disease and diabetes: A common agenda for the American Cancer Society, the American Diabetes Association, and the American Heart Association. Diabetes Care 27:1812-1824, 2004.

Eddy DM, Schlessinger L, Kahn R. Clinical outcomes and cost-effectiveness of strategies for managing people at high risk for diabetes. Ann Intern Med 143:251-264, 2005.

Kahn R, Buse J, Ferrannini E, Stern M. The metabolic syndrome: time for a critical appraisal: joint statement from the American Diabetes Association and the European Association for the Study of Diabetes. Diabetes Care 28:2289-2304,2005.(Joint publication in Diabetologia)

Rizza R,Henry RR, Kahn R. Commentary on the results and clinical implications of the PROactive study. Diabetes Care 28:2965-2967, 2005.

Eckel, RH, Kahn, R, Robertson RM, Rizza RA. Preventing Cardiovascular Disease and Diabetes:A call to action from the American Diabetes Association and the American Heart Association. Diabetes Care 29:1697-1699, 2006.

Kahn, R. The metabolic syndrome (emperor) wears no clothes. Diabetes Care. 29:1693-1696, 2006.

Klein S, Allison DB, Heymsfield SB, Kelly DE, Leibel RL, Nonas C, Kahn,R. Waist circumference and cardiometabolic risk. Diabetes Care 30:1647-1652, 2007.

Kahn R. Metabolic syndrome: Is it a syndrome? Does it matter? Circulation 115:1806-1811, 2007.

Klein S, Allison DB, Heymsfield SB, Kelley DE, Leibel RL, Nonas C, Kahn R. Waist circumference and cardiometabolic risk. A Consensus Statement. Diabetes Care. 30:1647-1652, 2007.

Rizza R, Eddy D, Kahn R. Cure, care, and commitment: what can we look forward to? Diabetes Care 31:1051-1059, 2008.

Genuth, S, Kahn R. A step backward—or is it forward? Diabetes Care 31:1093-1096, 2008.

Kahn R. Metabolic syndrome--what is the clinical usefulness? Lancet 371:1892-1893, 2008

Kahn R, Fonseca V. Translating the A1C assay. Diabetes Care 31:1704-1707, 2008.

Kahn R, Robertson RM, Smith R, Eddy D. The impact of prevention on reducing the burden of cardiovascular disease. Circulation 118:576-585, 2008.

Stern M, Williams K, Eddy D, Kahn R. Validation of prediction of diabetes by Archimedes and comparison with other predicting models. Diabetes Care 31:1670-1671, 2008.

Eddy D, Schlessinger L, Kahn R, Peskin B, Schiebinger R. Relationship between insulin resistance and related metabolic variables to coronary artery disease: a mathematical analysis. Diabetes Care 32:361-366, 2009.

Kahn R, Anderson JE. Improving diabetes care: model for health care reform. Diabetes Care 32:1115-1118, 2009.

Kahn R. Diabetes technology: now and in the future. Lancet 373:1742-1743, 2009.

Buse JB, Caprio S, Cefalu WT, Ceriello A, del Prato, S, Inzucchi S, McLaughlin S, Phillips GL, Robertson, RP, Rubino, F, Kahn R, Kirkman S. How do we define cure of diabetes. Diabetes Care 32: 2133-2135, 2009.

Kahn R, Alperin P, Eddy D, Borch-Johnsen K, Buse J, Feigelman J, Gregg, E, Holman RR, Kirkman, MS, Stern M, Tuomilehto J, Wareham NJ. Age at initiation and frequency of screnning to detect type 2 diabetes: a cost-effectiveness analysis. Lancet 375:1365-1374, 2010.

Kahn R, Gale EAM. Gridlocked guidelines for diabetes. Lancet 375:2203-2204, 2010.

Kahn R. Guidelines: we'll always need them, we sometimes dislike them, and we'll have to make them better. Diabetologia 53:2280-2284, 2010.

Kahn R. Reducing the impact of diabetes: is prevention feasible today, or should we aim for better treatment? Health Affairs. 31:76-83, 2012

Kahn R. Risk Prediction in diabetes prevention. Lancet—Diabetes and Endocrinology. 2014; 2:3-4.

Kahn R, Davidson MB. The reality of diabetes prevention. Diabetes Care. 2014; 37:943-949

Kahn R, Sievenpiper JL. Dietary sugar and body weight: have we reached a crisis in the epidemic of obesity and diabetes? Diabetes Care. 2014; 37:957-962.

Book Chapters, Technical Reports

Kahn, RA. Biochemical changes in frozen platelets. In: The Blood Platelet in Transfusion Therapy. T. J. Greenwalt, G.A. Jamieson, Editors. Alan Liss, N.Y., 167-180, 1978.

Kahn, RA, Staggs, SD. Blood component therapy. In: The Aspen Manual of Blood Transfusion. Aspen Press, Rockville, MD. 37-60,1981.

Kahn, RA, Harmon, JA, Miller, WV. Detection of platelet antibodies. In: Immune-Mediated Cell Destruction. American Association of Blood Banks, Washington, D.C., 151-197, 1981.

Kahn, RA. Donor screening to prevent post-transfusion hepatitis. In: Hepatitis, A Technical Workshop. American Association of Blood Banks, Washington, D.C., 99-125, 1981.

Kahn, RA. In-vitro tests for platelet compatibility. Plasma Therapy. 3:283-292, 1982.

Kahn, RA. Diseases transmitted by blood transfusion. Human Path. 14:241-247, 1983.

Kahn, RA. Establishing a tissue bank in a blood collection facility: An introduction to bone banking. In: The Preservation of Tissue and Solid Organs for Transplantation. American Association of Blood Banks, Arlington,VA., 1983.

Kahn, RA, Allen, R, Baldassare, J, Cheetham P. The Use of Blood Substitutes. Office of Technology Assessment Report, H-260, Washington,D.C., 133-172, 1985.

Mondou, P, Kahn, RA. Statistics. In: Immunohematology. E. Steane and S. Steane, Editors. American Dade, 1985.

Kahn,RA, Allen, RW, Baldassare, J. Alternate sources and substitutes for therapeutic blood components. Blood 66:1, 1-12, 1985.

APPENDIX B
DOCUMENTS CONSIDERED

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DOCUMENTS CONSIDERED

2015-2020 Dietary Guidelines for Americans. U.S. Dept. of Health and Human Services and U.S. Dept. of Agriculture. Eighth Edition. 2015. http://health.gov/dietaryguidelines/2015/guidelines/.

Adult Obesity Facts. Centers For Disease Control And Prevention. http://www.cdc.gov/obesity/data/adult.html. Last updated September 21, 2015.

Finding a Balance. Centers For Disease Control And Prevention. http://www.cdc.gov/healthyweight/calories/. Last updated May 15, 2015.

Food Availability (Per Capita) Data System. United States Department of Agriculture Economic Research Service. http://www.ers.usda.gov/data-products/food-availability-%28per-capita%29-data-system/.aspx. Last updated February 1, 2015.

Your Weight and Diabetes. Obes Soc. http://www.obesity.org/content/weight-diabetes. Last updated February 2015.

2014 National Diabetes Statistics Report. Centers For Disease Control And Prevention. http://www.cdc.gov/diabetes/data/statistics/2014statisticsreport.html.

Defining Adult Overweight and Obesity. Centers For Disease Control And Prevention. http://www.cdc.gov/obesity/adult/defining.html. Last updated April 27, 2012.

Dietary Guidelines Advisory Committee. 2010. Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans, 2010, to the Secretary of Agriculture and the Secretary of Health and Human Services. U.S. Department of Agriculture, Agricultural Research Service, Washington, DC.

Food Labeling: Revision of the Nutrition and Supplement Facts Labels. Fed Reg. 79:11880-11987. Proposed March 3, 2014. To be codified at 21 C.F.R. pt. 101. https://federalregister.gov/a/2014-04387.

Fryar CD, Carroll MD, Odgen CL. Prevalence of Overweight, Obesity, and Extreme Obesity Among Adults: United States, 1960–1962 Through 2011–2012. Centers For Disease Control And Prevention. http://www.cdc.gov/nchs/data/hestat/obesity_adult_11_12/obesity_adult_11_12.htm. Last updated September 19, 2014.

U.S. Dept of Agriculture. Economic Research Service: http://www.ers.usda.gov/data-products/food-availability-%28per-capita%29-data-system.aspx#.Ue1bGG0Zsz4 . Accessed 7.15.13

What Are the Health Risks of Overweight and Obesity? Nat Inst Health, Nat Heart Lung and Blood Inst. https://www.nhlbi.nih.gov/health/health-topics/topics/obe/risks. Last updated July 13, 2012.

U.S. Preventive Services Task Force. U.S. Preventive Services Task Force Procedure Manual. 2008

Abdullah A, Peeters, A, de Courten, M, Stoelwinder J. The Magnitude of Association Between Overweight and Obesity and the Risk of Diabetes: A Meta-Analysis of Prospective Cohort Studies. Diabetes Res Clin Pract. 2010; 89:309-19.

Aeberli I, Gerber PA, Hochuli M, Kohler S, Haile SR, Gouni-Berthold I, Berthold HK, Spinas GA, Berneis K. Low to moderate sugar-sweetened beverage consumption impairs glucose and lipid metabolism and promotes inflammation in healthy young men: a randomized controlled trial. Am J Clin Nutr. 2011; 94:479-485.

Aeberli I, Hochuli M, Gerber PA, Sze L, Murer SB, Tappy L, Spinas GA, Berneis K. Moderate amounts of fructose consumption impair insulin sensitivity in healthy young men: a randomized controlled trial. Diabetes Care. 2013; 36:150-156.

Akhavan T, Anderson GH. Effects of glucose-to-fructose ratios in solutions on subjective satiety, food intake, and satiety hormones in young men. Am J Clin Nutr. 2007; 86:1354-1363.

Akhavan T, Luhovyy BL, Anderson GH. Effect of drinking compared with eating sugars or whey protein on short-term appetite and food intake. Int J Obes (Lond). 2011; 35:562-569.

Albala C, Ebbeling CB, Cifuentes M, Lera L, Bustos N, Ludwig DS. Effects of replacing the habitual consumption of sugar-sweetened beverages with milk in Chilean children. Am J Clin Nutr. 2008; 88:605-611.

Almiron-Roig E, Flores SY, Drewnowski A. No difference in satiety or in subsequent energy intakes between a beverage and a solid food. Physiol Behav. 2004; 82:671-677.

Almiron-Roig E, Palla L, Guest K, Ricchiuti C, Vint N, Jebb SA, Drewnowski A. Factors that determine energy compensation: a systematic review of preload studies. Nutr Rev. 2013;71:458-473.

Atkins D, Best D, Briss PA, Eccles M, Falck-Ytter Y, Flottorp S, Guyatt GH,Harbour RT, Haugh MC, Henry D, Hill S, Jaeschke R, Leng G, Liberati A, Magrini N,Mason J, Middleton P, Mrukowicz J, O'Connell D, Oxman AD, Phillips B, Schünemann HJ, Edejer T, Varonen H, Vist GE, Williams JW Jr, Zaza S; GRADE Working Group.Grading quality of evidence and strength of recommendations. BMJ. 2004; 328:1490.

Avena NM, Rada P, Hoebel BG. Evidence for sugar addiction: behavioral and neurochemical effects of intermittent, excessive sugar intake. Neurosci Biobehav Rev. 2008; 32:20-39.

Bandini LG, Schoeller DA, Cyr HN, Dietz WH. Validity of reported energy intake in obese and nonobese adolescents. Am J Clin Nutr. 1990; 52:421-425

Beck-Nielsen H, Pedersen O, Lindskov HO. Impaired cellular insulin binding and insulin sensitivity induced by high-fructose feeding in normal subjects. Am J Clin Nutr. 1980; 33:273-278.

Benton D. The plausibility of sugar addiction and its role in obesity and eating disorders. Clin Nutr. 2010; 29:288-303.

Bernstein AM, de Koning L, Flint AJ, Rexrode KM, Willett WC. Soda consumption and the risk of stroke in men and women. Am J Clin Nutr. 2012; 95:1190-1199.

Black AE, Bingham SA, Johansson G, Coward WA. Validation of dietary intakes of protein and energy against 24 hour urinary N and DLW energy expenditure in middle-aged women, retired men and post-obese subjects: comparisons with validation against presumed energy requirements. Eur J Clin Nutr. 1997; 51:405-413.

Bland JM, Altman DG. Comparisons against baseline within randomized groups are often used and can be highly misleading. Trials. 2011; 12:264.

Boaz M, Raz O, Wainstein J. Low Fat vs. Low Carbohydrate Diet Strategies for Weight Reduction: A Meta-Analysis. J Obes Weight Loss Ther. 2015; 5:5.

Bray GA, Nielsen SJ, Popkin BM. Consumption of high-fructose corn syrup in beverages may play a role in the epidemic of obesity. Am J Clin Nutr. 2004;79(4):537-543. Erratum in: Am J Clin Nutr. 2004; 80:1090.

Bray GA, Popkin BM. Calorie-sweetened beverages and fructose: what have we earned 10 years later. Pediatr. Obes. 2013; 8:242-248.

Bray GA, Smith SR, de Jonge L, Xie H, Rood J, Martin CK, Most M, Brock C, Mancuso S, Redman LM. Effect of Dietary Protein Content on Weight Gain, Energy Expenditure, and Body Composition During Overeating: A Randomized Controlled Trial. JAMA. 2012; 307:47-55.

Bray GA. Fructose and risk of cardiometabolic disease. Curr Atheroscler Rep. 2012; 14:570-578.

Brown CM, Dulloo AG, Yepuri G, Montani JP. Fructose ingestion acutely elevates blood pressure in healthy young humans. Am J Physiol Regul Integr Comp Physiol. 2008; 294:R730-737.

Cassady BA, Considine RV, Mattes RD. Beverage consumption, appetite, and energy intake: what did you expect? Am J Clin Nutr. 2012; 95:587-593.

Cefalu WT. A “Spoonful of Sugar” and the Realities of Diabetes Prevention. Diabetes Care. 2014; 37:906-908.

Chen L, Caballero B, Mitchell DC, Loria C, Lin PH, Champagne CM, Elmer PJ, Ard JD, Batch BC, Anderson CA, Appel LJ. Reducing consumption of sugar-sweetened beverages is associated with reduced blood pressure: a prospective study among United States adults. Circulation. 2010; 121:2398-406. Erratum in: Circulation. 2010; 122:e408.

Chiavaroli L, Mirrahimi A, de Souza RJ, Cozma AI, Ha V, Wang DD, Yu ME, Carleton AJ, Beyene J, Kendall CWC, Jenkins DJA, Sievenpiper JL. Does Fructose Consumption Elicit a Dose-Response Effect on Fasting Triglycerides? A Systematic Review and Meta-Regression of Controlled Feeding Trials. Can J Diabetes 2012; 36(Suppl):S37.

Chiu S, Sievenpiper JL, de Souza RJ, Cozma AI, Mirrahimi A, Carleton AJ, DiBuono M, Jenkins AL, Leiter LA, Wolever TWS, Don Wauchope AC, Beyene J, Kendall CWC, Jenkins DJA Effect of fructose on non-alcoholic fatty liver disease (NAFLD): A Systematic Review and Meta-analysis of controlled feeding trials. Eur J Clin Nutr (Submitted for publication).

Colantuoni C, Schwenker J, McCarthy J, Rada P, Ladenheim B, Cadet JL, Schwartz GJ, Moran TH, Hoebel BG. Excessive sugar intake alters binding to dopamine and mu-opioid receptors in the brain. Neuroreport. 2001; 12:3549-3552.

Colditz GA, Manson JE, Stampfer MJ, Rosner B, Willett WC, Speizer FE. Diet and risk of clinical diabetes in women. Am J Clin Nutr. 1992; 55:1018-1023.

Cope MB, Koenings M, Allison DB. Sugar, Sugar-Sweetened Beverages, and Obesity: Separating Supposition from Demonstrated Fact, Misinformation. Forward. Fructose, High Fructose Corn Syrup, Sucrose And Health, Nutrition And Health. 2014; vii-x.

Corkey BE. Banting Lecture. Hyperinsulinemia: cause or consequence. Diabetes. 2012; 61:4-13.

Couchepin C, Lê KA, Bortolotti M, da Encarnaçao JA, Oboni JB, Tran C, Schneiter P, Tappy L. Markedly blunted metabolic effects of fructose in healthy young female subjects compared with male subjects. Diabetes Care. 2008; 31:1254-1256.

Cozma AI, de Souza RJ, Chiavaroli L, Ha V, Mirrahimi A, Beyene J, Kendall CWC, Jenkins DJA, Sievenpiper JL. Differential effects of fructose on glycemic control: A systematic review and meta-analysis of controlled feeding trials FASEB J. 2013; 27:855.15

Cozma AI, Ha V, Jayalath VH, de Souza RJ, Sievenpier JL. Sweeteners and Diabetes. Chapter 19. Fructose, High Fructose Corn Syrup, Sucrose And Health, Nutrition And Health. 2014; 309-323.

Cozma AI, Sievenpiper JL, de Souza RJ, Chiavaroli L, Ha V, Wang DD, Mirrahimi A, Yu ME, Carleton AJ, Di Buono M, Jenkins AL, Leiter LA, Wolever TM, Beyene J,Kendall CW, Jenkins DJ. Effect of fructose on glycemic control in diabetes: a systematic review and meta-analysis of controlled feeding trials. Diabetes Care. 2012; 35:1611-1620.

de Koning L, Malik VS, Kellogg MD, Rimm EB, Willett WC, Hu FB. Sweetened beverage consumption, incident coronary heart disease, and biomarkers of risk in men. Circulation. 2012; 125:1735-41.

de Koning L, Malik VS, Rimm EB, Willett WC, Hu FB. Sugar-sweetened and artificially sweetened beverage consumption and risk of type 2 diabetes in men. Am J Clin Nutr. 2011; 93:1321-1327.

De Ruyter JC, Olthof MR, Seidell JC, Katan MB. A trial of sugar-free or sugar-sweetened beverages and body weight in children. N Engl J Med. 2012; 367:1397-1406.

DeSalvo KB, Olsen R, Casavale KO. Dietary Guidelines for Americans. JAMA. Published online January 7, 2016.

de Souza RJ, Bray GA, Carey VJ, Hall KD, LeBoff MS, Loria CM, Laranjo NM, Sacks FM, Smith SR. Effects of 4 weight-loss diets differing in fat, protein, and carbohydrate on fat mass, lean mass, visceral adipose tissue, and hepatic fat: results from the POUNDS LOST trial. Am J Clin Nutr. 2012; 95:614-25.

DeFronzo R. Banting lecture. From the triumvirate to the ominous octet: a new paradigm for the treatment of type 2 diabetes mellitus. Diabetes 2009;58:773-795

DellaValle DM, Roe LS, Rolls BJ. Does the consumption of caloric and non-caloric beverages with a meal affect energy intake? Appetite. 2005; 44:187–193

Dhingra R, Sullivan L, Jacques PF, Wang TJ, Fox CS, Meigs JB, D'Agostino RB,Gaziano JM, Vasan RS. Soft drink consumption and risk of developing cardiometabolic risk factors and the metabolic syndrome in middle-aged adults in the community. Circulation. 2007; 116:480-488. Erratumin: Circulation. 2007; 116:e557.

DiMeglio DP, Mattes RD. Liquid versus solid carbohydrate: effects on food intake and body weight. Int J Obes Relat Metab Disord. 2000; 24:794-800.

Dolan LC, Potter SM, Burdock GA. Evidence-based review on the effect of normal dietary consumption of fructose on development of hyperlipidemia and obesity in healthy, normal weight individuals. Crit Rev Food Sci Nutr. 2010; 50:53-84.

Duffey KJ, Gordon-Larsen P, Steffen LM, Jacobs DR Jr, Popkin BM. Drinking caloric beverages increases the risk of adverse cardiometabolic outcomes in the Coronary Artery Risk Development in Young Adults (CARDIA) Study. Am J Clin Nutr. 2010; 92:954-959.

Dwan K et al. Systematic review of the empirical evidence of study publication bias and outcome reporting bias. PLos one. 2008;3:e308.

Ebbeling CB, Feldman HA, Chomitz VR, Antonelli TA, Gortmaker SL, Osganian SK, Ludwig DS. A Randomized Trial of Sugar-Sweetened Beverages and Adolescent Body Weight. N Engl J Med. 2012; 367:1407-1416.

Epstein LH, Carr KA, Lin H, Fletcher KD. Food reinforcement, energy intake, and macronutrient choice. Am J Clin Nutr. 2011; 94:12-18.

Erlanson-Albertsson C. How palatable food disrupts appetite regulation. Basic Clin Pharmacol Toxicol. 2005; 97:61-73.

Ervin RB, Kit BK, Carroll MD, Ogden CL. Consumption of added sugar among U.S. children and adolescents, 2005-2008. NCHS Data Brief. 2012; :1-8. http://www.cdc.gov/nchs/data/databriefs/db87.htm.

Ervin RB, Ogden CL. Consumption of added sugars among U.S. adults, 2005–2010. NCHS Data Brief. 2013; :1-8. http://www.cdc.gov/nchs/data/databriefs/db122.htm.

Eshak ES, Iso H, Kokubo Y, Saito I, Yamagishi K, Inoue M, Tsugane S. Soft drink intake in relation to incident ischemic heart disease, stroke, and stroke subtypes in Japanese men and women: the Japan Public Health Centre-based study cohort I. Am J Clin Nutr. 2012; 96:1390-1397.

Faeh D, Minehira K, Schwarz JM, Periasamy R, Park S, Tappy L. Effect of fructose overfeeding and fish oil administration on hepatic de novo lipogenesis and insulin sensitivity in healthy men. Diabetes. 2005;54(7):1907-1913. Erratum in: Diabetes. 2006; 55:563. Periasami, Raj [corrected to Periasamy, Raj]; Seongsu, Park [corrected to Park, Seongsu].

Fagherazzi G, Vilier A, Saes Sartorelli D, Lajous M, Balkau B, Clavel-Chapelon F. Fagherazzi G, Vilier A, Saes Sartorelli D, Lajous M, Balkau B, Clavel-Chapelon F. Consumption of artificially and sugar-sweetened beverages and incident type 2 diabetes in the Etude Epidemiologique aupres des femmes de la Mutuelle Generale de l'Education Nationale-European Prospective Investigation into Cancer and Nutrition cohort. Am J Clin Nutr. 2013; 97:517-23.

Flegal KM, Carroll MD, Kit BK, Ogden CL. Prevalence of obesity and trends in the distribution of body mass index among US adults, 1999-2010. JAMA. 2012; 307:491-497.

Flegal KM, Carroll MD, Kuczmarski RJ, Johnson CL. Overweight and obesity in the United States: prevalence and trends, 1960-1994. Int J Obes Relat Metab Disord. 1998; 22:39-47.

Flegal KM, Carroll MD, Ogden CL, Curtin LR. Prevalence and trends in obesity among US adults, 1999-2008. JAMA. 2010; 303:235-241.

Flegal KM, Carroll MD, Ogden CL, Johnson CL. Prevalence and trends in obesity among US adults, 1999-2000. JAMA. 2002; 288:1723-1727.

Flood-Obbagy JE, Rolls BJ. The effect of fruit in different forms on energy intake and satiety at a meal. Appetite. 2009; 52:416-422.

Food and Nutrition Board, Institute of Medicine. Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids (Macronutrients). Washington, DC: National Academy Press, 2001

Forman JP, Choi H, Curhan GC. Fructose and vitamin C intake do not influence risk for developing hypertension. J Am Soc Nephrol. 2009; 20:863-871.

Freeland-Graves JH, Nitzke S. Position of the Academy of Nutrition & Dietetics: Total Diet Approach to Healthy Eating. J Acad Nutr & Dietetics. 2013; 113:307-317.

Fung TT, Malik V, Rexrode KM, Manson JE, Willett WC, Hu FB. Sweetened beverage consumption and risk of coronary heart disease in women. Am J Clin Nutr. 2009; 89:1037-1042.

Fung TT, Rimm EB, Spiegelman D, Rifai N, Tofler GH, Willett WC, Hu FB. Association between dietary patterns and plasma biomarkers of obesity and cardiovascular disease risk. Am J Clin Nutr. 2001; 73:61-67.

Gardner C, Wylie-Rosett J, Gidding SS, Steffen LM, Johnson RK, Reader D,Lichtenstein AH; American Heart Association Nutrition Committee of the Council on Nutrition, Physical Activity and Metabolism, Council on Arteriosclerosis, Thrombosis and Vascular Biology, Council on Cardiovascular Disease in the Young; American Diabetes Association. Nonnutritive sweeteners: current use and health perspectives: a scientific statement from the American Heart Association and the American Diabetes Association. Diabetes Care. 2012; 35:1798-808.

Gibson S, Gunn P, Wittekind A, Cottrell R. The effects of sucrose on metabolic health: a systematic review of human intervention studies in healthy adults. Crit Rev Food Sci Nutr. 2013; 53:591-614.

GRADE Working Group. Grading quality of evidence and strengths of recommendations. BMJ. 2008; 336:995-998.

Grimm JW, Fyall AM, Osincup DP. Incubation of sucrose craving: effects of reduced training and sucrose pre-loading. Physiol Behav. 2005; 84:73-79.

Ha V, Sievenpiper JL, de Souza RJ, Chiavaroli L, Wang DD, Cozma AI, Mirrahimi A, Yu ME, Carleton AJ, Dibuono M, Jenkins AL, Leiter LA, Wolever TM, Beyene J,Kendall CW, Jenkins DJ. Effect of fructose on blood pressure: a systematic review and meta-analysis of controlled feeding trials. Hypertension. 2012; 59:787-795.

Hall KD, Heymsfield SB, Kemnitz JW, Klein S, Schoeller DA, Speakman JR. Energy balance and its components: implications for body weight regulation. Am J Clin Nutr. 2012; 95(4):989-994.Erratum in: Am J Clin Nutr. 2012; 96:448.

Halton T, Willett WC, Liu S, Manson JE, Stampfer MJ, Hu FB. Potato and french fry consumption and risk of type 2 diabetes in women. Am J Clin Nutr. 2006; 83:284-290.

Hanover LM ,White JS. Manufacturing, composition, and applications of fructose. Am J Clin Nutr. 1993; 58:724S-732S

Havel PJ. Dietary fructose: implications for dysregulation of energy homeostasis and lipid/carbohydrate metabolism. Nutr Rev. 2005; 63:133-157.

Heitmann BL, Lissner L, Osler M. Do we eat less fat, or just report so? Int J Obes Relat Metab Disord. 2000; 24:435-442.

Heitmann BL, Lissner L. Dietary underreporting by obese individuals--is it specific or non-specific? BMJ. 1995; 311:986-989.

Heitmann BL. The influence of fatness, weight change, slimming history and other lifestyle variables on diet reporting in Danish men and women aged 35-65 years. Int J Obes Relat Metab Disord. 1993; 17:329-336.

Hess J, Latulippe ME, Ayoob K, Slavin J. The confusing world of dietary sugars: definitions, intakes, food sources and international dietary recommendations. Food Funct. 2012; 3:477-486.

Heymsfield SB, Darby PC, Muhlheim LS, Gallagher D, Wolper C, Allison DB. The calorie: myth, measurement, and reality. Am J Clin Nutr. 1995; 62(5Suppl):1034S-1041S.

Hodge AM, English DR, O'Dea K, Giles GG. Glycemic index and dietary fiber and the risk of type 2 diabetes. Diabetes Care. 2004 Nov; 27:2701-2706.

Houchins JA, Burgess JR, Campbell WW, Daniel JR, Ferruzzi MG, McCabe GP, Mattes RD. Beverage vs. solid fruits and vegetables: effects on energy intake and body weight. Obesity. 2012; 20:1844-1850.

Hu FB, Li TY, Colditz GA, Willett WC, Manson JE. Television Watching and Other Sedentary Behaviors in Relation to Risk of Obesity and Type 2 Diabetes in Women. JAMA. 2003; 289:1785-91.

Hu FB. Dietary pattern analysis: a new direction in nutritional epidemiology. Curr Opin Lipidol. 2002; 13:3-9.

Hu FB. Resolved: There is sufficient scientific evidence that decreasing sugar-sweetened beverage consumption will reduce the prevalence of obesity and obesity-related diseases. Obesity Reviews. 2013; 14:606-619

Hu, E, Pan A, Malik, V, Sun Q. White rice consumption and risk of type 2 diabetes: meta-analysis and systematic review, BMJ. 2012; 344:e1454.

Hulshof T, De Graaf C, Weststrate JA. The effects of preloads varying in physical state and fat content on satiety and energy intake. Appetite. 1993; 21:273-286.

Huth PJ, Fulgoni VL 3rd, Keast DR, Park K, Auestad N. Major food sources of calories, added sugars, and saturated fat and their contribution to essential nutrient intakes in the U.S. diet: data from the national health and nutrition examination survey (2003--2006). Nutr J. 2013;12:116.

Iggman D, Rosqvist F, Larsson A, Arnlov J, Beckman L, Rudling M, Riserus U. Role of Dietary Fats in Modulating Cardiometabolic Risk During Moderate Weight Gain: A Randomized Double-Blind Overfeeding Trial (LIPOGAIN Study). J Am Heart Assoc. 2014; 3:e001095.

Ioannidis JP. Implausible Results in Human Nutrition Research. BMJ. 2013; 347:f6698.

Ioannidis JP. Why most discovered true associations are inflated. Epidemiology. 2008;19:640-648. Erratum in: Epidemiology. 2009; 20(4):629

Ioannidis JPA. Why most discovered true associations are inflated. Epidemiology. 2008; 19:640-648.

Janket SJ, Manson JE, Sesso H, Buring JE, Liu S. A prospective study of sugar intake and risk of type 2 diabetes in women. Diabetes Care. 2003; 26:1008-1015.

Johnson RK, Appel LJ, Brands M, Howard BV, Lefevre M, Lustig RH, Sacks F, Steffen LM, Wylie-Rosett J. Dietary sugars intake and cardiovascular health: a scientific statement from the American Heart Association. Circulation. 2009; 120:1011-1120.

Kahn R, Sievenpiper JL, Dietary sugar and body weight: have we reached a crisis in the epidemic of obesity and diabetes? We have, but the pox on sugar is overwrought and overworked. Diabetes Care. 2014; 37:957-962.

Kaiser KA, Shikany JM, Keating KD, Allison DB. Will reducing sugar-sweetened beverage consumption reduce obesity? Evidence supporting conjecture is strong, but evidence when testing effect is weak. Obesity Reviews. 2013;14:620-633

Kaiser KA, Shikany, JM, Keating KD, Allison DB. Pro v Con Debate: Role of sugar sweetened beverages in obesity: Will reducing sugar-sweetened beverage consumption reduce obesity? Evidence supporting conjecture is strong, but evidence when testing effect is weak. Obesity Reviews. 2013; 14:620-633.

Kissileff HR. Effects of physical state (liquid-solid) of foods on food intake: procedural and substantive contributions. Am J Clin Nutr. 1985; 42(5 Suppl):956-965.

Kit BK, Fakhouri, THI, Park S, Nielsen SJ, Ogden DL. Trends In Sugar-Sweetened Beverage Consumption Among Youth And Adults In The United States: 1999-2010. Am J Clin Nutr. 2013; 98:180-188. http://ajcn.nutrition.org/content/98/1/180.full.pdf+html.

Klurfeld DM, Foreyt J, Angelopoulos TJ, Rippe JM. Lack of Evidence For High Fructose Corn Syrup As The Cause Of The Obesity Epidemic. Int J Of Obes. 2013; 37:771-773. http://www.nature.com/ijo/journal/v37/n6/full/ijo2012157a.html.

Klurfeld DM. What Do Government Agencies Consider In The Debate Over Added Sugars? Adv Nutr. 2013; 4:257-261.

Kristal AR, Peters U, Potter JD. Is It Time to Abandon the Food Frequency Questionnaire? Cancer Epidemiology Biomarkers & Prevention. 2005; 14:2826-2828.

Lavin JH, French SJ, Ruxton CH, Read NW. An investigation of the role of oro-sensory stimulation in sugar satiety? Int J Obes Relat Metab Disord. 2002; 26:384-388.

Lê KA, Faeh D, Stettler R, Ith M, Kreis R, Vermathen P, Boesch C, Ravussin E, Tappy L. A 4-wk high-fructose diet alters lipid metabolism without affecting insulin sensitivity or ectopic lipids in healthy humans. Am J Clin Nutr. 2006; 84:1374-1379.

Lê KA, Ith M, Kreis R, Faeh D, Bortolotti M, Tran C, Boesch C, Tappy L. Fructose overconsumption causes dyslipidemia and ectopic lipid deposition in healthy subjects with and without a family history of type 2 diabetes. Am J Clin Nutr. 2009; 89:1760-1765.

Lindqvist A, Baelemans A, Erlanson-Albertsson C. Effects of sucrose, glucose and fructose on peripheral and central appetite signals. Regul Pept. 2008; 150:26-32.

Livesey G, Taylor R. Fructose consumption and consequences for glycation, plasma triacylglycerol, and body weight: meta-analyses and meta-regression models of intervention studies. Am J Clin Nutr. 2008; 88:1419-37.

Lustig RH, Schmidt LA, Brindis CD. Public health: The toxic truth about sugar. Nature. 2012; 482:27-29.

Lustig RH. Fructose: it's “alcohol without the buzz”. Adv Nutr. 2013; 4:226-235.

Maersk M, Belza A, Stødkilde-Jørgensen H, Ringgaard S, Chabanova E, Thomsen H, Pedersen SB, Astrup A, Richelsen B. Sucrose-sweetened beverages increase fat storage in the liver, muscle, and visceral fat depot: a 6-mo randomized intervention study. Am J Clin Nutr. 2012; 95:283-289.

Malik VS, Pan A, Willett WC, Hu FB. Sugar-Sweetened beverages and weight gain in children and adults: a systematic review and meta-analysis. Am J Clin Nutr. 2013; 98-1084-1102.

Malik VS, Popkin BM, Bray GA, Despres JP, Hu FB. Sugar-Sweetened Beverages, Obesity, Type 2 Diabetes Mellitus, and Cardiovascular Disease Risk. Circulation. 2010; 121:1356-1364.

Malik VS, Popkin BM, Bray GA, Després JP, Willett WC, Hu FB. Sugar-sweetened beverages and risk of metabolic syndrome and type 2 diabetes: a meta-analysis. Diabetes Care. 2010; 33:2477-2483.

Mann JI. Evidence-based nutrition: Does it differ from evidence-based medicine? Ann Med. 2010; 42:475-486.

Marriott BP, Cole N, Lee, E. National estimates of dietary fructose intake from 1977-2004 in the United States. J Nutr. 2009; 139:1228S-1235S.

Marriott BP, Olsho L, Hadden L, Connor P. Intake of added sugars and selected nutrients in the United States, National Health and Nutrition Examination Survey (NHANES) 2003-2006. Crit Rev Food Sci Nutr. 2010; 50:228-58

Martens MJ, Born JM, Lemmens SG, Karhunen L, Heinecke A, Goebel R, Adam TC, Westerterp-Plantenga MS. Increased sensitivity to food cues in the fasted state and decreased inhibitory control in the satiated state in the overweight. Am J Clin Nutr. 2013; 97:471-479.

Martin LJ, Su W, Jones PJ, Lockwood GA, Tritchler DL, Boyd NF. Comparison of energy intakes determined by food records and doubly labeled water in women participating in a dietary-intervention trial. Am J Clin Nutr. 1996; 63:483-490.

Mattes RD, Campbell WW. Effects of food form and timing of ingestion on appetite and energy intake in lean young adults and in young adults with obesity. J Am Diet Assoc. 2009; 109:430-437.

Mattes RD, Shikany JM, Kaiser KA, Allison DB. Nutritively sweetened beverage consumption and body weight: a systematic review and meta-analysis of randomized experiments. Obes Rev. 2011; 12:346-365.

McAllister EJ, Dhurandhar NV, Keith SW, Aronne LJ, Barger J, Baskin M, Benca RM, Biggio J, Boggiano MM, Eisenmann JC, Elobeid M, Fontaine KR, Gluckman P,Hanlon EC, Katzmarzyk P, Pietrobelli A, Redden DT, Ruden DM, Wang C, Waterland RA, Wright SM, Allison DB. Ten putative contributors to the obesity epidemic. Crit Rev Food Sci Nutr. 2009; 49:868-913.

McDevitt RM, Bott SJ, Harding M, Coward WA, Bluck LJ, Prentice AM. De novo lipogenesis during controlled overfeeding with sucrose or glucose in lean and obese women. Am J Clin Nutr. 2001; 74:737-746.

Meikle A, Riby LM, Stollery B. The impact of glucose ingestion and gluco-regulatory control on cognitive performance: a comparison of younger and middle aged adults. Hum Psychopharmacol. 2004; 19:523-35.

Melanson KJ, Zukley L, Lowndes J, Nguyen V, Angelopoulos TJ, Rippe JM. Effects of high-fructose corn syrup and sucrose consumption on circulating glucose,insulin, leptin, and ghrelin and on appetite in normal-weight women. Nutrition. 2007; 23:103-112.

Meyer KA, Kushi LH, Jacobs DR, Slavin J, Sellers TA, Folsom AR. Carbohydrates, dietary fiber, and incident type 2 diabetes in older women. Am J Clin Nutr. 2000;71:921-930.

Moore MC, Davis SN, Mann SL, Cherrington AD. Acute fructose administration improves oral glucose tolerance in adults with type 2 diabetes. Diabetes Care. 2001; 24:1882-1887.

Morton GJ, Cummings DE, Baskin DG, Barsh GS, Schwartz MW. Central nervous system control of food intake and body weight. Nature. 2006; 21; 443:289-295.

Mourao DM, Bressan J, Campbell WW, Mattes RD. Effects of food form on appetite and energy intake in lean and obese young adults. Int J Obes (Lond). 2007; 31:1688-1695.

Mozaffarian D, Hao T, Rimm EB, Willett WC, Hu FB. Changes in diet and lifestyle and long term weight gain in women and men, N Engl J Med. 2011; 364:2392-2404.

Muraki I, Imamura F, Manson JE, Hu FB, Willett WC, van Dam RM. Fruit consumption and risk of type 2 diabetes: results from three prospective longitudinal cohort studies. BMJ. 2013; 347:f5001. http://www.bmj.com/content/347/bmj.f5001.

Ngo Sock ET, Lê KA, Ith M, Kreis R, Boesch C, Tappy L. Effects of a short-term overfeeding with fructose or glucose in healthy young males. Br J Nutr. 2010; 103:939-943.

Nolan CJ, Damm P, Prentki M. Type 2 diabetes across generations: from pathophysiology to prevention and management. Lancet. 2011; 378:169-181

Ogden CL, Carroll MD, Fryar, CD, Flegal KM. Prevalence of obesity among adults and youth: United States 2011-2014. NCHS Data Brief. 2015; :1-8.

Ogden CL, Carroll MD, Kit BK, Flegal KM. Prevalence of Childhood and Adult Obesity in the United States 2011-2012. JAMA. 2014; 311:806-814. http://jama.jamanetwork.com/article.aspx?articleid=1832542.

Ogden CL, Carroll MD, Kit BK, Flegal KM. Prevalence of Obesity and Trends in Body Mass Index Among US Children and Adolescents 1999-2010. JAMA. 2012; 307:483-490. http://jama.jamanetwork.com/article.aspx?articleid=1104932.

Olsen NJ, Heitmann BL. Intake of calorically sweetened beverages and obesity. Obes Rev. 2009; 10:68-75.

Owen L, Scholey A, Finnegan Y, Sünram-Lea SI. Response variability to glucose facilitation of cognitive enhancement. Br J Nutr. 2013 Jun 21:1-12. [Epub ahead of print].

Owen L, Scholey AB, Finnegan Y, Hu H, Sünram-Lea SI. The effect of glucose dose and fasting interval on cognitive function: a double-blind, placebo-controlled, six-way crossover study. Psychopharmacology. 2012; 220:577-589.

Page KA, Chan O, Arora J, Belfort-Deaguiar R, Dzuira J, Roehmholdt B, Cline GW, Naik S, Sinha R, Constable RT, Sherwin RS. Effects of fructose vs glucose on regional cerebral blood flow in brain regions involved with appetite and reward pathways. JAMA. 2013; 309(1):63-70. Erratum in: JAMA. 2013; 309:1773.

Page KA, Seo D, Belfort-DeAguiar R, Lacadie C, Dzuira J, Naik S, Amarnath S,Constable RT, Sherwin RS, Sinha R. Circulating glucose levels modulate neural control of desire for high-calorie foods in humans. J Clin Invest. 2011; 121:4161-4169.

Pan A, Sun Q, Bernstein AM, Manson JE, Willett WC, Hu FB. Changes in Red Meat Consumption and Subsequent Risk of Type 2 Diabetes Mellitus Three Cohorts of US Men and Women. JAMA. 2013; 173:1328-1335.

Pan A, Sun Q, Bernstein AM, Schulze MB, Manson JE, Willett WC, Hu FB., Red meat consumption and risk of type 2 diabetes: 3 cohorts of US adults and an updated meta-analysis. Am J Clin Nutr. 2011; 94:1088-1096.

Piantadosi S, Byar DP, Green SB. The ecological fallacy. Am J Epidemiol. 1988; 127:893-904.

Pocock SJ, Collier TJ, Dandreo KJ, de Stavola BL, Goldman MB, Kalish LA, Kasten LE, McCormack VA. Issues in the reporting of epidemiological studies: a survey of recent practice. BMJ. 2004; 329:883

Position of the American Dietetic Association: Use of Nutritive and Nonnutritive Sweeteners. J Am Diet Assoc. 2004; 104:255-275.

Purnell JQ, Klopfenstein BA, Stevens AA, Havel PJ, Adams SH, Dunn TN, Krisky C, Rooney WD. Brain functional magnetic resonance imaging response to glucose and fructose infusions in humans. Diabetes Obes Metab. 2011; 13:229-234.

Raben A, Vasilaras TH, Møller AC, Astrup A. Sucrose compared with artificial sweeteners: different effects on ad libitum food intake and body weight after 10 wk of supplementation in overweight subjects. Am J Clin Nutr. 2002; 76:721-729.

Randall E, Marshall JR, Graham S, Brasure J. Patterns in food use and their associations with nutrient intakes. Am J Clin Nutr. 1990; 52:739-745.

Reid M, Hammersley R, Duffy M. Effects of sucrose drinks on macronutrient intake, body weight, and mood state in overweight women over 4 weeks. Appetite. 2010; 55:130-136.

Rippe JM, Angelopoulos TJ. Sucrose, high-fructose corn syrup, and fructose,their metabolism and potential health effects: what do we really know? Adv Nutr. 2013; 4:236-245.

Rippe JM. Fructose, High Fructose Corn Syrup, Sucrose, and Health: Modern Scientific Understandings. Chapter 1. Fructose, High Fructose Corn Syrup, Sucrose and Health, Nutrition and Health. 2014; 3-12.

Rizkalla SW. Health implications of fructose consumption: A review of recent data. Nutr Metab (Lond). 2010; 7:82.

Rolls BJ, Kim S, Fedoroff IC. Effects of drinks sweetened with sucrose or aspartame on hunger, thirst and food intake in men. Physiol Behav. 1990; 48:19-26.

Ruxton CH, Gardner EJ, McNulty HM. Is sugar consumption detrimental to health? A review of the evidence 1995-2006. Crit Rev Food Sci Nutr. 2010; 50:1-19.

Sackett DL. Bias in analytic research. J Chronic Dis. 1979; 32:51-63.

Sacks FM, Bray GA, Carey VJ, Smith SR, Ryan DH, Anton SD, McManus K, Champagne CM, Bishop LM, Laranjo N, Leboff MS, Rood JC, de Jonge L, Greenway FL, Loria CM, Obarzanek E, Williamson DA. Comparison of Weight-Loss Diets with Different Compositions of Fat, Protein, and Carbohydrates. N Engl J Med. 2009; 360:859-873.

Sawaya AL, Tucker K, Tsay R, Willett W, Saltzman E, Dallal GE, Roberts SB.Evaluation of four methods for determining energy intake in young and older women: comparison with doubly labeled water measurements of total energy expenditure. Am J Clin Nutr. 1996; 63:491-499.

Schoeller DA, Bandini LG, Dietz WH. Inaccuracies in self-reported intake identified by comparison with the doubly labelled water method. Can J Physiol Pharmacol. 1990; 68:941-9.

Schoeller DA, Thomas D, Archer E, Heymsfield SB, Blair SN, Goran MI, Hill JO, Atkinson RL, Corkey BE, Foreyt J, Dhurandhar NV, Kral JG, Hall KD, Hansen BC, Heitmann BL, Ravussin E, Allison DB. Self-report-based estimates of energy intake offer an inadequate basis for scientific conclusions. Am J Clin Nutr. 2013; 97:1413-1415.

Sievenpiper JL, Carleton AJ, Chatha S, Jiang HY, de Souza RJ, Beyene J, Kendall CW, Jenkins DJ. Heterogeneous effects of fructose on blood lipids in individuals with type 2 diabetes: systematic review and meta-analysis of experimental trials in humans. Diabetes Care. 2009; 32:1930-1937.

Sievenpiper JL, de Souza RJ, Cozma AI, Chiavaroli L, Ha V, Mirrahimi A. Fructose vs. Glucose and Metabolism: Do the Metabolic Differences Matter? Curr Opin Lipidol. 2014; 25:8-19.

Sievenpiper JL, de Souza RJ, Mirrahimi A, Yu ME, Carleton AJ, Beyene J, Chiavaroli L, Di Buono M, Jenkins AL, Leiter LA, Wolever TM, Kendall CW, Jenkins DJ. Effect of fructose on body weight in controlled feeding trials: a systematic review and meta-analysis. Ann Intern Med. 2012; 156:291-304.

Sievenpiper JL; Toronto 3D (Diet, Digestive Tract, and Disease) Knowledge Synthesis and Clinical Trials Unit. Fructose: where does the truth lie? J Am Coll Nutr. 2012; 31:149-151.

Silbernagel G, Machann J, Unmuth S, Schick F, Stefan N, Häring HU, Fritsche A.Effects of 4-week very-high-fructose/glucose diets on insulin sensitivity,visceral fat and intrahepatic lipids: an exploratory trial. Br J Nutr. 2011; 106:79-86.

Smeets PA, de Graaf C, Stafleu A, van Osch MJ, van der Grond J. Functional MRI of human hypothalamic responses following glucose ingestion. Neuroimage. 2005; 24:363-368.

Soenen S, Westerterp-Plantenga MS. No differences in satiety or energy intake after high-fructose corn syrup, sucrose, or milk preloads. Am J Clin Nutr. 2007; 86:1586-1594. Erratum in: Am J Clin Nutr. 2008; 87:1071.

Stanhope KL, Bremer AA, Medici V, Nakajima K, Ito Y, Nakano T, Chen G, Fong TH, Lee V, Menorca RI, Keim NL, Havel PJ. Consumption of fructose and high fructose corn syrup increase postprandial triglycerides, LDL-cholesterol, and apolipoprotein-B in young men and women. J Clin Endocrinol Metab. 2011; 96:E1596-1605.

Stanhope KL, Griffen SC, Bair BR, Swarbrick MM, Keim NL, Havel PJ.Twenty-four-hour endocrine and metabolic profiles following consumption of high-fructose corn syrup-, sucrose-, fructose-, and glucose-sweetened beverages with meals. Am J Clin Nutr. 2008; 87:1194-1203.

Stanhope KL, Griffen SC, Bremer AA, Vink RG, Schaefer EJ, Nakajima K, Schwarz JM, Beysen C, Berglund L, Keim NL, Havel PJ. Metabolic responses to prolonged consumption of glucose- and fructose-sweetened beverages are not associated with postprandial or 24-h glucose and insulin excursions. Am J Clin Nutr. 2011; 94:112-119.

Stanhope KL, Schwarz JM, Keim NL, Griffen SC, Bremer AA, Graham JL, Hatcher B,Cox CL, Dyachenko A, Zhang W, McGahan JP, Seibert A, Krauss RM, Chiu S, Schaefer EJ, Ai M, Otokozawa S, Nakajima K, Nakano T, Beysen C, Hellerstein MK, Berglund L, Havel PJ. Consuming fructose-sweetened, not glucose-sweetened, beverages increases visceral adiposity and lipids and decreases insulin sensitivity in overweight/obese humans. J Clin Invest. 2009; 119:1322-1334.

Stanhope KL. Sugar consumption, metabolic disease and obesity: The state of the controversy. Crit Rev Clin Lab Sci. 2015; Sep 17:1-16 [Epub ahead of print].

Subar AF, Thompson FE, Kipnis V, Midthune D, Hurwitz P, McNutt S, McIntosh A,Rosenfeld S. Comparative validation of the Block, Willett, and National Cancer Institute food frequency questionnaires : the Eating at America's Table Study. Am J Epidemiol. 2001; 154:1089-99.

Sun SZ, Anderson GH, Flickinger BD, Williamson-Hughes PS, Empie MW. Fructose and non-fructose sugar intakes in the US population and their associations with indicators of metabolic syndrome. Food Chem Toxicol. 2011; 49:2875-2882.

Sun SZ, Empie MW. Fructose metabolism in humans - what isotopic tracer studies tell us. Nutr Metab (Lond). 2012; 9:89.

Swinburn B, Sacks G, Ravussin E. Increased food energy supply is more than sufficient to explain the US epidemic of obesity. Am J Clin Nutr. 2009; 90:1453-1456.

Tamam S, Bellissimo N, Patel BP, Thomas SG, Anderson GH. Overweight and obese boys reduce food intake in response to a glucose drink but fail to increase intake in response to exercise of short duration. Appl Physiol Nutr Metab. 2012; 37:520-529.

Tappy L, Lê KA, Tran C, Paquot N. Fructose and metabolic diseases: new findings, new questions. Nutrition. 2010; 26:1044-1049.

Tappy L, Lê KA. Metabolic effects of fructose and the worldwide increase in obesity. Physiol Rev. 2010; 90:23-46.

Te Morenga L, Mallard S, Mann J. Dietary sugars and body weight: systematic review and meta-analyses of randomised controlled trials and cohort studies. BMJ. 2013; 345:e7492. http://www.bmj.com/content/346/bmj.e7492.full.pdf+html.

Teff KL, Elliott SS, Tschöp M, Kieffer TJ, Rader D, Heiman M, Townsend RR, Keim NL, D'Alessio D, Havel PJ. Dietary fructose reduces circulating insulin and leptin, attenuates postprandial suppression of ghrelin, and increases triglycerides in women. J Clin Endocrinol Metab. 2004; 89:2963-2972.

Tournier A, Louis-Sylvestre J. Effect of the physical state of a food on subsequent intake in human subjects. Appetite. 1991;16:17-24.

Trabulsi J, Schoeller DA. Evaluation of dietary assessment instruments against doubly labeled water, a biomarker of habitual energy intake. Am J Physiol Endocrinol Metab. 2001;281:E891-E899.

Tsuchiya A, Almiron-Roig E, Lluch A, Guyonnet D, Drewnowski A. Higher satiety ratings following yogurt consumption relative to fruit drink or dairy fruit drink. J Am Diet Assoc. 2006; 106:550-557.

van Baak MA, Astrup A. Consumption of sugars and body weight. Obes Rev. 2009; 10 Suppl 1:9-23.

Wang DD, Sievenpiper JL, de Souza RJ, Chiavaroli L, Ha V, Cozma AI, Mirrahimi A, Yu ME, Carleton AJ, DiBuono M, Jenkins AL, Leiter LA, Wolever TWS, Beyene J, Kendall CWC, Jenkins DJA. The effects of fructose intake on serum uric acid vary among controlled dietary trials. J Nutr. 2012; 142:916-923.

Wang DD, Sievenpiper JL, de Souza RJ, Cozma AI, Ha V, Chiavaroli L, Mirrahimi A, Carleton AC, Beyene J, Kendall CWC, Jenkins DJA. Effect of Fructose on Postprandial Triglycerides: A Systematic Review and Meta-Analysis of Controlled Feeding Trials. Atherosclerosis (Submitted for publication)

Welsh JA, Sharma AJ, Grellinger L, Vos MB. Consumption of Added Sugars is Decreasing in the United States. Am J Clin Nutr. 2011; 94:726-734. White JS. Straight talk about high-fructose corn syrup: what it is and what it ain't. Am J Clin Nutr. 2008; 88(suppl):1716S-21S.

White JS. Misconceptions about high-fructose corn syrup: is it uniquely responsible for obesity, reactive dicarbonyl compounds, and advanced glycation endproducts? J Nutr. 2009;139:1219S-1227S.

Wideman CH, Nadzam GR, Murphy HM. Implications of an animal model of sugar addiction, withdrawal and relapse for human health. Nutr Neurosci. 2005; 8:269-276.

Willett W. Nutrition epidemiology. 3rd. New York, NY. Oxford University Press, 2012; Chap. 11. p. 260. Implications of total energy intake for epidemiological analyses. Published online 2013. http://www.universitypressscholarship.com/mobile/view/10.1093/acprof:oso/9780199754038.001.0001/acprof-9780199754038-chapter-11. Accessed June 20, 2013

Winkelmayer WC, Stampfer MJ, Willett WC, Curhan GC. Habitual caffeine intake and the risk of hypertension in women. JAMA. 2005;294:2330-2335.

Woodward-Lopez G, Kao J, Ritchie L. To what extent have sweetened beverages contributed to the obesity epidemic? Public Health Nutr. 2011; 14:499-509.

Wright JD, Wang CY. Trends in intake of energy and macronutrients in adults from 1999-2000 through 2007-2008. NCHS Data Brief. 2010;:1-8.

Zang YH, An T, Zhang RC, Zhou Q, Huang Y, Zhang J. Very high fructose intake increase serum LDL-cholesterol: a meta-analysis of controlled feeding trials. J Nutr. 2013 (In Press). Published ahead of print. Doi: 10.3945/jn.113.175323

Ziauddeen H, Farooqi IS, Fletcher PC. Obesity and the brain: how convincing is the addiction model? Nat Rev Neurosci. 201214; 13:279-286.

EXHIBIT D

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DENISE CECELIA SIMPSON	)	
	)	Civil Action No. 2016 CA 001931 B
	)	Judge Marisa J. Demeo
Plaintiff	)	
	)	
v.	)	NEXT SCHEDULED EVENT: Initial
	)	Scheduling Conference on June 17, 2016
JOHNSON & JOHNSON, et al.	)	
	)	
	)	
Defendants	)	

PLAINTIFF DENISE SIMPSON'S STATEMENT OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT PERSONAL CARE PRODUCTS COUNCIL'S SPECIAL MOTION TO DISMISS PURSUANT TO THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT (D.C. CODE § 16-5501, ET SEQ.)

Plaintiff Denise Simpson files this Opposition to the Special Motion to Dismiss pursuant to the D.C. Anti-SLAPP Act ("the Act") filed by Defendant Personal Care Products Council ("PCPC"). In its Motion, PCPC argues that its activities and statements that form the basis of Ms. Simpson's claims against it are protected by the Act. But as discussed below, PCPC's activities and statements do not fall under the protection of the Act, and its Motion should be denied.

FACTS AND PROCEDURAL HISTORY

For decades, all Defendants—in furtherance of their private, commercial interests—have actively concealed and misrepresented the serious risk of ovarian cancer caused by the genital use of Talc-based cosmetic body powders, specifically Johnson's Baby Powder and Shower to Shower ("the Products"). As a result of the concealment and misrepresentations, countless women were unaware of the serious risk caused by the use of the Products. Following years of

regular and habitual use of the Talc-based Products in her genital area, Plaintiff Denise Simpson was diagnosed with ovarian cancer. Compl. ¶ 1. Ms. Simpson, a life-long DC resident, filed her Complaint in this Court on March 18, 2016 against (1) Johnson & Johnson (J&J) and its subsidiary, Johnson & Johnson Consumer Companies, Inc. (JJCC) – the manufacturers of the Products; (2) Imerys Talc America, Inc. (Imerys) – a supplier of Talc for use in the Products; and (3) PCPC – the current name of the trade association that has represented the interests of J&J, JJCC, and Imerys for decades.

Ms. Simpson alleges that PCPC, in concert with J&J, JJCC, and Imerys, coordinated their defense of the use of Talc in the Products following a series of studies that linked the use of Talc in the genital area to an increased risk of ovarian cancer. Compl. ¶¶ 32−34, 138−141. In their defense and commercial promotion of these dangerous Products, the Defendants misrepresented and concealed information from the government and the public concerning the risk associated between genital use of Talc and ovarian cancer. *Id.* Specifically, PCPC "formed the Talc Interested Party Task Force (TIPTF)" in cooperation with the other Defendants. Compl. ¶ 34 Through the TIPTF, Defendants "hired scientists to perform biased research" and "used political and economic influence on regulatory bodies" in order to "prevent regulation of talc and to mislead the consuming public about the true hazards of talc." *Id.* These statements and actions form the basis of Ms. Simpson's claims of negligence, fraud, and civil conspiracy against PCPC. *See* Compl. ¶¶ 76−83, 137−144, 152−158.

On May 2, 2016, Defendant PCPC filed a Special Motion to Dismiss, arguing that PCPC's statements and actions that form the basis of Ms. Simpson's claims are protected under the Act.

ARGUMENT

I. D.C.'s Anti-SLAPP Act does not protect PCPC's private, commercial activities and statements.

The District of Columbia Anti-SLAPP Act of 2010 ("the Act") "was enacted by the D.C. Council to protect the targets of suits intended as a weapon to chill or silence speech." *Doe v. Burke*, 2016 WL 932799 at *1 (D.C. Mar. 10, 2016) (internal punctuation omitted). The intent of the Act is to provide defendants who are sued based on actions falling under the protection of the Act with the option to "file a special motion to dismiss any claim arising from **an act in furtherance of the right of advocacy on issues of public interest** . . . ." D.C. Code Ann. § 16-5502(a). First, pursuant to the Act, the moving party must "make a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest," which PCPC has failed to do. *Id.* at § 16-5502(b). Second, if a defendant meets its burden of establishing a prima facie case, then the burden shifts to the responding party to "demonstrate[] that the claim is likely to succeed on the merits." *Id.*

Here, PCPC (the moving party) has failed to establish a prima facie case that the claims alleged in Ms. Simpson's Complaint against PCPC arise from acts in furtherance of the right of advocacy on issues of public interest. PCPC's involvement in this case, and the claims against it, are based on actions and statements that PCPC undertook for the private, commercial interests of itself and its members. The Court should deny PCPC's Special Motion to Dismiss at this stage of the litigation. As a result, the burden does not shift to Ms. Simpson to prove the likelihood of her success on the merits.

In its Motion, PCPC asserts—and Ms. Simpson agrees—there are two elements that PCPC must prove to make a prima facie showing under the Act: (1) "an act in furtherance of the right of advocacy," and (2) "on issues of public interest." Def.'s Mem. Special Mot. Dismiss at 3

("Def.'s Mem."); D.C. Code Ann. § 16-5501. For the reasons below, PCPC fails to make a prima facie showing under both elements.

1. PCPC fails to make a prima facie showing—as required—that the Act protects all of the private, commercial statements and actions that form the basis of Plaintiff's claims.

PCPC alleges that its statements to the government and the public are acts in furtherance of the right of advocacy. *See* Def.'s Mem. at 3−5. But Ms. Simpson's claims are not limited to the statements made by PCPC to the government or the public. Importantly, in her Complaint Ms. Simpson alleges that PCPC and the other Defendants acted in concert to pool their substantial resources to defend Talc use in the Products. Compl. ¶ 34. Therefore, the statements and actions *among the Defendants* about the defense of Talc form part of Ms. Simpson's claims. PCPC's statements and actions directed to the government and public are only part of these claims. The underlying bases of the claims involve not only statements to the government and public, but also statements among the Defendants, which are not "acts in furtherance of the right of advocacy." For that reason, PCPC fails to establish a prima facie case under this first element.

2. PCPC acted in furtherance of its own and its members *private, commercial interests* and not on issues of *public interest.*

The second element, "issue of public interest," is defined as follows in the Act:

> "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. **The term "issue of public interest" shall not be construed to include *private interests*, such as statements directed primarily toward protecting the speaker's *commercial interests* rather than toward commenting on or sharing information about a matter of public significance.**

D.C. Code Ann. § 16-5501(3) (emphasis added).

In presenting its Motion to the Court, PCPC cites to the first sentence of the section of the Act quoted above. However, PCPC conceals from the Court the most important part of the

section. In this section, the Act specifically excludes "private interests, such as statements directed *primarily* toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance." D.C. Code Ann. § 16-5501(3) (emphasis added). [1] In similar fashion, PCPC's concealment of this pivotal part of the statute is analogous to Defendants concealment of the risk of ovarian cancer caused by genital Talc use.

Rather than advocating on issues of public interest, PCPC advocated with its private interests and the commercial interests of the members as its primary motivators. PCPC, in concert with the other Defendants, made statements to the government and the public defending the safety of Talc as used in the Products. Compl. ¶ 34. Any statements made by PCPC concerning this were not made with the primary purpose of "commenting on or sharing information about a matter of public significance."

To this point, PCPC's senior executive vice president, Mark Pollak, testified that PCPC is the "trade association for the cosmetic and personal care products industry," which represents more than 600 member companies who manufacture, distribute, and supply personal care products in the U.S." Pollak Decl. ¶¶ 4−5. The Defendants who use or supply Talc in cosmetic products (J&J, JJCC, and Imerys) are among PCPC's members. *Id.* at ¶ 6. PCPC would not exist as a trade association without the members of the association and therefore has an inherent private interest in advocating for its members. PCPC promotes the benefits of membership on its website by stating that members can "[p]articipate in Council committees to help develop programs and find solutions that **benefit the industry**." *Benefits of Council Membership*,

[1] Plaintiff concedes that if PCPC's advocacy was truly on issues of public interest rather than on issues of private, commercial interest, then *some* of its advocacy would meet this first element (see discussion on Section I(1)) .

Personal Care Products Council (May 19, 2016), http://www.personalcarecouncil.org/member-benefits (emphasis added) (attached as Exhibit 1).

Mr. Pollak even admits that instead of advocating on issues of *public interest*, PCPC advocates "on issues of *interest to some or all of its members.*" *Id.* at ¶ 10 (emphasis added). On its website, PCPC advertises that it "represents the industry at the federal, state, and local level on issues of *interest to the cosmetic and personal care industry.*" *Legislative Advocacy*, Personal Care Products Council (May 18, 2016), http://www.personalcarecouncil.org/legislation-regulation/legislative-advocacy (attached as Exhibit 2). Although Mr. Pollak states that these issues of interest to its members "*may* involve issues of health, safety, and/or products[,]" it is clear that the private, commercial interests of its members *primarily* drove PCPC's actions alleged in Ms. Simpson's Complaint. *Id.* (emphasis added).

PCPC makes the spurious claim that it advocated only "on an issue of public interest, the safety of talc." Def.'s Mem. at 5. But in reality, PCPC advocated on an issue of private, commercial "interest to some of all of its members"—the defense of Talc used in Products manufactured or supplied by its members.

Because PCPC advocated on issues of private, commercial interests instead of interests of the public, PCPC has failed to establish a prima facie case under this element. Therefore, the Court should deny its Special Motion to Dismiss.

3. The legislative history confirms Ms. Simpson's position that PCPC is not entitled to the protection of the Act.

Other than the clear statutory language and statements made by PCPC, the legislative history confirms that PCPC is not entitled to the protection of the Act. In discussing the Anti-SLAPP Act, the D.C. Council Committee on Public Safety and the Judiciary stated, "[t]he actions that typically draw a SLAPP are often, as the ACLU noted, the kind of grassroots

activism that should be hailed in our democracy." D.C. Council, Comm. on Pub. Safety & the Judiciary, Report on Bill 18-893, at 3 (Nov. 18, 2010) ("Comm. Report") (attached as Exhibit 3). Furthermore, an ACLU representative testified to the Committee that the plaintiff in these actions is "usually the side with deeper pockets and ready access to counsel." Comm. Report, Testimony of the American Civil Liberties Union of the Nation's Capital before the Comm. on Pub. Safety & the Judiciary, at 1 (Sept. 17, 2010).

Here, PCPC's alleged activities are the exact opposite of "grassroots activism"; rather, its activities were driven by the interests of its corporate members. As such, PCPC is certainly the "side with the deeper pockets and ready access to counsel." The D.C. Council never intended for the Anti-SLAPP Act to apply private, commercial activities and statements, and this Court should not extend the protection of the Act.

Additionally, the Committee Report to the Act cited a study that showed that "[t]he vast majority of the cases identified by the study were brought under legal charges of defamation (such as libel and slander), or as such business torts as interference with contract." Comm. Rep. at 2 (citing George W. Pring, *SLAPPS: Strategic Lawsuits against Public Participation*, Pace Env. L. Rev., Paper 132, 1 (1989)). Ms. Simpson has not brought any such claims against PCPC in this case.

4. Because PCPC failed to establish a prima facie case, the burden has not shifted to Ms. Simpson to prove the likelihood of her success on the merits.

Only if PCPC "makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest," would Ms. Simpson have to respond by demonstrating the likelihood of her success on the merits. D.C. Code Ann. § 5502(b). But PCPC has failed to meet its burden to establish a prima facie case because its statements and

actions alleged in the complaint all relate primarily to its private, commercial interests. Therefore, the burden has not shifted to Ms. Simpson.

Alternatively, should the Court find that PCPC made a prima facie showing, Ms. Simpson would be prejudiced without additional, limited discovery as provided under the Act. D.C. Code Ann. § 16-5502(c)(2). Currently, no documents been produced in this case. While documents has been exchanged in other similar cases, including a companion case filed in D.C. Superior Court the Honorable Brian Holeman, the documents have been produced under protective orders signed by all counsel. Significantly, the parties have not yet agreed to a protective order in this case.

Regardless, PCPC has failed in its Motion to make a prima facie showing under the Act, and Ms. Simpson does not have the burden to prove the likelihood of her success on the merits at this stage of the litigation.

II. Because PCPC's Special Motion to Dismiss is frivolous within the meaning of the Act, the Court should award Ms. Simpson the reasonable costs and attorneys' fees incurred by opposing the motion.

The Anti-SLAPP Act allows the Court to "award reasonable attorney fees and costs to the responding party if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay." D.C. Code Ann. § 16-5504(b) (emphasis added). Ms. Simpson asserts that the motion is frivolous. In support of their Motion, PCPC concealed from the Court the most significant sentence of the statute: "The term 'issue of public interest' shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than commenting on or sharing information about a matter of public significance." D.C. Code Ann. §§ 16-5501(3), 16-5504(b) (emphasis added). Ms. Simpson has demonstrated that asserting the protection of the

Anti-SLAPP in this case is without merit and therefore frivolous. Accordingly, the Court should award Ms. Simpson the reasonable attorneys' fees and costs to compensate her for having to respond to this Motion.

CONCLUSION

The claims alleged against PCPC in Ms. Simpson's Complaint all clearly relate to PCPC's statements and actions on issues of private, commercial interest; not issues of public interest. Additionally, statements and actions between the Defendants (as opposed to the government or the public) at issue in the claims do not fall under the protection of the Act. As a result, PCPC has failed to make a prima facie showing, and its Special Motion to Dismiss should be denied.

RESPECTFULLY SUBMITTED,

ASHCRAFT & GEREL, LLP

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EXHIBIT E

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OUR MISSION & HISTORY

We unite America's non-alcoholic beverage companies to achieve responsible public policy and promote our industry's commitment to customers,

consumers and communities.

The non-alcoholic beverage industry plays an important role in the U.S. economy. Our industry has a direct economic impact of more than $166.5 billion, provides nearly 240,000 jobs and helps to support hundreds of thousands more that depend, in part, on beverage sales for their livelihoods. Beverage companies and their employees, and the firms and employees indirectly employed by the industry, provide significant tax revenues - $13.5 billion at the state level and $22.5 billion at the federal level. In addition, the beverage companies that produce and distribute non-alcoholic beverages in the U.S. and those they directly employ contribute nearly $1.5 billion to charitable causes in communities across the nation.

The American Beverage Association (ABA) is the trade association that represents America's non-alcoholic beverage industry. ABA was founded in 1919 as the American Bottlers of Carbonated Beverages, and renamed the National Soft Drink Association in 1966. Today the ABA represents hundreds of beverage producers, distributors, franchise companies and support industries. Together, they bring to market hundreds of brands, flavors and packages, including regular and diet soft drinks, bottled water and water beverages, 100 percent juice and juice drinks, sports drinks, energy drinks and ready-to-drink teas.

ABA provides a neutral forum in which members convene to discuss common issues while maintaining their tradition of spirited competition in the American marketplace. The Association also serves as liaison between the industry, government and the public, and provides a unified voice in legislative and regulatory matters. As the national voice for the non-alcoholic refreshment beverage industry, the American Beverage Association staff of legislative, scientific, technical, regulatory, legal and communications experts effectively represent members' interests.

EXHIBIT F

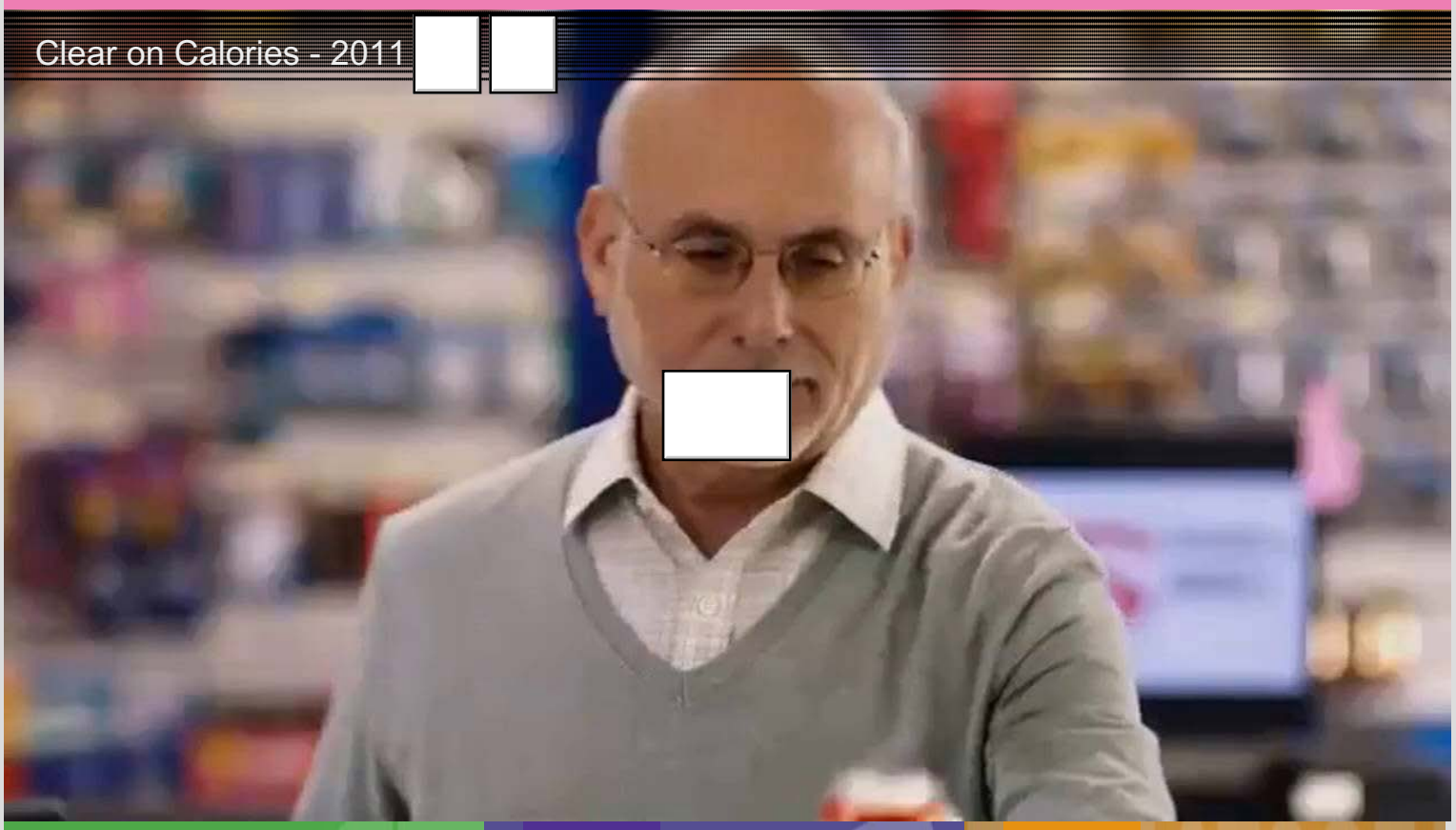
Putting Calorie Info Up Front

America's beverage companies have put clear calorie information at your fingertips. Our Clear on Calories Initiative and Calories Count™ Beverage Vending Program are both designed to help you choose a beverage that fits your needs.

Clear on Calories

As part of the Clear on Calories Initiative, launched in 2010 in support of the "Let's Move" anti-obesity campaign, we added an easy-to-read calorie label to the front of every can, bottle and pack we produce. The labels display the total calories per container on beverages 20 ounces or smaller. For containers larger than 20 ounces, calories are labeled per 12 ounces in most cases. On vending machines, calorie labels are right on the buttons to make it easier to choose the beverage that's right for you.

Clear on Calories - 2011



Cutting Sugar in the American Diet

Check out how the beverage industry's Balance Calories Initiative is working to reduce beverage calories per person 20% by 2025.

Removing Calories from Schools

See the results of our voluntary efforts to remove full-calorie soft drinks from schools.

Introducing More Choices

Explore a wider range of products with less sugar or no sugar at all from Coca-Cola, Dr Pepper and Pepsi.

The Coca-Cola Company | DR PEPPER SNAPPLE | PEPSICO | AMERICAN BEVERAGE ASSOCIATION

Click on a logo to learn more about the members of the American Beverage Association.

EXHIBIT G

ENG ESP

Find a Balance that Works for You

America's beverage companies—Coca-Cola, Dr Pepper and Pepsi—have come together to support your family's efforts to balance what you eat, drink and do. We know an important part of finding that balance is reducing the sugar from beverages in your family's diet. So we're backing you up with ways to make it easier. Learn more about what we're doing through our **industry efforts**, **beverage choices** and **community support**.

INDUSTRY EFFORTS

Cutting Sugar in the American Diet

Check out how the beverage industry's Balance Calories Initiative is working to reduce

BEVERAGE CHOICES

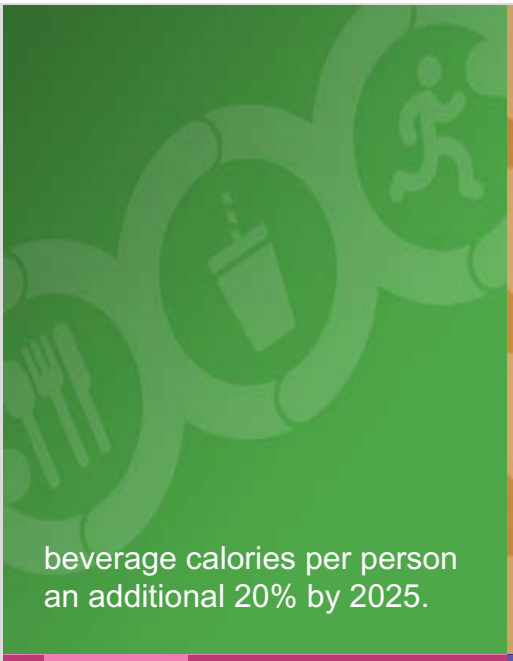
Introducing More Choices

Explore a wider range of products with less sugar or

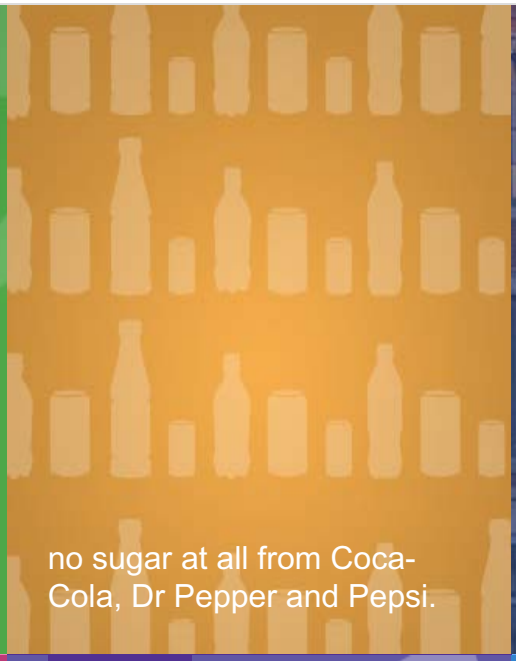
COMMUNITY SUPPORT

Making Our Communities Stronger

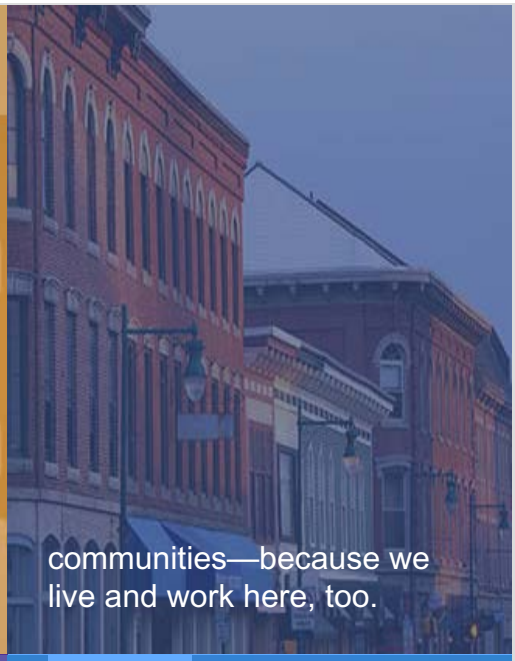
See how we're creating jobs, working with local partners and giving back to our



beverage calories per person an additional 20% by 2025.



no sugar at all from Coca-Cola, Dr Pepper and Pepsi.



communities—because we live and work here, too.

INDUSTRY EFFORTS

Putting Calorie Info Up Front

Learn how we're making it easier to find the beverage that's right for you.

INDUSTRY EFFORTS

Removing Calories from Schools

See the results of our voluntary efforts to remove full-calorie soft drinks from schools.

TWITTER

DPSG is working to support moms by offering more low & no cal options! #BalanceUS twitter.com/DrPep…

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EXHIBIT H

RESEARCH & EDUCATION, ENVIRONMENT

STAYING HYDRATED WITH BOTTLED WATER DURING SUMMER

JUNE 7, 2016

With temperatures climbing as we enter the summer months it is important to remember that we all need to stay hydrated. Our member companies make beverages that can help keep you hydrated and bottled water is an especially great option when enjoying everything that we love about the summer and sun. Beverage companies produce a variety of water that is both safe, convenient and great tasting.

Bottled water has been increasing in popularity for years now. The reasons for that are not surprising. Bottled water is easy to grab on the go and is available where and when you need it. These days there are more kinds of bottled water that ever before - spring water, purified water, mineral water, sparkling bottled water, well water and artesian water.

And beverage companies produce water in a responsible and environmentally friendly way. Check out this infographic that shows how the industry has reduced its water usage at our bottling facilities, which account for less than one percent of America's total water usage.

And like all of our other packaging, bottled water bottles are 100 percent recyclable, even the caps!

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EXHIBIT I

RESEARCH & EDUCATION, INITIATIVES & ADVOCACY

MEANINGFUL SOLUTIONS TO COMPLEX CHALLENGES

APRIL 26, 2016

Childhood obesity is a complex health challenge our nation is facing. It is important that we come together with other industries, communities and government in public-private partnerships to address this challenge. America's leading beverage companies are doing their part to advance innovative, solutions-based initiatives ranging from our School Beverage Guidelines to our most recent Balance Calories Initiative.

In 2006, we partnered with the Alliance for a Healthier Generation on the National School Beverage Guidelines – an initiative to remove full-calorie sodas from schools and replace them with a range of lower-calorie, smaller-portion choices. As a result of this ambitious effort we slashed beverage calories in schools by more than 90 percent and successfully changed the beverage landscape in schools across the country. This voluntary step by the beverage industry later helped form the basis of the beverage component of USDA's regulations for foods and beverages sold in schools.

We know it's important for mom and dad to have the information they need to make informed choices for their family, so in 2010 we launched Clear on Calories – our calorie labeling effort which prominently displays calorie information on the front of every bottle, can and pack we sell —in support of the First Lady's "Let's Move!" campaign. We are also placing calorie information on more than 3 million vending machines, self-serve fountains and retail coolers to make it easier for people to choose the drink that's right for them.

In 2014, we joined with the Alliance for a Healthier Generation again to create our Balance Calories Initiative. We have set a goal to reduce beverage calories consumed per person nationally by 20 percent by 2025. A component of this effort is Mixify™, a first-of-its kind national consumer awareness and engagement program encouraging teens and their families to balance their calories by moderating what they consume, including from beverages, and getting more active.

We take seriously our role in offering meaningful solutions and we hope others will join us. To learn more about

the beverage industry's commitment to fighting obesity, visit DeliveringChoices.org.

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EXHIBIT J

Finding a Balance

On This Page

- Finding a Balance
- The Caloric Balance Equation
- Balancing Diet and Activity to Lose and Maintain Weight Count, Cut, and Burn Calories
- Recommended Physical Activity Levels
- Questions and Answers about Calories

There's a lot of talk about the different components of food. Carbohydrates, fats, and proteins, all contain calories. If your diet focus is on any one of these alone, you're missing the bigger picture.

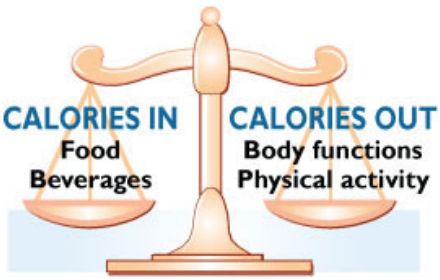
Video – Finding a Balance

To help people achieve caloric balance and to provide insights into ways in which communities can be involved, CDC-TV included "Finding a Balance" in its "Health Matters" series. This video provides expert perspectives on, the balance of calories and activity, and personal views of people who made changes in their lives to achieve this balance. Watch or download the video (https://www.cdc.gov/cdctv/healthyliving/healthyeating/finding-balance-obesity.html) (4:18 mins)

The Caloric Balance Equation

Whether you need to lose weight, maintain your ideal weight, or gain weight, the main message is – calories count! Weight management is all about balancing the number of calories you take in with the number your body uses or "burns off."

- A *calorie* is a unit of energy supplied by food and beverages. A calorie is a calorie regardless of its source. Carbohydrates, fats, sugars, and proteins all contain calories.
- If your body does not use calories, they are stored as fat.
- *Caloric balance* is like a scale. To remain in balance and maintain your body weight, the calories consumed must be balanced by the calories used in normal body functions, daily activities, and exercise.



If you are…	Your caloric balance status is…
Maintaining your weight	"**in balance**." You are eating roughly the same number of calories that your body is using. Your weight will remain **stable**.
Gaining weight	"**in caloric excess**." You are eating more calories than your body is using. You will store these extra calories as fat and you'll **gain** weight.
Losing weight	"**in caloric deficit**." You are eating fewer calories than you are using. Your body is pulling from its fat storage

Losing weight	**In caloric deficit.** You are eating fewer calories than you are using. Your body is pulling from its fat storage cells for energy, so your weight is **decreasing**.

Balancing Diet and Activity to Lose and Maintain Weight Count, Cut, and Burn Calories

If your body weight has not changed for several months, you are in caloric balance. If you need to gain or lose weight, you'll need to balance your diet and activity level to achieve your goal. To see how many calories you should have in a day to achieve and maintain your recommended weight, see the Dietary Guidelines for Americans, 2015–2020 (https://health.gov/dietaryguidelines/2015/guidelines/appendix-2/) .

It takes about 3,500 calories to lose a pound of body fat,[1] You can do this by reducing the calories you take in and increasing the calories you burn. An adult can lose 1 to 2 pounds per week by avoiding or burning 500–1000 calories per day,[2]

To learn how many calories you are taking in, write down the foods you eat and the beverages you drink, plus the calories they have, each day. By writing down what you eat and drink, you become more aware of everything you are putting in your mouth. Also, begin writing down your physical activity each day and the length of time you do it.

Here are simple paper and pencil tools to assist you:

Food Diary [PDF-18KB] (https://www.cdc.gov/healthyweight/pdf/food_diary_cdc.pdf)

Physical Activity Diary [PDF-17KB] (https://www.cdc.gov/healthyweight/pdf/physical_activity_diary_cdc.pdf)

Do you want to try a Web-based approach to track your food intake and physical activity? Go to the SuperTracker (https://www.supertracker.usda.gov/default.aspx) . The site will give you a personalized diet and activity plan.

Recommended Physical Activity Levels

- For adults, 2 hours and 30 minutes every week (about 22 minutes each day or 50 minutes 3 times per week), of moderate-intensity aerobic activity such as brisk walking. and
- Muscle-strengthening exercise on 2 or more days a week that work all major muscle groups (legs, hips, back, abdomen, chest, shoulders, and arms).
- Increase the intensity or the amount of time that you are physically active to improve health benefits and control body weight.
- Encourage children and teenagers to be physically active for at least 60 minutes each day, or almost every day.
- For more detail, see How much physical activity do you need? (https://www.cdc.gov/physicalactivity/everyone/guidelines/index.html)

Each person's body may have different needs for calories and exercise. A healthy lifestyle requires balance in the foods you eat, the beverages you drink, the way you do daily activities, and in the amount of activity in your daily routine. Counting calories all the time is not necessary, but it may help you in the beginning to find out how many calories are in the foods and drinks you consume regularly as you strive to achieve energy balance. The ultimate test of balance is whether or not you are gaining, maintaining, or losing weight.

Questions and Answers about Calories

Q: Are fat-free and low-fat foods low in calories?

A: Not always. Just because a product is fat-free, it doesn't mean that it is "calorie-free." Some fat-free and low-fat foods have extra sugars; although there is little or no fat, the calorie amount could be near the same as the original product. And, calories do count! See FAT-Free Versus Regular Calorie Comparison (http://www.nhlbi.nih.gov/health/public/heart/obesity/lose_wt/fat_free.htm) for more information.

Always read the Nutrition Facts food label to find out the calorie content. Remember, this is the calorie content for **one serving** of the food item, so be sure and check the serving size. If you eat more than one serving, you'll be eating more calories than is listed on the food label. For more information about the Nutrition Facts food label, visit How to Understand and Use the Nutrition Facts Food Label (http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm274593.htm) .

Q: If I eat late at night, will these calories automatically turn into body fat?

A: The time of day doesn't affect how your body uses calories. The number of calories you eat and the calories you burn affect your

weight.

Q: I've heard it is more important to worry about carbohydrates than calories. Is this true?
A: By focusing only on carbohydrates, you can still eat too many calories. Also, if you reduce the variety of foods in your diet, you could exclude vital nutrients and not be able to stay on the diet over time.

Q: Does it matter how many calories I eat as long as I'm maintaining an active lifestyle?
A: While physical activity is a vital part of weight control, so is controlling the number of calories you eat. If you take in more calories than you use, you will still gain weight.

Q. What other factors besides diet and behavior contribute to overweight and obesity?
A: Environment and genetic factors may add to causes of overweight and obesity. For more information, see Other Factors in Weight Gain (https://www.cdc.gov/healthyweight/calories/other_factors.html)

Want to learn more?

Cutting Calories at Every Meal (https://www.cdc.gov/healthyweight/healthy_eating/cutting_calories.html)
You can cut calories by eating foods high in fiber, making better drink choices, avoiding portion size pitfalls, and adding more fruits and vegetables to your eating plan.

Losing Weight (https://www.cdc.gov/healthyweight/losing_weight/index.html)
Even a modest weight loss, such as 5 to 10 percent of your total body weight, can produce health benefits.

Physical Activity for a Healthy Weight (https://www.cdc.gov/healthyweight/physical_activity/index.html)
Physical activity can increase the number of calories your body uses for energy or "burns off." The burning of calories through physical activity, combined with reducing the number of calories you eat, creates a "calorie deficit" that can help with weight loss.

References

[1]DHHS, A Healthier You, page 19. Available online (http://www.health.gov/dietaryguidelines/dga2005/healthieryou/html/chapter5.html)

[2]DHHS, AIM for a Healthy Weight, page 5. Available online [PDF-2.17MB] (http://www.nhlbi.nih.gov/health/public/heart/obesity/aim_hwt.pdf)

Breastfeeding

Micronutrient Malnutrition

State and Local Programs

File Formats Help:

How do I view different file formats (PDF, DOC, PPT, MPEG) on this site? (https://www.cdc.gov/Other/plugins/)

(https://www.cdc.gov/Other/plugins/#pdf)

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EXHIBIT K

EAT

Milk and Other Surprising Ways to Stay Hydrated

BY AMBY BURFOOT JUNE 30, 2016 11:45 AM

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Most Americans have heard that they should drink eight glasses of water a day to stay hydrated, but there is surprisingly little data to support this advice.

Tony Cenicola/The New York Times

But now, a new "beverage hydration index" provides evidence-based suggestions for how to most efficiently hydrate. The index was developed from a British study published in December that tracked how long 13 common beverages remain in the body after being consumed.

"In the last 25 years, we've done many studies on rehydration after exercise," said Ronald J. Maughan, a hydration expert from Loughborough University, and lead author of the study. "We thought it was time to look at hydration in typical consumers who aren't exercising."

The hydration index is modeled after the well-known glycemic index, which measures how the body responds to the carbohydrate content of different foods. (The glycemic index is used to help individuals keep their glucose-insulin response under control.) The guiding principle behind the new hydration index is that some fluids last longer in your body than others, providing more hydration. After all, if you drink a cup of water and then immediately excrete half that amount in your urine, you haven't added eight ounces to your water supply, but only four.

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The British study determined the hydration index of 13 common beverages by having the participants, 72 males in their mid-20s, drink a liter of water as the standard beverage. The amount of water still remaining in subjects' bodies two hours later — that is, not voided in urine — was assigned a score of 1.0. All other beverages were evaluated in a similar manner, and then scored in comparison to water. A score higher than 1.0 indicated that more of the beverage remained in the body as compared to water, while a score lower than 1.0 indicated a higher excretion rate than water.

The results showed that four beverages — oral rehydration solution, like Pedialyte; fat-free milk; whole milk and orange juice — had a significantly higher hydration index than water. The first three had hydration index scores around 1.5, with orange juice doing slightly better than water at 1.1. Oral rehydration solutions are specifically formulated to combat serious dehydration such as that resulting from chronic diarrhea.

"It's a very clever, even brilliant study," said Lawrence Armstrong, a hydration expert at the University of Connecticut and immediate past president of the American College of Sports Medicine. "It assumes that water is the optimal rehydration fluid, which is biologically correct, and then compares other fluids to water."

Why is milk so efficient at rehydration? "Normally when you drink, it signals the kidneys to get rid of the extra water by producing more urine," Dr. Maughan said. "However, when beverages contain nutrients and electrolytes like sodium and potassium, as milk does, the stomach empties more slowly with a less dramatic effect on the kidneys."

Perhaps surprisingly, drinks containing moderate amounts of caffeine and alcohol or high levels of sugar had hydration indexes no different from water. In other words, coffee and beer are not dehydrating, despite common beliefs to the contrary. The study also showed that regular soda can hydrate you just as well as water, although soda contains sugar and most sports and nutrition experts do not recommend it for hydration.

"It's true that caffeine is a diuretic, but not at the concentration found in most coffee drinks," Dr. Maughan said.

The study was funded by the European Hydration Institute, which is supported by funds from the Coca-Cola Co., which sells soft drinks, iced tea, orange juice, bottled water and sports drinks.

Dr. Maughan said that Coke was not involved in any part of the study, and did not choose the products it used. Dr. Maughan said the study was based on experiments going back more than 35 years.

"Some, but not all of these studies were funded by industry, many of them relating to either sports drinks or oral rehydration solutions used for the treatment of acute diarrhea in children," he said. "In this study we used two cola drinks, but they did not hydrate as well

as some of the other products used."

The hydration index could prove useful when making decisions about what beverages to consume and when. For example, if you're going on a long drive and won't have access to fluids (or to bathrooms), you'd be smarter to drink milk with its high hydration index rather than water or iced coffee. But don't forget that milk has many more calories than water, so don't overdo it, either.

While severe dehydration is rare except in heavy exercise, extreme environments and disease, studies have shown that heat and dehydration can contribute to increased mortality rates during hot weather. "Mortality increases sharply during heat waves, mostly because people don't drink enough to compensate for their increased fluid losses," Dr. Maughan said.

Dr. Armstrong noted that in hot weather, it's important to monitor your hydration status throughout the day. He suggested paying attention to your thirst, and drinking when necessary. Also, if your urine color is a dark yellow, it's time for a refreshing drink.

Updated July 4: This post has been updated to include information about the funding source of the study.

EXHIBIT L

INITIATIVES & ADVOCACY

THE EVIDENCE IS CLEAR, TAXES ARE NOT THE SOLUTION TO OBESITY

JUNE 29, 2016

Academic research studies have all reached same conclusion – taxes on soda are regressive and they don't make people any healthier. In a recent piece for the *NewBostonPost,* Julie Gunlock of Independent Women's Forum breaks down why a tax on a common grocery item like beverages is misguided and harmful.

Gunlock notes a study from researchers at Cornell University that found people who do reduce soda consumption will generally only substitute the calories with calories from other foods and beverages.

Gunlock also points out that besides having no positive impact on obesity, "these taxes impact those who live at and under the poverty line the most because a larger percentage of their income goes to food and beverage purchases, which may include sugar-sweetened drinks."

"Demonizing single ingredients — in this case the sugar in sodas — ignores the complexity of obesity and it's many causes," concludes Gunlock.

We agree. Singling out one grocery item or product is not a solution to obesity. Instead, we should be working together to provide consumers the information and choices they need to make the best decisions for their family.

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PRESS RELEASES

BEVERAGE COMPANIES RESPOND TO FDA ANNOUNCEMENT ON NUTRITION FACTS PANEL

MAY 20, 2016

In response to today's release of the FDA rule change on the Nutrition Facts Panel, the American Beverage Association issued the following statement:

In response to today's release of the FDA rule change on the Nutrition Facts Panel, the American Beverage Association issued the following statement:

Statement:

"We believe that people should have clear and understandable nutrition facts about foods and beverages so that they can make informed choices that are right for themselves and their families. America's beverage companies have supported nutrition transparency; it's why we voluntarily placed clear calorie labels on the front of every bottle and can we produce in support of first lady Michelle Obama's "Let's Move" campaign in 2010.

"We look forward to continuing our commitment to offer a wide variety of beverages – including more low- and no-calorie options and smaller portion sizes – and to engaging with the FDA to make sure consumers have the information they need."

For Background Purposes:

America's beverage companies have gone beyond required labeling by taking voluntary steps to ensure our consumers get clear and understandable information on nutrition:

America's beverage companies in 2010 announced that they would begin placing prominent clear calorie labels on the very front of every bottle, can and pack produced. The voluntary initiative was launched in support of first

lady Michelle Obama's "Let's Move" anti-obesity campaign.

> Mrs. Obama praised the Clear on Calories initiative when announcing her campaign: "In fact, just today, the nation's largest beverage companies announced that they'll be taking steps to provide clearly visible information about calories on the front of their products - as well as on vending machines and soda fountains. This is exactly the kind of vital information parents need to make good choices for their kids."

Beverage companies launched the *Calories Count*™ Beverage Vending Program in 2013 to make it easy for consumers to check the calories of their beverages when making selections, and to remind them that beverage calories matter. "Calories Count – Check then Choose" messages were placed on the front of vending machines and vending machines buttons were updated to include calorie information for each choice. Beginning in 2010, beverage companies voluntarily adopted the serving size changes that FDA announced today, giving our consumers more relevant nutrition information on our package labels years ahead of the FDA deadline. With FDA's approval, beverage companies redesigned thousands of package labels to reflect a 12-ounce serving size. Only packages for juice and juice drinks continue to use an 8-ounce serving size, as directed by the FDA.

Beverage companies are pro-actively working nationwide to help Americans reduce the calories they get from beverages:

In partnership with the Alliance for a Healthier Generation, beverage companies announced a nationwide initiative in 2014 to reduce beverage calories in the American diet. To do so, we are leveraging our marketing, innovation and distribution strength to provide consumers more reduced-calorie and smaller-portion choices, calorie information at every point of purchase, and visible calls to action to remind consumers about calories and the importance of balancing what they eat, drink and do.

Our Balanced Calories Initiative seeks to reduce beverage calories consumed per person by 20 percent nationally by 2025, making it the single-largest voluntary effort by an industry to help fight obesity.

The ABA and its member companies joined with Mrs. Obama for "Drink Up!," the 2013 initiative launched by the Partnership for a Healthier America to promote water consumption. The "Drink Up" logo was placed on bottled water, packaging, company trucks and in advertising to help boost Mrs. Obama's campaign to get Americans to drink more water. America's beverage companies have voluntarily reduced calories from beverages sold in schools by 90 percent through the national School Beverage Guidelines, in which companies agreed to remove full-calorie soft drinks from schools and replace them with more lower-calorie options and smaller portions sizes. The ABA and its member companies actively supported the passage of the landmark Healthy Hunger-Free Kids Act of 2010, which included the first-ever "Smart Snacks nutritional standards for foods and beverages sold on school campuses during the school day.

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The American Beverage Association is the trade association representing the broad spectrum of companies that manufacture and distribute non-alcoholic beverages in the United States.

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