

## **TERRY**

14 CVS 12342

### SUPERIOR COURT OF NORTH CAROLINA, WAKE COUNTY

October 13, 2014

#### **Reporter**

2014 NC Sup. Ct. Pleadings LEXIS 98 \*

ROBBIE DEAN TERRY, CHRISTOPHER WAYNE COOK, JOSHUA MICHAEL EARNHARDT, KEVIN BARRINGER, BRIAN M. BLACK, BARRY NEAL BURNETTE, SCOTT CASNER, DEMETRIUS RAY CLARK, ROBERT REDELL DIAL, MALCOM EASON, GARY W. EDWARDS, A. J. GORDON, RICHARD HALL, DEREK HEINTZ, LLOYD COREY HUGHES, PAUL DANIEL HUGHES, ALAN MICHAEL HUMPHREY, ROBERT MITCHELL HUNT, STEPHEN HUNT, TULLY LANGLEY, CHARLES MACK LATHAM, JAMES KELVIN LOCKLEAR, JOE TRAVIS LOCKLEAR, JOHNY RAY LOCKLEAR, MICHAEL LOUKOS, SAMUEL E. MCLAWHORN, JERRY L. MURPHY, ROD MURPHY, NEKIME MATU OXENDINE, SCOTT RICHARDSON, KATHERINE ROBERTS, JACKIE ROSE, ERIC C. ROTEN, ERIC SCHWARTZ, B. M. SELLERS, JR., DANIEL T. SHARPE, BRADLEY D. SUDDUTH, COREY THOMPSON, JOSHUA S. VERNON, MICHAEL BAILEY, JONATHAN COCHRAN, KASEY CORNWELL, BLAKE FISHER, ANGELIS GENEAO, KATHRYN GENEAO, TERRY 6ILLISPIE, BRANDON SHERROD JOHNSON, MARK MELVIN, JONATHAN MILLER, KURT D. MILLS, FRANK ODELL, JONATHAN JASON SHERRILL, JASON STEWART, CHAD THOMAS WALKER, and BENJAMIN SHANE YOUNG, individually and on behalf of a class of similarly situated persons, Plaintiffs, v. STATE OF NORTH CAROLINA, PATRICK L McCRORY, Governor of the State of North Carolina, in his official capacity, JAIVIES ARTHUR "ART" POPE, State Budget Director, in his official capacity, JAIVIES G. DOLAN, Acting State Controller, in his official capacity, JANET COWELL, Treasurer of the State of North Carolina, in her official capacity, and FRANK L PERRY, Secretary, North Carolina Department of Public Safety, in his official capacity., Defendants.

**Type:** Pleading

#### **Counsel**

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**[\*1]** LAW OFFICE OF DAVID A. WIJEWICKRAMA  
David A. Wijewickrama, N.C. State Bar No. 30694,  
Waynesville, NC, CLONINGER, BARBOUR,  
SEARSON & JONES, PLLC, Fredericks. Barbour, N.C.  
State Bar No. 12118, W. Scott Jones, N.C. State Bar No.  
18262, Asheville, NC, Attorneys for Plaintiffs .

#### **Title**

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#### **AMENDED COMPLAINT**

#### **Text**

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#### **(Jury Trial Demanded)**

Plaintiffs assert claims, individually and on behalf of a class of similarly situated persons, by and through their undersigned counsel, as follows:

#### **I. PARTIES, SUBJECT MATTER, VENUE, AND DIVISION**

1. Plaintiffs bring this action on behalf of themselves and all other similarly situated State Troopers employed across the State by the State of North Carolina as members of the North Carolina State Highway Patrol.
2. This action arises from breaches of employment contracts between the State of North Carolina and Plaintiffs, North Carolina State Highway Patrol Troopers.
3. Plaintiff Robbie Dean Terry is a resident of Robeson County.
4. Plaintiff Christopher Wayne Cook is a resident of Cherokee County.
5. Plaintiff Joshua Michael Barnhardt is a resident of Cabarrus County.

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6. Plaintiff Kevin Barringer is a resident of Rowan County.
7. Plaintiff Brian [\*2] M. Black is a resident of Cleveland County.
8. Plaintiff Barry Neal Burnette is a resident of McDowell County.
9. Plaintiff Scott Casner is a resident of Craven County.
10. Plaintiff Demetrius Ray Clark is a resident of Robeson County.
11. Plaintiff Robert Redell Dial is a resident of Robeson County.
12. Plaintiff Malcom Eason is a resident of Cabarrus County.
13. Plaintiff A. J. Gordon is a resident of Clay County.
14. Plaintiff Gary W. Edwards is a resident of Avery County.
15. Plaintiff Richard Hall is a resident of Cleveland County.
16. Plaintiff Derek Heintz is a resident of Cabarrus County.
17. Plaintiff Lloyd Corey Hughes is a resident of Avery County.
18. Plaintiff Paul Daniel Hughes is a resident of Yancey County.
19. Plaintiff Alan Michael Humphrey is a resident of Robeson County.
20. Plaintiff Robert Mitchell Hunt is a resident of Robeson County.
21. Plaintiff Stephen Hunt is a resident of Robeson County.
22. Plaintiff Tully Langley is a resident of Perquimans County.
23. Plaintiff Charles Mack Latham is a resident of Cleveland County.
24. Plaintiff James Kelvin Locklear is a resident of Robeson County.
25. Plaintiff Joe Travis Locklear is a resident of [\*3] Robeson County.
26. Plaintiff Johnny Ray Locklear is a resident of Robeson County.
27. Plaintiff Michael Loukos is a resident of Mecklenburg County.
28. Plaintiff Samuel E. McLawhorn is a resident of Lenoir County.
29. Plaintiff Jerry L. Murphy is a resident of Sampson County.
30. Plaintiff Rod Murphy is a resident of Sampson County.
31. Plaintiff Nekime Matu Oxendine is a resident of Cumberland County.
32. Plaintiff Scott Richardson is a resident of Halifax County.
33. Plaintiff Katherine Roberts is a resident of Davidson County.
34. Plaintiff Jackie Rose is a resident of Mecklenburg County.
35. Plaintiff Eric C. Roten is a resident of Davie County.
36. Plaintiff Eric Schwartz is a resident of Union County.
37. Plaintiff B. M. Sellers, Jr., is a resident of Bladen County.
38. Plaintiff Daniel T. Sharpe is a resident of Johnston County.
39. Plaintiff Bradley D. Sudduth is a resident of Randolph County.
40. Plaintiff Corey Thompson is a resident of Johnston County.
41. Plaintiff Joshua S. Vernon is a resident of Stokes County.
42. Plaintiff Michael Bailey is a resident of Cleveland County.
43. Plaintiff Jonathan Cochran is a resident of Cherokee County.

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44. Plaintiff [\*4] Kasey Cornwell is a resident of Lincoln County. named in his official capacity.
45. Plaintiff Blake Fisher is a resident of Cabarrus County. 63. Defendant Cowell is the Treasurer of the State of North Carolina, and is named in her official capacity.
46. Plaintiff Angelis Geneao is a resident of Hertford County. 64. Defendant Perry is the Secretary of the North Carolina Department of Public Safety, and is named in his official capacity.
47. Plaintiff Kathryn Geneao is a resident of Hertford County. 65. The promises that are the subject of this action took place in the counties of residence of the Plaintiffs at the time they sought employment with the North Carolina State Highway Patrol, and in other counties. Upon information and belief, the promises that are the subject of this action were made in the majority of the counties in the State.
48. Plaintiff Terry Gillispie is a resident of Davidson County. 66. The breaches of contract that are the subject of this action took place in the counties of residence and counties of employment of the Plaintiffs. Upon information and belief, the breaches that are the subject of this action [\*6] took place in the majority of counties in the State.
49. Plaintiff Brandon Sherrod Johnson is a resident of Wake County. 67. Venue is proper in Wake County, pursuant to [N.C.G.S. § 1-82](#).
50. Plaintiff Mark Melvin is a resident of Person County. 68. The amount in controversy exceeds \$ 25,000, and the Superior Court is the proper division for trial, pursuant to [N.C.G.S. § 7A-243](#).
51. Plaintiff Jonathan Miller is a resident of Alamance County.
52. Plaintiff Kurt D. Mills is a resident of Wake County.
53. Plaintiff Frank Odell is a resident of Gaston County.
54. Plaintiff Jonathan Jason Sherrill is a resident of Forsyth County.
55. Plaintiff Jason Stewart is a resident of Person County.
56. Plaintiff Chad Thomas Walker is a resident of Rowan County.
57. Plaintiff Benjamin Shane Young is a resident of Mitchell County.
58. Defendant State of North Carolina has no immunity from this lawsuit, pursuant to [Smith v. State, 289 N.C. 303 \(1976\)](#) and its progeny.
59. Upon information and belief, the State of North Carolina has further waived any immunity it might otherwise have for some or all of Plaintiffs' claims by the [\*5] purchase of liability insurance which provides coverage for some or all of Plaintiffs' claims.
60. Defendant McCrory is the Governor of the State of North Carolina, and is named in his official capacity.
61. Defendant Pope is the State Budget Director, and is named in his official capacity.
62. Defendant Dolan is the acting State Controller, and is

## II. COMMON FACTS

69. Plaintiffs incorporate by reference the allegations of paragraphs 1-68 of their Amended Complaint above, as if fully set out herein, pursuant to the provisions of Rule 10 (c) of the North Carolina Rules of Civil Procedure.
70. Plaintiffs are employed as State Troopers by the North Carolina State Highway Patrol.
71. As an inducement to join the North Carolina State Highway Patrol and become State Troopers, Plaintiffs were promised by agents and employees of the State of North Carolina, acting in their official capacities within the course and scope of their employment, a set pay schedule. The set pay schedule included a promise that Plaintiffs would reach "top base pay" in a range of \$ 50,000 and above within six to seven years of employment.
72. Plaintiffs were promised by agents and employees of the State of North Carolina, acting in their official capacities and within the course and scope of their

employment, [\*7] that their pay would be increased on a regular, scheduled, graduated basis, so that they would reach "top pay" within six to seven years of employment.

73. The promises and inducements of Defendants referenced above were supported by valid consideration.

74. The graduated or set pay schedule described above and promised to Plaintiffs was contractual, and was not discretionary.

75. Plaintiffs relied to their detriments on the inducements and promises described above, by leaving and/or foregoing other employment, completing training, and serving as State Troopers.

76. Plaintiffs' retirement benefits are based on a state formula calculating an average of their highest-paid years of salary.

77. The inducements, promises and assurances described above and made to Plaintiffs included salary and benefits, including retirement benefits.

78. Plaintiffs have fully performed all of their duties under their contracts with the State of North Carolina.

79. Plaintiffs' rights to the promised pay, which they have earned by their labor, are vested.

80. Plaintiffs' rights to the promised "top base pay" to which they are now entitled are vested.

81. Plaintiffs' rights to retirement benefits [\*8] based on the pay, which they were promised, and to which they are entitled based on their service, are vested.

82. Since 2009, the State of North Carolina has failed to honor its promises to Plaintiffs, and has failed to pay Plaintiffs what they were promised for the labor that they have performed.

83. State Troopers are paid by the State every month. Each and every pay period since 2009 constitutes a separate obligation of the State to pay Plaintiffs the amounts promised.

84. Each and every paycheck received by Plaintiffs since 2009 constitutes a separate breach of contract by the State.

85. At no time has the State totally repudiated its obligations under its contracts with Plaintiffs. Instead, Plaintiffs have been told on numerous occasions by

representatives of the State to delay and wait for the State to address its failure to pay Plaintiffs what was promised.

86. At any time since 2009, the State could have performed its duties to Plaintiffs under its contracts with Plaintiffs.

87. Defendants' breaches have caused Plaintiffs and the other members of the proposed Class (as defined hereinafter) to endure financial hardship including, for some, eligibility for public assistance, [\*9] foreclosure, and inability to pay medical bills

88. Defendant State of North Carolina is liable as the employer of Plaintiffs, and as principal for its employees and agents who made promises to Plaintiffs.

89. Defendant McCrory, in his official capacity as Governor, has the duties set forth in [\*Article III, Section 5 of the North Carolina Constitution\*](#) to prepare and recommend to the General Assembly a comprehensive budget, to administer the budget enacted by the General Assembly, and to take care that the laws are faithfully executed. Defendant McCrory, in his official capacity, is liable for the breaches of promises to Plaintiffs by the agents and employees of the State of North Carolina.

90. Defendant Pope, in his official capacity as State Budget Director, is responsible for payment of the obligations of the State of North Carolina to State Troopers, and is liable for the breaches of promises to Plaintiffs by the agents and employees of the State of North Carolina.

91. Defendant Dolan, in his official capacity as acting State Controller, is responsible for payment of the obligations of the State of North Carolina to State Troopers, and is liable for the breaches of promises to [\*10] Plaintiffs by the agents and employees of the State of North Carolina.

92. Defendant Cowell, in her official capacity as Treasurer of the State of North Carolina, is responsible for payment of the obligations of the State of North Carolina to State Troopers, and is liable for the breaches of promises to Plaintiffs by the agents and employees of the State of North Carolina.

93. Defendant Perry, the Secretary of the North Carolina Department of Public Safety, in his official capacity, is responsible for payment of the obligations of the State of

North Carolina to State Troopers, and is liable for the breaches of promises to Plaintiffs by the agents and employees of the State of North Carolina.

94. Upon information and belief, funds sufficient to meet the obligations of the State to Plaintiffs described above have been budgeted, appropriated and available, but have not been spent by the State to fulfill its obligations to Plaintiffs.

### III. BREACH OF CONTRACT

95. Plaintiffs incorporate by reference the allegations of paragraphs 1-94 of their Amended Complaint above, as if fully set out herein, pursuant to the provisions of Rule 10 (c) of the North Carolina Rules of Civil Procedure. [\*11]

96. Defendants' conduct constitutes breach of contract with Plaintiffs.

97. As a direct and proximate result of Defendants' breaches of contract. Plaintiffs have been damaged by loss of pay and benefits, including retirement benefits.

98. Plaintiffs are entitled to recover damages from Defendants for all past, present and future losses resulting from Defendants' breaches of contract.

### IV. ALTERNATIVE CLAIMS FOR RELIEF-NORTH CAROLINA CONSTITUTION

99. Plaintiffs incorporate by reference the allegations of paragraphs 1-98 of their Amended Complaint above, as if fully set out herein, pursuant to the provisions of Rule 10 (c) of the North Carolina Rules of Civil Procedure.

100. In the alternative to the prior claim for relief, to the extent Defendants or any of them, are found to have sovereign or governmental (or other immunity) for claims brought by Plaintiffs herein, which is denied, then in that event, as a separate and distinct cause of action against Defendants, Plaintiffs sue for violation of their constitutional rights pursuant to the North Carolina Constitution, including without limitation:

1. Violation of Article I, Sec. § 18, on the ground the Defendants' acts [\*12] and omissions damaged the Plaintiffs without due course of law and/or without providing an adequate remedy at law and open access to the Courts; and.
2. Violation of Article I, Sec. § 19, on the ground the

Defendants' acts and omissions deprived the Plaintiffs of their property and privileges without due process of the law of the land and equal protection of the laws.

101. As a proximate result of the constitutional violations as alleged herein, the Plaintiffs were injured by Defendants as alleged above.

102. The Constitutional claims herein are pled as an alternative remedy should the Court find that sovereign or governmental (or other) immunity in any of its forms exist and, if it does exist, then in that event, Plaintiffs have no adequate remedy at law, and they assert constitutional violations pursuant to the laws of North Carolina.

### V. UNITED STATES CONSTITUTION CLAIMS

103. Plaintiffs incorporate by reference the allegations of paragraphs 1-102 of their Amended Complaint above, as if fully set out herein, pursuant to the provisions of Rule 10 (c) of the North Carolina Rules of Civil Procedure.

104. Any action by Defendants purporting to limit, alter, or eliminate [\*13] any obligation of the State under its contracts with Plaintiffs constitutes an impairment of obligation of contract, in violation of the Article I, Section 10 of the United States Constitution.

105. As a proximate result of the constitutional violations as alleged herein, the Plaintiffs were injured by Defendants as alleged above.

### VI. DECLARATORY JUDGMENT

106. Plaintiffs incorporate by reference the allegations of paragraphs 1-105 of their Amended Complaint above, as if fully set out herein, pursuant to the provisions of Rule 10 (c) of the North Carolina Rules of Civil Procedure.

107. Plaintiffs bring this action for a declaratory judgment pursuant to Article 26, Chapter 1, [N.C.G.S. 1-253](#) et seq. of the North Carolina General Statutes for all appropriate and available supplemental relief.

108. There is an actual, genuine, justiciable controversy between the parties hereto relating to the rights of the Plaintiffs and the obligations of the Defendants under Plaintiffs' contracts of employment.

109. This is a claim for declaratory relief with respect to the interpretation and enforcement of the Plaintiffs'



contracts of employment. This Court has jurisdiction over this claim [\*14] pursuant to [N.C.G.S. § 1-253](#).

110. Plaintiffs request that the Court declare the rights and obligations of the parties with respect to the issues set forth herein.

#### VII. SPECIFIC PERFORMANCE

111. Plaintiffs incorporate by reference the allegations of paragraphs 1-110 of their Amended Complaint above, as if fully set out herein, pursuant to the provisions of Rule 10 (c) of the North Carolina Rules of Civil Procedure.

112. Plaintiffs have at all times faithfully performed their duties as State Troopers and remain ready, willing and able to continue to perform all their duties under their contracts with the State of North Carolina.

113. Defendants have failed to perform their duties, and fulfill their promises to Plaintiffs.

114. In the alternative to the claims set forth above, Plaintiffs seek the remedy of specific performance; that the Court order Defendants to perform their obligations as promised to Plaintiffs.

#### VIII. ALTERNATIVE CLAIM FOR RELIEF- NEGLIGENT MISREPRESENTATION AND WAIVER OF IMMUNITY

115. Plaintiffs incorporate by reference the allegations of paragraphs 1-114 of their Amended Complaint above, as if fully set out herein, pursuant to the provisions of Rule 10 (c) [\*15] of the North Carolina Rules of Civil Procedure.

116. In the alternative to the claims set forth above, the promises, statements, and assurances of a set pay schedule described above made by representatives of the State of North Carolina to Plaintiffs were incorrect, were misrepresentations, and were made without reasonable care.

117. The representatives of the State of North Carolina making the promises, statements, and assurances to Plaintiffs owed a duty of care to the Plaintiffs.

118. Plaintiffs justifiably relied on the misrepresentations made to them regarding their pay by representatives of the State of North Carolina.

119. Plaintiffs relied on the misrepresentations made to them regarding pay to their detriment.

120. The negligence of the State's representatives alleged above is imputed to the State.

121. As a proximate result of the negligent misrepresentations of the State, Plaintiffs have suffered damages.

122. Upon information and belief, the State of North Carolina has waived any immunity it might otherwise have for this claim by the purchase of liability insurance.

#### IX. ALTERNATIVE CLAIM FOR RELIEF- NEGLIGENT MISREPRESENTATION BASED ON MINISTERIAL ACTS FOR WHICH [\*16] THERE IS NO IMMUNITY

123. Plaintiffs incorporate by reference the allegations of paragraphs 1-121 of their Amended Complaint above, as if fully set out herein, pursuant to the provisions of Rule 10 (c) of the North Carolina Rules of Civil Procedure.

124. The claims made in this Section IX are made in the alternative to the claims set forth above.

125. During their training. Plaintiffs were made promises, statements, and assurances regarding their pay by representatives of the State explaining their pay and benefits.

126. The promises, statements, and assurances of graduated or step pay increases referenced above made by representatives of the State of North Carolina to Plaintiffs during training were incorrect, were misrepresentations, and were made without reasonable care.

127. The functions being performed by representatives of the State making promises, statements, and assurances of a set pay schedule as described above during Plaintiffs' training were ministerial in nature.

128. Upon information and belief, the State employees making the promises, statements, and assurances of a set pay schedule as described above during Plaintiffs' training were not authorized to exercise [\*17] discretion, but were only authorized to perform the ministerial functions of informing Plaintiffs about their pay and benefits.

129. The representatives of the State of North Carolina making the promises, statements, and assurances to

Plaintiffs during training owed a duty of care to the Plaintiffs.

130. Plaintiffs justifiably relied on the misrepresentations made to them by representatives of the State of North Carolina during training.

131. Plaintiffs relied on the misrepresentations made to them regarding pay during training to their detriment.

132. The negligence of the State's representatives alleged above is imputed to the State.

133. Because the acts of the State's representatives referred to above were ministerial, there is no immunity for this claim.

134. As a proximate result of the negligent misrepresentations of the State, Plaintiffs have suffered damages.

#### X. CLASS CERTIFICATION

135. Plaintiffs incorporate by reference the allegations of paragraphs 1-134 of their Amended Complaint above, as if fully set out herein, pursuant to the provisions of Rule 10 (c) of the North Carolina Rules of Civil Procedure.

136. Upon information and belief, more than one hundred State [\*18] Troopers, and as many as several hundred State Troopers, were made the same promises as the named Plaintiffs, were not paid as contractually agreed, and have suffered damages, all in a similar manner to the named Plaintiffs.

137. The named Plaintiffs and the unnamed State Troopers referenced above constitute a class, as defined by Rule 23 (a) of the North Carolina Rules of Civil Procedure (sometimes referred to herein as the "Class.")

138. The named Plaintiffs and the unnamed members of the Class have a common interest in the same issues of law and fact, and those issues predominate over issues affecting only individual members of the class.

139. The persons constituting the Class are so numerous as to make it impracticable to bring them all before the Court.

140. The named Plaintiffs will fairly and adequately represent the interests of all members of the Class.

141. There is no conflict of interest between the named

and unnamed members of the Class.

142. A class action is a superior method of adjudicating the matters at issue.

143. A class action would permit the adjudication of numerous individual claims in one forum, would promote judicial efficiency, and would conserve [\*19] the resources of the parties and the Court.

144. The proposed class would consist of all Troopers hired by the State on or after July 1, 2002.

145. In addition to bringing this action on behalf of themselves individually. Plaintiffs move the Court for certification of the Class, pursuant to Rule 23 of the North Carolina Rules of Civil Procedure.

#### XI. MOTION FOR RULE 2.1 DESIGNATION

146. The number of Plaintiffs, the motion of Plaintiffs for Class Certification, the complexity of legal issues, the promotion of efficient administration of justice, and other factors which the Chief Justice may deem appropriate make this case suitable for designation as an exceptional civil case, pursuant to the provisions of Rule 2.1 of the General Rules of Practice.

147. Plaintiffs move the Court for recommendation to the Chief Justice that this case be designated as an exceptional civil case, pursuant to the provisions of Rule 2.1 of the General Rules of Practice, and for entry of such other orders as are appropriate.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray the Court as follows:

1. For recommendation to the Chief Justice that this case be designated [\*20] as an exceptional civil case pursuant to the provisions of Rule 2.1 of the General Rules of Practice, and for entry of such other orders as are appropriate;
2. For an order certifying the proposed Class, designating Plaintiffs as the named representatives of the Class, and designating the undersigned as Class counsel;
3. For an award to Plaintiffs and the Class for damages, including interest thereon, in the amount proven at trial;
4. For declaration of the rights of Plaintiffs and obligations of Defendants pursuant to the contracts of

employment of Plaintiffs and other members of the Class;

5. In the alternative, for an order requiring specific performance by the State of the employment contracts with Plaintiffs and the Class;

6. For an award of attorneys' fees and costs, as allowed by law;

7. For a trial by jury; and

8. For such other and further relief as this Court may deem just and proper.

This the 13th day of October, 2014.

LAW OFFICE OF DAVID A. WIJEWICKRAMA

/s/ [Signature]

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*Attorneys for Plaintiffs*

### **CERTIFICATE OF SERVICE**

THE UNDERSIGNED hereby certifies that the foregoing ***Amended Complaint*** on behalf of Plaintiffs was served upon all parties in this action, in conformity with the North Carolina Rules of Civil Procedure, by causing to deposit a copy of same in a postpaid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service, properly

addressed to the attorney(s) of record or the parties, as follows:

Marc Bernstein  
Special Deputy Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, NC 27602-0629

*Attorney for Defendants*

This the 13th day of October, 2014.

/s/ [Signature]

Frederick S. Barbour

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