KLINE & SPECTER, P.C.
Shanin Specter, ID No. 40928
shanin.specter@klinespecter.com
Charles Becker, ID No. 81910
charles.becker@klinespecter.com
1525 Locust Street
Philadelphia, PA 19102
215-772-1000

MORGAN, LEWIS & BOCKIUS LLP
Marc J. Sonnenfeld, ID No. 17210
marc.sonnenfeld@morganlewis.com
John P. Lavelle, Jr., ID No. 54279
john.lavelle@morganlewis.com
Thomas J. Sullivan, ID No. 88838
thomas.sullivan@morganlewis.com
1701 Market Street
Philadelphia, PA 19103
215-963-5000

Attorneys for Plaintiffs

LORA JEAN WILLIAMS; GREGORY J. SMITH; CVP MANAGEMENT, INC. d/b/a or t/a CITY VIEW PIZZA; JOHN'S ROAST PORK, INC. f/k/a JOHN'S ROAST PORK; METRO BEVERAGE OF PHILADELPHIA, INC. d/b/a or t/a METRO BEVERAGE; DAY'S BEVERAGES, INC. d/b/a or t/a DAY'S BEVERAGES; AMERICAN BEVERAGE ASSOCIATION; PENNSYLVANIA BEVERAGE ASSOCIATION; PHILADELPHIA BEVERAGE ASSOCIATION; and PENNSYLVANIA FOOD MERCHANTS ASSOCIATION,

Plaintiffs,

v.

CITY OF PHILADELPHIA and FRANK BRESLIN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PHILADELPHIA DEPARTMENT OF REVENUE,

Defendants.

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
COMMERCE PROGRAM

_____ Term, 2016

No. _____

COMPLAINT – CIVIL ACTION

(EQUITY)

NOTICE TO DEFEND

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Philadelphia Bar Association
Lawyer Referral and Information Service
One Reading Center
Philadelphia, Pennsylvania 19107
(215) 238-6333
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AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perer dinero o sus propiedades u otros derechos importantes para usted.

Lleva esta demanda a un abogado inmediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagartal servicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede conseguir asistencia legal.

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PRELIMINARY STATEMENT AND SUMMARY OF CLAIMS

1. Plaintiffs hereby challenge the City of Philadelphia's ("City's") new tax on soft drinks – the "Sugar Sweetened Beverage Tax" (referred to herein as the "Philadelphia Soft Drink Tax" or the "Tax" because the Tax is not only on beverages sweetened with sugar, but also on diet beverages and a variety of other beverages – many with zero or low calories – sweetened with non-sugar sweeteners). The Philadelphia Soft Drink Tax essentially duplicates the tax on the beverages covered by the Commonwealth of Pennsylvania's sales and use tax on soft drinks (referred to herein as the "Pennsylvania Soft Drink Tax"). *See* Bill No. 160176 § 194101 *et seq.* (attached hereto as Ex. A); *see also* Sections 201(a), (m), and 202 of the Act of March 4, 1971, P.L. 6, No. 2, known as the Tax Reform Code, 72 P.S. §§ 7201(a), (m), 7202; & 7204 (relevant excerpts attached hereto as Ex. B). The Philadelphia Soft Drink Tax was enacted on June 20, 2016 and was effective immediately, with the imposition and collection of the Tax beginning on January 1, 2017. *See* Bill No. 160176.

2. The Philadelphia Soft Drink Tax is an unlawful attempt by the City to circumvent the Commonwealth's taxation supremacy and the Pennsylvania Constitution's uniformity requirement in order to generate revenue for the City at the expense of the Commonwealth and its citizens. At the same time, the Tax will meaningfully diminish the everyday purchasing power of Philadelphia residents – particularly those on a limited or fixed income – and will put the City's small businesses that sell soft drinks at a material competitive disadvantage relative to comparable businesses just outside the City's borders.

3. More broadly, permitting the Philadelphia Soft Drink Tax to stand would create a roadmap for every local government in the Commonwealth to evade the Commonwealth's supreme taxation structure on thousands of products – from over-the-counter pharmaceuticals to

cars – merely by imposing a duplicative tax at a different level in the distribution chain than a tax already imposed by the Commonwealth.

4. The City is expressly prohibited from taxing subjects and property already taxed by the Commonwealth. *See* 53 P.S. § 15971 (the Sterling Act). Affected beverages – the subject of the tax imposed by the Philadelphia Soft Drink Tax – are already taxed at 6% by the Pennsylvania Soft Drink Tax. Plainly aware that a tax expressly imposed on the "sale" of a soft drink would be preempted under the Sterling Act, the City has attempted to skirt the preemptive effect of the Pennsylvania Soft Drink Tax by imposing the Philadelphia Soft Drink Tax on "the distribution" of soft drinks that will be held out for retail sale in the City – one step up the chain from the actual retail sale of these beverages to consumers. However, the City may not circumvent the Commonwealth's supreme taxation authority simply by changing its label or shifting the point at which the Tax is imposed. The Sterling Act's preemptive mandate is not limited to a City tax imposed at the exact same point in the distribution chain; instead, the relevant question is whether the City's Tax is imposed on the same subject matter, personal property, and/or transaction as a preexisting Commonwealth tax. Here, the Philadelphia Soft Drink Tax is imposed on precisely the same subject and property as the Pennsylvania Soft Drink Tax – soft drinks. And once the practical incidence of the Philadelphia Soft Drink Tax is examined, it is apparent that the Tax (1) is duplicative of, (2) conflicts with, and (3) frustrates and obstructs the purpose of the Pennsylvania Soft Drink Tax. Accordingly, the Philadelphia Soft Drink Tax should be struck down as preempted.

5. First, because virtually every type of beverage subject to the Philadelphia Soft Drink Tax is also subject to the Pennsylvania Soft Drink Tax, the Philadelphia Soft Drink Tax

duplicates the Pennsylvania Soft Drink Tax. *Compare* Bill No. 160176, § 19-4101(3), *with* 72 P.S. §§ 7201(a), (m) & 7202.

6. By imposing the Philadelphia Soft Drink Tax on the same beverages that are subject to the Pennsylvania Soft Drink Tax, the City is seizing the taxing authority expressly reserved to the Commonwealth in contravention of the Sterling Act's prohibition on local taxation of a "privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee." 53 P.S. § 15971(a).

7. Second, the Philadelphia Soft Drink Tax contravenes the Commonwealth's comprehensive scheme to impose tax on taxable personal property only once in the chain of distribution and to prohibit tax pyramiding. *See* 72 P.S. § 7202(a); § 7201(k)(8); *see also Commw. v. Wetzel*, 257 A.2d 538, 539 (Pa. 1969) (explaining that tax pyramiding occurs when a tax is imposed on "the middleman buying from the producer in order to sell to the retailer who in turn resells the product to the ultimate consumer").

8. Third, the Philadelphia Soft Drink Tax stands as an obstacle to and frustrates the purpose behind the Pennsylvania Soft Drink Tax – to raise revenue for the Commonwealth – and, thus, is impliedly preempted.

9. The Philadelphia Soft Drink Tax will cause sales of soft drinks subject to the 6% Pennsylvania Soft Drink Tax to decrease. This will cause a net loss of revenue of $2.7 million to $7.8 million per year for the Commonwealth despite the higher end price to consumers. Thus, the Philadelphia Soft Drink Tax is void as it impermissibly frustrates and obstructs the revenue-raising purpose of the Pennsylvania Soft Drink Tax.

10. Thus, to the extent it is not expressly preempted by the Pennsylvania Soft Drink Tax, 72 P.S. § 7201, *et seq.*, the Philadelphia Soft Drink Tax stands as an obstacle to and

frustrates the purpose of the Pennsylvania Soft Drink Tax – to raise revenue for the Commonwealth.

11. Fourth, the Philadelphia Soft Drink Tax is preempted under Pennsylvania law because the Tax is contrary to the purpose of the Commonwealth's prohibition on charging of the sales and use tax for purchases made using Supplemental Nutrition Assistance Program ("SNAP") funds.

12. SNAP is a federally funded program, and, by mandate of the Food Stamp Act of 1977, as amended, a state cannot receive federal SNAP funds unless it agrees not to impose a sales and use tax on eligible grocery items – including low-calorie and regular soft drinks – that are purchased with federal SNAP funds. *See* 7 U.S.C.A. § 2013(a); 7 U.S.C.A. § 2012(k). SNAP exempts all beverages covered by the Tax, whether no- or low-calorie or regular.

13. Congress amended the Food Stamp Act in 1985 to ensure that states did not circumvent its prohibition on collecting state or local sales taxes on SNAP purchases in order to "put[] an end to what is, in effect, a transfer of revenues from the federal government to state and local governments at the expense of low-income persons . . . Federal dollars provided for food assistance should not be diverted to other purposes, even if there is some return for the poor." *See* H.R. Rep. 99-271(l) (1985).

14. In compliance with the federal mandate, the Commonwealth enacted a statute specifically exempting SNAP purchases from imposition of the Pennsylvania Soft Drink Tax. *See* 72 P.S. § 7204(46).

15. The Philadelphia Soft Drink Tax directly interferes with the Commonwealth's administration of the SNAP Program and the Commonwealth's tax exemption for SNAP purchases because (1) the Tax sharply reduces the purchasing power of SNAP participants in

contravention of the SNAP program, and (2) the Tax shifts federal money that is supposed to be used to increase the grocery-buying power of low-income residents to the City treasury in contravention of the sales and use tax exemption for purchases made with SNAP funds.

16. In its misguided attempt to circumvent Sterling Act preemption by imposing the Tax at the distributor level of the distribution chain, the City has also created an impermissible taxation scheme on property which violates the Uniformity Clause of the Pennsylvania Constitution in four ways.

17. First, the Tax is imposed on the class of soft drinks in a non-uniform way based solely on volume, not value – at both the distributor wholesale level and the consumer market price level – in contravention of long-standing precedent precluding such a non-value based method of calculation of taxes on property (such as soft drinks).

18. Second, the Tax is imposed on distributors in an unequal and unreasonable way because the Tax is much greater on large, inexpensive products than on small, more expensive products.

19. Third, the Tax is imposed on retailers in an unequal and unreasonable way. Either the distributor passes on the Tax to the retailer, or the retailer itself is responsible for payment of the Tax in the first instance (a) pursuant to its role as a "dealer," or (b) because the distributor has failed to pay the Tax. Among retailers that sell affected beverages, the retailers will suffer starkly different tax burdens depending on whether they sell large, inexpensive products rather than small, more expensive products.

20. Fourth, the burden of the Tax is borne by consumers in unreasonably disparate ways. The amount of the Tax borne by the consumer is less on a percentage basis for small, more expensive products and wildly higher for large, less expensive products.

21. The City did not, and indeed cannot, provide a justification for taxing these various classes in such arbitrary and unreasonable ways.

NATURE OF ACTION

22. This is a civil action challenging the legality and constitutionality of the Philadelphia Soft Drink Tax.

23. Plaintiffs seek, pursuant to Rule 1601 of the Pennsylvania Rules of Civil Procedure, 42 Pa. C.S.A. § 931, and the Declaratory Judgments Act, 42 Pa. C.S.A. § 7531, *et seq.*, a declaration that the Philadelphia Soft Drink Tax is preempted under Pennsylvania law.

24. Plaintiffs also seek a declaratory judgment that the Philadelphia Soft Drink Tax violates the Uniformity Clause (Article 8, Section 1) of the Pennsylvania Constitution.

25. Plaintiffs also seek, pursuant to Rule 1531 of the Pennsylvania Rules of Civil Procedure, injunctive relief restraining the City and its officers, employees, and agents from enforcing the Philadelphia Soft Drink Tax.

26. Injunctive relief is appropriate because if Plaintiffs are forced to pay the unconstitutional and preempted Tax, Plaintiffs will not be able to recover the excess money paid to the City in a timely and effective manner. Indeed, certain Plaintiffs may not be able to recover any monies paid as a result of the unlawful Tax because certain Plaintiffs (such as consumers) will have borne the cost of the Tax, but will not have physically been responsible for payment of the Tax pursuant to the terms of the Philadelphia Soft Drink Tax. As a result, Plaintiffs have no adequate remedy at law.

27. Further, injunctive relief is appropriate in this instance without exhausting administrative remedies "where pursuit of statutory remedies would be pointless, or such remedies would be inadequate," *Parsowith v. Commw. of Pa. Dep't of Revenue*, 723 A.2d 659,

662 (Pa. 1999) (citation omitted), and where taxpayer complaints in equity challenge the constitutionality of enabling legislation because administrative agencies are not empowered to determine constitutionality, *Borough of Green Tree v. Bd. of Prop. Assmnt. Appeals and Review*, 328 A.2d 819, 825 (Pa. 1974). As a result, Plaintiffs have no adequate remedy at law.

JURISDICTION AND VENUE

28. Jurisdiction is proper in this Court under Rules 1601 and 1531 of the Pennsylvania Rules of Civil Procedure, 42 Pa. C.S.A. § 931, and the Declaratory Judgments Act, 42 Pa. C.S.A. § 7531, *et seq.*

29. Venue is proper in Philadelphia County pursuant to Rules 1006 and 2103 of the Pennsylvania Rules of Civil Procedure because Defendants are located in Philadelphia County and may be served in Philadelphia County.

THE PARTIES

30. Plaintiff Lora Jean Williams is an adult citizen, resident of the City of Philadelphia, and a consumer of soft drinks purchased within the City, who can be contacted through her undersigned counsel, Kline & Specter, P.C. *See* Declaration and Verification of Lora Jean Williams ("Williams Decl.") (attached hereto as Ex. C) ¶¶ 3, 4, 8.

31. Plaintiff Gregory J. Smith is an adult citizen, resident of the City of Philadelphia, and a consumer of soft drinks purchased within the City, who can be contacted through his undersigned counsel, Kline & Specter, P.C. *See* Declaration and Verification of Gregory J. Smith ("Smith Decl.") (attached hereto as Ex. D) ¶¶ 3, 4, 6.

32. Plaintiff CVP Management, Inc. d/b/a or t/a City View Pizza ("City View Pizza") is a Pennsylvania corporation that sells, *inter alia*, soft drinks in the City of Philadelphia, which has its principal place of business at 1434 Cecil B. Moore Avenue, Philadelphia, PA 19121. *See*

Declaration and Verification of John Anathasiadis ("Anathasiadis Decl.") (attached hereto as Ex. E) ¶¶ 2-3.

33. Plaintiff John's Roast Pork, Inc. f/k/a John's Roast Pork ("John's Roast Pork") is a restaurant that sells, *inter alia*, soft drinks in the City of Philadelphia at its restaurant location and principal place of business at 14 E. Snyder Avenue, Philadelphia, PA 19148. *See* Declaration and Verification of John Bucci, Jr. ("Bucci Decl.") (attached hereto as Ex. F) ¶¶ 2-3.

34. Plaintiff Metro Beverage of Philadelphia, Inc. d/b/a or t/a Metro Beverage of Philadelphia ("Metro Beverage") is a Pennsylvania corporation that produces and distributes, *inter alia*, soft drinks for sale in the City of Philadelphia, which has its principal place of business at 455 Dunksferry Road, Bensalem, PA 19020. *See* Declaration and Verification of Andrew Cimochowski ("Cimochowski Decl.") (attached hereto as Ex. G) ¶¶ 2-3.

35. Plaintiff Day's Beverages, Inc. d/b/a or t/a Day's Beverages ("Day's Beverages") is a Pennsylvania corporation that produces and distributes, *inter alia*, soft drinks for sale in the City of Philadelphia, which has its principal place of business at 529 Guinevere Drive, Newtown Square, PA 19073. *See* Declaration and Verification of David P. DiGirolamo ("DiGirolamo Decl.") (attached hereto as Ex. H) ¶¶ 3-4.

36. Plaintiff the American Beverage Association ("ABA") is a nationwide trade association representing America's non-alcoholic beverage industry, consisting of hundreds of beverage producers, distributors, brand companies, and support industries, including 274 operating in the Commonwealth of Pennsylvania and approximately 23 operating in the City of Philadelphia, which has its principal place of business at 1275 Pennsylvania Avenue NW, Suite 1100, Washington, DC 20004. *See* Declaration and Verification of Susan Neely ("Neely Decl.") (attached hereto as Ex. I) ¶¶ 3, 5.

37. Plaintiff the Pennsylvania Beverage Association ("PBA") is a Pennsylvania non-profit corporation representing Pennsylvania's non-alcoholic beverage industry, consisting of beverage producers, distributors, brand companies, and support industries operating within the Commonwealth of Pennsylvania and in the City of Philadelphia, with its principal place of business at 204 State Street, Harrisburg, PA 17101. *See* Declaration and Verification of Anthony Crisci ("Crisci Decl.") (attached hereto as Ex. J) ¶ 2.

38. Plaintiff the Philadelphia Beverage Association ("Philadelphia BA") is a trade association representing the City of Philadelphia's non-alcoholic beverage industry, consisting of four beverage producers, distributors, brand companies, and support industries operating within the City, with its principal place of business at 1900 Market Street, Philadelphia, PA 19103. *See* Declaration and Verification of Harold Honickman ("Honickman Decl.") (attached hereto as Ex. K) ¶¶ 2, 5.

39. Plaintiff the Pennsylvania Food Merchants Association ("PFMA") is a Pennsylvania trade association representing more than 3,200 convenience stores, supermarkets, independent grocers, wholesalers, and consumer product vendors operating in the Commonwealth of Pennsylvania, approximately 173 of which operate in the City of Philadelphia, which has its principal place of business at 1029 Mumma Road, Wormleysburg, PA 17043. *See* Declaration and Verification of David McCorkle ("McCorkle Decl.") (attached hereto as Ex. L) ¶¶ 3-4.

40. Defendant the City of Philadelphia is a municipality and political subdivision of the Commonwealth of Pennsylvania, duly organized and operating under the laws of the Commonwealth of Pennsylvania, which has its principal place of business at 1515 Arch Street, 17th Floor, Philadelphia, PA 19102.

41. Defendant Frank Breslin, in his official capacity as the Commissioner of the Philadelphia Department of Revenue, is responsible for the enforcement, billing, collections, and audits of taxes and certain City fees and for initiating legal actions against delinquent taxpayers. Defendant Breslin has a principal place of business at 1401 John F. Kennedy Boulevard, Philadelphia, PA 19102.

42. The Philadelphia Soft Drink Tax implicates a potential dispute between and among ABA, PBA, and Philadelphia BA member business entities and non-ABA, PBA, or Philadelphia BA distributors (including Plaintiff Day's Beverages), who are regarded as distributors, retailers, or both, and retailers (including members of the PFMA) and between these business entities and the Defendants.

FACTUAL BACKGROUND

43. The Philadelphia City Council adopted the Philadelphia Soft Drink Tax on June 16, 2016, and it was signed into law by Mayor Kenney on June 20, 2016. The Tax takes effect immediately; however, the provisions governing the imposition and collection of the Tax do not take effect until January 1, 2017.

44. The Philadelphia Soft Drink Tax defines "sugar-sweetened beverage" incorrectly and broadly to include any non-alcoholic beverage, or syrup or other concentrate used in the preparation of a beverage, that lists as an ingredient: "(.1) any form of caloric sugar-based sweetener, including, but not limited to, sucrose, glucose or high fructose corn syrup; or (.2) any form of artificial sugar substitute, including stevia, aspartame, sucralose, neotame, acesulfame potassium (Ace-K), saccharin, and advantame." Ex. A, Bill No. 160176, § 19-4101(3)(a), (b).

45. "Distributor" is defined as "[a]ny person who supplies sugar-sweetened beverage to a dealer." *Id.*, § 19-4101(2).

46. "Dealer" is defined as "[a]ny person engaged in the business of selling sugar-sweetened beverage for retail sale within the City, including but not limited to restaurants; retail stores; street vendors; owners and operators of vending machines; and distributors who engage in retail sales." *Id.*, § 19-4101(1). Because dealers under the Philadelphia Soft Drink Tax are in reality retailers of soft drinks, for ease of reference herein, "dealers" will be referred to as "retailers."

47. The Tax excludes the following from the definition of "sugar-sweetened beverages": (.1) baby formula, (.2) "medical food" as it is defined under the Orphan Drug Act, (.3) any product more than fifty percent (50%) of which, by volume, is milk, (.4) any product more than fifty percent (50%) of which, by volume, is fresh fruit, vegetables or a combination of the two added by someone other than the customer, (.5) unsweetened drinks to which a purchaser can add, or can request that a seller add, sugar, at the point of sale, and (.6) any syrup or other concentrate that the customer combines with other ingredients to create a beverage. *Id.*, § 19-4101(3)(c).

48. The Tax is imposed on the "supply of any sugar-sweetened beverage to a [retailer]; the acquisition of any sugar-sweetened beverage by a [retailer]; the delivery to a [retailer] in the City of any sugar-sweetened beverage; and the transport of any sugar-sweetened beverage into the City by a [retailer]." *Id.* However, the Tax is to be imposed only once in the chain of supply, delivery, and distribution. *See id.*, § 19-4105.

49. The Tax is imposed "only when the supply, acquisition, delivery or transport is for the purpose of the [retailer]'s holding out for retail sale within the City the sugar-sweetened beverage or any beverage produced therefrom." *Id.*, § 19-4103(1).

50. Distributors are generally responsible for payment of the Tax to the City. *See id.*, § 19-4105(1).

51. However, where a retailer does not acquire an affected beverage from a registered distributor (and, thus, the distributor does not pay the Tax), then the retailer is responsible for payment of the Tax. *See id.*, § 19-4105(2).

52. The Tax requires the distributor to provide "a receipt detailing the amount of sugar-sweetened beverage supplied in the transaction and the amount of tax owing on such a transaction" to a retailer to whom the distributor supplies a "sugar-sweetened beverage." *Id.*, § 19-4104(2).

53. The Tax applies to almost every soft drink (including no-calorie or low-calorie soft drinks) sold in the City and is levied at the rate of 1.5-cents-per-ounce on each soft drink based on the volume of the soft drink to be sold to the consumer, regardless of the per-ounce value of the soft drink. The Tax is massive – it raises the cost of soft drinks to consumers by an average of 31% per beverage.

54. In light of the sweeping scope and excessive burden of the Philadelphia Soft Drink Tax, the Tax will detrimentally affect every soft drink retailer and distributor and all consumers who purchase affected beverages in the City.

The Philadelphia Soft Drink Tax, Like the Pennsylvania Soft Drink Tax, Is Imposed on the Retail Consumer.

55. The Philadelphia Soft Drink Tax is collected for non-alcoholic sweetened beverages and syrups used to create sweetened beverages – products which are also subject to the Pennsylvania Soft Drink Tax.

56. The Philadelphia Soft Drink Tax is to be paid by distributors of the affected beverages (or, in certain circumstances, retailers of the affected beverages) when there is intent for the beverage to be held out for retail sale within the City. *See id*., § 19-4103(1).

57. As the Tax was debated in the City Council, the City admitted the impact of the Philadelphia Soft Drink Tax on consumer behavior. For example, Mayor Kenney stated that the Tax would be passed on to consumers through an increase in prices of affected beverages or increase of prices of other grocery items. *See* Transcript of Mayor Kenney on Smerconish, Apr. 7, 2016, at [11:38] (attached hereto as Ex. M) ("Big supermarkets have the ability to blend the tax through a myriad of products in their store to a percentage of cents in each of all the stuff that's on the shelves in the aisles. I think for the small business owner who sells single bottles, it's probably going to be about a quarter more for a bottle of Pepsi or Coke."). The Mayor's statement is consistent with the evidence from Berkeley – the only jurisdiction in the United States to impose a similar tax – where the tax *is* being borne by the consumer. *See* Public Health Institute, *Berkeley Evaluation of Soda Tax (BEST) Study Preliminary Findings*, Nov. 3, 2015 (attached hereto as Ex. N). To be sure, the City – in particular, its lawyers – has attempted to downplay that consumer impact, doubtlessly recognizing that this harms their legal positions. City Solicitor Sozi Tulante stated that the Tax "would be imposed on the distributor or retailer, not on the consumer," and that "[t]here is no City 'intent' that the tax will be borne by the consumer, nor is there any evidence that it will be borne by the consumer." *See* Memorandum On Philadelphia Sugar-Sweetened Beverage Tax From Sozi Pedro Tulante, City Solicitor, To James F. Kenney, Mayor, Mar. 1, 2016 (attached hereto as Ex. O) (emphasis omitted).

58. On its face, the plain language of the Tax demonstrates that it is intended to burden the retail consumer. *See, e.g.*, Ex. A, Bill No. 160176, § 19-4103(1) (providing that the

Tax "is imposed only when the supply, acquisition, delivery or transport is for the purpose of the [retailer]'s holding out [the affected beverage] for retail sale within the City").

59. The Tax on "syrups" and "concentrates" further demonstrates that the Tax is inextricably intertwined with the retail sale of the affected beverage because a syrup is not taxed based on the volume of the syrup itself, but instead on the volume of the consumer-ready "resulting beverage" that the retailer makes available for sale. *See id.*, § 19-4103(1).

60. For syrups and concentrates, the actual amount of soft drink transported into (or within) the City is not taxed; it is the amount of the final, consumer-ready soft drink that is available at retail sale that is taxed. *See id.*

61. In determining the consumer-ready soft drink that is available at retail sale, distributors and retailers will rely on the manufacturer's recommendation of water-to-syrup ratio to determine what the volume of the taxable "resulting beverage" will be.

62. By way of example, if a distributor delivers a 5 gallon (640 ounces) container of syrup used to make fountain sodas to a restaurant (which functions as a retailer) in the City, the Tax is not assessed on the 640 ounces of syrup delivered. Assuming the manufacturer's recommended ratio of water to syrup is 5-to-1, the Tax would apply to the 3,840 ounces of the "resulting beverage" that is being sold to the consumer. Thus, instead of being taxed $9.60 on the 640 ounces of syrup distributed, the applicable tax would be $57.60 on the 3,840 ounces of soft drink available for retail sale. Because the ratio changes from retailer to retailer, calculating the correct amount of Tax imposes a significant burden on the distributor or retailer that must make this calculation.

63. In the case of online grocers located outside the City that use a website to offer soft drinks for retail sale in the City but do not have a specific amount of inventory of soft drinks

offered for retail sale in the City, the imposition of the Tax for "transport of any sweetened beverage into the City by a" retailer would occur only after a retail sale is executed. That fact further demonstrates that the Tax is linked to or triggered by retail sale.

64. Although the online grocer will qualify as a retailer under the Tax, when the online grocer receives "sugar-sweetened beverages" potentially subject to the Tax from a distributor, the online grocer and the distributor cannot know the amount of "sugar-sweetened beverage" that will be subject to the Tax because the online grocer's inventory of beverages offered for retail sale might be sold inside or outside the City. The online grocer will therefore know which soft drinks are subject to the Tax only after it makes a sale in the City. Thus, in this example, the Tax is conditioned on retail sale.

65. In these circumstances, as with the Pennsylvania Soft Drink Tax, the Philadelphia Soft Drink Tax is imposed at the time of the retail sale in the City when a consumer purchases the soft drink.

66. Where the distributor fails to pay the Tax, the retailer is liable to pay the Tax. *See* Bill No. 160176, § 19-4105. In this way too, the Tax is intertwined with retail sale.

67. In short, the Tax is never imposed absent an intended or actual retail sale.

The Philadelphia Soft Drink Tax Will Have an Adverse Impact on Plaintiffs.

68. The Philadelphia Soft Drink Tax will increase the price of soft drinks.

Plaintiff Williams

69. Plaintiff Williams purchases soda in 2-liter bottles from a Save-a-Lot grocery store located in the City using SNAP benefits. *See* Ex. C, Williams Decl. ¶ 4, 8.

70. An increase in the price of soft drinks will affect Ms. Williams's ability to purchase soda and other items with her remaining grocery budget and SNAP benefits. *See id.* ¶¶ 5-9.

Plaintiff Smith

71. Plaintiff Smith purchases regular and no/low-calorie soft drinks in 2-liter bottles and 12-oz cans at various grocery stores located within the City. *See* Ex. D, Smith Decl. ¶ 6.

72. An increase in the price of soft drinks will reduce Mr. Smith's and Mr. Smith's wife's ability to purchase soft drinks and other groceries with Mr. Smith's earnings. *See id.* ¶¶ 7-8.

73. Due to the imposition of the Tax and increase in soft drink prices, Mr. Smith and his wife will purchase soft drinks at grocery stores outside of the City. *See id.* ¶ 9.

Plaintiff City View Pizza

74. City View Pizza sells foodstuffs, including soft drinks subject to the Philadelphia Soft Drink Tax, at retail in the City. *See* Ex. E, Anathasiadis Decl. ¶ 3.

75. City View Pizza will transfer to its customers any portion of the Philadelphia Soft Drink Tax that is passed on to its business by its distributor. *See id.* ¶ 6.

76. An increase in the price of soft drinks will result in a loss of revenue for City View Pizza due to a decrease in sales volume of soft drinks, fewer customer visits, and a loss of customers. *See id.* ¶¶ 7-9.

Plaintiff John's Roast Pork

77. John's Roast Pork sells foodstuffs, including soft drinks, at retail in the City. *See* Ex. F, Bucci Decl. ¶ 3.

78. John's Roast Pork will transfer to its customers any portion of the Philadelphia Soft Drink Tax that is passed on to its business by its distributor. *See id.* ¶ 5.

79. An increase in the price of soft drinks will result in a loss of revenue for John's Roast Pork due to a decrease in sales volume of soft drinks, fewer customer visits, and a loss of customers. *See id.* ¶¶ 6-8.

Plaintiff Metro Beverage

80. Metro Beverage distributes foodstuffs, including soft drinks, in the City. *See* Ex. G, Cimochowski Decl. ¶ 3.

81. Metro Beverage will transfer to its customers any portion of the Philadelphia Soft Drink Tax that is levied on its business by the City. *See id.* ¶¶ 5-6.

82. An increase in the price of soft drinks will result in a loss of revenue for Metro Beverage due to a decrease in sales volume of soft drinks, fewer customers purchasing soft drinks, and a loss of customers. *See id.* ¶¶ 11-13.

83. Metro Beverage distributes approximately 30 different brands of affected beverages, each of which will be very differently affected by the Tax because the Tax is calculated on volume, not value. *See id.* ¶ 7. The Tax will increase the wholesale price of Metro Beverage's soft drinks from a low of a 1.7% increase to a high of a 91.5% increase. *See id.*

84. Many of Metro Beverage's customers in Philadelphia have informed Metro Beverage that they will either buy soft drinks by traveling outside the City or that they have lined up distributors from other cities who will deliver soft drinks and not charge the Tax. *See id.* ¶ 8.

Plaintiff Day's Beverages

85. Day's Beverages manufacturers, distributes, and sells foodstuffs, including soft drinks, for resale in the City. *See* Ex. H, DiGirolamo Decl. ¶ 4.

86. Soft drinks account for 100% of Day's Beverages' sales within the City. *See id.* ¶ 6.

87. Day's Beverages' customers include food and beverage wholesalers, retail and wholesale distributors, supermarkets, and regional and national grocery chains, and customers that wish to purchase products for international export. *See id.* ¶ 5.

88. Day's Beverages will transfer to its customers any portion of the Philadelphia Soft Drink Tax that is levied on its business by the City. *See id.* ¶ 8.

89. An increase in the price of affected beverages will result in a loss of revenue for Day's Beverages due to fewer new customers purchasing Day's Beverages' soft drinks, decreased demand for soft drinks from existing customers, and a loss of customers. *See id.* ¶¶ 13-15.

90. The approximately 24 varieties of soft drinks that Day's Beverages distributes will be impacted in very different ways due to the fact that the Tax is imposed based on volume, not value. *See id.* ¶ 10. The Tax will increase the wholesale price of Day's Beverages' soft drinks from a low of a 50% increase to a high of a 110% increase. *See id.*

Plaintiff ABA

91. The ABA's members produce and distribute non-alcoholic beverages, including soft drinks, for retail sale in the City. *See* Ex. I, Neely Decl. ¶ 3.

92. The ABA's members will transfer to their customers the Philadelphia Soft Drink Tax that is levied on their businesses by the City, as it is economically not feasible to do otherwise. *See id.* ¶ 10.

93. The price increase for soft drinks for retail sale in the City will result in a loss of revenue for the ABA's members due to a decrease in sales volume of soft drinks, fewer customers purchasing soft drinks from the ABA's members doing business in the City, and a loss of customers for ABA members doing business in the City. *See id.* ¶¶ 11-13.

Plaintiff PBA

94. The PBA's members produce and distribute non-alcoholic beverages, including soft drinks, for retail sale in the City. *See* Ex. J, Crisci Decl. ¶ 6.

95. The PBA's members will transfer to their customers the Philadelphia Soft Drink Tax that is levied on their businesses by the City, as it is economically not feasible to do otherwise. *See id.* ¶ 8.

96. The price increase for soft drinks for retail sale in the City will result in a loss of revenue for the PBA's members due to a decrease in sales volume of soft drinks, fewer customers purchasing soft drinks from the PBA's members doing business in the City, and a loss of customers for PBA members doing business in the City. *See id.* ¶¶ 9-11.

Plaintiff Philadelphia BA

97. The Philadelphia BA's members produce and distribute non-alcoholic beverages, including soft drinks, for retail sale in the City. *See* Ex. K, Honickman Decl. ¶ 6.

98. The price increase for soft drinks for retail sale in the City will result in a loss of revenue for the Philadelphia BA's members due to a decrease in sales volume of soft drinks, fewer customers purchasing soft drinks from the Philadelphia BA's members doing business in the City, and a loss of customers for Philadelphia BA members doing business in the City. *See id.* ¶ 8.

Plaintiff PFMA

99. The PFMA's members purchase foodstuffs, including soft drinks, from distributors for retail sale in the City. *See* Ex. L, McCorkle Decl. ¶ 5.

100. The PFMA's members will transfer to their customers the Philadelphia Soft Drink Tax that is passed on to their businesses by their distributors, as it is economically not feasible to do otherwise. *See id.* ¶ 7.

101. An increase in the price of soft drinks for retail sale in the City will result in a loss of revenue for the PFMA's members due to a decrease in sales volume of soft drinks, fewer customer visits, and a loss of customers. *See id.* ¶¶ 8-12.

Supply and Distribution for All Types of Beverages Is the Same Whether the Beverages Are Subject to the Tax or Not.

102. The distribution of soft drinks occurs in the same manner and does not vary from the distribution of other similar beverages that the Tax does not cover.

103. Despite this reality, the Tax is imposed on distributors solely for distribution of soft drinks.

The Tax Rate Imposed by the Philadelphia Soft Drink Tax Will Vary by Beverage at Both the Retailer and Distributor Levels.

104. The Philadelphia Soft Drink Tax will impose a tax of $.015 on every ounce of affected beverages and, for syrups and concentrates, at a rate that "yields one and one-half cents ($0.015) per fluid ounce on the resulting beverage, prepared to the manufacturer's specifications." Ex. A, Bill No. 160176, § 19-4103(2)(b).

105. The Commonwealth of Pennsylvania and the City of Philadelphia already impose separate taxes on soft drinks based on their retail value. The Philadelphia Soft Drink Tax is an additional tax imposed on soft drinks based, instead, on volume regardless of the market price (or value) of the soft drink.

106. The Philadelphia Soft Drink Tax will impose a markedly different tax burden across affected beverages, ranging from under 2% of the retail price to well over 100% of the retail price.

107. As examples, the following chart displays the disparate impact the Philadelphia Soft Drink Tax will have on various beverages as compared to retail price:

Product & Volume	Retail Price[1]	Amount of Tax Imposed	Projected Retail Price with Tax	Tax % of Retail Price
Great Value Cola, 2-liter bottle	$0.68	$1.01	$1.69	149.12%
Great Value Ginger Ale, 2-liter bottle	$0.84	$1.01	$1.85	120.71%
Hawaiian Punch, 1 gallon	$1.88	$1.92	$3.80	102.13%
Cott Beverages Diet Cola, 12-pack of 12-oz cans	$2.25	$2.16	$4.41	96.00%
Coca-Cola Cherry Zero, 12-pack of 12-oz cans	$3.33	$2.16	$5.49	64.86%
Pepsi, 24-pack of 12-oz cans	$6.98	$4.32	$11.30	61.89%
Kool-Aid Bursts, 6-pack of 6.75-oz bottles	$1.00	$0.61	$1.61	60.75%
Gatorade, 32-oz bottle	$0.94	$0.48	$1.42	51.06%
Gatorade, 8-pack of 20-oz bottles	$4.98	$2.40	$7.38	48.19%
Snapple Lemon Tea, 12-pack of 16-oz bottles	$6.98	$2.88	$9.86	41.26%
Ocean Spray Cran-Apple Juice Drink, 64-oz bottle	$2.68	$0.96	$3.64	35.82%

[1] Retail price is taken from Walmart store prices for 2200 Wheatsheaf Lane, Philadelphia, PA. *See* Walmart.com, Philadelphia Walmart Supercenter, http://www.walmart.com/store/5891 (prices reflected are retail prices as of September 6, 2016).

Product & Volume	Retail Price[1]	Amount of Tax Imposed	Projected Retail Price with Tax	Tax % of Retail Price
Yoo-hoo Strawberry Drink, 10-pack of 6.5-oz bottles	$2.98	$0.98	$3.96	32.72%
Snapple Lemon Tea, 20-oz bottle	$1.58	$0.30	$1.88	18.99%
Diet Pepsi, 20-oz bottle	$1.68	$0.30	$1.98	17.86%
Monster Energy Drink, 10-pack of 16-oz cans	$14.72	$2.40	$17.12	16.30%
Muscle Milk Chocolate Shake, 4-pack of 11-oz bottles	$5.12	$0.66	$5.78	12.89%
Pure Protein Chocolate Shakes, 4-pack of 11-oz bottles	$6.98	$0.66	$7.64	9.46%
Starbucks Coffee frappuccino, 13.7-oz bottle	$2.43	$0.21	$2.64	8.46%
5-hour ENERGY, 1.93-oz bottle	$2.48	$0.03	$2.51	1.17%

108. As shown in the above chart, for some products the Tax imposed will far exceed 100% of the retail cost of the product.

109. Similarly, the Tax rate imposed at the distributor level will vary widely, ranging from an under 2% increase in wholesale price to an over 100% increase of the wholesale price of the affected beverage. *See* Ex. G, Cimochowski Decl. ¶ 7 (stating imposition of Tax will increase price of Metro Beverage's soft drinks from a low of 1.7% increase to a high of a 91.5%

increase); Ex. H, DiGirolamo Decl. ¶ 10 (stating imposition of the Tax will increase the price of Day's Beverages' soft drinks from a low of a 50% increase to a high of a 110% increase).

110. By way of illustration, displayed below are the extremely disproportionate tax rates to be paid on three beverages: store brand 2-liter cola, 13.7-ounce Starbucks frappuccino [sic], and 2-ounce 5-hour ENERGY drink:

$0.68 + $1.01 = $1.69
Philadelphia Soft Drink Tax = 149.12%

$2.43 + $0.21 = $2.64
Philadelphia Soft Drink Tax = 8.46%

$2.48 + $0.03 = $2.51
Philadelphia Soft Drink Tax = 1.17%

111. Given how great the tax burden is relative to the market price at the retail level and wholesale price at the distribution level for many beverages, it would be economically infeasible for a distributor or retailer to absorb the Tax. Instead, as discussed *supra*, distributors and retailers will pass the cost of the Tax along to consumers.

LEGAL BACKGROUND

Preemption

112. The Philadelphia Soft Drink Tax is the most recent in a long line of unconstitutional taxes that municipalities, including Philadelphia, have attempted to impose on Pennsylvania residents, but that Pennsylvania courts have held were explicitly or implicitly preempted by state law.

Pennsylvania Courts Have Routinely Struck Down As Preempted Local Governments' Attempted Overreach On Taxation.

113. Municipalities are creatures of the state and have no inherent powers of their own. Rather, they possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect. *See Holt's Cigar Co. v. City of Phila.*, 10 A.3d 902, 906

(Pa. 2011). Thus, a municipality – such as Defendant the City of Philadelphia – can only tax insofar as the Pennsylvania General Assembly has granted it powers to do so.

114. The Pennsylvania Commonwealth Court has emphasized that courts "cannot deem a legislative enactment constitutional merely because it may seem in [the court's] view to be just, expedient, necessary or wise, or because it enjoys unanimous popular support. The Constitution is in matters of state law the supreme law of the Commonwealth to which all acts of the Legislature and of any governmental agency are subordinate, . . . and it is [the court's] duty and responsibility to consider only whether the legislation meets or violates constitutional requirements." *Carl v. S. Columbia Area Sch. Dist.*, 400 A.2d 650, 652 (Pa. Commw. Ct. 1979) (citation and quotation marks omitted)

115. Pursuant to the Sterling Act, the City is prohibited from levying, or collecting "any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee." *See* 53 P.S. § 15971. Thus, in cases where local municipalities have attempted to exceed the powers granted to them by taxing a subject, property, or transaction already subject to taxation by the Commonwealth, courts have routinely rejected such actions as preempted under Pennsylvania law.

116. For instance, in *In re Lawrence Township School District*, 67 A.2d 372 (Pa. 1949), the Supreme Court struck down a local tax imposed on "all coal mined" after determining, *inter alia*, that the tax was expressly preempted. *Id.* at 373-74. The Court emphasized that the tax was invalid because it contravened "the prohibition in the statute against the local body imposing a tax on the privilege of employing property which is already taxed by the State." *Id.* at 376. The Court rejected the school district's efforts to classify the tax as one on

the "privilege of mining" and instead focused on the true nature of the tax – a tax on coal – which was already subject to a Pennsylvania state tax. *Id.* at 374.

117. In *Folcroft Borough v. General Outdoor Advertising*, 72 Pa. D. & C. 539 (Pa. Ct. Cm. Pls. Del. Cty. 1950), another Pennsylvania court struck down a municipality's overreach – this time an attempt to impose a tax on billboards. The *Folcroft* Court held that business owners already paid state property taxes on their billboards when business owners included the net value of billboards in their corporate income statements, and, thus, the municipality had no right to enact a statute imposing an additional tax on the same subject or property (billboards). *Id.* at 541.

118. In *Murray v. City of Philadelphia*, 71 A.2d 280 (Pa. 1950), the Supreme Court rejected Philadelphia's effort to collect city wage taxes on capital received from corporations because the corporations were already required to pay a capital stock tax on dividends to the Commonwealth. *Id.* at 286. This wage tax was struck down as preempted under the Sterling Act even though the capital stock tax and the wage tax were levied against two completely different entities: the corporation and the individual. *See id.* The Court emphasized that the City's right to tax "is to be strictly construed, and not extended by implication." *Id.* at 283 (citations omitted). Because the Sterling Act was intended to "prevent double taxation" such that the City "could not tax subjects taxed by the state," the Court stated that "the practical operation of the two taxes is controlling as against mere difference in terminology from time to time employed in describing taxes in various cases." *Id.* at 284. The Court emphasized that "it is immaterial that state taxes have been referred to as excise or franchise taxes or by any other adjective; the reality controls[, and] thus, [t]he fact that this tax is paid to the state conclusively shows that the city has no jurisdiction to tax the corporate income." *Id.* at 286.

119. The Supreme Court reaffirmed the limited taxation power of municipalities in *United Tavern Owners of Philadelphia v. School District of Philadelphia.*, 272 A.2d 868 (Pa. 1971) (plurality op.), when it rejected another Philadelphia tax – the imposition of a tax on liquor – a product already subject to the Commonwealth's sales and use tax. The Court emphasized that "when the state decides to enter a specific area for purpose of raising state revenues [such as by enacting a sales and use tax], a municipal tax in the same area could pose a threat, either by causing a diminution of the taxed activity or by increasing the costs of collection." *Id.* at 873. The Court rejected the City's argument that because the Commonwealth taxed liquor distribution and the City taxed liquor retail sales, the City's tax did not violate the Sterling Act; instead, the Court deemed it irrelevant that the tax was imposed on a different transaction since both taxes operated as sales and use taxes. *Id.*

120. In the 1980s, the Supreme Court again reaffirmed the limited taxation power of municipalities when it held that a tax "on the privilege of doing business" in the City of Harrisburg was unlawful when applied to an importer of malt and brewed liquor because the Commonwealth already collected taxes on the sale of liquor. *See Commw. v. Wilsbach Distrib., Inc.*, 519 A.2d 397, 402 (Pa. 1986). The Court held that a city tax on liquor sales impermissibly "impinge[d]" on the Commonwealth's taxation of and regulation of the liquor industry. *Id.*

121. In the 1990s, the Commonwealth Court struck down a school district's attempt to tax the privilege of making wagers at an off-track betting facility. The Court found that such a local tax was preempted by the Commonwealth's tax on admission to an off-track betting parlor and the Commonwealth's tax imposed on wagers made at those facilities. *See Pocono Downs, Inc. v. Catasauqua Area Sch. Dist.*, 669 A.2d 500, 502-03 (Pa. Commw. Ct. 1996). Deciding that "the nomenclature used in connection with the taxes here should not be a determinant

factor," the Court rejected the idea "that a local tax is not duplicative merely because it expressly purports to be a different tax than an existing State tax or to be applicable to a different taxpayer than one already taxed." *Id.*

122. As these cases demonstrate, when municipalities attempt to intrude on the Commonwealth's taxation authority by taxing the same subject, transaction, or property, Pennsylvania courts have routinely struck down such efforts regardless of what the tax is called or whether the duplicative tax is imposed on a different person or at a different level in the chain of commerce.

The Philadelphia Soft Drink Tax Is Preempted.

123. The Philadelphia Soft Drink Tax presents yet another attempted overreach by a local government, which, in the face of the cases discussed above, cannot survive the Commonwealth's preemptive power.

124. This case implicates two types of preemption: (1) express preemption, where a state statute includes language that specifically bars or otherwise limits local authorities from acting on a particular subject matter already subject to state regulation; and (2) conflict preemption, where a local enactment (a) irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of a state statute or (b) renders compliance with a state statute impossible. *See Holt's Cigar Co.*, 10 A.3d at 907.

125. In determining whether an act of local government is preempted by the Commonwealth, a court will look first to the language of any express preemption clause in the statute authorizing the local government to impose taxes as "the best evidence of the legislature's pre-emptive intent." *JoJo Oil Co. v. Dingman Twp. Zoning Hearing Bd.*, 77 A.3d 679, 690 (Pa.

Commw. Ct. 2013) (citation omitted); *see also Murray*, 71 A.2d at 283-84 (examining preemptive language of statute).

126. Where a statute is silent as to whether municipalities are permitted to enact supplementary legislation or to impinge in any manner upon the field entered upon the specific subject matter regulated by the Commonwealth, the question must be determined by statutory analysis to ascertain the probable intention of the legislature. *See Wilsbach Distrib., Inc.*, 519 A.2d at 399.

127. Here, the Philadelphia Soft Drink Tax is subject to (1) express preemption based on the terms of the Sterling Act; and (2) conflict preemption – in the form of obstacle preemption – due to (a) interference with the Commonwealth's intention that a tax be imposed on a product at only one point in the distribution chain, and (b) interference with the Commonwealth's revenue-raising goal of the Pennsylvania Soft Drink Tax, and (c) the Commonwealth's preclusion of charging the Pennsylvania Soft Drink Tax for SNAP purchases and compliance with the Commonwealth's mandate that federal SNAP money not be impermissibly transferred to other state or local government entities.

Express Preemption

Express Preemption by the Sterling Act.

128. The City's authority to impose taxes, and limits on that authority, are derived from the Sterling Act, 53 P.S. § 15971.

129. The Sterling Act prohibits the City from levying "any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee." *Id.*; *see also Murray*, 71 A.2d at 283-84.

130. The City is therefore expressly preempted from taxing transactions, subjects and/or personal property that are already taxed by the Commonwealth. The Sterling Act plainly states that the City has only "power to tax [subjects that the Commonwealth] does not now tax or license." 53 P.S. § 15971(a).

131. The Pennsylvania Soft Drink Tax applies to "each separate sale at retail of tangible personal property," including, *inter alia*, sales of soft drinks. *See* 72 P.S. § 7201(a), (m).

132. The Pennsylvania Soft Drink Tax is imposed on the retail purchase of the beverage so that the tax is imposed only once in the chain of distribution (at the time the taxed product – the soft drink – reaches the consumer).

133. The United States Supreme Court and Pennsylvania courts are in accord that "[t]he name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents[.]" *Dawson v. Ky. Distilleries & Warehouse Co.*, 255 U.S. 288, 292 (1921); *see also United Tavern Owners of Phila.*, 272 A.2d at 873 (focusing on practical effect of taxes and rejecting argument that city's tax is distinct merely because it was imposed on a "different transaction"); *Murray*, 71 A.2d at 284 ("In determining whether double taxation results, whether the city tax conflicts with that imposed by the state, the practical operation of the two taxes is controlling as against mere difference in terminology from time to time employed in describing taxes in various cases."); *Pocono Downs, Inc.*, 669 A.2d at 502-03 (emphasizing that "terminology or the identity of the taxpayer [should not] be considered to the exclusion of the standard for testing the incidence of a tax" and emphasizing "that nomenclature used in connection with the taxes here should not be a determinant factor").

134. By purporting to tax the volume of a soft drink when "suppl[ied]" by a distributor to a retailer, when "acqui[red]" by a retailer, when "deliver[ed]" to a retailer, or when

"transport[ed]" by the retailer, the City is attempting to avoid the conclusion that the Tax constitutes a tax on soft drinks – a subject and property already subject to the Pennsylvania Soft Drink Tax.

135. But like other municipalities' failed efforts to circumvent preemption by classifying a tax on coal as a tax on the privilege of mining in *In re Lawrence*, classifying a tax on capital stock as a tax on shareholders who own the capital stock in *Murray*, or classifying a tax on racing wagers as a tax on a privilege of betting in *Pocono Downs*, the City's effort to classify the Tax as a tax on supply, acquisition, or delivery of a soft drink so as to avoid Sterling Act preemption fails. After all, the Sterling Act precludes local taxation of a subject or property already taxed by the Commonwealth; there is no requirement that the Tax expressly be imposed at the same point in the chain of distribution.

136. Where, as here, two taxes are imposed on the same item of commerce at different points in the chain of distribution, the practical effect is double taxation. *Wetzel*, 257 A.2d at 539 ("Since the consumer pays the sales tax, any requirement that the retailer or middleman should be obligated for an additional sales levy effects double taxation with respect to the same item of commerce.").

137. Here, the Pennsylvania Soft Drink Tax is imposed on soft drinks sold within the Commonwealth. Essentially, these same soft drinks will be subject to the Philadelphia Soft Drink Tax.

138. Thus, in "[p]ractical operation," *see Murray*, 71 A.2d at 285, the two taxes are duplicative. This is true whether the Tax is based on volume or value.

139. As an illustration, the following chart provides a side-by-side comparison of the definition of "soft drink" in the Pennsylvania Soft Drink Tax (72 P.S. § 7201(a)) and the

definition of "Sugar-sweetened beverage" in the Philadelphia Soft Drink Tax (Bill No. 160176, § 19-4101(3)):

	Pennsylvania Soft Drink Tax (72 P.S. § 7201(a))	**Philadelphia Soft Drink Tax (Bill No. 160176, § 19-4101(3))**
Definition of:	"Soft drinks"	"Sugar-sweetened beverage"
Defined as:	All non-alcoholic beverages, whether carbonated or not, such as soda water, ginger ale, coca cola, lime cola, pepsi cola, Dr. Pepper, fruit juice when plain or carbonated water, flavoring or syrup is added, carbonated water, orangeade, lemonade, root beer or any and all preparations, commonly referred to as "soft drinks," of whatsoever kind, and are further described as including any and all beverages, commonly referred to as "soft drinks," which are made with or without the use of any syrup.	(a) Any non-alcoholic beverage that lists as an ingredient: (.1) any form of caloric sugar-based sweetener, including, but not limited to, sucrose, glucose or high fructose corn syrup; or (.2) any form of artificial sugar substitute, including stevia, aspartame, sucralose, neotame, acesulfame potassium (Ace-K), saccharin, and advantame. (b) Any non-alcoholic syrup or other concentrate that is intended to be used in the preparation of a beverage and that lists as an ingredient: (.1) any form of caloric sugar-based sweetener, including, but not limited to, sucrose, glucose or high fructose corn syrup; or (.2) any form of artificial sugar substitute, including stevia, aspartame, sucralose, neotame, acesulfame potassium (Ace-K), saccharin, and advantame.
Excluded from Definition:	• Natural fruit or vegetable juices (including concentrates and non-carbonated fruit juice drinks) containing not less than 25% natural fruit juice by volume • Natural fluid milk and non-carbonated drinks made from milk-derivatives • Coffee, coffee substitutes, tea, cocoa	• "Fresh" fruit and/or vegetables (more than 50% by volume, added by someone other than the customer) • Milk (more than 50% by volume) • Baby formula • "Medical food" • Unsweetened drinks to which purchasers can add sugar (or request sugar be added) at point of sale • Syrup/concentrate customer combines with other ingredient to create a beverage

	Pennsylvania Soft Drink Tax (72 P.S. § 7201(a))	Philadelphia Soft Drink Tax (Bill No. 160176, § 19-4101(3))
Examples		
Soda (all types)	Included	Included
Diet Soda (all types)	Included	Included
Sports drinks	Included	Included
Energy drinks	Included	Included
Alcoholic Beverage Mixers	Included	Included
Alcoholic Beverages	Not included	Not included
Water	Not included	Not included
Flavored Water	Included	Included if contains any form of sugar/sugar-substitute
Flavored Carbonated Water	Included	Included if contains any form of sugar/sugar-substitute
Unsweetened Coffee/Tea	Hot Coffee included, otherwise not included	Not included
Fruit & Juice Drinks	Not included if over 25% "natural" fruit/vegetable juice	Not included if over 50% "fresh" fruit vegetable
Baby formula	Not-included if made from milk derivatives	Not included
Milk & milk drinks	Not included unless carbonated	Not included if over 50% milk
Pre-sweetened Coffee/Tea	Not included	Included if contains any form of sugar/sugar substitute
"Medical Food"	Unknown	Not included
Unflavored Carbonated Water	Included	Not included

140. Because the Commonwealth has already imposed a tax on soft drinks, the City's efforts to tax the same subject matter, property, and/or transaction must be rejected as expressly preempted under the Sterling Act.

141. The Philadelphia Soft Drink Tax is nominally imposed on supply, acquisition, delivery, or transport, but only once and only when the beverage is to be held out for retail sale. Thus, in substance, the Tax is imposed only in the case of a retail sale transaction, just like the Pennsylvania Soft Drink Tax, which is imposed on that same transaction.

142. If the Philadelphia Soft Drink Tax is upheld, then the City and other local municipalities would be free to impose a similar tax on all tangible property that is subject to the

Pennsylvania Soft Drink Tax (sales and use tax), including, *inter alia*, jewelry, over-the-counter pharmaceuticals, furniture, electronics, car parts, mattresses, magazines, and automobiles. *See* Ex. P attached hereto (listing all items subject to the Pennsylvania Soft Drink Tax, which, if the Philadelphia Soft Drink Tax were upheld, could be subject to additional taxation by local governments). This would impermissibly intrude on the Commonwealth's supremacy in the area of taxation under the Sterling Act and the Local Tax Enabling Act.

143. If the City is free to tax products as it pleases without regard to its limited taxing authority, then taxes could be imposed on the same products at various points in the chain-of-sale. For instance, a car can be taxed when it arrives at a train port in the City (by the City), then the same car can be taxed upon delivery to the car dealership (by the City again), and then a consumer could have to pay an additional tax in connection with the consumer's purchase of that same car (by the Commonwealth).

144. Thus, upholding the Philadelphia Soft Drink Tax would provide Philadelphia and all cities and municipalities throughout the Commonwealth a plethora of new items to tax despite the fact that such items are already subject to taxation by the Commonwealth. This would pose a significant encroachment on and seizure of the Commonwealth's supreme power with respect to taxation.

Conflict Preemption

145. Conflict preemption precludes a local government from regulating in a manner that implicitly contradicts, contravenes, or is inconsistent with a Commonwealth statute. *See Holt's Cigar Co.*, 10 A.3d at 906.

146. Conflict preemption applies, as relevant here, where the local ordinance stands as an obstacle to the full purposes of the state statute. *See Fross v. Cty. of Allegheny*, 20 A.3d 1193, 1203 (Pa. 2011).

The Philadelphia Soft Drink Tax Is Implicitly Preempted by the Pennsylvania Soft Drink Tax's Prohibition on Taxation of Resale Items.

147. The Commonwealth's tax laws and jurisprudence are intended to ensure that the sales and use tax and other taxes are imposed only once in the chain of distribution of a given item of commerce. Indeed, the Pennsylvania Soft Drink Tax expressly does not apply to items intended for resale. *See* 72 P.S. § 7202(a) (providing the Pennsylvania Soft Drink Tax is "imposed upon each separate sale at retail of tangible personal property or services, as defined herein"); § 7201(k)(8) ("The term 'sale at retail' shall not include (i) any such transfer of tangible personal property or rendition of services for the purpose of resale.").

148. The purpose of the resale exemption in the Pennsylvania Soft Drink Tax is to prohibit tax pyramiding. *See Wetzel*, 257 A.2d at 539 ("[L]egislature included the 'sale for resale' exemption within the [sales and use tax] in order to eliminate tax 'pyramiding' . . . ."); *Lafferty v. Commw.*, 233 A.2d 256, 259 (Pa. 1967) ("[P]urpose of the [resale] exclusion is to prevent 'tax pyramiding' . . . .").

149. The Philadelphia Soft Drink Tax amounts to tax pyramiding in that it is imposed on the middleman, the distributor, who buys or acquires soft drinks from the producer in order to sell or deliver the same soft drinks to the retailer, who in turn resells the product to the ultimate consumer. *See Wetzel*, 257 A.2d at 539 (explaining that tax pyramiding occurs when a tax is imposed on "the middleman buying from the producer in order to sell to the retailer who in turn resells the product to the ultimate consumer").

150. Due to the Philadelphia Soft Drink Tax, a soft drink will be subject to taxation twice in the distribution chain – once, at the distributor level when the distributor is required to pay the Philadelphia Soft Drink Tax and then once again at the retail-sale-to-consumer level where a consumer is required to pay the Pennsylvania Soft Drink Tax.

151. The Philadelphia Soft Drink Tax directly conflicts with the Commonwealth's intention – as expressed in the resale exemption of the Pennsylvania Soft Drink Tax – to impose a tax on a given item at only one place in the distribution chain and to prohibit tax pyramiding.

152. This double taxation frustrates and cannot be reconciled with the Commonwealth's intent to have a given subject only taxed at one time in the distribution chain.

153. Thus, where, as here, the City purports to impose the Philadelphia Soft Drink Tax at the distributor level when a consumer will still be required to pay the Pennsylvania Soft Drink Tax on the same soft drink later in the distribution chain, the City's double taxation is implicitly preempted under the Sterling Act.

Imposition of the Philadelphia Soft Drink Tax Stands as an Obstacle and Frustrates the Revenue-Raising Purpose of the Pennsylvania Soft Drink Tax.

154. Permitting the Philadelphia Soft Drink Tax to stand will undermine the central purpose of the Pennsylvania Soft Drink Tax: to raise revenue for the Commonwealth.

155. To avoid the substantial cost of the Philadelphia Soft Drink Tax, consumers will be incentivized to cross state lines to purchase soft drinks in neighboring states. For example, consumers can travel to New Jersey, which is only minutes away from Philadelphia and readily accessible by public transportation including bus or train, to purchase soft drinks.

156. As a result of the imposition of the Tax and pass-through to consumers, fewer people will be purchasing soft drinks in the City, thus decreasing the net revenue generated from the Pennsylvania Soft Drink Tax by $2.7 to $7.8 million annually and frustrating the revenue-generation purpose of the Pennsylvania Soft Drink Tax.

157. Accordingly, the Philadelphia Soft Drink Tax, which stands as an obstacle to and frustrates the purpose of the Pennsylvania Soft Drink Tax, is preempted. *Holt's Cigar Co.*, 10 A.3d at 906.

Imposition of the Philadelphia Soft Drink Tax Impermissibly Conflicts with the Commonwealth's Participation in SNAP.

Federal Law Governing SNAP

158. Congress amended the Food Stamp Act in 1985 to include the prerequisite that a "[s]tate may not participate in [SNAP] if the Secretary determines that State or local sales taxes are collected within that State on purchases of food made with benefits issued under this chapter." 7 U.S.C. § 2013(a); *see also* Pub. L. 99-198 (amending the Act). This prohibition applies to all eligible food purchases. The legislative history of the amendment explains that the prohibition on collecting state or local sales taxes on SNAP purchases was added to the statute in order to "put[] an end to what is, in effect, a transfer of revenues from the federal government to state and local governments at the expense of low income persons. . . . Federal dollars provided for food assistance should not be diverted to other purposes, even if there is some return for the poor." *See* H.R. Rep. 99-271(l) (1985).

159. Pursuant to the Food Stamp Act, the United States Department of Agriculture's Food and Nutrition Service ("FNS") promulgated regulations pertaining to the prohibition of collecting sales tax. After reiterating that that there is "[n]o sales taxes on food stamp purchases," 7 C.F.R. § 272.1(b), the regulations provide additional guidance on this prohibition:

> (1) A State shall not participate in the Food Stamp Program if State or local sales taxes **or other taxes or fees, including but not limited to excise taxes**, are collected within the State on purchases made with food stamp coupons . . . .
>
> (2) **State and/or local law shall not permit the imposition of tax on food paid for with coupons**. FNS may terminate the issuance of coupons and disallow administrative funds otherwise payable . . . in any State where such taxes are charged.

7 C.F.R. § 272.1(b)(1)-(2) (emphasis added). In promulgating these regulations, FNS stated that "any tax or fee collected by a State or locality **having the effect of reducing the purchasing power of Food Stamp Program participants on food stamp purchases is covered by the new**

statutory provision, whether or not that tax is actually named a "sales tax." Food Stamp Program; Provision on Earned Income, Shelter and Dependent Care Deductions, Resource Limits and Sales Tax on Food Stamp Purchases, 51 Fed. Reg. 11010 (Apr. 1, 1986) (emphasis added). Note that the Department of Agriculture takes the same view, that the actual operation of the tax governs.

160. The federal regulations require that a "State shall not participate in the Food Stamp Program if State or local sales taxes or other taxes or fees, including but not limited to excise taxes, are collected within the State on purchases made with food stamp coupons." 7 C.F.R. § 272.1(b)(1). Moreover, the regulations mandate that "State and/or local law shall not permit the imposition of tax on food paid for with coupons." 7 C.F.R. § 272.1(b)(2).

Pennsylvania Law Governing SNAP

161. In order to prohibit a "transfer of revenues from the federal government to state and local governments at the expense of low income persons," H.R. 99-271(1) (1985), as well as comply with federal law, the General Assembly amended the Pennsylvania Soft Drink Tax in 1987 to exempt purchases of SNAP-eligible food and beverages, including, *inter alia*, soft drinks. *See* 72 P.S. § 7204(46). Thus, SNAP-eligible purchases are not subject to the 6% Pennsylvania Soft Drink Tax or Philadelphia's additional 2% sales and use tax. This exemption applies to all eligible foods, whether no- or low-calorie, sweetened or unsweetened, and, therefore, applies to all beverages covered by the Philadelphia Soft Drink Tax.

162. Pennsylvania law requires that every county in the Commonwealth participate in SNAP. *See Commw. Dep't of Pub. Welfare v. Adams Cty.*, 392 A.2d 692, 696-97 (Pa. 1978) ("[P]articipation in the Federal Food Stamp Program and a concomitant obligation for a share of administrative costs are mandated by state law for each county, as well as each city of the first

class, since the obligation which Section 471 imposes is not contingent upon voluntary adoption of the program.").

163. In order for a retailer in the Commonwealth to accept SNAP benefits, the retailer must agree to not charge state or local tax on purchases made with SNAP benefits. *See* U.S. Dep't of Agriculture, Food and Nutrition Serv., *Important SNAP Information*, http://www.fns.usda.gov/sites/default/files/Retailer_Notice_111412.pdf (last visited on Sept. 6, 2016).

Philadelphia's Participation in SNAP

164. Pursuant to the Supreme Court's interpretation of 62 P.S. § 471, Philadelphia must participate in SNAP. *See Adams Cty.*, 392 A.2d at 696-97.

165. Federal funds provided to Philadelphia residents through the SNAP program may be used to purchase a variety of groceries, including, *inter alia*, no- and low-calorie, regular and unsweetened and sweetened beverages. *See* 7 U.S.C.A. § 2012(k).

166. As of May 2016, approximately 492,805 individuals (31% of people) in Philadelphia County were receiving SNAP benefits. *See* Greater Philadelphia Coalition Against Hunger, *SNAP Statistics*, http://www.hungercoalition.org/food-stamp-statistics (last visited Sept. 6, 2016); *see also* United States Census Bureau, *Quick Facts Philadelphia County, Pennsylvania*, http://www.census.gov/quickfacts/table/INC910214/42101 (last visited Sept. 6, 2016) (estimating that, as of July 2015, Philadelphia County had a total population of 1,567,442 individuals).

167. As set forth above, despite the nomenclature used, the Tax amounts to a tax on the sale of soft drinks in the City that would otherwise be exempt from local taxes. In practice, the

imposition of the Tax on distributors or retailers will result in passing on the cost of the Tax directly to consumers via an increased purchase price for soft drinks.

168. In order to pay the price increase caused by the Tax, a SNAP purchaser will be doing precisely what the Commonwealth mandates is impermissible: transferring federal funds to a local government in order to cover the increased cost of groceries.

169. This back-door sales and use tax (the Philadelphia Soft Drink Tax), which will be embedded into the price of soft drinks, contravenes the Commonwealth's express prohibition on state or local taxes being paid with SNAP benefits as set forth in the Commonwealth's tax exemption statute. The unlawful wealth transfer of federal funds to the City amounts to $23 million per year for this projected $91 million per-year tax.

The Philadelphia Soft Drink Tax Stands as an Obstacle to Enforcement of the Commonwealth's SNAP Legislation and Policies.

170. This transfer of federal funds to Philadelphia also frustrates and stands as an obstacle to the very purpose of the SNAP Program: to provide funds for the purchase of groceries by SNAP recipients, and not for state or local taxes. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000).

171. Due to the Tax, a low-income Philadelphia resident making the same purchases he or she had made prior to enactment of the Tax will be able to purchase fewer groceries for the same amount of money than prior to the imposition of the Tax.

172. The grocery bill increase will be dramatic for a SNAP recipient, who bears the entire cost of the Tax on the purchase of a soft drink.

173. For instance, a SNAP recipient who purchased a 2-liter bottle of Great Value Cola for his or her family prior to the imposition of the Tax will have paid 68 cents, but due to the

imposition of the Tax, that person's grocery bill just for purchase of this one item will increase by $1.01 to $1.69 an increase of 149%. *See* Chart, ¶ 107, *supra*.

174. The extra $1.01 to pay for the Tax ends up going from the federal government's coffers to the City's. This frustrates the Commonwealth's goal in enacting the sales and use tax exemption for SNAP purchases: ensuring that federal funds provided to SNAP recipients to make grocery purchases do not go to fund local or state governments, but rather go to the SNAP recipient's buying power.

175. Thus, the imposition of the Tax and its impact on low-income Philadelphia residents who make purchases with SNAP funds frustrates the purpose of and stands as an obstacle to the Commonwealth's administration of SNAP and enactment of the sales and use tax exemption.

Uniformity

176. Article 8, Section 1 of the Pennsylvania Constitution provides that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

177. This requirement applies to acts of the state general assembly as well as resolutions and ordinances enacted by local governments. *Coe v. Duffield*, 138 A.2d 303, 305 (Pa. Super. Ct. 1958).

178. This requirement applies to "all species of taxes." *Amidon v. Kane*, 279 A.2d 53, 58 (Pa. 1971).

179. The test for whether a tax complies with the requirement of uniformity is twofold: (1) whether there is a reasonable distinction and difference between the classes of taxpayers to justify different tax treatment; and (2) whether the tax burden imposed on all members of the same class is substantially equal. *Id.* at 59.

180. When a method or formula for computing a tax will, in its operation or effect, produce arbitrary, unjust, or unreasonably discriminatory results, the Pennsylvania Constitution's uniformity requirement is violated. *See Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1211 (Pa. 2009).

181. In cases where the validity of a classification for tax purposes is challenged, the test is whether the classification is based upon a legitimate distinction between the classes that provides a non-arbitrary and reasonable basis for the difference in treatment. *Id.*

182. When there exists no legitimate distinction between the classes, and, thus, the tax scheme imposes substantially unequal tax burdens upon persons otherwise similarly situated, the tax is unconstitutional. *Id.*

183. Here, the members of various classes will be subject to the substantially unequal tax burdens imposed by the Tax: (1) the class of soft drinks (wherein the Tax is based solely on volume and not value, at both the distributor wholesale and consumer price level); (2) the class of distributors (wherein distributors that distribute high-volume, less expensive soft drinks suffer a much greater tax burden percentage-wise than those who distribute low-volume, more expensive soft drinks); (3) class of retailers (wherein retailers will incur very different tax burdens depending on the volume of and which soft drinks they sell); and (4) class of consumers (wherein consumers who purchase high-volume, less expensive soft drinks suffer a much greater tax burden than those who purchase low-volume, more expensive soft drinks).

Pennsylvania Courts Have Repeatedly Stuck Down as Unconstitutional Taxes That Were Imposed in a Non-Uniform Way.

184. Applying Article 8, Section 1 of the Pennsylvania Constitution, Pennsylvania courts have routinely struck down taxes imposed by local governments that: (1) purported to

create unreasonable classes; or (2) purported to apply a tax in an unequal and unreasonable way across a given class.

185. In *Commonwealth ex rel. Department of Justice v. A. Overholt & Co.*, 200 A. 849 (1938), the Supreme Court held that a state floor tax on liquors imposed at a rate of $2 per gallon – the equivalent of 22% to 100% of the value of the liquors – violated the Pennsylvania Constitution's Uniformity Clause and "present[ed] an outstanding example of a legislatively imposed inequality of burden" because gallons of whisky that were of unequal value would be taxed at the same volume-based rate. *Id.* at 851, 853. The Court emphasized that "[w]hen property in the form of a gallon of liquor valued at forty cents is taxed $2, i.e., five time its value, while a gallon of liquor valued at $16 is taxed $2, i.e., 1/8th of its value, the uniformity clause of the State Constitution is violated precisely as it would be violated if in imposing taxes on two properties of exactly the same value, the legislature imposed on one a tax of forty cents and on the other a tax of sixteen dollars." *Id.* at 853. The Court further emphasized that "[t]he values of the liquors were deliberately and systematically disregarded" such that "the property owner is faced with an attempted trespass on his right of equality before the law – a right imbedded in the organic laws of both State and Nation." *Id.* at 853-54.

186. The Pennsylvania Constitution's prohibition on property taxes based on volume and not value was reaffirmed when the Delaware County Court of Common Pleas struck down a tax on billboards imposed based on the size of the billboards without respect to their value in *Folcroft*, 72 Pa. D. & C. at 544.

187. It was reaffirmed again when the Supreme Court held a tax based on the amount of coal mined without regard to the value of the coal was non-uniform and thus unconstitutional in *In re Lawrence Township School District*, 67 A.2d at 372. Notably, in *In re Lawrence*, the

Supreme Court held there was a uniformity violation despite the fact that the difference between the amount of taxes paid on value of coal mined varied by only a dollar per ton. *See id.* at 383 (noting that "the value of coal mined in Lawrence Township varie[d] from $4.25 per ton to $5.25 per ton").

The Taxation of the Class of Beverages Is Non-Uniform and Creates Unequal Burdens at Both the Retail Price and Distributor Levels.

188. The Philadelphia Soft Drink Tax will be imposed on soft drinks intended to be held out for retail sale within the City.

189. However, under the Tax, soft drinks – the class of property subject to the Tax – will not be treated uniformly.

190. The Philadelphia Soft Drink Tax imposes a flat tax per unit (ounce) regardless of the market price or wholesale price of the soft drink.

191. Thus, as illustrated in the chart set forth *supra* in paragraph 107, the Philadelphia Soft Drink Tax will amount to a much greater tax burden on some soft drinks than others, ranging from less than a 2% tax on the retail price to nearly 150% of the retail price.

192. Similarly, as set forth in paragraph 109 *supra*, the imposition of the Philadelphia Soft Drink Tax at the distributor level will cause distributors to pay price increases ranging from 1.7% to 110% of the wholesale price of the soft drinks.

193. There is no reasonable or just basis for the difference in tax treatment between a 2-liter bottle of store brand cola taxed at a rate of 149.12% of its retail price and a 13.7-ounce bottle of a Starbucks Coffee frappuccino [sic] taxed at a rate of 8.46% of its retail price or a 5-hour ENERGY drink taxed at 1.17% of its retail price.

194. Likewise, there is no lawful reason that distributors should pay a range of a low of a 1.7% increase to a high of a 91.5% increase for affected beverages that they distribute. *See* Ex. G, Cimochowski Decl. ¶ 7.

195. The Tax is explicitly imposed based solely on volume of the beverage and not its value. *See* Ex. A, Bill No. 160176, § 19-4103(a)-(b) (imposing rate of tax of one and one-half cents ($.015) per fluid ounce of beverage for composed beverages and one and one-half cents ($.015) per fluid ounce of resulting beverages for those made with syrup).

196. By virtue of imposing a tax burden according to volume as opposed to market value (at either the wholesale distributor market level or the consumer price market level), the Philadelphia Soft Drink Tax imposes a substantially unequal tax burden across the class of affected beverages for consumers and distributors. *See In re Lawrence Twp. Sch. Dist.*, 67 A.2d at 374 (striking down local, specific tax based on uniformity where tax found to be a property tax on "coal mined" that was assessed by amount of coal and not value of coal); *Overholt*, 200 A. at 853 (explaining that "[u]niformity of taxation means equality of tax burden. A tax to be uniform must operate alike on the classes of things or property subject to it. The tax herein challenged presents an outstanding example of a legislatively imposed inequality of burden" because it is imposed on volume alone, not value); *see also City of Harrisburg v. Sch. Dist. of City of Harrisburg*, 710 A.2d 49, 54 (Pa. 1998); *Folcroft*, 72 Pa. D. & C. at 543.

197. Because it is assessed by volume (ounce) instead of value, the very method for computing the Philadelphia Soft Drink Tax will produce arbitrary, unjust, and unreasonably discriminatory results of a tax ranging from 1.2% to 149% of value, a disparity far greater than the other non-uniform taxes that have been stricken. *See* Chart, ¶ 107, *supra*; *Overholt*, 200 A. at 853-54 (striking as non-uniform floor tax on liquors imposed at a rate of $2 per gallon – 22% to

100% of the value of the liquors); *In re Lawrence Twp. Sch. Dist.*, 67 A.2d at 383 (striking as non-uniform tax imposed on coal where value of coal mined varied by only a dollar from $4.25 per ton to $5.25 per ton); *Folcroft*, 72 Pa. D. & C. at 543 (striking as non-uniform tax imposed on billboards at rate of 50 cents per square inch "entirely irrespective of the value of the billboard"); *Clifton*, 969 A.2d at 1211 ("[W]hen a method or formula for computing a tax will, in its operation or effect, produce arbitrary, unjust, or unreasonably discriminatory results, the uniformity requirement is violated.").

198. However, even if the Tax were assessed on the basis of value, it would still fail as a matter of law because it would still be duplicative of the Pennsylvania Soft Drink Tax and therefore preempted under the Sterling Act for the reasons set forth in paragraphs 123-175, *supra*.

The Tax Creates an Unreasonable Class of Distributor Taxpayers and Imposes an Unequal Burden Across the Class of Distributors.

199. The Philadelphia Soft Drink Tax creates a class of distributor taxpayers that also fails as non-uniform.

200. The Philadelphia Soft Drink Tax creates a class of taxpayers consisting of distributors that supply or deliver affected beverages to dealers in the City. *See* Ex. A, Bill No. 160176, § 19-4105(1) ("The tax shall be paid to the City by the registered distributor[.]"). In some circumstances, the tax will be imposed on dealers who acquire affected beverages from sources other than registered distributors. *Id*., § 19-4105(2).

201. To the extent the Tax assesses tax burden by volume and not value, distributors that distribute high-volume, less expensive soft drinks suffer a much greater tax burden on a percentage basis than those who distribute low-volume, more expensive soft drinks.

202. Thus, taxing the class of distributors in different ways depending on what types of beverages they distribute violates the Uniformity Clause. *See Carl*, 400 A.2d at 650 (invalidating school district occupation tax for lack of "reasonable classification as required by the Constitution"); *In re Lawrence Twp. Sch. Dist.*, 67 A.2d at 383-84.

203. Distributors will be further harmed because the tax burden imposed on distributors is arbitrary and unjust.

The Taxation of the Class of Retailers Is Non-Uniform and Creates Unequal Burdens.

204. Where retailers are the taxpayers – either because (1) the Tax is passed on to retailers by distributors or (2) retailers do not acquire affected beverages from registered distributors (and, thus, the distributors do not pay the Tax) – the taxpayer class of retailers also fails as non-uniform.

205. Thus, the Philadelphia Soft Drink Tax will impact sellers of high-volume, less expensive soft drinks on a percentage basis more harshly than sellers of only low-volume, more expensive soft drinks. *See* Chart, ¶ 107, *supra*.

206. Further, the City's taxation of retailers will vary widely based on the specific affected beverages sold by a given retailer.

207. A supermarket would likely sell large volumes of soda, but minimal volumes of 5-hour ENERGY drinks.

208. Convenience stores, in contrast, are the typical retailers for 5-hour ENERGY drinks (although they also sell soda, but primarily in individual serving sizes).

209. Thus, supermarkets will be required to pay over 149% of the retail price in tax for a large volume of their sales – store-brand sodas. *See* Chart, ¶ 107, *supra*. In contrast, convenience stores will only be required to pay less than 2% of the retail price for a large volume of their sales – 5-hour ENERGY drinks. *See id.*

210. The City has failed to articulate any reasonable basis for this disparate treatment.

211. Accordingly, the City's imposition of the Tax on the class of retailers is non-uniform and unconstitutional.

The Taxation of the Class of Consumers Is Non-Uniform and Creates Unequal Burdens.

212. The taxpayer class of consumers also fails as non-uniform.

213. The Philadelphia Soft Drink Tax will be borne at varying rates depending on whether consumers purchase less expensive (on a cost-per-ounce basis) or more expensive (on a cost-per-ounce basis) affected beverages.

214. The City has also articulated no reasonable basis for treating a consumer who purchases a more expensive (on a cost-per-ounce basis) affected beverage differently from a consumer who purchases a less expensive (on a cost-per-ounce basis) affected beverage.

215. And, indeed, there is no reason to treat consumers differently depending on the type of soft drink they purchase or the cost-per-ounce of the soft drink they purchase.

216. Thus, taxing of the class of consumers in these different ways violates the Uniformity Clause. *See Carl*, 400 A.2d at 650; *In re Lawrence Twp. Sch. Dist.*, 67 A.2d at 383-84.

COUNT I

Request for Declaratory Judgment and Injunctive Relief Based on Express Sterling Act Preemption

217. Paragraphs 1 through 216 are incorporated by reference as if fully set forth herein.

218. The Commonwealth imposes the Pennsylvania Soft Drink Tax on retail purchases of soft drinks.

219. Pursuant to express terms of the Sterling Act, the City is prohibited from taxing any "transaction," "personal property," and "subject" that is already taxed by the Commonwealth.

220. The Philadelphia Soft Drink Tax imposes a tax burden on the same subject, transaction, and personal property as the Pennsylvania Soft Drink Tax – soft drinks – and threatens to diminish state revenues from the Pennsylvania Soft Drink Tax.

221. The Philadelphia Soft Drink Tax exceeds the City's tax authorization and is preempted in light of the Pennsylvania Soft Drink Tax. Accordingly, the Philadelphia Soft Drink Tax should be declared invalid and the City should be permanently enjoined from enforcing the Tax.

222. There is no adequate remedy at law because affected beverage distributors, retailers, and consumers will be irreparably harmed by the imposition of the Tax, cannot recoup taxes paid in a timely and effective manner, and require certainty as to whether the invalid Tax will be enforced by Defendants.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant the following relief:

(a) An Order declaring the Philadelphia Soft Drink Tax to be invalid and without legal effect;

(b) An Order permanently enjoining Defendants from enforcing the Philadelphia Soft Drink Tax; and

(c) Such other and further relief as this Court deems just and appropriate.

COUNT II

Request for Declaratory Judgment and Injunctive Relief Based on Doctrine of Conflict Preemption

223. Paragraphs 1 through 222 are incorporated by reference as if fully set forth herein.

224. The Pennsylvania General Assembly enacted the Sterling Act providing that the Commonwealth exclusively can impose a sales and use tax (such as the Pennsylvania Soft Drink Tax) on a variety of goods.

225. By enacting the Pennsylvania Soft Drink Tax, the Commonwealth sought to gain revenues for in-state purchases on specific products, including, *inter alia*, soft drinks.

226. Where, as here, the City has enacted a tax that will encompass virtually all of the beverages already subject to the Pennsylvania Soft Drink Tax, the City is impermissibly attempting to impinge on the Commonwealth's taxation authority.

227. Indeed, because the Philadelphia Soft Drink Tax will decrease overall consumption of affected beverages and/or cause people who otherwise would have shopped in the City to go to another nearby state (such as New Jersey) to make their soft drink purchases, the City is interfering with the Commonwealth's collection of maximum revenues from the Pennsylvania Soft Drink Tax.

228. The imposition of the Philadelphia Soft Drink Tax will decrease the revenues the Commonwealth collects from the Pennsylvania Soft Drink Tax, while ensuring that the City gets revenues through the Philadelphia Soft Drink Tax and its associated compliance fees.

229. Thus, the imposition of the Philadelphia Soft Drink Tax and pass-through to consumers stands as an obstacle to the Commonwealth's collection of the Pennsylvania Soft Drink Tax and frustrates the Commonwealth's goal in enacting the Pennsylvania Soft Drink Tax: to create a revenue-generating measure for the Commonwealth.

230. Additionally, the Pennsylvania Soft Drink Tax expressly precludes the taxation of items for resale in order to prohibit tax pyramiding and ensure that a tax is levied only once in the chain of distribution of the same item of commerce.

231. Here, the Philadelphia Soft Drink Tax is imposed on soft drinks at the distributor level.

232. These same soft drinks are then taxed a second time at the retailer-to-consumer transaction level due to the imposition of the Pennsylvania Soft Drink Tax.

233. Such double-taxation of the same item of commerce at two separate points in the distribution chain amounts to tax pyramiding, which cannot be reconciled with the Commonwealth's intent. As such, the Philadelphia Soft Drink Tax is implicitly preempted by the Pennsylvania Soft Drink Tax, which may only be imposed once in the chain of distribution.

234. Permitting an additional tax on the same soft drink to be imposed earlier in the distribution chain stands as an obstacle to the purpose of the Pennsylvania Soft Drink Tax and its resale exemption, and, thus, this additional City Tax is preempted pursuant to the doctrine of conflict preemption.

235. Accordingly, the Philadelphia Soft Drink Tax should be declared invalid and the City should be permanently enjoined from enforcing the Tax.

236. There is no adequate remedy at law because soft drink distributors, retailers, and consumers will be irreparably harmed by the imposition of the Tax, cannot recoup the taxes paid in a timely and effective manner, and require certainty as to whether the invalid Tax will be enforced by Defendants.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant the following relief:

(a) An Order declaring the Philadelphia Soft Drink Tax to be invalid and without legal effect;

(b) An Order permanently enjoining Defendants from enforcing the Philadelphia Soft Drink Tax; and

(c) Such other and further relief as this Court deems just and appropriate.

COUNT III

Request for Declaratory Judgment and Injunctive Relief Based on Doctrine of Conflict Preemption Due to the SNAP Pennsylvania Soft Drink Tax (Sales and Use Tax) Exemption Statute

237. Paragraphs 1 through 236 are incorporated by reference as if fully set forth herein.

238. The Pennsylvania General Assembly enacted legislation prohibiting the imposition of the Pennsylvania Soft Drink Tax (sales and use tax) on purchases made with SNAP funds received from the federal government.

239. By enacting such, the Commonwealth sought to preserve the buying power of SNAP recipients and prohibit the use of federal monies to pay for state and local taxes.

240. The imposition of the Tax and pass-through to consumers stands as an obstacle to the Commonwealth's sales and use tax exemption law and will result in SNAP recipients paying the increased cost of the Tax on their grocery purchases – in the form of increased prices for covered beverages.

241. Thus, the Tax will have the effect of transferring federal SNAP funds to the City government.

242. This result also frustrates the goal of the Commonwealth's participation in the SNAP program: to increase the buying power of low-income residents.

243. Therefore, the Philadelphia Soft Drink Tax frustrates the purpose of and conflicts with the Commonwealth's sales and use tax exemption for SNAP purchases, and is preempted under the doctrine of conflict preemption.

244. Accordingly, the Tax should be declared invalid and the City should be permanently enjoined from enforcing the Tax.

245. There is no adequate remedy at law because soft drink distributors, retailers, and consumers will be irreparably harmed by the Philadelphia Soft Drink Tax, cannot recoup the taxes paid in a timely and effective manner, and require certainty as to whether the invalid Tax will be enforced by Defendants.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant the following relief:

(a) An Order declaring the Philadelphia Soft Drink Tax to be invalid and without legal effect;

(b) An Order permanently enjoining Defendants from enforcing the Philadelphia Soft Drink Tax; and

(c) Such other and further relief as this Court deems just and appropriate.

COUNT IV

Request for Declaratory Judgment and Injunctive Relief Based on Non-Uniformity through the Unequal Burden on Beverages at the Retail Level and the Distributor Level

246. Paragraphs 1 through 245 are incorporated by reference as if fully set forth herein.

247. The Philadelphia Soft Drink Tax purports to impose a flat tax per unit (ounce) regardless of the market price of the beverage at the distributor level or at retail sale.

248. The Philadelphia Soft Drink Tax imposes a substantially unequal tax burden on property within the same class of affected beverages both at the distributor level and at the retail sale level.

249. The very method for computing the Philadelphia Soft Drink Tax will produce arbitrary, unjust, and unreasonably discriminatory results on distributors, retailers, and consumers.

250. The distributors will be required to pay widely varying percentage increases in taxes, which will vary from soft drink to soft drink.

251. These percentage increases for wholesale beverage prices are not in any way tied to the actual market value that the distributors recoup from their distribution of beverages to retailers.

252. Likewise, these percentages are not in any way tied to the value of the soft drinks as reflected in their market price at retail.

253. The Philadelphia Soft Drink Tax violates the Commonwealth's constitutional mandate of uniformity of tax burden because it imposes an unequal tax burden across the class of beverages at both the distributor and retailer levels. Accordingly, the Tax should be declared invalid and the City should be permanently enjoined from enforcing the Tax.

254. There is no adequate remedy at law because soft drink beverage distributors, retailers, and consumers will be irreparably harmed by the imposition of the Tax, cannot recoup taxes paid in a timely and effective manner, and require certainty as to whether the invalid Tax will be enforced by Defendants.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant the following relief:

(a) An Order declaring the Philadelphia Soft Drink Tax to be invalid and without legal effect;

(b) An Order permanently enjoining Defendants from enforcing the Philadelphia Soft Drink Tax; and

(c) Such other and further relief as this Court deems just and appropriate.

COUNT V

Request for Declaratory Judgment and Injunctive Relief Based on Non-Uniformity Through the Creation of an Unreasonable Taxpayer Class and Unequal Burden on Distributors

255. Paragraphs 1 through 254 are incorporated by reference as if fully set forth herein.

256. The Tax establishes a class of taxpayer distributors that fails as non-uniform.

257. Taxing distributors of soft drinks at varying amounts based on the volume of soft drinks sold at retail – not on value – also leads to arbitrary, unjust, and unreasonably discriminatory results among the class of distributors.

258. Indeed, because the tax is imposed based on volume and not value, distributors who deliver high-volume, less expensive affected beverages will incur a significantly larger tax burden on a percentage basis than those who deliver low-volume, more expensive affected beverages.

259. The Philadelphia Soft Drink Tax violates the Commonwealth's constitutional mandate of uniformity of tax burden because it imposes an unequal tax burden across the class of distributors. Accordingly, the Tax should be declared invalid and the City should be permanently enjoined from enforcing the Tax.

260. There is no adequate remedy at law because affected beverage distributors, retailers, and consumers will be irreparably harmed by the imposition of the Tax, cannot recoup taxes paid in a timely and effective manner, and require certainty as to whether the invalid Tax will be enforced by Defendants.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant the following relief:

(a) An Order declaring the Philadelphia Soft Drink Tax to be invalid and without legal effect;

(b) An Order permanently enjoining Defendants from enforcing the Philadelphia Soft Drink Tax; and

(c) Such other and further relief as this Court deems just and appropriate.

COUNT VI

Request for Declaratory Judgment and Injunctive Relief Based on Non-Uniformity Through the Unequal Burden on Retailers

261. Paragraphs 1 through 260 are incorporated by reference as if fully set forth herein.

262. The retailers who pay the tax also are a class of non-uniform taxpayers. The Philadelphia Soft Drink Tax will be imposed on both retailers that sell a large volume of soft drinks and those who sell a very small volume of soft drinks.

263. Thus, the Philadelphia Soft Drink Tax will impact sellers of high-volume, less expensive soft drinks more harshly on a percentage basis than sellers of only low-volume, more expensive soft drinks.

264. Additionally, the tax on retailers will vary greatly depending on the products sold due to the fact that the Tax is calculated based on volume of beverage, not value.

265. Taxing retailers differently based on volume and products sold leads to arbitrary, unjust, and unreasonably discriminatory results among the class of retailers.

266. The Philadelphia Soft Drink Tax violates the Commonwealth's constitutional mandate of uniformity of tax burden because it imposes an unequal tax burden across the class of retailers. Accordingly, the Tax should be declared invalid and the City should be permanently enjoined from enforcing the Tax.

267. There is no adequate remedy at law because soft drink distributors, retailers, and consumers will be irreparably harmed by the imposition of the Tax, cannot recoup taxes paid in a timely and effective manner, and require certainty as to whether the invalid Tax will be enforced by Defendants.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant the following relief:

(a) An Order declaring the Philadelphia Soft Drink Tax to be invalid and without legal effect;

(b) An Order permanently enjoining Defendants from enforcing the Philadelphia Soft Drink Tax; and

(c) Such other and further relief as this Court deems just and appropriate.

COUNT VII

Request for Declaratory Judgment and Injunctive Relief Based on Non-Uniformity Through the Unequal Burden on Consumers

268. Paragraphs 1 through 267 are incorporated by reference as if fully set forth herein.

269. The class of consumers who are required to pay the passed-through cost of the Tax are subject to non-uniformity.

270. The Philadelphia Soft Drink Tax will be imposed more harshly on a percentage basis on those consumers that purchase high-volume, less expensive soft drinks subject to the Tax than those who purchase low-volume, more expensive soft drinks subject to the Tax.

271. Taxing consumers differently based on product sold and/or cost-per-ounce of a soft drink leads to arbitrary, unjust, and unreasonably discriminatory results among the class of consumers.

272. The Philadelphia Soft Drink Tax violates Pennsylvania's constitutional mandate of uniformity of tax burden because it imposes an unequal tax burden across the class of

consumers (whether those consumers use SNAP benefits to make purchases or their personal funds). Accordingly, the Tax should be declared invalid and the City should be permanently enjoined from enforcing the Tax.

273. There is no adequate remedy at law because soft drink distributors, retailers, and consumers will be irreparably harmed by the imposition of the Tax, cannot recoup taxes paid in a timely and effective manner, and require certainty as to whether the invalid Tax will be enforced by Defendants.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant the following relief:

(a) An Order declaring the Philadelphia Soft Drink Tax to be invalid and without legal effect;

(b) An Order permanently enjoining Defendants from enforcing the Philadelphia Soft Drink Tax; and

(c) Such other and further relief as this Court deems just and appropriate.

Dated: September 14, 2016

Respectfully submitted,

KLINE & SPECTER, P.C.

By: _____

Shanin Specter, ID No. 40928
shanin.specter@klinespecter.com
Charles Becker, ID No. 81910
charles.becker@klinespecter.com
1525 Locust Street
Philadelphia, PA 19102
215-772-1000

MORGAN, LEWIS & BOCKIUS LLP

By: _____

Marc J. Sonnenfeld, ID No. 17210
marc.sonnenfeld@morganlewis.com
John P. Lavelle, Jr., ID No. 54279
john.lavelle@morganlewis.com
Thomas J. Sullivan, ID No. 88838
thomas.sullivan@morganlewis.com
1701 Market Street
Philadelphia, PA 19103
215-963-5000

Attorneys for Plaintiffs