

STATE OF NORTH CAROLINA
DURHAM COUNTY

FILED
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2019 AUG 27 P 2:16
FILE NO.

DURHAM CO., C.S.C.

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

Plaintiff,

v.

BEARD VAPE CO.,

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 Beard Vape Co., 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

Beard Vape, a for-profit company based in Texas, makes e-cigarettes that taste like candy but are packed with addictive nicotine. Beard Vape targets children, and does not require appropriate age verification when selling its

dangerous products. Beard Vape's actions have contributed to the epidemic of youth vaping throughout the country, and in North Carolina.

Beard Vape Co - "The One" E-Liquid - 100ml



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

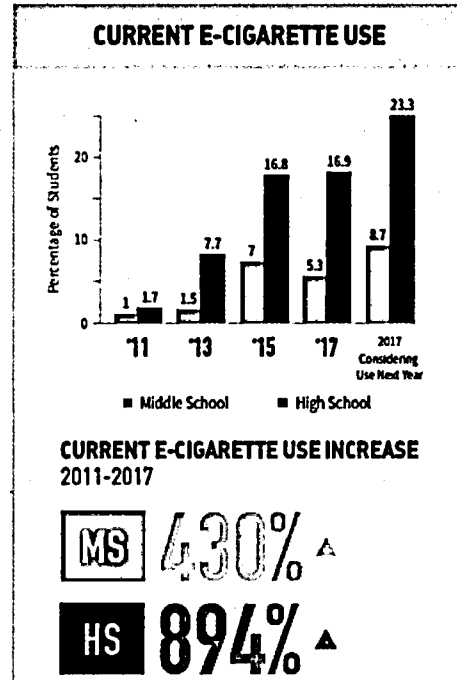
Nicotine is poisonous to the human brain. The developing brains of teenagers and children are particularly vulnerable to nicotine, and have what one study describes as “exquisite sensitivity” to nicotine’s neurotoxic effects. Even small and brief exposures to nicotine can cause lasting neurobehavioral 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

Beard Vape is one actor in this billion-dollar industry, producing and promoting candy- and dessert-flavored e-liquids that are specifically targeted to lure minors to using its products. Among the flavors Beard Vape sells are marshmallow, New York-style cheesecake, blueberry donut, and cinnamon funnel cake. In addition, Beard Vape’s products—which contain higher concentrations of nicotine than its competitors’—are some of the most dangerous and addictive on the market.

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

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>.

million students 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 Beard Vape, and exacerbated Beard Vape's egregious disregard for proper age verification measures, 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 Beard Vape's business conduct. The State seeks to enjoin Beard Vape 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 Beard Vape Co. is a foreign corporation with its principal place of business in Austin, Texas. Beard Vape is an online manufacturer and retailer of various brands of vapor products.

3. At all relevant times, Beard Vape 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 Beard Vape.

5. The Attorney General’s Office served a Civil Investigative Demand on Beard Vape on or about July 23, 2019, pursuant to N.C.G.S. §§ 75-9 *et seq.* Beard Vape has not responded or produced any records or documents 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. Beard Vape 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 youth 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, Beard Vape has disregarded the dangers associated with underage nicotine use in the name of profit. Beard Vape’s business strategy is premised on selling dessert-flavored e-liquids designed to attract children, including flavors that replicate popular foods among children, like marshmallow, New York-style cheesecake, cinnamon funnel cake, and “everyone’s favorite gummy candy,” Sweet and Sour Sugar Peach:

description

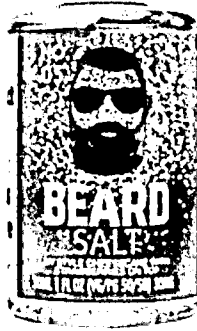
Candy lovers, rejoice! NO. 71 is a sweet & sour sugar peach unlike any other, because there is no other. Continuing its tradition of top shelf flavor, Beard Vape Co. turned everyone’s favorite gummy candy into a tasty E-liquid.

Another of Beard’s “original 5”, NO. 71 was an instant standout due to it’s incredible flavor and nailing the sweet, sour tang of a peach gummy.

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



Cinnamon Funnel Cake



NY Style Cheesecake



Sweet and Sour Sugar Peach

9. Since the State's investigation into Beard Vape began, the company has revamped its website and its product branding, including changing the labels on e liquids from images of food and candy products to the Beard Vape logo.

However, the flavors and promotion of Beard Vape's products remain the same. For example, the description for Beard Vape Co. "No. 5" reads,

Ever wanted to drop everything and enjoy a slice of NY style cheesecake with strawberries on top? Well, now you can with Beard Vape Co. NO. 05. One of the Beard's 5 original E-liquids, NO. 05 has all the decadence of a 5-star cheesecake, with none of the guilt. A mouth watering slice of heaven, only made of clouds instead of calories.

Manufactured with impeccable care and detail using only the highest quality ingredients, NO. 05 is widely regarded as the best cheesecake E-liquid on the market. Beard Vape Co. spares no expense when it comes to quality control, so each bottle contains every hint and note of flavor, from the tart strawberries garnishing the top, down to the crunchy graham cracker crust.



10. Beard Vape intentionally obscures the nicotine concentrations of its products on its packaging. While most e-liquid manufacturers describe nicotine concentration in their products as a percentage, Beard Vape presents the nicotine concentration in its products as total volume: 0, 3, 6, or 12mg. Beard Vape's packaging contains no information about what those volumes mean or how they compare to other nicotine products. Instead, Beard Vape's product descriptions merely boast the products' likeness to popular children's foods.

11. Many of Beard Vape's products contain as much as 10% 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%. Beard Vape'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. E-liquids containing nicotine concentrated at 10% are inappropriate for the vast majority of adults. Indeed, even vaping advocates explain that a 10 mg/mL nicotine concentration is only appropriate for a “heavy smoker or smoker of high nicotine cigarettes.”⁹

13. Beard Vape also creates an on-ramp for products specifically designed to hook children on the habit of vaping. Not only does Beard Vape sell products with high concentrations of nicotine, Beard Vape 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.

14. 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 products because of the flavors,¹⁰ and 81% of 12-17 year olds who use e-cigarettes began with a flavored version.¹¹

⁹ See About Nicotine Strengths, NICVAPE, available at <https://www.nicvape.com/About-Nicotine-Strengths>.

¹⁰ NCDHHS, *supra* note 5.

¹¹ 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.

15. 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.¹²

16. This lack of awareness and perception by kids is not surprising—and not their fault. The companies, like Beard Vape, selling e-liquids that come in flavors replicating gummy bears, marshmallows, and cheesecake are specifically and unlawfully targeting children and deceiving them about the highly addictive nature of nicotine e-liquid.

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

17. 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.¹³ 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.

¹² 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>.

¹³ See S.L. 2013-165, § 1. <https://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2013-2014/SL2013-165.html>

18. 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).

19. 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.*

20. 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 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.

21. 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, Beard Vape has never utilized an independent third-party age-verification service to perform age verification prior to filling online orders to North Carolina consumers. Thus, every transaction between Beard Vape

and any North Carolina customer has been in violation of N.C. Gen. Stat. § 14-313(b2) and § 75-1.1. Upon information and belief, many of these transactions allowed individuals under age 18 to purchase e-cigarette products directly from Beard Vape.

22. In violation of N.C.G.S. § 14-313(b2), Beard Vape 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. Beard Vape Uses Deceptive and Unfair Marketing Strategies to Attract Underage Consumers.

23. Beard Vape actively markets its products to minors, both on its own websites and on social media. Beard Vape'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).

24. 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."¹⁴

25. 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), Beard Vape uses dessert-like

¹⁴ "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/>.

flavors, bright colors, and child-friendly product names to promote its products to minors.

26. Beard Vape sells and has sold e-cigarette products in flavors designed to look and/or taste like marshmallow, cheesecake, salted caramel malt, and funnel cake. Beard Vape markets these products, typically through its social media pages or paid advertisements, by selling products that sound like foods popular among children.

27. Beard Vape 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 Beard Vape's marketing activities take place on those platforms rather than in adult-oriented media. Beard Vape's use of these youth-oriented social media channels directly promotes these child-friendly products to underage consumers.

Beard Vape Co
July 17 at 11:32 PM

Why toast marshmallows when you can vape them?!

WARNING: This product contains nicotine. Nicotine is an addictive chemical.

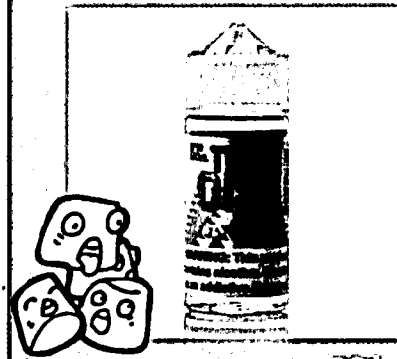


0 12

Beard Vape Co
July 8 at 8:00 PM

I mean... He said it. [Cox8_of_vape](#)

WARNING: This product contains nicotine. Nicotine is an addictive chemical.



DO YOURSELF A FAVOR AND GET IT IN YOUR RELATIONMENT

0 1

6 Comments

Beard Vape Co
July 22 at 1:52 PM

This product contains nicotine : Nicotine is an addictive chemical.

Ryan Hall - RKT TV reviewed Marshmallow Milk !! Check it out, and let us know, do you guys agree ?!

<https://www.youtube.com/watch?v=cmKrSlszvt0>



YOUTUBE.COM

Donuts & Vape Juice! The One!

For more information on everything you saw in this video & more, please g...

28. Beard Vape also promotes reviews of its own dessert and other youth-oriented products on social media. These reviews are often provided by people who appear young to encourage underage use.

29. 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.”¹⁵

30. On information and belief, Beard Vape 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 that are predominately popular with young people, Beard Vape 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 1-30 are incorporated by reference as if they were set out at length herein.

2. Beard Vape, 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. Beard Vape’s unfair or

¹⁵ Jenssen & Walley, *supra* note 12.

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 Beard Vape, 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 Beard Vape, its officers, directors, employees, and agents, and all those acting in concert with them, as appropriate;
3. Award civil penalties to the State from Beard Vape pursuant to N.C.G.S. § 75-15.2;
4. Disgorge Beard Vape'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.

JOSHUA H. STEIN
Attorney General

W. Swain Wood
General Counsel

Kevin Anderson
Senior Deputy Attorney General
Director, Consumer Protection Division



Laura H. McHenry
Assistant Attorney General
N.C. State Bar No. 45005
lmchenry@ncdoj.gov

Daniel Wilkes
Assistant Attorney General
N.C. State Bar No. 46500
dwilkes@ncdoj.gov

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Phone: (919) 716-6000
Facsimile: (919) 716-605