

FILED

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
2019 MAR 27 P.D. FILE NO.

DURHAM CO., C.S.D.

STATE OF NORTH CAROLINA, ex rel.
JOSHUA H. STEIN, Attorney General,

BY JS

Plaintiff,

v.

VAPECO DISTRIBUTION LLC,

Defendant.

**COMPLAINT AND MOTIONS FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

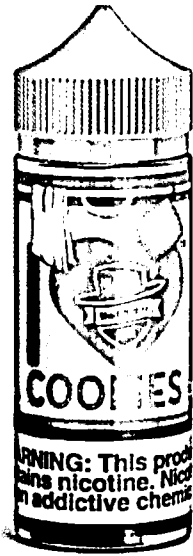
JURY TRIAL DEMANDED

Plaintiff, the State of North Carolina, by and through its Attorney General, Joshua H. Stein, brings this action against Defendant VapeCo Distribution LLC, pursuant to the North Carolina Unfair or Deceptive Trade Practices Act, N.C.G.S. §§ 75-1.1 *et seq.*, for marketing and selling e-cigarette products designed to appeal to youth to North Carolina consumers. The State seeks to ensure that these tobacco products are not unlawfully marketed and sold to minors. In support of its Complaint, the State alleges as follows:

INTRODUCTION AND SUMMARY

VapeCo, a for-profit company based in California, sells e-cigarettes that taste like candy but are packed with addictive nicotine. VapeCo targets children, and does not require appropriate age verification when selling its dangerous products.

VapeCo's actions have contributed to the epidemic of youth vaping throughout the country, and in North Carolina.



I LOVE COOKIES

\$24.99 - \$62.99

☆☆☆☆☆ 97 Reviews

The original cookie with a layered twist. A sweet caramel taste paired with a hint of strawberry. I Love Cookies will really excite your taste buds boasting an alluring aroma that takes you back to your childhood. All that's missing is the cold glass of milk.

CLEAR

Size

100ML 200ML (2X100ML)

300ML (3 X 100ML.)

Select One

0MG NICOTINE 3MG NICOTINE

6MG NICOTINE

Vapor products are defined under North Carolina law as “any noncombustible product that employs a mechanical heating element, battery, or electronic circuit regardless of shape or size and that can be used to heat a liquid nicotine solution contained in a vapor cartridge.” N.C.G.S. § 14-313(a)(5). When the e-liquid reaches a certain temperature, it converts to an aerosol that a user inhales or “vapes.” Nicotine is a highly addictive element found in combustible cigarettes and other tobacco products. As a result, the State regulates e-liquids and other vapor products that contain nicotine in the same manner as tobacco products.¹

¹ Vapor products and components of vapor products (e.g., device-compatible cartridges containing e-liquids, and separately bottled e-liquids and juices) fall

Nicotine is poisonous to the human brain. The developing brains of teenagers and children are particularly vulnerable to nicotine, and have what one study describes as “exquisite sensitivity” to nicotine’s neurotoxic effects. Even small and brief exposures to nicotine can cause lasting neurobehavioral damage in adolescents.² When a young person gets addicted to nicotine, it makes it much more likely that he or she will later become a user of traditional cigarettes or illegal drugs.³

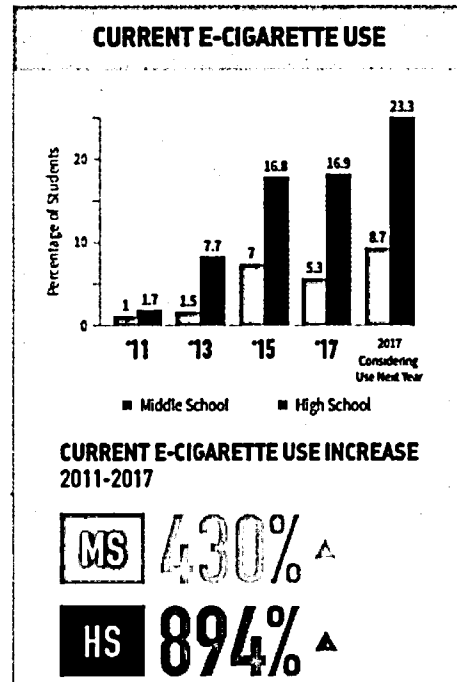
VapeCo is one actor in this billion-dollar industry, producing and promoting candy and ice cream-flavored e-liquids that are specifically targeted to lure minors to using its products. Among the flavors VapeCo manufactures and sells are popsicle, apple juice, graham cracker, and taffy. In addition, VapeCo’s products—which contain higher concentrations of nicotine than its competitors’—are some of the most dangerous and addictive on the market.

under the umbrella of “tobacco products” as defined under North Carolina law. See N.C.G.S. § 14-313(a)(4).

² Yael Abreu-Villaça, et al., *Nicotine is a neurotoxin in the adolescent brain: critical periods, patterns of exposure, regional selectivity, and dose thresholds for macromolecular alterations*, 979 *Brain Research* 114-28 (July 25, 2003), <https://www.ncbi.nlm.nih.gov/pubmed/12850578>.

³ U.S. Department of Health, and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease, Prevention and Health Promotion, Office on Smoking and Health, *E-Cigarette Use Among Youth And Young Adults: A Report of the Surgeon General — Executive Summary* (2016), https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Exec_Summ_508.pdf.

Both the U.S. Surgeon General and the former Food and Drug Administration (FDA) Commissioner have described underage use of e-cigarettes as an “epidemic.”⁴ Statistics confirm these warnings from public health advocates. In 2011, just 1.7% of North Carolina high school students reported using e-cigarette products; by 2017, 16.9% of high school students and 5.3% of middle school students reported using e-cigarette products within the last 30 days, making e-cigarettes by far the most commonly used tobacco product among youth.⁵ According to the National Youth Tobacco Survey, more than 3.6 million middle and high school students were current e-cigarette users in 2018, an increase of more than 1.5 million students



⁴ U.S. Department of Health and Human Services, Public Health Service, Surgeon General’s Advisory on E-cigarette Use Among Youth (Dec. 18, 2018), <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>; see also U.S. Food and Drug Administration, FDA News Release: *FDA takes new steps to address epidemic of youth e-cigarette use, including a historic action against more than 1,300 retailers and 5 major manufactures for their roles perpetuating youth access* (Sept. 12, 2018), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm620184.htm>.

⁵ NC DHHS, Division of Public Health, Tobacco Prevention and Control Branch, *North Carolina Youth Tobacco Survey Middle & High School Fact Sheet*, available at <https://www.tobaccopreventionandcontrol.ncdhhs.gov/data/yts/docs/2017-YTS-FactSheet-FINAL.pdf>.

since 2017.⁶ The reason for such a dramatic spike in underage use of nicotine is plain: a 2019 study showed that use of e-cigarettes among young people results in higher nicotine dependence levels than nicotine dependence related to combustible cigarette use. While e-cigarette manufacturers and retailers claim that e-cigarettes are a safer alternative to combustible cigarettes, among young adults, use of e-cigarettes carries a greater risk of addiction than from combustible cigarettes.⁷

The spike in underage use of e-cigarettes is the predictable result of the youth-oriented marketing and product design engaged in by VapeCo, and exacerbated by VapeCo's egregious disregard for proper age-verification measures, which are required by law to ensure that these harmful and highly addictive products are not sold to minors.

The State brings this action to stop these unlawful practices and protect North Carolina youth from the devastating effects of nicotine addiction resulting from VapeCo's business conduct. The State seeks to enjoin VapeCo from selling or marketing its products—which are specifically designed to lure minors—in North Carolina, and hold it accountable for its unlawful acts in the form of civil penalties, costs, and reasonable attorneys' fees.

⁶ U.S. FDA: Youth Tobacco Use: Results from 2018 National Youth Tobacco Survey (Nov. 15, 2018), <https://www.fda.gov/tobacco-products/youth-and-tobacco/youth-tobacco-use-results-national-youth-tobacco-survey>.

⁷ Mateusz Jankowski et al., *E-Cigarettes Are More Addictive Than Traditional Cigarettes—A Study in Highly Educated Young People*, 16 Intl. J. of Envir. Research and Pub. Health 2279 (2019).

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, the State of North Carolina (“the State”), acting on relation of its Attorney General, Joshua H. Stein, brings this action pursuant to Chapters 75 and 114 of the North Carolina General Statutes. The Attorney General is charged, among other things, with enforcing North Carolina’s Unfair or Deceptive Trade Practices Act, N.C.G.S. §§ 75-1.1 *et seq.*, on behalf of the State.

2. Defendant VapeCo Distribution LLC, upon information and belief d/b/a Mad Hatter Juice, is a foreign corporation with its principal place of business in Chatsworth, California. VapeCo is both a manufacturer and online retailer of e-cigarettes and other vapor products. It sells nicotine-containing e-liquids and juices, which it also refers to as “e-juice” and “vape juice.”

3. At all relevant times, VapeCo has been engaged in trade or commerce in the State of North Carolina and subject to North Carolina’s Unfair or Deceptive Trade Practices Act, N.C.G.S. §§ 75-1.1, *et seq.*

4. This Court has personal jurisdiction over VapeCo. *See Affidavit of William G. Lindsey, State v. Eonsmoke LLC*, ¶¶ 4, 11, 14, Ex. 3.

5. The Attorney General’s Office served a Civil Investigative Demand on VapeCo on or about July 23, 2019, pursuant to N.C.G.S. §§ 75-9 *et seq.* VapeCo has not produced any records to the Attorney General’s Office.

6. The Court has subject matter jurisdiction over this dispute, and venue is proper in Durham County pursuant to the Attorney General’s selection under N.C. Gen. Stat. § 75-14.

FACTUAL ALLEGATIONS

I. VapeCo Uses Kid-Friendly Flavors to Make Dangerous Nicotine Products Appealing to Minors.

7. It has long been recognized that flavors create an on-ramp for underage and non-smokers to begin using tobacco products. Utilizing kid-friendly flavors to make tobacco flavors more palatable to youth is a strategy first employed by the tobacco industry. An internal Lorillard memorandum, which became public as a result of the Master Settlement Agreement, demonstrated that, because younger consumers were “attracted to products with ‘less tobacco taste,’” company officials suggested using “data from the company which produced ‘Life Savers’ as a basis for determining which flavors enjoy the widest appeal” among youth.⁸

8. Just like the tobacco industry of old, VapeCo has disregarded the dangers associated with underage nicotine use in the name of profit. VapeCo’s business strategy is premised on selling candy- and dessert flavored e-liquids designed to attract children, including flavors that replicate popular children’s foods like apple juice boxes, watermelon, graham cracker, bubblegum, and popsicle flavors.

⁸ Letter from S.T. Jones to File at 2 (June 8, 1979), <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=mjxf0129>.

9. Mad Hatter's conduct is particularly egregious because of the extensive lengths the company goes to in order to simulate the food products after which their products are inspired. For example, Mad Hatter sells an apple juice-flavored eliquid that is packaged to look like a juice box, complete with



plastic straw on the side of the small box. In the hands of a young child, who may not be able to distinguish between an actual apple juice box and a package of liquid nicotine, a 180 ml container of eliquid would be deadly. In fact, a single teaspoon of concentrated liquid nicotine can be fatal for an average toddler.

10. Fatal ingestion of eliquid products is not a hypothetical harm. In 2014, a 1-year-old died from liquid nicotine poisoning. The next year, poison control centers received 2,452 calls⁹ about exposure to liquid nicotine via accidental or intentional ingestion or absorption (as opposed to exposure to the "vapor" or aerosol generated by the eliquid via an e-cigarette device), a 60% increase from 2013. A study by the American Academy of Pediatrics reported that of 8,269 liquid nicotine exposures among children under six years old reported to US poison control centers, 92.5% of those reports involved children who ingested the eliquid and 83.9% of the

⁹ See Koriath, *supra* note 17.

children were under three years old. Children exposed to liquid nicotine suffered seizures, coma, respiratory arrest, cardiac arrest and death.¹⁰

11. Many of VapeCo's products contain 6% nicotine concentration, meaning they are substantially more dangerous and addictive than the leading e-liquids on the market, which advertise, at most, a 5% nicotine concentration. Most tobacco- and menthol-flavored e-liquids on the market advertise even lower concentrations of nicotine—between 1% and 3%. VapeCo's kid-friendly flavors that are geared toward hooking minors are more addictive and stronger than other e-liquids on the market that are more attractive to adult, habitual smokers.

12. VapeCo also creates an on-ramp for products specifically designed to hook children on the habit of vaping. Not only does VapeCo sell products with high concentrations of nicotine, VapeCo also sells products that have 0% nicotine. While these products do not deliver nicotine to users, they are designed to introduce new users to the habit of vaping and create an on-ramp for new users to slowly increase nicotine intake as they grow more accustomed to the delivery system. And when these e-liquids that contain no nicotine are sold in kid-friendly flavors, they attract children who begin to develop a habit of vaping.

13. The stakes could not be higher for our children. One in four North Carolina high school or middle school students who use e-cigarettes say they use the

¹⁰ Govindarajan P, Spiller HA, Casavant MJ, et al., E-Cigarette and Liquid Nicotine Exposures Among Young Children, *Pediatrics*, 2018; 141(5):e20173361. Vol. 141, No. 5, May 2018,

products because of the flavors,¹¹ and 81% of 12-17 year olds who use e-cigarettes began with a flavored version.¹²

14. Moreover, many underage users are not even aware that e-cigarettes contain nicotine. One 2018 study found that 11.5% of 8th-12th graders who use e-cigarettes believe they are inhaling flavored water vapor. A separate 2018 study reported that 63% of users aged 15-24 of popular e-cigarette brand JUUL did not know that all JUUL products, including the fruit- and dessert-flavored cartridges, contained nicotine.¹³

15. This lack of awareness and perception by kids is not surprising—and not their fault. The companies, like VapeCo, selling e-liquids that come in apple juice boxes, complete with a plastic straw taped to the side, and in flavors like “gummy bear” or replicating Lucky Charms or Cinnamon Toast Crunch cereals are specifically and unlawfully targeting children and deceiving them about the highly addictive nature of nicotine e-liquid.

¹¹ NCDHHS, *supra* note 5.

¹² See American Academy of Pediatrics et al., Campaign for Tobacco-Free Kids, *The Flavor Trap: How Tobacco Companies Are Luring Kids with Candy-Flavored E-Cigarettes and Cigars* (Mar. 15, 2017), https://www.tobaccofreekids.org/microsites/flavortrap/full_report.pdf.

¹³ N.C. Department of Health and Human Services, Press Release: *Growing Number of North Carolina Teens at Risk of Addiction to Nicotine, Study Finds* (Apr. 11, 2019), <https://www.ncdhhs.gov/news/press-releases/growing-number-north-carolina-teens-risk-addiction-nicotine-study-finds>.

II. VapeCo Failed to Utilize Adequate Age Verification to Ensure Minors Were Not Purchasing Its Products Online.

16. In June 2013, the North Carolina General Assembly amended N.C.G.S. § 14, “Article 39. Protection of Minors” to broaden the definition of tobacco products to include vapor products and components of vapor products.¹⁴ This expanded prohibitions on the distribution of tobacco products to persons under 18 to e-cigarettes and e-cigarette components such as device-compatible cartridges containing e-liquids, and separately bottled e-liquids and juices.

17. The amended statute also added a provision governing online sales or “other remote sales methods” of vapor products, since the previous iteration of the statute seemingly contemplated only brick-and-mortar retailers in outlining prohibitions designed to protect minors from tobacco sales. N.C.G.S. § 14-313(b2).

18. The new subsection, titled “Internet distribution of tobacco products,” requires that any retailer selling tobacco products online “shall perform an age verification through an independent, third-party age verification service that compares information available from public records to the personal information entered by the individual during the ordering process to establish that the individual ordering the tobacco product is 18 years of age or older.” *Id.*

19. This provision became effective on August 1, 2013. *See* S.L. 2013-165, § 1. Therefore, any internet-based transaction that took place on or after August 1, 2013 by a retailer that resulted in the distribution of a vapor product to any North

¹⁴ *See* S.L. 2013-165, § 1.
<https://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2013-2014/SL2013-165.html>

Carolina consumer was unlawful unless an independent, third-party age-verification service was engaged to establish that the purchaser was at least 18 years of age.

20. Although North Carolina has required any company selling e-cigarette devices or components, including e-liquids, through the Internet to perform age verification via an independent, third-party age-verification service since 2013, upon information and belief, VapeCo did not engage or contract with any third-party age-verification service. Thus, every online transaction between VapeCo and a North Carolina consumer from 2013 violated North Carolina law. Upon information and belief, many of these transactions allowed individuals under age 18 to purchase e-cigarette products directly from VapeCo.

21. In violation of N.C.G.S. § 14-313(b2), VapeCo continues to allow minors to access its website and purchase its nicotine-containing e-liquids and juices without using a third-party age verification procedure.

III. VapeCo Uses Deceptive and Unfair Marketing Strategies to Attract Underage Consumers.

22. VapeCo actively markets its products to minors, both on its own websites and on social media. VapeCo's practices are substantially injurious to underage consumers and offend the established public policy of youth tobacco prevention, and thus violate N.C.G.S. § 75-1.1. *See Marshall v. Miller*, 32 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).

23. Researchers at Yale School of Medicine surveyed teenagers to understand what they found "cool about e-cigarettes." The top two responses were

(1) appealing flavors, and (2) performing vapor tricks, “such as blowing smoke rings or creating funnels of smoke that look like tornadoes.”¹⁵

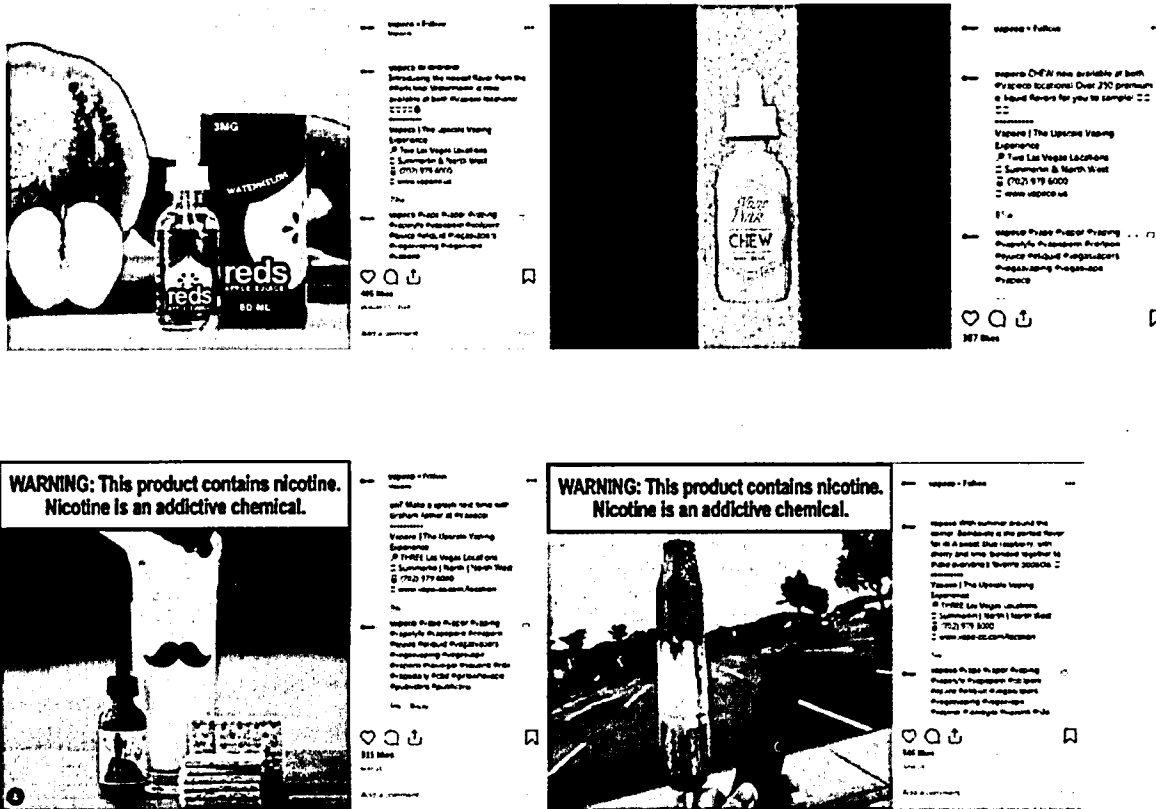
24. Similar to the tobacco industry’s now-banned marketing practices designed to appeal to youth (such as using cartoon characters, celebrity endorsements, and targeted product placement), VapeCo use dessert flavors, bright colors, and child-friendly product names to promote its products to minors.

25. VapeCo sells and has sold e-cigarette products in flavors designed to look and/or taste like graham cracker, bubblegum, other popular candy and desserts, and various fruit juices and slushies. VapeCo markets these products, typically through its social media pages or paid advertisements, by picturing the products in packaging made to mimic foods popular among children.

26. VapeCo also uses marketing channels that are most popular among teenagers, and are less popular among adults. Young people are more likely to use social media platforms such as Instagram and Snapchat than adults, yet most of VapeCos’ marketing activities take place on those platforms rather than in adult-oriented media. VapeCo’s use of these youth-oriented social media channels directly promotes these child-friendly products to underage consumers.

27. VapeCo’s advertisements that target youth audiences sometimes include, but often fail to include, appropriate nicotine warnings.

¹⁵ “Vaping Tricks Increase Teens’ Attraction to E-Cigarettes,” Partnership for Drug-Free Kids, May 7, 2015, <https://drugfree.org/learn/drug-and-alcohol-news/vaping-tricks-increase-teens-attraction-e-cigarettes/>.



28. Unfortunately, these marketing practices are effective. A 2016 study showed that 78% of middle and high school students were exposed to e-cigarette advertisements from at least one source, such as product websites or social media. “Exposure to these advertisements increase[d] intention to use e-cigarettes among adolescent nonusers” and was “associated with current e-cigarette use, with increasing exposure being associated with increased odds of use.”¹⁶

29. On information and belief, VapeCo does not use age-gating procedures to prevent underage consumers from following their social media pages or accessing their websites. By not using age-gating procedures and using marketing channels

¹⁶ *Jenssen & Walley, supra* note 12.

that are predominately popular with young people, VapeCo purposely exposes minors to its e-cigarette marketing.

CLAIM FOR RELIEF

Violations of the Unfair or Deceptive Trade Practices Act, N.C.G.S. § 75-1.1

1. The allegations contained in paragraphs 1-29 are incorporated by reference as if they were set out at length herein.
2. VapeCo, in the course of marketing its e-cigarette devices and e-liquid products, engaged in unfair or deceptive trade practices affecting North Carolina consumers that are prohibited by N.C.G.S. § 75-1.1. VapeCo's unfair or deceptive omissions, acts, and practices include, but are not limited to, knowingly marketing, selling, and delivering addictive nicotine-based products to minors, including by:
 - a. Designing its products, including its kid-friendly flavors and appearance, to appeal to youthful audiences, knowing that that would include many minors;
 - b. Pursuing marketing strategies and campaigns that it knew would attract minors;
 - c. Failing to provide age-verification techniques for internet sales required by North Carolina law, thereby allowing many underage users to easily obtain its products.

JURY DEMAND

3. The State demands trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, for the reasons outlined above, the State requests that the Court:

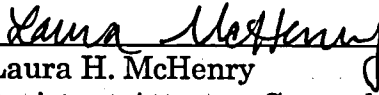
1. Issue a temporary restraining order enjoining VapeCo, its officers, directors, employees, and agents, and all those acting in concert with them, from offering, selling, delivering or in any manner providing e-cigarette products within this State;
2. Preliminarily and permanently enjoin VapeCo, its officers, directors, employees, and agents, and all those acting in concert with them, as appropriate;
3. Award civil penalties to the State from VapeCo pursuant to N.C.G.S. § 75-15.2;
4. Disgorge VapeCo's profits from its unfair or deceptive acts and practices to the State;
5. Award the State its costs, including a reasonable attorneys' fee, incurred by the investigation and litigation of this matter pursuant to N.C.G.S. § 75-16.1; and
6. Any and all further legal and equitable relief as the Court deems the State is entitled to receive.

This the 27th day of August, 2019.

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