



1 County's proposed language fails, in many respects, to fairly and impartially inform voters of the  
2 effect of I-3. Instead, the proposed language uses value-laden and biased language to describe  
3 the measure in a way that seems likely to unfairly distort its electoral prospects. Petitioner  
4 respectfully maintains that the language he proposes below would provide better notice to voters  
5 of I-3's subject matter, contents, and effect in a concise, impartial, and understandable way as  
6 required by Oregon law. See ORS 250.035(1); ORS 251.345.

## 7 II. PARTIES

8 3.

9 Eric Fruits is a resident of Portland, Oregon, in Multnomah County. He is an elector  
10 pursuant to ORS 250.005 because he is qualified to vote under section 2, Article II of the Oregon  
11 Constitution, and he is qualified to vote in Multnomah County.

12 4.

13 Jenny M. Madkour ("County Attorney") is the Multnomah County Attorney. Pursuant to  
14 ORS 250.175(3) and MCC § 5.101(A)(1), the County Attorney is required to prepare the ballot  
15 title for County initiatives.<sup>1</sup> On information and belief, as required by MCC § 5.101(A)(1), the  
16 County Attorney prepared the ballot title and explanatory statement for I-3. She is the  
17 Respondent in this matter pursuant to ORS 250.195(1).

## 18 III. JURISDICTION AND VENUE

19 5.

20 This Court has jurisdiction over this action because this Petition was filed within the  
21 statutory seven-day time period from the time the ballot title was first filed with the Multnomah  
22 County Director of Elections and notice of receipt was published. See ORS 250.195(1);  
23 MMC § 5.101(B). The County provided Notice of the Ballot Title and Explanatory Statement

24 \_\_\_\_\_  
25 <sup>1</sup> Oregon election law provides that, for initiatives, "the *district attorney* shall prepare [the] ballot title[.]"  
26 ORS 250.175(3) (emphasis added). The Multnomah County Code, however, provides that "[t]he *county attorney*  
has five business days after receiving the prospective petition to prepare a ballot title for the proposed measure and  
an explanatory statement for the voter's pamphlet." MCC § 5.101(A)(1).

1 for I-3 on or about June 17, 2016. Venue for this action lies in Multnomah County pursuant to  
2 ORS 250.195(1).

3 **IV. DESCRIPTION OF INITIATIVE MEASURE**

4 6.

5 I-3 would impose a new tax on "Sugar-Sweetened Beverage Products" in the amount of  
6 one cent (\$0.01) per fluid ounce. Exhibit 1 § 4(1). I-3 creates a regime where some disfavored  
7 sugar-sweetened products are singled out for taxation, thus effectively providing preferential tax  
8 treatment for favored beverages. It then sets up a rather dizzying array of definitional cross-  
9 references for what appears to be the sole purpose of introducing campaign slogans into the text  
10 of the measure itself.

11 7.

12 The new tax applies to two types of products: (1) "Sugar-Sweetened Beverages" (*id.*  
13 § 3(13)) and (2) "Added Caloric Sweeteners" (*id.* § 3(1)). The phrase "Added Caloric  
14 Sweeteners" encompasses an array of natural and artificial sweeteners, such as various forms of  
15 sugar, corn syrup, and flavored syrups. *Id.* § 3(1). It extends to sweeteners in various forms,  
16 including liquids, syrups, powders, frozen sweeteners, and so on. *Id.*

17 8.

18 The phrase "Sugar-Sweetened Beverage," on the other hand, is less inclusive. It is  
19 defined to encompass some drinks that contain sugar, while excluding others that do as well. *Id.*  
20 § 3(13)-(16). Specifically, "Sugar-Sweetened Beverage" includes "any nonalcoholic beverage  
21 intended for human consumption that has one or more Added Caloric Sweeteners and contains  
22 more than 2 calories per ounce of beverage." *Id.* § 3(13). On its face, this definition excludes  
23 alcoholic beverages. *Id.* The measure then explicitly excludes an array of drinks that otherwise  
24 would or might fall within this definition, including (a) milk (sweetened or otherwise), *id.*  
25 §§ 3(10), (15)(a); (b) "milk alternatives" regardless of sugar content, *id.* §§ 3(11), (15)(b);  
26 (c) "natural" fruit and/or vegetable juice, regardless of sugar content, *id.* § 3(15)(c);

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1 (d) infant/baby formula (regardless of sugar content), *id.* § 3(15)(d); (e) beverages for “medical  
2 use” as defined, *id.* § 3(3), (15)(e); and (f) products “designed as supplemental, meal  
3 replacement, or sole-source nutrition,” again regardless of sugar content, *id.* § 3(15)(f). The  
4 measure also creates a unique and remarkably parochial exemption for “small-batch  
5 nonalcoholic Sugar-Sweetened Beverages produced in Multnomah County[.]” *Id.* § 5(3).

6 9.

7 Having created a regime of favored and disfavored beverages containing sugar, the  
8 measure then sets out a series of definitional cross-references that appear designed to allow the  
9 Sponsor to use the prejudicial and loaded term “sugary drinks” as many times as possible  
10 throughout the measure. The measure first creates a new term “Sugar-Sweetened Beverage  
11 Product” that encompasses both “Sugar-Sweetened Beverages” and “Added Caloric  
12 Sweeteners.” *Id.* § 3(16). It then recasts “Sugar-Sweetened Beverage Products” into more  
13 freighted and negative terms, defining tautologically “Sugar-Sweetened Beverage Products” as  
14 “Sugary Drink.” *Id.* § 3(17).

15 10.

16 The excise tax on sugar-sweetened beverages would be paid by the first non-exempt  
17 distributor in the supply chain upon distribution of sugar-sweetened beverages in the County. *Id.*  
18 § 4(4). Revenues collected from this new tax would be segregated to pay for the administration  
19 and operation of a new special fund. *Id.* § 8. The new tax would fund the administrative costs  
20 (i.e., overhead) of the new special fund. *Id.* § 8(3). It would also fund health and education-  
21 related programs “primarily serving” children in low-income communities and communities of  
22 color in the County. *Id.* § 8(2). Having established that the special fund must “primarily”—but  
23 not exclusively—fund such programs, the measure does not provide further clarification or  
24 restrictions on other permissible use of the fund’s revenues. *See generally id.* § 8.



1 and (3) a concise and impartial statement (“summary”) of not more than 175 words  
2 summarizing the measure and its major effect. ORS 250.035(1).

3 13.

4 While not part of the ballot title, the explanatory statement is an impartial, simple, and  
5 understandable statement explaining the proposed measure and its effect that is printed in the  
6 county voters pamphlet. ORS 251.345. The explanatory statement may not exceed 500 words.  
7 MCC § 5.101(A)(2).

8 14.

9 Any elector dissatisfied with the ballot title formulated by the County may petition the  
10 circuit court seeking a different title by stating the reasons the proposed title is “insufficient, not  
11 concise or unfair.” ORS 250.195(1). The circuit court reviews the initiative and ballot title,  
12 hears arguments, and certifies a title for the measure to the county clerk that meets the  
13 requirements of ORS 250.195(1). *Id.* Multnomah County allows petitioners to simultaneously  
14 challenge explanatory statements along with the ballot title. *See* MMC § 5.101(C).

## 15 VII. CLAIMS AND OBJECTIONS

### 16 A. Claims and Objections to the Caption

#### 17 1. Standards Governing Ballot Title Captions

18 15.

19 As the Oregon Supreme Court has held: “The caption is the ‘headline’ of the ballot title;  
20 it ‘provides the context for the reader’s consideration of the other information in the ballot title’  
21 and must describe the proposed measure’s subject matter accurately.” *Conroy v. Rosenblum*, 358  
22 Or 807, 2016 WL 1165712, at \*2 (2016) (citing *Towers v. Rosenblum*, 354 Or 125, 129 (2013)).  
23 “[T]he subject matter of a ballot title is the actual major effect of a measure or, if the measure has  
24 more than one major effect, all such effects (to the limit of the available words).” *Id.* (internal  
25 quotation marks omitted). “[T]he caption must identify the measure’s subject matter in terms  
26 that will not confuse or mislead potential petition signers and voters, and it cannot overstate or

1 understate the scope of the legal changes that the measure would enact.” *Buehler v. Rosenblum*,  
2 354 Or 318, 323 (2013) (internal citations omitted).

3 16.

4 The purpose of ballot title language is thus to fairly, accurately, and neutrally describe the  
5 ballot measure so that voters can make an informed decision. As a result, the agency responsible  
6 for drafting the language should not use biased or slanted language. It should not “introduce[] a  
7 ‘loaded term’ into the caption” that may influence voters to vote for or against the measure.  
8 *Caruthers v. Kroger*, 347 Or 660, 667 (2010). Because of that overriding imperative, the agency  
9 should not give slavish devotion to the language used by the sponsor of the measure who, after  
10 all, has every incentive to use freighted terminology to advance its political objectives. *Id.*; see  
11 also *Bernard v. Keisling*, 317 Or 591, 596-97 (1993) (court will not hesitate to look beyond  
12 words of measure if those words obfuscate subject, chief purpose, summary, or major effect of  
13 measure).

14 17.

15 Stated bluntly, “[p]roponents of a measure are not entitled to engineer a favorable ballot  
16 title by incorporating politically inflated terms or phrases in the text of the measure in order to  
17 advance its passage.” *Earls v. Myers*, 330 Or 171, 176 (2000). Courts have thus “been critical  
18 of using wording drawn from a proposed measure in a caption if that wording ‘is not neutral and  
19 might mislead voters into supporting the proposal without understanding its true effects.’”  
20 *Caruthers*, 347 Or at 667 (quoting *Mabon v. Myers*, 332 Or 633, 638 n.2 (2001)). For example,  
21 in *Mabon*, the Oregon Supreme Court noted that the phrase “innocent human life,” as contained  
22 in a ballot measure, was likely “not neutral and might mislead voters.” *Id.* at 638 n.2. Likewise,  
23 in *Earls*, the Supreme Court rejected the Attorney General’s argument that its inclusion of the  
24 phrase “freedom to choose” simply mirrored the measure’s language because that phrase was  
25 “likely to prejudice voters regarding the measure.” 330 Or at 176; see also *Marr v. Thornton*,

1 237 Or 503, 504 (1964) (deleting phrase "right-to-work" from ballot title caption as campaign  
2 slogan that amounted to argument for measure).

3 **2. The County's Proposed Caption Uses Prejudicial and Misleading Language**  
4 **That Does Not Fully and Fairly Apprise Voters of the Measure's Content and**  
5 **Effect**

6 18.

7 The caption formulated by the County Attorney reads: "*Taxes sugary drink distribution,*  
8 *dedicates revenue to children's health, education.*" Exhibit 2. Petitioner objects to the ballot  
9 title's caption on two grounds: (1) the phrase "sugary drink" is misleading and prejudicial, and  
10 (2) the latter portion of the caption ("*dedicates revenue to children's health, education*") is  
11 inaccurate and can be stated to more fairly, fully, and neutrally describe the measure's effect.

12 **a. The Phrase "Sugary Drink" is Misleading**

13 19.

14 First, the phrase "sugary drink" is misleading because it is both over and under inclusive.  
15 The phrase is *overinclusive* because it purports to include many beverages that would not  
16 actually be taxed (i.e., it overstates the types of beverages that will be taxed). In other words, the  
17 phrase "sugary drink" does not differentiate between (a) beverages that are "sugary" because  
18 they "naturally" include sugar, which are *not* subject to taxation under I-3; (b) sugar-sweetened  
19 beverages that *are* subject to taxation under I-3; and (c) sugar-sweetened beverages that are *not*  
20 subject to taxation under I-3. The language of I-3 explicitly excludes milk, milk alternatives,  
21 beverages containing 100 percent natural fruit and/or vegetable juice (including fruit and/or  
22 vegetable juice drinks mixed with water or carbonated water), infant formula, beverages for  
23 medical use, and beverages designed for supplementation or meal replacement that includes  
24 protein, carbohydrates, vitamins and minerals. Exhibit 1 § 3(15). The use of the phrase "sugary  
25 drink" could easily cause voters to think that the abovementioned excluded beverage categories  
26 were to be taxed. For example, a voter might be surprised to learn that a "natural" juice product  
is not a "Sugary Drink" and an iced tea product is, even though the juice product contains



1 markedly more sugar than the iced tea product.<sup>2</sup> That same voter might also be surprised to learn  
2 that sugar transforms iced tea into a “Sugary Drink,” Exhibit 1 § 3(14), but has no such effect if  
3 added to soymilk, *id.* §§ 3(11), (15).<sup>3</sup> The phrase is also *underinclusive* because I-3 also would  
4 tax “Added Caloric Sweeteners.” *See* Exhibit 1 §§ 3(1), 4(1). As noted above, such sweeteners  
5 include those that *do not* contain sugar, and which come in syrup, powder, and other *non-liquid*  
6 forms. *Id.* § 3(1). No average voter reading the County’s proposed caption would understand  
7 that he or she was being asked to approve a tax on such products.

8 20.

9 Second, the phrase “sugary drink” is prejudicial due to the potential negative connotation  
10 voters may have with the word “sugary.” The drafter of I-3 seems to have both recognized and  
11 intended this fact, given that the measure (unnecessarily) defines the phrase “Sugary Drink”  
12 synonymously with “Sugar-Sweetened Beverage Product.” *See id.* § 3(17) (“‘Sugary Drink’  
13 means ‘Sugar-Sweetened Beverage Product’”). There is no colorable explanation for  
14 complicating the measure’s text with a superfluous, tautological definition unless doing so was  
15 an attempt to evoke a negative response from potential voters. In a very similar case to this one  
16 from California, a local measure sought to levy a tax on sugar-sweetened beverages distributed  
17 by businesses in the City of Berkeley, California. *See Johnson v. Numainville*, 2014 WL  
18 10449620 (Cal. Super. Ct. Sep. 2, 2014) (Exhibit 5). The ballot title drafted by the City Council  
19 in that case used the phrase “high-calorie, sugary drinks” to describe the beverages that would be  
20 subject to the tax. *Id.* at 1. Much like in Oregon, “a ballot title [in California] must not be false,  
21 misleading or partial to one side.” *See id.* at 3. Applying this legal standard to the phrase “high-  
22 calorie, sugary drinks,” the California court ruled that the “phrase suggests that the tax will be

23 <sup>2</sup> Compare Naked Juice, *doubleberry*, <http://www.nakedjuice.com/our-products/juice/protein-zone-double-berry>  
24 (follow link to “nutritional content”: 55 grams of sugar in 15.2 ounce serving); with Honest Tea, *Peach Oo-La-Long*  
25 *Tea*, <https://www.honesttea.com/blog/products/peach-oo-la-long-tea/> (follow link to “nutrition info”: 16 grams of  
26 sugar in 16 ounce serving).

<sup>3</sup> Compare, e.g., Honest Tea, *Peach Oo-La-Long Tea*, <https://www.honesttea.com/blog/products/peach-oo-la-long-tea/> (follow link to “nutrition info”: 16 grams of sugar in 16 ounce serving) with Silk, *Vanilla Soymilk*,  
<https://silk.com/products/vanilla-soymilk> (follow link to “nutrition”: 18 grams of sugar per 16 ounces).

1 limited to certain beverages that contain more than the average calories and *too much sugar*; in  
2 other words, beverages that most people would find to be unhealthy.” *Id.* (emphasis added).  
3 While the ballot title at issue in this case does not contain the phrase “high-calorie,” it does  
4 contain the exact same phrase (i.e., “sugary drinks”) that the court in *Johnson* found to be  
5 inappropriate for implying that the beverages to be taxed contained too much sugar. *Compare*  
6 Exhibit 5 at 3 with Exhibit 1. It is no answer that the County drew the phrase “sugary drink”  
7 from the measure’s text. “Proponents of a measure are not entitled to engineer a favorable ballot  
8 title by incorporating politically inflated terms or phrases in the text of the measure in order to  
9 advance its passage.” *Earls*, 330 Or at 176. The County thus should not have used wording  
10 drawn from the proposed measure that was “not neutral and might mislead voters into supporting  
11 the proposal without understanding its true effects.” *Caruthers*, 347 Or at 667 (internal citation  
12 omitted).

13 21.

14 Space in the caption is obviously limited. Petitioner submits that a fair and neutral way  
15 of describing the types of product to which the new tax applies would be “*Taxes certain*  
16 *beverages, sweeteners.*”

17 **b. The Phrase “Dedicates Revenue to Children’s Health, Education,” is**  
18 **Misleading**

19 22.

20 Second, the latter portion of the caption, which states that the new tax “*dedicates revenue*  
21 *to children’s health, education,*” is misleading and can be stated to more fairly, fully, and  
22 neutrally describe the measure’s effect. The County’s language implies that money raised by the  
23 new tax will be immediately and exclusively allocated to children’s health and education. The  
24 reality is both different and more complex.  
25  
26

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23.

By its own terms, I-3 does not directly allocate or dedicate money to children's health and education. Instead, it creates a *new* special fund paid for by a new tax. Exhibit 1 § 8(1). The County's proposed language elides the creation of this new special fund entirely.

24.

The County's proposed language also inaccurately states that *all* the taxes raised would be "dedicated" to children's health and education. Not so. Because the tax is new, collecting it requires overhead. The tax would fund that overhead in addition to children's health and education programs. The proceeds from the tax would pay first for the costs of administering and collecting the tax. *Id.* And because the new tax would be used for a new special fund, a portion of the revenues raised necessarily must—and will be—allocated to *administration* of the new fund. *Id.* § 8(3) (authorizing up to 5% of the special fund to be used to pay for "expenses associated with administering the fund"). And even as to the portion of the tax revenues that won't be used for operation costs, not all funds are "dedicated" to the identified children's health and education programs. Rather, such funds must be used "primarily"—not exclusively—for such purposes. *Id.* § 8(2). A more accurate description of the initiative's actual purpose would be that the new tax would be used to "*administer, operate new special fund.*"

25.

As a result, and in sum, Petitioner respectfully submits that a more accurate and unbiased caption would be: "*Taxes certain beverages, sweeteners to administer, operate new special fund.*"<sup>4</sup>

<sup>4</sup> For the Court's convenience, attached as Exhibit 3 is a comparison of the County's ballot title and explanatory statement with Petitioner's proposed revisions. In Exhibit 3, additions are notated in underline and deletions noted in ~~double strikethrough~~. Petitioner's proposed caption, question, and summary all fall within the statutory word limits. Attached as Exhibit 4 is a "clean" version of Petitioner's proposed ballot title and explanatory statement.

1 **B. Claims and Objections to the Question**

2 26.

3 The question should plainly phrase “the chief purpose of the measure so that an  
4 affirmative response to the question corresponds to an affirmative vote on the measure[.]”  
5 ORS 250.035(1)(b). The question formulated by the County Attorney reads: “*Should*  
6 *Distributors pay excise tax of \$0.01 per ounce on sugary drinks with revenues used exclusively*  
7 *for children’s health and education?”* Exhibit 2. As a threshold matter, the County’s 21-word  
8 question exceeds the statutory 20-word cap set by ORS 250.035(1)(b) and must be reduced to 20  
9 words. More significantly, the question suffers from the same core deficiencies as the caption,  
10 using prejudicial, misleading, and inaccurate language.

11 27.

12 First, the question employs the same misleading and prejudicial phrase “sugary drinks” as  
13 the caption (which refers specifically to “sugary drink”). There is more space available in the  
14 question to more fully describe the products that would be subject to the new tax. Petitioner  
15 submits that the Court should replace “sugary drinks” with the more accurate phrase used by the  
16 initiative itself, “sugar-sweetened beverage.” The question should also note that the tax would  
17 be levied on certain sweeteners as well.

18 28.

19 Next, as it currently reads, the question states that revenues generated by the tax will be  
20 “used exclusively” for children’s health and education. This is, as discussed above, simply  
21 incorrect. The initiative would allow up to five percent of the funds generated by the new tax to  
22 be used for administrative costs. Exhibit 1 § 8(3). This is not a trivial or insignificant amount.  
23 The total funds generated by this tax have the potential to be very large and will be used to pay  
24 for a variety of bureaucratic and administrative costs such as taxpayer registration, generation of  
25 tax payment schedules, calculation of deficiencies and refunds, enforcement procedures,  
26 adjudicating challenges to the amount of taxes owed by a taxpayer, and audits. Exhibit 1 §§ 6-8.

1 In addition, funds will ostensibly be used to pay for the administration and operation of the new  
2 fifteen-member Children's Health Fund Advisory Committee, which is charged with, among  
3 other things, advising the County on the effectiveness of the new tax and making  
4 recommendations regarding the funding of programs. *Id.* § 9. The initiative also states only that  
5 the tax revenues raised must be dedicated "primarily" to children's health and education  
6 programs.

7 29.

8 As a result, Petitioner respectfully submits that a more accurate and unbiased 20-word  
9 question would be: "*Should new excise tax be imposed on certain sugar-sweetened beverages*  
10 *and sweeteners to administer, operate children's health and education fund?*"

11 **C. Claims and Objections to the Summary**

12 30.

13 The summary should be a "concise and impartial" statement of not more than 175 words.  
14 ORS 250.035(1)(c). The 175-word summary formulated by the County Attorney can be read at  
15 Exhibit 2. In main, the County's proposed summary fairly describes the measure. It is, however,  
16 inaccurate and underinclusive in certain respects.

17 31.

18 First, the summary states confusingly that the new tax would apply to "*Sugar Sweetened*  
19 *Beverage Products and products used to make them.*" Exhibit 2. According to I-3, the definition  
20 of sugar-sweetened beverage product already includes "Sugar-Sweetened Beverage" and "Added  
21 Caloric Sweetener." See Exhibit 1 at 3. As a result, the phrase "and products used to make  
22 them" is superfluous and opaque. It is more accurate to state that the tax would be imposed on  
23 "certain sugar-sweetened beverages and products used to make them."

24 32.

25 Second, the summary inaccurately describes the products excluded from the definition of  
26 "Sugar-Sweetened Beverages," providing a partial list of the exemptions set out in Section 3(15)

1 of the measure. *Compare* Exhibit 1 § 3(15) with Exhibit 2. Given available space, Petitioner  
2 proposes that the summary clarify that it exempts “various products, including” those  
3 specifically delineated in the summary.

4 33.

5 Third, the summary inaccurately states that the measure “requires revenues from tax to be  
6 placed in Fund and used to fund programs primarily serving children in low income communities  
7 and communities of color that promote physical exercise, health, nutrition, early childhood  
8 education initiatives.” Exhibit 2. This language suggests that *all* taxes raised will be (a) placed  
9 in the new special fund and (b) used directly on children’s health and education programs.

10 Neither point is accurate. As explained above, the cost of collecting and administering the new  
11 tax will be paid for using the new tax proceeds before any tax revenues are placed in the special  
12 fund. Exhibit 1 § 8(1). Moreover, up to five percent of the money *placed* in the fund can be  
13 spent on operating and administration costs. *Id.* § 8(3). The County’s summary elides these  
14 administrative costs, which may be significant and of keen interest to voters.

15 34.

16 Fourth, read as a whole, the summary is unclear and contains redundant language that can  
17 be streamlined to make room for the necessary clarifying language and content set out above.  
18 Petitioner respectfully submits that a more concise and accurate 175-word summary would be:

19 *This Measure would impose an excise tax of \$0.01 per fluid ounce*  
20 *on businesses that distribute in Multnomah County certain “sugar-*  
21 *sweetened beverages” and products used to make them.*  
22 *Distribution defined as transfer from one business to another; the*  
23 *tax applies only to first non-exempt Distribution within County.*  
24 *Sugar-sweetened beverage defined as nonalcoholic beverages*  
25 *containing one or more “added caloric sweeteners” and more*  
26 *than 2 calories per ounce. Exempts various products, including*  
*milk, milk alternatives, 100 percent natural fruit and/or vegetable*  
*juices, products intended as supplemental meal or meal*  
*replacements. Tax to be collected, enforced and administered by*  
*County Tax Administrator. Tax collection and administration*  
*costs funded through new tax. Up to 5 percent of remaining*  
*revenue used for administrative and operational purposes. All*  
*other revenues placed in new “Children’s Health and Education*



1 also applies to distribution of added caloric sweeteners, as explained above with regard to the  
2 ballot title.

3 37.

4 Second, where the explanatory statement lists exemptions to the definition of “sugar-  
5 sweetened beverage,” it lists “fruit juice” and “vegetable juice” with no additional modifiers or  
6 explanation. See Exhibit 2. This is misleading because it would cause voters to assume that *all*  
7 fruit and/or vegetable-containing beverages or fruit and/or vegetable-flavored beverages would  
8 be exempt from the tax. Under the measure, only fruit and vegetable juices meeting a specific  
9 definition are exempt from taxation. See Exhibit 1 § 3(15)(c) (exempting “[a]ny beverage that  
10 contains only 100 percent natural fruit juice, natural vegetable juice, or combined natural fruit  
11 juice and natural vegetable juice, including natural fruit or vegetable juices diluted with water or  
12 carbonated water, so long as there is no other Added Caloric Sweetener”). The summary, unlike  
13 the explanatory statement, makes that clear. A more accurate description of the initiative’s  
14 exemptions regarding fruit and/or vegetable juice would be: The phrase “sugar-sweetened  
15 beverage products” does not include “100 percent natural fruit and/or vegetable juice (including  
16 such beverages diluted with water or carbonated water).” This more accurate language would  
17 be simple and understandable to voters.

18 38.

19 Third, the explanatory statement redundantly indicates that the measure “[r]equires a  
20 performance audit of the Fund every other year” and “[r]equires County Auditor to conduct  
21 performance audit every other year.” See Exhibit 2. Presumably this was an oversight, as it is  
22 unnecessarily duplicative, and one of the sentences should be deleted for clarity and to save  
23 space.

24 39.

25 Fourth, the proposed explanatory statement fails to adequately explain—and appears to  
26 seek actively to downplay—the administrative cost of the measure and the administrative regime



1 necessary to carry it out. Out of the total 500 words that are allowed, the current language  
2 dedicates 34 words to the administrative aspects of the measure: "*Provides for administration of*  
3 *the tax by County or by contract with a State agency, limits amount spent on administration to*  
4 *5% of proceeds[]*" and "*Requires County Auditor to conduct performance audit every other*  
5 *year.*" *Id.* As an initial matter, this description of how proceeds are to be used is prejudicial.  
6 Indicating that the measure "limits" the tax proceeds that can be spent on administration costs  
7 minimizes such expenses and their impact. The point can be stated more neutrally by stating  
8 simply that "*five percent of tax proceeds could be spent to pay for administration and/or*  
9 *operation*" of the new fund and related tax regime. Moreover, given the extra remaining words,  
10 the explanatory statement can and should provide voters additional information regarding the  
11 new tax regime created by I-3.

12 40.

13 Based on the above objections, Petitioner respectfully submits that a more accurate and  
14 unbiased explanatory statement of 500 words or less would be:

15 *If passed, this County Ordinance would impose an excise tax of*  
16 *\$0.01 per fluid ounce on Sugar-Sweetened Beverage Products*  
17 *(SSBP). SSBP includes (a) nonalcoholic beverage intended for*  
18 *human consumption that has one or more Added Caloric*  
19 *Sweeteners and contains more than 2 calories per ounce of*  
20 *beverage and (b) added caloric sweeteners. SSBP does not*  
21 *include milk, milk alternatives, 100% natural fruit and/or*  
22 *vegetable juice (including such beverages diluted with water),*  
23 *infant formula, beverages for medical use, or any product designed*  
24 *as supplemental or meal replacement containing proteins,*  
25 *carbohydrates, vitamins and minerals.*

26 *The tax would be levied upon the first non-exempt distribution of*  
*SSBP in Multnomah County. Distribution would not be taxed*  
*more than once in the chain of commerce. A distributor is defined*  
*as a business entity doing business in Multnomah County that*  
*transfers title of SSBP to another business entity in Multnomah*  
*County, and includes business entities that transport SSBP*  
*purchased outside the County for purposes of retail sale within the*  
*County. The County's jurisdiction over distributors extends to all*  
*persons doing business in Multnomah County as defined by the*  
*Multnomah County Business Income Tax Code. Retail sales of*  
*SSBP to a consumer would not be subject to the tax.*

1           *Distribution to a retailer of sugar or other sweeteners sold by a*  
2           *retailer such as a grocery store and distribution of small-batch*  
3           *nonalcoholic SSBP produced in the County by a manufacturer*  
4           *licensed pursuant to ORS 635.027 would be exempt.*

5           *Proceeds from the tax would be dedicated to a "Children's Health*  
6           *and Education Fund" for programs primarily serving children in*  
7           *low income communities and communities of color that increase*  
8           *physical fitness; improve nutrition and dental health; reduce*  
9           *health disparities; and support early childhood education.*

10           *The Ordinance would establish "The Children's Health and*  
11           *Education Fund Advisory Committee" comprised of 15 members.*  
12           *Committee members would be appointed by the County Board of*  
13           *Commissioners based upon recommendations from several local*  
14           *non-profit organizations. The Committee would advise the County*  
15           *on the effectiveness of the tax in reducing distribution and*  
16           *consumption of SSBP and the impact on beverage prices,*  
17           *consumer purchasing, and health outcomes and would make*  
18           *recommendations regarding funding of programs.*

19           *The tax would be administered by the County or by contracting*  
20           *with a State agency. Five percent of tax proceeds could be spent to*  
21           *pay for administration and/or operation of the tax, the Fund, and*  
22           *the Committee. The tax would be collected, enforced, and*  
23           *administered by the County Tax Administrator. The County*  
24           *Commissioners and Tax Administrator would adopt and enforce*  
25           *rules and regulations relating to the administration and*  
26           *enforcement of the tax, including taxpayer registration; reporting*  
          *requirements for distributors and retailers; the schedule for tax*  
          *payments; the process for determining deficiencies and refunds;*  
          *enforcement procedures including provisions authorizing the*  
          *imposition of penalties for noncompliance; and the procedures for*  
          *challenging determinations of taxes owed. Requires County*  
          *Auditor to conduct audit every other year.*

*Specifies operative date for Ordinance of 1/1/2017, and an*  
          *operative date for imposition and collection of tax of 1/1/2018.*

#### VIII. PRAYER FOR RELIEF

          Petitioner respectfully requests this Court examine I-3 and the proposed ballot title and  
          explanatory statement, and grant the following relief:

- A.     An Order amending the ballot title and explanatory statement to comply with the  
          ballot title and explanatory statement requirements as set forth above, and  
          certifying such title and explanatory statement to the county clerk; and

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B. Such other and further relief as this Court deems just and equitable.

DATED: June 28, 2016

**PERKINS COIE LLP**

By: /s/ Sarah J. Crooks

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Attorneys for Petitioner

**Multnomah County Children's Health and Education Fund  
Paid For with a Distribution Tax on Sugary Drinks**

The people of Multnomah County, exercising their right to enact laws by citizen initiative, enact the following Ordinance to be made part of the Multnomah County Code.

**Section 1. Findings**

1. Rates of diabetes, heart disease, and tooth decay are high in Multnomah County. Children, low income communities and communities of color have been disproportionately affected.
2. While there is no single cause for the rise in these diseases, there is overwhelming evidence of the link between the consumption of sugary drinks and soda and the incidence of diabetes, heart disease, tooth decay and other health problems.
3. In addition to the human cost to those who suffer from these diseases, there is a public health and economic cost to the County associated with these diseases.

**Section 2. Policy and Purpose of Tax**

1. Based on the findings set forth above, the purpose of this Ordinance is to diminish the human and economic costs of diseases associated with the consumption of sugary drinks.
2. This ordinance imposes an excise tax on the privilege of conducting businesses that distribute sugary drinks and products used to make them. It is not a sales tax.
3. Certain drinks containing added sugar are exempted, including infant formula, milk products and natural fruit and vegetable juices.
4. Revenues collected through this tax on sugary drinks will be placed in a special fund to be designated as "The Children's Health and Education Fund." The money in this fund will be used to fund programs primarily serving children in low income communities and communities of color in Multnomah County that improve nutrition and access to healthy foods, increase physical activity and fitness, support early childhood education initiatives and improve children's general health and academic achievement. No more than 5% of the fund can be spent on administrative expenses associated with administering the fund. The fund shall be subject to an audit every other year.
5. This Ordinance creates a "Children's Health and Education Fund Advisory Committee" made up of experts and community members to (1) advise the County on the effectiveness of this excise tax in discouraging the distribution and consumption of sugary drinks, and (2) make recommendations regarding the funding of programs designed to improve children's health and education.

**Section 3. Definitions**

Unless otherwise defined in this section, terms that are defined in Chapter 12 of the Multnomah County Code shall have the meanings provided therein.

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JIM SCOTT  
DIRECTOR OF ELECTIONS

1. "Added Caloric Sweetener" means any substance or combination of substances that meets all of the following four criteria:
  - a. is suitable for human consumption;
  - b. adds calories to the diet if consumed;
  - c. is perceived as sweet when consumed; and
  - d. is used for making, mixing, or compounding sugar-sweetened beverages by combining the substance or substances with one or more other ingredients including, without limitation, water, ice, powder, coffee, tea, fruit juice, vegetable juice, or carbonation or other gas.

An Added Caloric Sweetener may take any form, including but not limited to a liquid, syrup, or powder, whether or not frozen. "Added Caloric Sweetener" includes, without limitation, sucrose, fructose, glucose, other sugars, high fructose corn syrup, and flavored syrups.

2. "Alcoholic beverage" shall have the same meaning as set forth in ORS 471.001.
3. "Beverage for Medical Use" means a beverage suitable for human consumption and manufactured for use as an oral nutritional therapy for persons who cannot absorb or metabolize dietary nutrients from food or beverages, or for use as an oral rehydration electrolyte solution for infants and children formulated to prevent or treat dehydration due to illness. "Beverage for Medical Use" shall not include drinks commonly referred to as "sports drinks" or any other common names that are derivations thereof.
4. "Business entity" includes, but is not limited to an individual, a natural person, proprietorship, partnership, limited partnership, family limited partnerships, joint venture (including tenants-in-common arrangements), association, cooperative, trust, estate, corporation, personal holding company, limited liability company, limited liability partnership or any other form of organization for doing business. This definition is intended to track the term "person" as used in Multnomah County Code, Chapter 12.
5. "County" means Multnomah County, Oregon.
6. "Tax Administrator" means the Chief Financial Officer of the County or his or her designees.
7. "Consumer" means an individual who purchases a sugar-sweetened beverage product in the County for a purpose other than resale or use in the ordinary course of business.
8. "Distribution" or "Distribute" means the transfer of title or possession (1) from one Business Entity to another for consideration or (2) within a single Business Entity, such as by a wholesale or warehousing unit to a Retailer, or between two or more employees or contractors. "Distribution" or "Distribute" shall not mean the retail sale to a Consumer.
9. "Distributor" means any Business Entity that distributes Sugar-Sweetened Beverage Products in the County. A business entity that transports Sugar-Sweetened Beverage Products purchased outside the County for the purposes of retail sale within the County shall be deemed a Distributor.
10. "Milk" means natural liquid milk, natural milk concentrate (whether or not reconstituted) or dehydrated natural milk (whether or not reconstituted), regardless of

animal source or butterfat content. For purposes of this definition, "Milk" includes flavored milk drinks containing no more than 40 grams of total sugar (naturally-occurring and from added Caloric Sweetener) per 12 ounces (3.3 grams of total sugar per ounce).

11. "Milk alternatives" include but are not limited to non-dairy creamers or beverages primarily consisting of plant-based ingredients (e.g. soy, rice, or almond milk products), regardless of sugar content.
12. "Retailer" means any Business Entity that sells Sugar-Sweetened Beverage Products to a Consumer.
13. "Sugar-Sweetened Beverage" means any nonalcoholic beverage intended for human consumption that has one or more Added Caloric Sweeteners and contains more than 2 calories per ounce of beverage.
14. "Sugar-Sweetened Beverage" includes, but is not limited to, all added caloric drinks and beverages commonly referred to as "soda," "pop," "cola," "soft drinks," "sports drinks," "energy drinks," "sweetened ice teas," "sweetened coffee drinks" or any other common names that are derivations thereof.
15. "Sugar-Sweetened Beverage" shall not include any of the following:
  - a. Milk
  - b. Milk Alternatives
  - c. Any beverage that contains only 100 percent natural fruit juice, natural vegetable juice, or combined natural fruit juice and natural vegetable juice, including natural fruit or vegetable juices diluted with water or carbonated water, so long as there is no other Added Caloric Sweetener.
  - d. Any product commonly known as "infant formula" or "baby formula," or any product whose purpose is infant rehydration.
  - e. Beverages for Medical Use
  - f. Any product designed as supplemental, meal replacement, or sole-source nutrition that includes proteins, carbohydrates, and multiple vitamins and minerals
16. "Sugar-Sweetened Beverage Product" means a Sugar-Sweetened Beverage or Added Caloric Sweetener.
17. "Sugary Drink" means "Sugar-Sweetened Beverage Product."

#### **Section 4. Excise Tax on Distribution of Sugary Drinks Imposed**

1. The County hereby imposes an excise tax of one cent (\$0.01) per fluid ounce on the privilege of distributing Sugar-Sweetened Beverage Products in Multnomah County.
2. The County's jurisdiction over Distributors doing business in Multnomah County shall extend to all persons doing business in the county, as defined in Chapter 12 of the Multnomah County Code, subject to the exemptions set forth in that Chapter 12, §12.400.
3. For the purposes of this Chapter, the volume, in ounces, of a Sugar-Sweetened Beverage Product shall be calculated as follows:

- a. For a Sugar-Sweetened Beverage, the volume, in fluid ounces, of Sugar-Sweetened Beverages distributed to any Business in the County.
  - b. For Added Caloric Sweeteners, the largest volume, in fluid ounces, of Sugar-Sweetened Beverages that could be produced from the Added Caloric Sweeteners based on the manufacturer's instructions or, if the Distributor uses the Added Caloric Sweeteners to produce a Sugar-Sweetened Beverage, the regular practice of the Distributor. For Added Caloric Sweeteners that may be used to flavor coffee, milk and other drinks, the tax shall be calculated assuming that the Added Caloric Sweetener is combined with carbonated water to make a soda drink (e.g. "Italian sodas.")
4. The tax shall be paid upon the first non-exempt distribution of a Sugar-Sweetened Beverage Product in the County. To the extent that there is a chain of Distribution within Multnomah County involving more than one Distributor, the tax shall be levied on the first Distributor subject to the jurisdiction of the County. To the extent the tax is not paid as set forth above for any reason, it shall be payable on subsequent Distributions and by subsequent Distributors, provided that the Distribution of Sugar-Sweetened Beverage Products may not be taxed more than once in the chain of commerce.

#### Section 5. Exemptions

The tax imposed by this Chapter shall not apply:

1. To any Distributor that is not subject to taxation by the County under the laws of the United States or the State of Oregon;
2. To any Distribution of Added Caloric Sweeteners to a Retailer intended for sale for later use by Consumers (e.g. bags of sugar or other sweeteners in a grocery store).
3. To any Distribution of small-batch nonalcoholic Sugar-Sweetened Beverages produced in Multnomah County by a manufacturer licensed pursuant to ORS 635.027. The County shall determine the volume of production that qualifies for this small-batch exemption.

#### Section 6. Duties, Responsibilities and Authority of the Tax Administrator

1. It shall be the duty of the Tax Administrator or his or her designee to collect and receive all taxes imposed by this Chapter, and to keep an accurate record thereof.
2. The Board of County Commissioners and the Tax Administrator may prescribe, adopt, and enforce ordinances, rules and regulations relating to the administration and enforcement of this Sugary Drink Tax. Such rules and regulations may include, but are not limited to, the following:
  - a. The determination of whether and how a Distributor must register with the County;
  - b. Reporting requirements for Distributors and Retailers;
  - c. The schedule for payment of the tax;

- d. The process for determining deficiencies and refunds;
  - e. Enforcement procedures, including provisions authorizing the imposition of penalties and other sanctions for noncompliance; and
  - f. The procedures for challenging a determination relating to the amount of taxes owed.
3. Whenever any tax under this Chapter has been paid more than once or has been erroneously or illegally collected or received by the County, it may be refunded to the payer.
  4. The Tax Administrator shall annually verify that the taxes owed under this Chapter have been properly applied, exempted, collected, and remitted.

### **Section 7. Collection**

1. The amount of any tax, penalty, and interest imposed under the provisions of this Chapter shall be deemed a debt to the County. Any Distributor owing money under the provisions of this Chapter shall be liable in an action brought in the name of the County for the recovery of such amount.
2. The Multnomah County Board of Commissioners may, but is not required to, contract with other public agencies, including the Oregon Department of Revenue (as authorized by ORS 306.620) or the Oregon Liquor Control Commission, to administer and collect the taxes owed under this Chapter. If the County Commissioners exercise this option, the duties and responsibilities of the Tax Administrator shall be given, as appropriate, to the contracted public agency, which may delegate such duties and responsibilities as necessary and as authorized by law.

### **Section 8. The Children's Health Fund**

1. The proceeds from this tax on sugary drinks, after deducting the reasonable costs of administering and collecting the tax, shall be placed in a special fund to be designated as the "Children's Health and Education Fund."
2. Money in the Children's Health and Education Fund shall be dedicated to the funding of programs primarily serving children in low income communities and communities of color that:
  - a. Increase physical activity and physical fitness of children in Multnomah County;
  - b. Improve the nutrition of children in Multnomah County;
  - c. Improve the dental health of children in Multnomah County;
  - d. Reduce health disparities of children in Multnomah County;
  - e. Support early childhood education initiatives.
3. No more than 5% of the fund may be spent on expenses associated with administering the fund.
4. The fund shall be subject to a performance audit every other year.

### **Section 9. The Children's Health and Education Fund Advisory Committee**



1. There shall be established the Children's Health Fund Advisory Committee ("Committee") to (1) advise the County on the effectiveness of this sugary drink tax in discouraging the distribution and consumption of sugar-sweetened beverages, and (2) make recommendations regarding the funding of programs designed to improve children's health in Multnomah County.
2. The Committee shall be made up of 15 members who are residents of Multnomah County. Members will be recruited and recommended by the designated organizations and appointed by the Board of County Commissioners. In the event a designated organization ceases to exist or changes mission, the Board of County Commissioners may either designate a different organization with a similar mission to make recommendations or directly appoint members who will fill the role for the designated vacant seat.
3. The Board shall appoint members of the Committee based on the recommendations from the following designated organizations:
  - a. The Regional Health Equity Coalition (RHEC) will recommend members for seats one through five. RHEC-recommended committee members shall be community members who represent and have expertise working in underserved communities that are heavily impacted by diabetes, heart disease, dental decay or other chronic diseases linked to soda consumption. At least two appointees shall be individuals who are involved in the Multnomah County Community Health Improvement Plan (often referred to as "the Multnomah County CHIP").
  - b. All Hands Raised will recommend three individuals with expertise in school health for seats six through nine. Seat six will be an individual with a focus on early childhood education; seats seven and eight will be individuals with a focus on K-12 education. At least two of these three members will have primary worksites east of I-205.
  - c. The Multnomah County Youth Commission will recommend members for seats nine and ten who are 18 years of age or younger at the commencement of the initial term and at the commencement of any succeeding term.
  - d. The Oregon Hunger-Relief Task Force shall recommend an individual with expertise in hunger, food security and nutrition for seat eleven.
  - e. The Multnomah County Health Department shall recommend members to fill seats twelve through fifteen. Seats twelve and thirteen shall be county or state public health department staff with expertise in nutrition, physical activity, and/or dental health. Seats fourteen and fifteen shall be other individuals with expertise researching or evaluating public health programs related to diabetes, heart disease, and sugary drink consumption, community-based youth food and nutrition programs, school-based food and nutrition programs, or early childhood nutrition.
4. Members shall serve two-year terms. The County Chair shall have discretion to stagger terms of appointment as necessary to ensure rotating terms and continuity. No member may serve more than two consecutive two-year terms.

5. Members of the Committee shall serve without pay, but may be reimbursed for actual expenses.
6. The Committee shall:
  - a. Evaluate and analyze the impact of the tax on beverage prices, consumer purchasing behavior and health outcomes.
  - b. Align the Children's Health and Education Fund investments with the Multnomah County Community Health Improvement Plan.
  - c. Make funding recommendations to the County Board of Commissioners, consistent with the priorities required by this measure and the Committee's strategic plan, based on a transparent grant application and review process.
  - d. Monitor performance of programs receiving funds from the Children's Health Fund. This includes identifying key data, as well as outcome goals to ensure accountability and effectiveness of funded programs in improving children's health.

#### **Section 10. Performance Audit**

The Multnomah County Auditor shall conduct a performance audit every other year. The results of the audit shall be made publicly available on the Multnomah County website as well as any website for the Children's Health Fund.

#### **Section 11. Operative Date**

This ordinance shall become operative on January 1, 2017, except the County will not impose or collect the tax until January 1, 2018.

#### **Section 12. Severability**

If any part, section or provision of this Ordinance, or tax imposed pursuant to this Ordinance is found unconstitutional, illegal or invalid, such a finding will affect only that part, section or provision of the Ordinance and the remaining parts, sections or provisions shall remain in full force and effect.



# Notice of Multnomah Co Initiative Ballot Title & Explanatory Statement - MultColnit- 03

## **NOTICE OF BALLOT TITLE AND EXPLANATORY STATEMENT – MultColnit-03**

NOTICE IS HEREBY GIVEN that a ballot title and explanatory statement for a Multnomah County Initiative Petition has been filed with the Multnomah County Director of Elections. The initiative petition complies with constitutional requirements. Any registered voter in Multnomah County dissatisfied with the ballot title and explanatory statement may file a petition with the Multnomah County Circuit Court for review on or before 5:00 PM, June 28, 2016. Any person filing a challenge must also file a copy of the challenge with the Director of Elections, 1040 SE Morrison St., Portland, by the end of the next business day after the petition is filed with the Circuit Court.

**CAPTION:** Taxes sugary drink distribution, dedicates revenue to children's health, education.

**QUESTION:** Should Distributors pay excise tax of \$0.01 per ounce on sugary drinks with revenues used exclusively for children's health and education?

**SUMMARY:** Creates a Multnomah County Ordinance that imposes an excise tax of \$0.01 per fluid ounce on businesses that distribute in Multnomah County Sugar Sweetened Beverage Products and products used to make them. Defines Distribution as transfer from one business entity to another; excludes retail sales to consumers; applies only to first non-exempt Distribution within Multnomah County. Sugar Sweetened Beverage Products defined as nonalcoholic beverages containing one or more Added Caloric Sweeteners and more than 2 calories per ounce of beverage. Exempts milk, milk alternatives, natural fruit and/or vegetable juices; products intended as supplemental meal or meal replacements. Creates "The Children's Health and Education Fund", requires revenues from tax to be placed in Fund and used to fund programs primarily serving children in low income communities and communities of color that promote physical exercise, health, nutrition, early childhood education initiatives. Requires Tax to be collected, enforced and administered by County Tax Administrator. Creates Children's Health Fund Advisory Committee; advises Board of County Commissioners on effectiveness of tax on distribution and consumption of Sugar Sweetened Beverage Products.

## **EXPLANATORY STATEMENT**

**This Measure would create a Multnomah County Ordinance that imposes an excise tax of \$0.01 per fluid ounce on Distributors of Sugar-Sweetened Beverage Products (SSBP), which include but are not limited to beverages commonly referred to as soda, pop, cola, soft drinks, sports drinks, energy drinks, sweetened iced teas or sweetened coffee drinks.**

**SSBP does not include Milk, Milk alternatives, fruit juice, vegetable juice, infant formula, beverages for Medical Use, or any product designed as supplemental or meal replacement and which contains proteins, carbohydrates, vitamins and minerals.**

**A Distributor is defined as a Business Entity doing business in Multnomah County and that transfers title of SSBP to another Business Entity in Multnomah County, and includes a business entity that transports SSBP purchased outside the County for the purposes of retail sale within the County. The County's jurisdiction over Distributors extends to all persons doing business in Multnomah County as defined in the Multnomah County Business Income Tax Code.**

**Retail sales of SSBP to a consumer are not subject to the tax.**

**The tax is levied upon the first non-exempt distribution of SSBP. Distribution of SSBP may not be taxed more than once in the chain of commerce of Distributors subject to the jurisdiction of the County.**

**The following Distributors are exempt from the tax: Distributors not legally subject to taxation by the County; distribution to a Retailer of sugar or other sweeteners sold by a Retailer such as a grocery store; and Distribution of small-batch nonalcoholic SSBP produced in the County by a manufacturer licensed pursuant to ORS 635.027.**

**Provides for administration of the tax by County or by contract with a State agency, limits amount spent on administration to 5% of proceeds.**

**Proceeds from the tax are dedicated to "Children's Health and Education Fund" for programs primarily serving children in low income communities and communities of color that increase physical fitness; improve nutrition, dental health; reduce health disparities, support early childhood education. Requires a performance audit of the Fund every other year.**

**Establishes The Children's Health and Education Fund Advisory Committee comprised of 15 members. Provides for appointment of Committee members by the County Board of Commissioners based upon recommendations of Regional Health Equity Coalition, All Hand Raised, Multnomah County Youth Commission, Oregon Hunger-Relief Task Force, and Multnomah County Health Department. Requires Advisory Committee to advise County on the effectiveness of the excise tax in reducing Distribution and consumption of SSBP, the impact on beverage prices, on consumer purchasing, and on health outcomes, and to make recommendations regarding funding of programs.**

**Requires County Auditor to conduct performance audit every other year.**

**Specifies an operative date for Ordinance of 1/1/2017, and an operative date for imposition and collection of tax of 1/1/2018.**

**Tim Scott,  
Multnomah County Director of Elections**

## CAPTION

Taxes certain beverages, sweeteners ~~sugary drink distribution~~, to administer, operate new special fund ~~dedicates revenue to children's health, education.~~

## QUESTION

Should ~~new Distributors pay~~ excise tax ~~be imposed of \$0.01 per ounce~~ on certain sugar-sweetened beverages and sweeteners to administer, operate ~~sugary drinks with revenues used exclusively for children's health and education fund?~~

## SUMMARY

This measure would ~~Creates a Multnomah County Ordinance that~~ imposes an excise tax of \$0.01 per fluid ounce on businesses that distribute in Multnomah County certain "Sugar Sweetened Beverages" products and products used to make them. ~~Defines Distribution defined as transfer from one business entity to another; excludes retail sales to consumers; the tax applies only to first non-exempt Distribution within Multnomah County.~~ Sugar Sweetened Beverage Products defined as nonalcoholic beverages containing one or more "Added Caloric Sweeteners" and more than 2 calories per ounce of beverage. Exempts various products including milk, milk alternatives, 100 percent natural fruit and/or vegetable juices; products intended as supplemental meal or meal replacements. Tax to be collected, enforced and administered by County Tax Administrator. Tax collection and administration costs funded through new tax. Up to 5 percent of remaining revenue used for administrative and operational purposes. All other revenues placed in new ~~Creates "The Children's Health and Education Fund", requires revenues from tax to be placed in Fund and used to fund programs primarily serving children in low income communities and communities of color that promote physical exercise, health and nutrition, early childhood education initiatives. Requires Tax to be collected, enforced and administered by County Tax Administrator.~~ Creates Children's Health Fund Advisory Committee, which advises Board of County Commissioners on effectiveness of new tax and makes recommendations on use of funds on distribution and consumption of Sugar Sweetened Beverage Products.

## EXPLANATORY STATEMENT

~~If passed, this County Ordinance Measure would impose create a Multnomah County Ordinance that imposes an excise tax of \$0.01 per fluid ounce on Distributors of Sugar-Sweetened Beverage Products (SSBP), which SSBP includes (a) nonalcoholic beverage intended for human consumption that has one or more Added Caloric Sweeteners and contains more than 2 calories per ounce of beverage and (b) added caloric sweeteners, but are not limited to beverages commonly referred to as soda, pop, cola, soft drinks, sports drinks, energy drinks, sweetened iced teas or sweetened coffee drinks.~~

SSBP does not include Milk, Milk alternatives, 100% natural fruit and/or vegetable juice (including such beverages diluted with water), vegetable juices, infant formula, beverages for medical use, or any product designed as supplemental or meal replacement and which containing proteins, carbohydrates, vitamins and minerals.

~~A Distributor is defined as a Business Entity doing business in Multnomah County and that transfers title of SSBP to another Business Entity in Multnomah County, and includes a business entity that transports SSBP purchased outside the County for the purposes of retail sale within the County. The County's jurisdiction over Distributors extends to all persons doing business in Multnomah County as defined in the Multnomah County Business Income Tax Code.~~

~~Retail sales of SSBP to a consumer are not subject to the tax.~~

The tax would be ~~is~~ levied upon the first non-exempt distribution of SSBP in Multnomah County. Distribution would of SSBP may not be taxed more than once in the chain of commerce of Distributors subject to the jurisdiction of the County.

A distributor is defined as a business entity doing business in Multnomah County that transfers title of SSBP to another business entity in Multnomah County, and includes business entities that transport SSBP purchased outside the County for purposes of retail sale within the County. The County's jurisdiction over distributors extends to all persons doing business in Multnomah County as defined by the Multnomah County Business Income Tax Code. Retail sales of SSBP to a consumer would not be subject to the tax.

~~The following Distributors are exempt from the tax: Distributors not legally subject to taxation by the County; distribution to a Retailer of sugar or other sweeteners sold by a Retailer such as a grocery store; and Distribution of small batch nonalcoholic SSBP produced in the County by a manufacturer licensed pursuant to ORS 635.027.~~

Distribution to a retailer of sugar or other sweeteners sold by a retailer such as a grocery store and distribution of small-batch nonalcoholic SSBP produced in the County by a manufacturer licensed pursuant to ORS 635.027 would be exempt.

~~Provides for administration of the tax by County or by contract with a State agency, limits amount spent on administration to 5% of proceeds.~~

Proceeds from the tax would be ~~are~~ dedicated to a "Children's Health and Education Fund" for programs primarily serving children in low income communities and communities of color that increase physical fitness; improve nutrition; and dental health; reduce health disparities; and support early childhood education. ~~Requires a performance audit of the Fund every other year.~~

The Ordinance would Establishes "The Children's Health and Education Fund Advisory Committee" comprised of 15 members. Provides for appointment of Committee members would be appointed by the County Board of Commissioners based upon recommendations from several

~~local non-profit organizations of Regional Health Equity Coalition, All Hand Raised, Multnomah County Youth Commission, Oregon Hunger Relief Task Force, and Multnomah County Health Department. The Requires Advisory Committee would to advise the County on the effectiveness of the excise tax in reducing distribution and consumption of SSBP, and the impact on beverage prices, on consumer purchasing, and on health outcomes, and would to make recommendations regarding funding of programs.~~

The tax would be administered by the County or by contracting with a State agency. Five percent of tax proceeds could be spent to pay for administration and/or operation of the tax, the Fund, and the Committee. The tax would be collected, enforced, and administered by the County Tax Administrator. The County Commissioners and Tax Administrator would adopt and enforce rules and regulations relating to the administration and enforcement of the tax, including taxpayer registration; reporting requirements for distributors and retailers; the schedule for tax payments; the process for determining deficiencies and refunds; enforcement procedures including provisions authorizing the imposition of penalties for noncompliance; and the procedures for challenging determinations of taxes owed.  
Requires County Auditor to conduct ~~performance~~ audit every other year.

Specifies ~~an~~ operative date for Ordinance of 1/1/2017, and an operative date for imposition and collection of tax of 1/1/2018.



## CAPTION

Taxes certain beverages, sweeteners to administer, operate new special fund.

## QUESTION

Should new excise tax be imposed on certain sugar-sweetened beverages and sweeteners to administer, operate children's health and education fund?"

## SUMMARY

This Measure would impose an excise tax of \$0.01 per fluid ounce on businesses that distribute in Multnomah County certain "sugar-sweetened beverages" and products used to make them. Distribution defined as transfer from one business to another; the tax applies only to first non-exempt Distribution within County. Sugar-sweetened beverage defined as nonalcoholic beverages containing one or more "added caloric sweeteners" and more than 2 calories per ounce. Exempts various products, including milk, milk alternatives, 100 percent natural fruit and/or vegetable juices, products intended as supplemental meal or meal replacements. Tax to be collected, enforced and administered by County Tax Administrator. Tax collection and administration costs funded through new tax. Up to 5 percent of remaining revenue used for administrative and operational purposes. All other revenues placed in new "Children's Health and Education Fund" used to fund programs primarily serving children in low income communities and communities of color that promote health and education. Creates Children's Health Fund Advisory Committee which advises County Commissioners on effectiveness of new tax and makes recommendations on use of funds.

## EXPLANATORY STATEMENT

If passed, this County Ordinance would impose an excise tax of \$0.01 per fluid ounce on Sugar-Sweetened Beverage Products (SSBP). SSBP includes (a) nonalcoholic beverage intended for human consumption that has one or more Added Caloric Sweeteners and contains more than 2 calories per ounce of beverage and (b) added caloric sweeteners. SSBP does not include milk, milk alternatives, 100% natural fruit and/or vegetable juice (including such beverages diluted with water), infant formula, beverages for medical use, or any product designed as supplemental or meal replacement containing proteins, carbohydrates, vitamins and minerals.

The tax would be levied upon the first non-exempt distribution of SSBP in Multnomah County. Distribution would not be taxed more than once in the chain of commerce. A distributor is defined as a business entity doing business in Multnomah County that transfers title of SSBP to another business entity in Multnomah County, and includes business entities that transport SSBP purchased outside the County for purposes of retail sale within the County. The County's jurisdiction over distributors extends to all persons doing business in Multnomah County as defined by the Multnomah County Business Income Tax Code. Retail sales of SSBP to a consumer would not be subject to the tax.

Distribution to a retailer of sugar or other sweeteners sold by a retailer such as a grocery store and distribution of small-batch nonalcoholic SSBP produced in the County by a manufacturer licensed pursuant to ORS 635.027 would be exempt.

Proceeds from the tax would be dedicated to a "Children's Health and Education Fund" for programs primarily serving children in low income communities and communities of color that increase physical fitness; improve nutrition and dental health; reduce health disparities; and support early childhood education.

The Ordinance would establish "The Children's Health and Education Fund Advisory Committee" comprised of 15 members. Committee members would be appointed by the County Board of Commissioners based upon recommendations from several local non-profit organizations. The Committee would advise the County on the effectiveness of the tax in reducing distribution and consumption of SSBP and the impact on beverage prices, consumer purchasing, and health outcomes and would make recommendations regarding funding of programs.

The tax would be administered by the County or by contracting with a State agency. Five percent of tax proceeds could be spent to pay for administration and/or operation of the tax, the Fund, and the Committee. The tax would be collected, enforced, and administered by the County Tax Administrator. The County Commissioners and Tax Administrator would adopt and enforce rules and regulations relating to the administration and enforcement of the tax, including taxpayer registration; reporting requirements for distributors and retailers; the schedule for tax payments; the process for determining deficiencies and refunds; enforcement procedures including provisions authorizing the imposition of penalties for noncompliance; and the procedures for challenging determinations of taxes owed. Requires County Auditor to conduct audit every other year.

Specifies operative date for Ordinance of 1/1/2017, and an operative date for imposition and collection of tax of 1/1/2018.

2014 WL 10449620 (Cal.Super.) (Trial Pleading)  
Superior Court of California.  
Alameda County

Anthony JOHNSON & Leon Cain, Petitioners/Plaintiffs,

v.

Mark NUMAINVILLE, the City Clerk of the City of Berkeley; Tim Dupuis,  
Alameda County Registrar of Voters; Does I-V, Respondents/Defendants.  
CITY COUNCIL OF THE CITY OF BERKELEY, a municipal corporation; Zach  
Cowan, the City Attorney of the City of Berkeley; Does VI-XV, Real Parties in Interest.

No. RG14736763.  
September 2, 2014.

**Order and Judgment Re: Petition for Peremptory Writ of Mandate and Complaint for Declaratory and Injunctive Relief**

The Petition of Anthony Johnson and Leon Cain ("Petitioners") for Peremptory Writ of Mandate and Complaint for Declaratory and Injunctive Relief, came on regularly for hearing on August 29, 2014, in Department 31, the Honorable Evelio Grillo presiding. Petitioners appeared by counsel Christopher Skinnell. Respondent Mark Numainville appeared by counsel James Harrison. Respondent Tim Dupuis and the County of Alameda appeared by counsel Raymond Lara. Real Parties in Interest City Council of the City of Berkeley and Zach Cowan appeared by counsel Margaret Prinzing.

The court has considered all of the papers filed in connection with the petition, and the arguments at the hearing and, good cause appearing, hereby rules as follows:

**BACKGROUND**

Petitioners bring this writ challenging the ballot label and City Attorney's Impartial Analysis for Measure D. Measure D asks voters whether or not to approve a tax on sugar-sweetened beverages that are distributed by businesses in the City of Berkeley, subject to some exemptions. Through Resolution No. 66,712-N.S., the Berkeley City Council wrote and adopted the ballot label that is currently to appear on the November 2014 ballot.

The current ballot label reads:

Shall an ordinance imposing a 1¢ per ounce general tax on the distribution of high-calorie, sugary drinks (e.g., sodas, energy drinks, presweetened teas) and sweeteners used to sweeten such drinks, but exempting: (1) sweeteners (e.g., sugar, honey, syrups) typically used by consumers and distributed to grocery stores; (2) drinks and sweeteners distributed to very small retailers; (3) diet drinks, milk products, 100% juice, baby formula, alcohol, or drinks taken for medical reasons, be adopted?

Petitioners contend that the ballot label adopted by the Berkeley City Council is in stark contrast to the proposed label contained in the draft resolution initially attached to the agenda for the City Council's July 1, 2014 meeting, which read:

Shall the City of Berkeley impose a general tax of 1cent per ounce on sugar-sweetened beverages distributed in the City, payable by distributors with annual gross receipts over \$100,000?

By substituting "high-calorie, sugary drinks" in place of "sugar-sweetened," Petitioners contend that the ballot label prepared by the City contains false and misleading, biased and partisan language, encouraging a "yes" vote on the tax measure. Thus, Petitioners ask that the court order that "high-calorie, sugary drinks" be stricken from the ballot label and replaced with "sugar-sweetened."

Petitioners also seek changes to the "City Attorney's Impartial Analysis" of Measure D. The City Attorney's analysis states that "[s]ugar sweetened beverages whose distribution would be subject to the tax would include high-calorie, low-nutrition products, like soda, energy drinks, and heavily presweetened tea, that contain at least 2 calories per fluid ounce." Petitioners contend that this portion of the analysis, like the ballot, is also biased, false and misleading, and ask that "high-calorie, low-nutrition" be replaced with "sugar-sweetened beverages." Also, Petitioners claim that the proposed tax is not limited to "heavily" presweetened tea, and therefore asks that the court order that "heavily" be stricken from the analysis.

The City Attorney's analysis also states that "[t]he tax would be payable by the distributor, not the customer." Petitioners ask that the court order that the words "not the customer" be stricken from this sentence because although literally true, this is materially misleading and highly biased.

### STANDARD OF REVIEW

A ballot question by a city must comply with the same requirements imposed on the Attorney General for a title and summary prepared for a state election. (See Elec. Code sec. 10403(a)(2).) Elections Code section 9051(c) states:

In providing the ballot title and summary, the Attorney General shall give a true and impartial statement of the purpose of the measure in such language that the ballot title and summary shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure.

(Elec. Code sec. 9051(c).)

A peremptory writ of mandate shall be issued only upon clear and convincing proof that the ballot title or summary prepared by the city attorney, is false, misleading, or inconsistent with the requirements of Section 9203. (Elec. Code sec. 9204.)

Further, a peremptory writ of mandate or an injunction shall be issued as to official election materials, only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with the requirements of chapter 3 of the Elections Code, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law. (Elec. Code sec. 9295.)

Finally, a peremptory writ of mandate shall be issued upon proof that an error or omission has occurred, or is about to occur, in the placing of a name on, or in the printing of, a ballot, sample ballot, voter pamphlet, or other official matter, or that any neglect of duty has occurred, or is about to occur, in violation of the Elections Code or Constitution, and the issuance of a writ will not substantially interfere with the conduct of the election. (Elec. Code, § 13314.)

Thus, Petitioners, as the party challenging the ballot question and materials, have the burden of proof of showing that they are entitled to a peremptory writ of mandate under one or more of these sections.

### LEGAL ANALYSIS OF PETITIONERS' CLAIMS

## 1. ISSUANCE OF A WRIT OR INJUNCTION WILL NOT SUBSTANTIALLY INTERFERE WITH PRINTING OR DISTRIBUTION OF THE ELECTION MATERIALS

As a preliminary matter, the court finds that issuance of a writ or injunction in this action will not substantially interfere with the printing or distribution of the election materials involved here. The court has received and reviewed the declaration of Tim Dupuis, the Alameda County Registrar of Voters, in which he states that any order to the ballot materials must be on or before September 3, 2014. (Dupuis Decl. para. 21.)

Therefore, the remaining issues before the court are whether Petitioners have established by clear and convincing evidence that the challenged statements are either false, or misleading, or partial. The court now addresses each of the challenged statements, below.

## 2. "HIGH-CALORIE, SUGARY DRINKS" IN THE BALLOT QUESTION IS PARTIAL AND MISLEADING

A ballot is governed by different standards than govern arguments in voters' pamphlets. (*Huntington Beach City Council v. Sup. Ct.* (2002) 94 Cal.App.4<sup>th</sup> 1417, 1433.) Voter pamphlets are governed by Election Code section 9295, which the Legislature intended to maximize freedom of speech unless it is false, misleading or inconsistent with the requirements of chapter 3. (*Id.*) In contrast though, wording on a ballot or structure of the ballot cannot favor a particular partisan position because of the constitutional guarantees of equal protection and freedom of speech as applied to public elections. (*McDonough v Sup. Ct.* (2012) 204 Cal.App.4<sup>th</sup> 1169, 1174.) Thus, a ballot title must not be false, misleading or partial to one side. (*Id.* at 1174.) "Partial" means that the council's language signals to voters the council's view of how they should vote, or casts a favorable light on one side of the issue while disparaging the opposing view. (*Martinez v. Sup. Ct.* (2006) 142 Cal.App.4<sup>th</sup> 1245, 1248.) However, this is viewed through a lens that gives a drafter "considerable latitude" in composing the ballot title, and only in a clear case should a title be held insufficient. (*McDonough, supra* at 1174.) In other words, "if reasonable minds may differ as to the sufficiency of the title, the title should be held sufficient." (*Id.*)

In *McDonough*, the court found that in the context of a pension modification measure that the phrase "Pension Reform" in the ballot title was a clear form of advocacy. (*Id.*) The court found that the word "reform" in both definition and connotation evoked a removal of defects or wrong. (*Id.* at 1174.) Thus, the city council had implicitly characterized the existing pension system as defective, wrong, or susceptible of abuse, thereby taking a biased position by the title of the measure itself. (*Id.* at 1174-1175.) As such, the ballot title was properly altered to "Pension Modification." (*Id.* at 1175.)

Similarly, in *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4<sup>th</sup> 1417, 1433-1434, the court found that in the context of a measure to increase the tax on a utility that the word "exemption" in the title of the ballot was a form of advocacy because it "carries the whiff of privilege about it" and therefore was not sufficiently neutral. "Exemption" in the tax context, gave an impression of unfair influence and special treatment. (*Id.* at 1434.) Further, it conveyed the idea that the utility was not paying any utility tax, which the court found to be untrue. (*Id.*) The court found that the trial court's decision to replace "exemption" with the word "exclusion," was proper as it was more neutral. (*Id.* at 1433-1434.)

In light of these cases, the court finds that the ballot question here asking whether a tax should be imposed on "high-calorie, sugary drinks" is likewise a form of advocacy and therefore not impartial. This phrase suggests that the tax will be limited to certain beverages that contain more than the average calories and too much sugar; in other words, beverages that most people would find to be unhealthy. The adjective "high" is defined in the dictionary as: (1) rising or extending upward a great distance, (2) extending or reaching upward more than other things of the same kind (3) located far above the ground or another surface. (See *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 28 Aug. 2014. <<http://www.merriam-webster.com/dictionary/high>>.) The adjective sugary is defined as: (1) tasting like sugar or containing a lot of sugar, (2) showing or expressing a pleasant emotion in a way that seems excessive and false :

too sweet. (See *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 28 Aug. 2014. < <http://www.merriam-webster.com/dictionary/sugary>>.) Thus, combining these phrases to ask whether a tax should be imposed on "high-calorie, sugary drinks" improperly advocates voting in favor of the tax. The court finds that the phrase "sugar-sweetened beverages," as proposed in the draft resolution and requested by Petitioners, is more neutral and less of an argument likely to create prejudice for or against Measure D.

Furthermore, Petitioners have presented clear and convincing evidence to support that using the phrase "high-calorie, sugary drinks" is also misleading. If passed, the City would levy a tax of one cent per fluid ounce on the privilege of distributing "sugar-sweetened beverage products" in the City. (See Proposed Berkeley Municipal Code Chapter 7.72.) The phrase "high-calorie, sugary drinks" is not defined anywhere in the proposed ordinance; however, the proposed ordinance defines "sugar-sweetened beverage" as meaning "any beverage intended for human consumption to which one or more Added caloric sweeteners has been added and that contains at least 2 calories per fluid ounce." (See Proposed Berkeley Municipal Code Chapter 7.72.030(0).) "Sugar-sweetened beverage product" is defined as a "Sugar-sweetened beverage or Added caloric sweetener." ((See Proposed Berkeley Municipal Code Chapter 7.72.030(P).))

Petitioners make a compelling argument therefore, that claiming the tax is imposed on "high-calorie, sugary drinks" is misleading to voters when in fact, a tax would be imposed on any 12-ounce drink containing a mere 24 calories. The court agrees that a reasonable voter would not be likely to consider a beverage containing 24 calories to be "high calorie" or "sugary."

In fact, Petitioners show that this tax would in fact be imposed on several drinks with a similar amount of calories. Gatorade's "G2 Thirst Quencher" would be taxed by Measure D, even though it contains only 30 calories per 12-ounce serving, despite that it is advertised to the public as "low calorie" consistent with FDA guidelines. (See Skinnell Reply Decl., para. 5 and attached Exh. 5; 21 C.F.R. sec. 101.60(b)(2)(i).) Petitioners also presented evidence to support several other beverages that contain a similar amount of calories would be taxed as well: (1) KeVita "Living Greens" Sparkling Probiotic Drink, which contains 30 calories per 8-ounce serving, (2) Something Natural Raspberry/Key Lime Sparkling Water containing 30 calories per 325 ml serving,<sup>1</sup> (3) Solar Revive Organic, Raw Kombucha which has 15 calories per 4-ounce serving (45 calories per 12 fl oz.), (4) Honest Tea Classic Green Tea, which has 30 calories per 8-ounce serving, (5) Steaz Lightly Sweetened Iced Green Tea (Blueberry/Pomegranate), which has 40 calories per 8-ounce serving, and (6) Guayaki Brand "Yerba Mate" Sparkling Grapefruit/Ginger, which has 30 calories per 8-ounce serving.<sup>2</sup> (See Skinnell Reply Decl., paras. 5-12 and Exhs. 5-6.) In light of the evidence, the court finds that allowing the ballot question to describe the tax as being distributed on "high-calorie, sugary drinks" is misleading, and accordingly should be changed to "sugar-sweetened beverage," which is the phrase in the proposed ordinance used to describe the tax and is also defined within the proposed ordinance.

<sup>1</sup> A 325 ml serving is approximately 10.9896 ounces.

<sup>2</sup> Petitioners also claim that "Q" Tonic Water would be taxed as well because it has 24 calories per serving. While the evidence presented references 24 calories, it does not state what the serving size is. Thus, the court cannot conclude that the tax would apply to this beverage.

The City's contention that public health experts consider a 24-calorie sugary drink to be "high-calorie" for children and no more than 40 calories per container for teens and adults, is not persuasive here. The City cites to studies and a World Health Organization's draft guideline addressing sugar and calorie intake, claiming public health experts consider even a 24-calorie sugary drink to be "high-calorie" for children and that teens and adults should consume no more than 40 calories per beverage container. (See Narcisco Deck, paras. 2-7, and Exhs. 1-6.) However, while this may tend to lend support for an argument that the phrase "high calorie, sugary drinks" in the context of children is not false, it does not support that the phrase "high-calorie, sugary beverage" is not misleading. "Misleading" is defined as "delusive; calculated to be misunderstood." (*Black's Law Dictionary* 1021 (8<sup>th</sup> ed. 2004).) Thus, the question is not whether a 24-

calorie beverage constitutes a "high-calorie, sugary beverage" for a child, but rather whether a voter reading the ballot question that the tax will apply to a "high-calorie, sugary beverage" would construe a 24-calorie beverage as one. The court finds that the use of the phrase "high-calorie, sugary beverage" is calculated to be misunderstood since it would include a 24-calorie beverage, and thus "high-calorie, sugary beverage" is misleading.

Petitioners' petition to replace the phrase "high-calorie, sugary beverage" with "sugar-sweetened beverage" in the ballot question is GRANTED.

### **3. "HIGH-CALORIE, LOW-NUTRITION PRODUCTS" IN THE CITY ATTORNEY'S IMPARTIAL ANALYSIS IS ALSO PARTIAL AND MISLEADING**

Whenever any city measure qualifies for the ballot, the city attorney shall prepare an impartial analysis of the measure showing the effect of the measure on the existing law and the operation of the measure. (Elec. Code sec. 9280.) Similar to the ballot, the City Attorney's analysis must also not be false, misleading or partial to one side. (See *McDonough, supra* at 1174; Elec. Code sees. 9051, 9295 and 10403.)

The "City Attorney's Impartial Analysis" provides that sugar sweetened beverages that would be subject to the tax would include "high-calorie, low nutrition" products. (See Petition, Exh.5.) Although the City Attorney references "low nutrition" instead of "sugary beverage" as used in the ballot question, this phrase similarly seems designed to sway voters in favor of voting for passage by suggesting that the beverages being taxed are not good for voters. Thus, for the same reasons discussed above, the court finds that the phrase "high-calorie, low-nutrition" is similarly partial in favor of passage of Measure D and is also misleading.

The petition to replace the phrase "high-calorie, low nutrition" with "sugar-sweetened beverage" is GRANTED because Petitioners have met their burden of presenting clear and convincing proof that it is partial or biased in favor of passage of Measure D and is also misleading.

### **4. "HEAVILY" PRESWEETENED TEA IN THE CITY ATTORNEY'S IMPARTIAL ANALYSIS IS PARTIAL AND MISLEADING**

The City Attorney's Impartial Analysis also states that beverages subject to the tax would include "heavily presweetened tea." (See Petition, Exh.5.)

Petitioners object to the term "heavily," claiming it is false, misleading and biased. Specifically, reference to "heavily" presweetened teas gives the impression that other presweetened teas will be exempt from the tax. In fact though, teas, such as Honest Tea Green Tea that contains only 30 calories per serving and Steaz Lightly Sweetened Ice Green Tea that contains only 40 calories per serving, will still be subject to the tax.

The City responds that the ordinance refers to heavily presweetened tea, and thus the City has simply complied with the mandate to track the actual language of the measure. Further, the City claims this phrase is accurate because even "lightly sweetened" teas can contain as many as 80 calories. Both Snapple's Lightly Sweetened Peach Passionfruit Tea and Snapple's Lightly Sweetened Cherry Pomegranate Tea contain 80 calories per 16-ounce serving. (See Narcisco Decl., Exhs. 7 and 8.)

"Heavily" is defined as: (1) to a great degree: very much, or (2) in a slow or heavy way. (*Merriam-Webster.com*. Merriam-Webster, n.d. Web. 28 Aug. 2014. < <http://www.merriam-webster.com/dictionary/heavily>>.) Thus, to state that the tax applies to "heavily" presweetened teas is to suggest that the proposed tax would apply to teas that have been sweetened "to a great degree" or "very much" and further implies that it will not apply to teas that have not been sweetened to

such a degree. Tellingly, the City fails to identify any presweetened teas that would be exempt from the proposed tax. As such, the court can only conclude based on the evidence that the word "heavily" is biased or partial as advocating for passage of Measure D, and misleads the voters into thinking that the proposed tax will exempt certain presweetened teas when in fact, the tax will apply to presweetened teas containing only 30 calories per serving.

The petition is therefore GRANTED, and the phrase "heavily" is to be stricken from the City Attorney's Impartial Analysis.

#### **5. THE STATEMENT THAT THE TAX WOULD BE PAYABLE BY THE DISTRIBUTOR, NOT THE CUSTOMER, IS NOT PARTIAL OR MISLEADING**

The City Attorney's Impartial Analysis also states that "[t]he tax would be payable by the distributor, not the customer." (See Petition, Exh. 5.)

Petitioners seek to strike the portion "not the customer" because although literally true, it is materially misleading and highly biased. Although the tax will be paid by distributors, as a practical matter the tax is likely to be passed through to consumers as distributors and retailers have every incentive to recoup this cost from consumers. If the full costs were borne by distributors, Petitioners point out there would be no incentive for consumers to reduce their consumption. Further, Petitioners claim this statement is highly partisan as it persuades voters to vote for Measure D because they will not bear the costs.

As a general rule, the ballot title and summary prepared by the Attorney General are presumed accurate, and the Attorney General is afforded considerable latitude. (*Yes on 25, Citizens For An On-Time Budget v. Superior Court* (2010) 189 Cal.App.4th 1445,1452.) The deference results from the recognition that drafting a ballot title and summary can be difficult when multiple reasonable interpretations are possible. (*Id.* at 1453.) "If reasonable minds may differ as to its sufficiency, the title and summary prepared by the Attorney General must be upheld," and only in clear cases should the title and summary be held insufficient. (*Id.*)

The court agrees with the City that Petitioners assume too much in this instance. Petitioners have not presented clear and convincing evidence that the statement "not the customer" is misleading or partial. Petitioners concede that the tax will be paid directly by the distributors, not directly by the customers. Petitioners only speculate that it is likely that such cost will be passed down to consumers, but it is unknown at this point whether or not any of the tax will eventually be passed down to customers. As the City points out, distributors or retailers could choose to absorb the cost of the tax in order to better compete with other distributors or retailers.

Moreover, reasonable minds may differ as to the sufficiency of the City Attorney's statement that the tax will be paid by the distributor, "not the customer." Although Petitioners contend that this statement is biased because it advocates voting in support of Measure D, another interpretation is that it simply informs the voter that the tax will in fact be paid by the distributor, and not directly by the customer. A voter may want to know if voting for this tax means that the cost of purchasing such beverages will automatically increase because of the tax.

Accordingly, the court finds that Petitioners have not met their burden of proving by clear and convincing evidence that the statement "not the customer" is partial or misleading. The petition on this ground is DENIED.

#### **CONCLUSION**

The Petition for Writ of Mandate is GRANTED in part and DENIED in part.



The court orders the following language for the ballot question for Measure D:

Shall an ordinance imposing a 10 per ounce general tax on the distribution of *sugar-sweetened beverages* ~~high-caloric, sugary drinks~~ (e.g., sodas, energy drinks, presweetened teas) and sweeteners used to sweeten such drinks, but exempting: (1) sweeteners (e.g., sugar, honey, syrups) typically used by consumers and distributed to grocery stores; (2) drinks and sweeteners distributed to very small retailers; (3) diet drinks, milk products, 100% juice, baby formula, alcohol, or drinks taken for medical reasons, be adopted?

The court also orders the following changes to the City Attorney's Impartial Analysis:

*Beverages*

Sugar sweetened beverages whose distribution *would be* subject to the tax would include *sugar-sweetened beverages* ~~high caloric, low-nutrition products~~, like soda, energy drinks, and heavily presweetened tea, that contain at least 2 calories per fluid ounce.

Petitioners' proposed peremptory writ will be modified in accordance with this order, and signed and entered by the court.

DATED: SEP - 2 2014

<<signature>>

Evelio M. Grillo

JUDGE OF THE SUPERIOR COURT