

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
DURHAM COUNTY 2019 AUG 27 P 2:15 FILE NO. SUPERIOR COURT DIVISION

DURHAM CO., C.S.C.

STATE OF NORTH CAROLINA, ex-rel. *ze*
JOSHUA H. STEIN, Attorney General,)

Plaintiff,)

v.)

DIRECT ELIQUID 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 Direct eLiquid 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

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

dangerous products. Direct e-Liquid's actions have contributed to the epidemic of youth vaping throughout the country, and in North Carolina.



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).

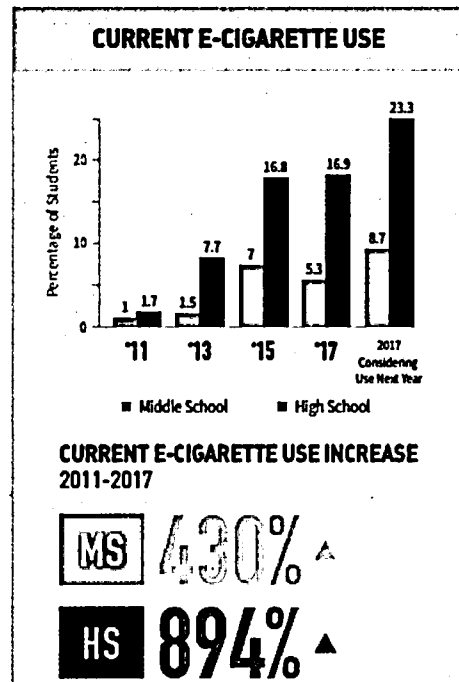
Nicotine is poisonous to the human brain. The developing brains of teenagers and children are particularly vulnerable to nicotine, and have what one study describes as “exquisite sensitivity” to nicotine’s neurotoxic effects. Even small and brief exposures to nicotine can cause lasting neurobehavioral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

Direct eLiquid is one actor in this billion-dollar industry, selling and promoting candy- and cereal-flavored e-liquids that are specifically targeted to lure minors to using its products. Among the flavors Direct eLiquid sells are flavors designed to mimic candy, snacks and desserts popular with children, such as Fruit Roll-Ups, Swedish Fish, cupcakes, slushies, ice cream, bubble gum, hard candy, and Sour Patch Kids. In addition, Direct eLiquid’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 designed engaged in by Direct eLiquid, and exacerbated by its egregious disregard for age-verification procedures 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 Direct eLiquid's activities. The State seeks to enjoin Direct eLiquid from selling or marketing e-cigarette 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 Direct eLiquid LLC is a foreign corporation with its principal place of business in Boca Raton, Florida. Direct eLiquid is an online retailer of various brands of vapor products. It sells nicotine-containing e-liquids and juices, which it also refers to as “e-juice” and “vape juice,” in flavors designed to mimic kid-friendly dessert and cereal flavors including strawberry milk, slushy, bubblegum, ice cream, cupcakes, cinnamon rolls, donut, gummies, pink lemonade, and punch.

3. At all relevant times, Direct eLiquid 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 Direct eLiquid. *See Affidavit of William G. Lindsey, State v. Eonsmoke LLC*, ¶¶ 4-5, Ex. 5.

5. The Attorney General’s Office served a Civil Investigative Demand on Direct eLiquid on or about June 21 2019, pursuant to N.C.G.S. §§ 75-9 *et seq.* In response, Direct eLiquid produced certain records and 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

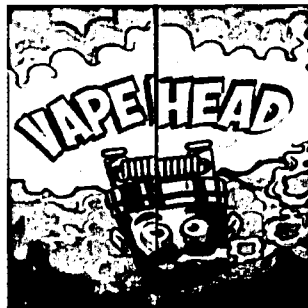
I. Direct eLiquid Uses Kid-Friendly Flavors to Make Dangerous Nicotine Products Appealing to Minors.

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

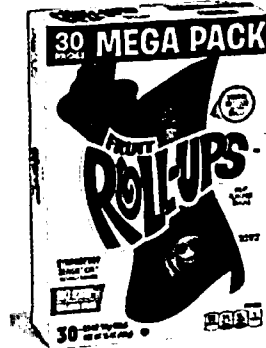
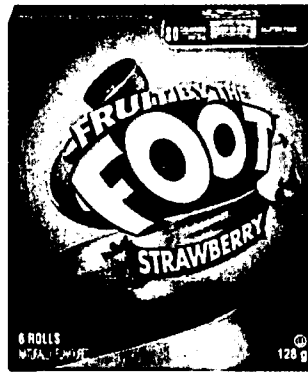
8. Just like the tobacco industry of old, Direct eLiquid has disregarded the dangers associated with underage nicotine use in the name of profit. Direct eLiquid's business strategy is premised on selling candy and cereal flavored e-liquids designed to attract children, including flavors that mimic Fruit Roll-Ups, Swedish Fish, and Bazooka bubblegum, Gushers, and Sour Patch Kids.

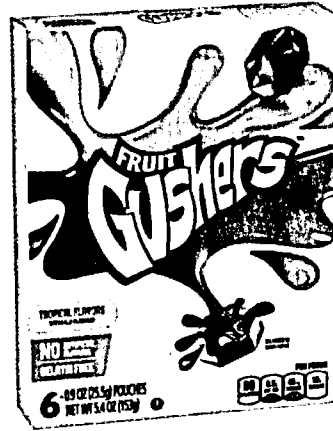
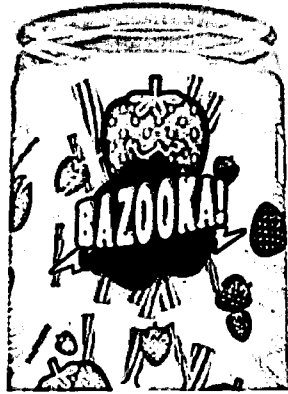
⁸ Letter from S.T. Jones to File at 2 (June 8, 1979), <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=mjxf0129>.

Direct eLiquid Flavor



Candy





9. Direct eLiquid also markets fruit-flavored soda flavors in packaging that resembles soda cans, which may lead children to drinking the e-liquid. While inhaling the aerosol generated from an e-liquid is unquestionably harmful to the

human body, e-liquids can be deadly when consumed in liquid form. Even exposure to liquid nicotine through skin contact can be toxic, because the nicotine is absorbed through the skin similar to a nicotine patch.⁹



10. Direct eLiquid 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, Direct eLiquid presents the nicotine concentration in its products as total volume: 3 mg or 6 mg. Direct eLiquid's packaging contains no information about what those volumes mean or how they compare to other nicotine products. Instead, Direct eLiquid's product descriptions merely boast the products' likeness to popular children's snacks.

⁹ See Trisha Koriath, *Liquid Nicotine Used in E-Cigarettes Can Kill Children*, American Academy of Pediatrics, Dec. 28, 2018, available at <https://www.healthychildren.org/English/safety-prevention/at-home/Pages/Liquid-Nicotine-Used-in-E-Cigarettes-Can-Kill-Children.aspx>.



Jam Monster Grape: Succulent purple grapes made into the famous jam that usually completes our peanut butter and bread creations. This time, however, it's smoothly swept over a homemade piece of buttered toast! Savory, sweet, satisfying.

75/25 VG/PG

- Select -

Quantity *

1

+ ADD TO CART

11. Many of Direct eLiquid'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%. Direct eLiquid'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. Direct eLiquid also creates an on-ramp for products specifically designed to hook children on the habit of vaping. Not only does Direct eLiquid sell products with high concentrations of nicotine, Direct eLiquid 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 products because of the flavors,¹⁰ and 81% of 12-17 year olds who use e-cigarettes began with a flavored version.¹¹

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.¹²

15. This lack of awareness and perception by kids is not surprising—and not their fault. The companies, like Direct eLiquid, selling e-liquids that come in apple juice boxes, complete with a plastic straw taped to the side, and in flavors replicating Fruit by the Foot and Sour Patch Kids confections are specifically and

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.

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>.

unlawfully targeting children and deceiving them about the highly addictive nature of nicotine e-liquid.

II. Direct eLiquid 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.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.

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.*

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

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 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, Direct eLiquid 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 Direct eLiquid 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 Direct eLiquid.

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

22. Direct eLiquid actively markets its products to minors, both on its own websites and on social media. Direct eLiquid'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.”¹⁴


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), Direct eLiquid uses candy-like flavors, popular children’s characters, cartoons, bright colors, and youth-friendly product names to promote its products to minors.

25. Direct eLiquid sells and has sold e-cigarette products in flavors designed to look and/or taste like Swedish Fish, Fruit Gushers, Butterbeer from Harry Potter, and various sodas. Direct eLiquid markets these products, typically through its social media pages or paid advertisements, by (a) selling products that look like actual candy popular among children, and (b) using images of cartoon characters.

26. Direct eLiquid 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



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/>.

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

 **DirectEliquid.com** ⋮
April 23, 2018 · 🌐

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27. 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

28. On information and belief, Direct eLiquid 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

¹⁵ *Jenssen & Walley, supra note 12.*

marketing channels that are predominately popular with young people, Direct eLiquid 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 1-28 are incorporated by reference as if they were set out at length herein.
2. Direct eLiquid, 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. Direct eLiquid'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 Direct eLiquid, 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 Direct eLiquid, its officers, directors, employees, and agents, and all those acting in concert with them, as appropriate;
3. Award civil penalties to the State from Direct eLiquid pursuant to N.C.G.S. § 75-15.2;
4. Disgorge Direct eLiquid'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