

**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:  
BJ'S II, INC. d/b/a BJ'S II  
4315 PACIFIC HWY E  
FIFE, WA 98424-2612

LICENSEE

LICENSE NO. 088476-1S

LCB NO. 23, 626  
CONSOLIDATED WITH  
LCB NO. 23,503

OAH NO. 2009-LCB-0040

ORDER DENYING MOTION TO  
VACATE DEFAULT ORDER

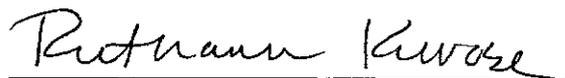
1. The Licensee, on September 21, 2010, served the Board with a Motion to Reopen and Vacate the Decision to Revoke License No. 088476-1S, along with supporting documents.
2. The Administrative Hearing in this case was set for April 15, 2010 before an Administrative Law Judge. The Licensee did not appear for the hearing, and does not allege that he called, or otherwise made any effort to request a continuance of the hearing date, either before the scheduled date and time, or at any time after the scheduled date and time. The Administrative Law Judge's Initial Order, finding the Licensee in default for failure to appear, was dated May 7, 2010, and served on the Licensee by mail. The Licensee did not request the default be vacated within seven days of the date of service, pursuant to RCW 34.05.440.
3. The Board's Final Order affirming the ALJ's Initial Order of Default was entered on June 9, 2010. The Order was served on the Licensee by mail, and included instructions to allow the Licensee to Petition for Reconsideration (within 10 days) or to appeal to Superior Court (within 30 days). The Licensee neither requested reconsideration nor appealed the order to Superior

Court. In fact, the Licensee made no contact with the Board until filing the instant Motion to Reopen and Vacate Order of Default.

4. The Licensee has not shown good cause for its failure to seek to vacate the Default Order prior to its request dated September 20, 2010. The Licensee's declaration that he "forgot" about the hearing, then went on an out of state trip three weeks later, does not show that he exercised due diligence in seeking to pursue his right to a hearing. Similarly, Licensee's manager does not assert that she was unavailable on the day of the hearing, and her vacation started two full weeks after the hearing date. Even if the Licensee's extended trip were found to be a valid excuse for not attending the hearing and not seeking to vacate the Initial Order of Default, the Licensee's Declaration states that his trip lasted from May 7 through June 10, 2010. The Board's Final Order was dated June 9, 2010, and served by mail, yet the Licensee apparently took no action to determine what his rights might be until after receiving a July 15, 2010 notice from the Tribe.
5. The Licensee's argument about the basis for the disqualifying convictions, and the assertion that no such conviction would occur today, due to the Cigarette Compact between the Puyallup Tribe and the State of Washington does not support the argument that the Licensee has a strong defense to the Board's action to revoke his license. The fact remains that the Licensee was convicted of offenses sufficient to total 12 criminal history points (not eight, as the Licensee asserts in his Declaration) and the convictions have not been overturned or vacated.
6. The Board declines to Reopen the case or to Vacate the Order of Default.

DATED this 28 day of September, 2010.

  
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Washington State  
Liquor Control Board

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September 29, 2010

Christopher J. Marston, Attorney for Licensee  
PO Box 1657  
Tacoma, WA 98401-1657

BJ's II, Inc. Licensee  
d/b/a BJ's II  
4315 Pacific Hwy E  
Fife, WA 98424-2612

Brian Considine, AAG  
GCE Division, Office of Attorney General  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100

**RE: Order Denying Motion to Vacate Default Order**  
**LICENSEE: BJ's II, Inc.**  
**TRADE NAME: BJ's II**  
**LOCATION: 4315 Pacific Hwy E, Fife, WA 98424-2612**  
**LICENSE NO. 088476-1S**  
**LCB HEARING NO. 23,626 consolidated with 23,503**  
**OAH NO. 2009-LCB-0040**  
**UBI: 601 521 458 001 0001**

Dear Parties:

Enclosed please find a Declaration of Service by Mail and a copy of the order in the above referenced matter.

If you have any questions, please contact me at (360) 664-1602.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin McCarroll", with a long horizontal line extending from the end of the signature.

Kevin McCarroll  
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Beth Lehman, Licensing Supervisor, WSLCB  
Tacoma Enforcement and Education Division, WSLCB

PO Box 43076, 3000 Pacific Ave. SE, Olympia WA 98504-3076, (360) 664-1602 [www.liq.wa.gov](http://www.liq.wa.gov)

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2  
3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

5 BJ'S II, INC.  
6 d/b/a BJ'S II  
7 4315 PACIFIC HWY E  
8 FIFE, WA 98424-2612

9 LICENSEE

10 LICENSE NO. 088476-1S

LCB NO. 23,626  
CONSOLIDATED WITH  
LCB NO. 23,503

OAH NO. 2009-LCB-0040

DECLARATION OF SERVICE BY  
MAIL

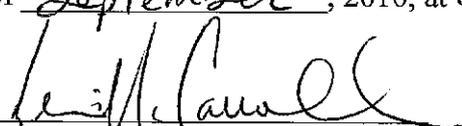
11 I certify that I caused a copy of the ORDER DENYING MOTION TO VACATE DEFAULT  
12 ORDER in the above-referenced matter to be served on all parties or their counsel of record by  
13 US Mail Postage Prepaid via Consolidated Mail Service for Licensees; by Campus Mail for the  
14 Office of Attorney General, on the date below to:

16 CHRISTOPHER J. MARSTON, ATTORNEY  
17 FOR LICENSEE  
18 PO BOX 1657  
TACOMA, WA 98401-1657

BRIAN CONSIDINE, ASSISTANT  
ATTORNEY GENERAL, GCE DIVISION  
OFFICE OF THE ATTORNEY GENERAL  
MAIL STOP 40100

19 BJ'S II, INC. LICENSEE  
20 d/b/a BJ'S II  
4315 PACIFIC HWY E  
FIFE, WA 98424-2612

21  
22 DATED this 29<sup>th</sup> day of September, 2010, at Olympia, Washington.

23  
24   
25 Kevin McCarroll, Adjudicative Proceedings Coordinator  
26

DECLARATION OF SERVICE BY  
MAIL

1

Washington State Liquor Control Board  
3000 Pacific Avenue SE  
PO Box 43076  
Olympia, WA 98504-3076  
(360) 664-1602



**Davies Pearson**  
ATTORNEYS AT LAW

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Michael G. Sanders  
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Bertil F. Johnson  
John C. Kouklis  
Larry E. Levy  
Claude M. Pearson  
Anne G. Peck  
Dennis G. Seinfeld  
(1940-2005)

\*ALSO LICENSED IN OREGON

September 20, 2010

*Via Legal Messenger*

Washington State Liquor Control Board  
Attn: Kevin Carroll  
3000 Pacific Avenue Southeast  
P.O. Box 43076  
Olympia, WA 98504-3076

Re: In the Matter of: BJ's II, Inc.  
LCB No. 23,626  
LCB No. 23,503  
OAH No. 2009-LCB-0040

**RECEIVED**  
SEP 21 2010  
LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION

Dear Mr. Carroll:

Enclosed please find the following documents:

1. Motion to Reopen and Vacate Order of Default and Final Order;
2. Declaration of David Turnipseed;
3. Declaration of Venita Lam;
4. Declaration of Herman Dillon, Sr.;
5. Declaration of Christopher J. Marston; and
6. Notice of Appearance.

If you should have any questions, please do not hesitate to contact me.

**WSLCB MS: 43075**

**SEP 21 2010**

*Letter to Kevin Carroll*  
*Page 2 of 2*  
*September 20, 2010*

Thank you.

Sincerely,

Christopher J. Marston

Enclosures

cc: Mary M. Tennyson  
Senior Assistant Attorney General  
1125 Washington St. SE  
P.O. Box 40110  
Olympia, WA 98504-0110

Brian Considine  
Assistant Attorney General  
1125 Washington St. SE  
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Olympia, WA 98504-0110

BJ's II, Inc.

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF )

BJ'S II, INC. )  
d/b/a BJ'S II )  
4315 PACIFIC HWY E )  
FIFE, WA 98424-2612 )

Licensee )

LICENSE NO. 088476-1S )

LCB NO. 23,626  
CONSOLIDATED WITH  
LCB NO. 23,503

OAH NO. 2009-LCB-0040

MOTION TO REOPEN AND  
VACATE THE DECISION TO  
REVOKE LICENSE NO.  
088476-1S

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COMES NOW the Licensee, BJ's II, Inc. d/b/a BJ's II, by and through its attorneys, Davies Pearson, P.C., and Christopher J. Marston, and the requests the following:

**I. RELIEF REQUESTED**

A Final Order of the Board was entered on June 9, 2010, in this matter, permanently revoking the liquor license privileges granted to BJ's II, Inc. d/b/a BJ's II, under License No. 088476-1S. BJ's II, Inc., respectfully requests that the Liquor Control Board reopen this matter, vacate the Order of Default and the Final Order, and reinstate

**MOTION TO REOPEN AND VACATE THE  
DECISION TO REVOKE LICENSE NO.  
088476-1S**

Page 1

**DAVIES PEARSON, P.C.**  
ATTORNEYS AT LAW  
920 FAWCETT -- P.O. BOX 1657  
TACOMA, WASHINGTON 98401  
TELEPHONE (206) 383-5461  
FAX (206) 572-3052

BJ's II's liquor license or remand this matter to the Administrative Law Judge for a new hearing on the merits.

## II. PROCEDURAL AND FACTUAL HISTORY

### a. History regarding BJ's II, Inc. and Its Liquor License:

BJ's II, Inc. ("BJ's"), the Licensee, is a Washington State corporation doing business on Puyallup Tribal land in Pierce County, Washington. Its sole corporate officer and owner is David Turnipseed who is also a member of the Puyallup Tribe. BJ's has been in business since 1986 and was incorporated in 1994. BJ's is commonly referred to as a smoke shop because it sells a wide variety of tobacco products to the public, including members and non-members of the Puyallup Tribe. Since July 28, 2006, BJ's has held a liquor license, and it has sold various alcoholic products from its store.

BJ's has been in compliance with the liquor laws of the State of Washington and has complied with its duties as a licensee. According to the Washington State Liquor Control Board Enforcement and Education Division ("WSLCB"), as of February 19, 2009, when it issued a Compromise Not Reached letter to Mr. Turnipseed, BJ's did not have any public safety violations and no conduct violations. In other words, it was an exemplary licensee compared to many businesses that have a Washington State liquor license.

Notwithstanding this record, the WSLCB issued to BJ's a Statement of Intent to Revoke Liquor License ("Statement"). The sole basis for the issuance of the Statement was because Mr. Turnipseed had received a felony conviction on August 29, 2007.

Under RCW 66.24.010(2) and WAC 314-07-040(1), this meant that Mr. Turnipseed had accumulated 8 criminal history points. Given that the accumulation of 8 criminal history points can be grounds for denial of a licensee's liquor license, the WSLCB moved to revoke BJ's license.

According to the documentation BJ's received from the WSLCB, it received an Administrative Violation Notice on December 23, 2008, which notified Mr. Turnipseed that it intended to cancel BJ's license as a result of the criminal conviction. Mr. Turnipseed attempted to resolve the matter with the WSLCB, including informing them of the circumstances surrounding his felony conviction, but the WSLCB refused to compromise the matter and sought cancellation of the license as the only agreeable resolution. As a result, Mr. Turnipseed requested an administrative hearing before an Administrative Law Judge.

An Amended – Administrative Violation Notice was served on BJ's on August 10, 2009, and a Complaint by the WSLCB was issued on August 25, 2009, to revoke BJ's license. A Statement of Intent to Revoke Liquor License was issued on February 11, 2010. A Request for Hearing, Response to Statement of Intent to Revoke was timely submitted by Mr. Turnipseed to the WSLCB. Mr. Turnipseed also submitted a Witness and Exhibit List on behalf of BJ's. A telephonic administrative hearing was scheduled for April 15, 2010, before Administrative Law Judge Mary Ellen Goodwin.

All along, BJ's and Mr. Turnipseed were actively pursuing administrative remedies available to BJ's with respect to the decision by the WSLCB to revoke BJ's license. Unfortunately, on April 15, 2010, Mr. Turnipseed was in meetings with his tax

advisors and the meetings went longer than expected, and he failed to remember the administrative hearing was scheduled for the same day and time. Not realizing he had missed the administrative hearing, he left on an extended trip out-of-state from May 7, 2010, through June 10, 2010. Venita Lam, BJ's manager, was also out of state from May 1, 2010, through May 21, 2010, in Hawaii. She was also out of the office from June 7, 2010, through July 6, 2010, because of the sale of seasonal fireworks.

With both Mr. Turnipseed and Ms. Lam out of the office for significant time periods immediately following the administrative hearing, they did not receive or review the correspondence from the Office of Administrative Hearings or the WSLCB. In addition, until the Puyallup Tribal Council contacted Mr. Turnipseed with a letter dated July 15, 2010, which was after the time period for moving to appeal or request reconsideration of the WSLCB's Final Order, Mr. Turnipseed and Ms. Lam did not realize the revocation of BJ's license could result in BJ's violating the Puyallup Tribe's Liquor Ordinance, and therefore, prohibit him from selling alcohol at BJ's.

Mr. Turnipseed also did not realize the State in its agreement(s) with the Puyallup Tribe for the issuance of gambling licenses had agreed not to use convictions for cigarette offenses as grounds for the denial of a gaming license, unless other extenuating factors existed. And, he did not realize that the Puyallup Tribal Council would support his position before the WSLCB.

**b. History regarding Mr. Turnipseed's Felony Conviction:**

These proceedings arose out of Mr. Turnipseed's felony conviction for trafficking in contraband cigarettes, i.e., untaxed cigarettes. However, the circumstances under

which Mr. Turnipseed received the felony conviction were unique. The Puyallup Tribe (the "Tribe") and the State of Washington had a longstanding dispute over whether the State should be allowed to force the Tribe and its members to collect the State's cigarette tax on cigarettes sold by members of the Tribe.

As explained in the Declaration of Hermon Dillon, Sr., the Tribe entered into a Cigarette Tax Agreement with the State of Washington (through its Department of Licensing) effective April 20, 2005. The negotiation of that Agreement took place off and on over a period of more than ten years. As the Agreement's Preamble indicates, the document's main purpose was to resolve a longstanding disagreement between the State and the Tribe over the taxation of cigarettes by the Tribe and members of the Tribe.

That dispute had gone on for more than thirty years and had resulted in constant litigation between the State and the Tribe and between the United States and Tribal members. The Agreement provides that retail cigarette sales made in compliance with the terms of the Agreement will not be deemed a violation of state law and that the State will not assert that such sales violate federal law. The Agreement also provides the State with, among other things, a previously unavailable way to insure that the applicable cigarette tax is collected on sales of cigarettes made to non-Indian customers.

The criminal prosecutions that took place as a result of activities before the Agreement went into effect are not in danger of being repeated. They resulted from the Tribal members' (and the Tribe's) strongly held belief that it was not properly respectful

of the Tribe's sovereign authority for the State to assert taxing authority over those businesses. These Tribal members were not and are not people inclined to break the law. They were individuals standing up for principles they believed strongly in.

Mr. Turnipseed was such an individual. And, the criminal conviction that Mr. Turnipseed received is not indicative of his ability to comply with the liquor licensing laws of the State of Washington.

### **III. STATEMENT OF ISSUES**

Should the WSLCB reopen and vacate the Order of Default and the Final Order of the Board, and reinstate BJ's liquor license or, in the alternative, schedule a new hearing date for BJ's appeal of the WSLCB's Complaint to revoke BJ's liquor license, given that there are special circumstances that warrant reopening this matter and vacating the Order of Default and the Final Order.

### **IV. EVIDENCE RELIED UPON**

BJ's relies on the records in this proceeding and on the Declaration of David Turnipseed, the Declaration of Venita Lam, the Declaration of Hermon Dillon, Sr, and the Declaration of Christopher J. Marston.

### **V. LEGAL ARGUMENT**

BJ's is requesting that the WSLCB reopen this proceeding and vacate the Order of Default and the Final Order of the Board. In addition, BJ's is requesting that the WSLCB either reinstate its liquor license or, in the alternative, remand this matter to the Administrative Law Judge for a new hearing for BJ's appeal to be heard on the merits.

**A. THIS PROCEEDING SHOULD BE REOPENED AND THE ORDER OF DEFAULT AND THE FINAL ORDER OF THE BOARD SHOULD BE VACATED.**

Under RCW 66.08.150, "The action, order, or decision of the board as to any denial of an application for the reissuance of a permit or license or as to any revocation, suspension, or modification of any permit or license shall be an adjudicative proceeding and subject to the applicable provisions of chapter 34.05 RCW." Pursuant to RCW 34.05, the WSLCB can adopt rules for its administrative hearings, but it has not adopted any rules addressing whether or not there are any remedies available to a licensee if they fail to timely move to vacate an order of default. RCW 34.05.440(3) provides that:

Within seven days after service of a default order under subsection (2) of this section, or such longer period as provided by agency rule, the party against whom it was entered may file a written motion requesting that the order be vacated, and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of that party, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

In this case, BJ's did not move to vacate the order of default within the seven (7) days, and it did not seek to have the WSLCB reconsider its Final Order of the Board ("Final Order"). However, there are sufficient reasons for why the WSLCB should reopen this proceeding and vacate the Order of Default and the Final Order.

In making a decision, it would be beneficial for the WSLCB to look at CR 60, which provides, in pertinent part, that:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:  
(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity

in obtaining a judgment or order;  
(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);  
(11) Any other reason justifying relief from the operation of the judgment.  
The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

CR 60(b)(1), (3), and (11). In the Department of Social & Health Services, for example, it has adopted a specific rule that allows a party to have an order vacated upon a showing of good cause. See, WAC 388-02-0300(2). While the WSLCB has not adopted an analogous rule, the WSLCB has the inherent authority to vacate the Order of Default and the Final Order and reviewing CR 60 to do so is appropriate under the circumstances.

Under CR 60, "Where a party moving to vacate a default judgment is able to demonstrate a strong or virtually conclusive defense to an opponent's claim, scant time is spent inquiring into the reasons which occasioned entry of the default provided the moving party's application is timely and the failure to properly appear in the action in the first instance was not willful." *Shepard Ambulance, Inc. et al. v. Helsell, Fetterman, et al.*, 95 Wn. App. 231, 242, 974 P.2d 1275 (1999). If BJ's does not have a legitimate defense to the WSLCB's charges, there is little point in addressing the reasons BJ's failed to appear for the hearing or move to vacate the Order of Default within seven (7) days or request reconsideration of the Final Order. Therefore, BJ's defenses to the claims will be addressed first. Then, the three provisions under CR 60 that are applicable to this case will be discussed.

1. **David Turnipseed's Felony Conviction should not be used as a Basis to Revoke BJ's Liquor License.**

The basis for the Final Order was that David Turnipseed, the President of BJ's, has a felony conviction. Under WAC 314-07040(1), "The board **will not normally** issue a liquor license to an applicant who has accumulated eight or more points as indicated below . . ." (Emphasis Added). This WAC provision then goes on to state that a person with a felony conviction accumulates 12 points. By its plain language, WAC 314-07040(1), provides that there may be circumstances that are unusual or abnormal which would justify the issuance of a liquor license to somebody with a felony conviction. Ultimately, the WSLCB's purpose in proceeding with canceling or suspending a liquor license is to protect the public health, safety and morals from imprudent, improper, and/or unlawful actions of licensees in the exercise of the privilege conferred upon them. *See, Jow Sin Quan, et al. v. Washington State Liquor Control Board*, 69 Wn.2d 373, 382, 418 P.2d 424 (1966).

The main purpose of the WSLCB was not served in this case when the WSLCB revoked BJ's license. While Mr. Turnipseed did have a felony conviction that resulted in him accumulating 12 points, the felony conviction arose out of a genuine dispute between the Tribe and the State of Washington over the taxation of the sale of cigarettes. This dispute is described in the declaration of Herman Dillon, Sr. In Mr. Dillon's declaration, he also describes how the Tribe and the State of Washington resolved the dispute by entering into a written Cigarette Tax Agreement ("Agreement"), and how the Agreement has operated properly since its provisions took effect.

The actions Mr. Turnipseed was accused of committing that allegedly violated the law are not in danger of being repeated. The activities Mr. Turnipseed was accused of committing took place before the Agreement was entered into, so Mr. Turnipseed did not have the benefit of the Agreement. It would be a different matter had Mr. Turnipseed been charged for actions he took after the Agreement was entered into, but this did not happen. The goal of the WSLCB is to protect the public from licensees that are unfit to hold the license and properly comply with the laws regarding the sale of alcohol, which would necessarily endanger the public.

Where Mr. Turnipseed was convicted of a felony that was directly related to a dispute between two sovereign governments, the felony is not indicative of Mr. Turnipseed's fitness to hold a liquor license by himself or through BJ's. While a felony may be indicative of a person's unfitness to hold a liquor license under normal circumstances, these are not normal circumstances. The language in WAC 314-07040(1) implies that there may be unusual circumstances where it would not be appropriate to deny a liquor license to an applicant with a felony. In this case, clearly the circumstances under which Mr. Turnipseed received his felony are unusual. And, they justify the WSLCB departing from its normal course of action because Mr. Turnipseed's felony conviction is not indicative of his ability to properly hold a liquor license nor is it indicative of a threat to the public for BJ's to hold such a license.

In fact, as of as of February 19, 2009, when it issued a Compromise Not Reached letter to Mr. Turnipseed, BJ's did not have any public safety violations and no conduct violations. Its liquor license was originally issued on July 28, 2006. For all

intents and purposes, BJ's has conducted itself in an appropriate manner with respect to its liquor license and has complied with the State's rules and regulations pertaining to licensees. Other than the fact that Mr. Turnipseed has a felony conviction, there is no justification for revoking BJ's liquor license. The felony conviction he received does not support a finding by the WSLCB that allowing BJ's to retain its liquor license would endanger the public.

Finally, while not binding on the WSLCB, in its agreement with the Tribe for the issuance of gambling licenses, the State of Washington has agreed not to use convictions for cigarette offenses as grounds for the denial of a gaming license, unless other extenuating factors existed. It states in pertinent part that:

Notwithstanding anything herein to the contrary, in the absence of other violations, it shall not be automatic grounds for revocation, suspension or denial for an Indian from a federally recognized Indian tribe to have been charged and convicted of the following non-gambling related offenses, the occasion of which occurred prior to Supreme Court rulings on the subject: (1) fishing or hunting offenses; (2) cigarette, fireworks or alcohol sales offenses . . . In the absence of other violations, these Indian individuals shall not be barred solely as a result of such activities from certification.

See, Declaration of David Turnipseed, Ex. B. Obviously, there is a unique relationship between the Tribe, its members, and the State as a result of the Tribe and the State being two sovereign entities. Because of this relationship, it is apparent the State has acknowledged that not all offenses committed by an Indian from the Tribe or, for that matter, another federally recognized Indian tribe, should be considered in the same manner that an offense committed by a non-member of the Tribe would be considered.

Of course, one of the primary reasons being exactly what was set forth previously and in the declarations submitted with this motion. That is, that some offenses committed by members of the Tribe arise out of genuine, good faith disputes between the power and authority of the Tribe versus the State of Washington to regulate certain matters. Under these circumstances, BJ's liquor license should not have been revoked as a result of Mr. Turnipseed's felony conviction, which arose out of such a dispute. Because BJ's has demonstrated a strong or virtually conclusive defense to the WSLCB's action to revoke its license, less emphasis should be placed on the reasons for why BJ's failed to move to vacate the Order of Default or request review of the Final Order because it is evident that the failure to do so was not willful.

2. **Mistake, Inadvertence, Surprise, Excusable Neglect or Irregularity in Obtaining a Judgment or Order.**

Nevertheless, the reasons will be discussed, and the applicable provisions of CR 60 will be applied. The first provision that justifies reopening and vacating the Order of Default and the Final Order is under CR 60(b)(1). It provides that a judgment or order may be vacated if it was obtained as a result of mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining the judgment or order. CR 60(b)(1).

Here, BJ's was mistaken in when the hearing was scheduled for. Mr. Turnipseed and Ms. Lam both failed to realize BJ's had missed the hearing date. Both of them were then out-of-town for extended periods of time and did not realize that they had missed the original hearing or the due date to move to vacate the Order of Default. Upon her return, Ms. Lam, who is the manager for BJ's, was managing firework sales

leading up to the Fourth of July holiday, and while Mr. Turnipseed is the President, he does not manage the day-to-day operations of BJ's.

Up until BJ's failure to appear for the telephone hearing, it had timely complied with all the deadlines to dispute the WSLCB's decision to proceed with revoking its license. It had timely requested a settlement conference with the WSLCB. When this failed, it timely requested an administrative hearing. It then timely submitted its witness list for the administrative hearing. Unfortunately, there was a mistake by BJ's in properly noting the date for the telephone hearing. This was not on purpose but was inadvertent on the part of BJ's.

This is similar to other cases in which the courts have vacated judgments or orders. For example, in *Calhoun v. Merritt*, 46 Wn. App. 616, 621, 731 P.2d 1094 (1986), the court vacated a default judgment when the defendant believed his insurer was already dealing with opposing counsel, and he misunderstood what he was supposed to do after he was served with the complaint. In *Norton v. Brown*, 99 Wn. App. 118, 992 P.2d 1019 (1999), a similar situation occurred where a default judgment was entered against the defendant as a result of an automobile accident. The defendant's insurance company had been handling settlement discussions with the plaintiff's counsel prior to the lawsuit being filed and knew of the impending lawsuit. However, when the defendant was served with the summons and complaint, he failed to notify his insurer, the insurer did nothing, and the plaintiff entered an order of default and default judgment, which was ultimately vacated by the *Norton* court.

Even though the factual circumstances are not exactly the same, there was a mistake on the part of BJ's in determining when it needed to appear for the telephonic hearing and in determining that it needed to take further action to protect its liquor license. Both Mr. Turnipseed and Ms. Lam, the individuals responsible for management of BJ's had left to go out of town shortly after the telephonic hearing was held. Then, upon their return, Mr. Turnipseed and Ms. Lam did not realize that they needed to respond to the WSLCB. It is also clear that Mr. Turnipseed was mistaken in his understanding of the repercussions of the WSLCB's decision. Until he received the July 15, 2010, letter from the Tribe, which was after the deadline for appealing or requesting reconsideration of the Final Order, he did not realize the revocation of BJ's liquor license through the WSLCB would also result in the Tribe prohibiting BJ's from selling alcohol.

As a policy matter, our Supreme Court has stated that default judgments are not favored because "it is the policy of the law that controversies be determined on the merits . . ." *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999), quoting, *Dioughy v. Dioughy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960). A court's decision to vacate a default judgment is guided by equitable principles. *Id.* Where BJ's was mistaken as to the time in which it needed to appear and respond to the WSLCB's actions, and the necessity for it to respond, there was excusable neglect on BJ's for failing to do so. BJ's has a valid, if not conclusive, defense to the WSLCB's decision to revoke its liquor license, and it has moved within a reasonable time to request that the

Order of Default and Final Order be vacated. BJ's should be afforded the opportunity to present its defenses and have them determined on the merits, not by default.

3. **Newly Discovered Evidence which by Due Diligence could not have been Discovered in time to move for a New Trial under Rule 59(b).**

The second provision under CR 60 that applies is that BJ's discovered evidence that it could not have discovered by due diligence in time to move for a new trial under rule 59(b) or, in this case, in time to move for reconsideration of the WSLCB's Final Order. See, CR 60(b)(3).

While Mr. Turnipseed was aware of the circumstances surrounding his felony conviction and was aware of the Cigarette Tax Agreement, he was not aware that the Tribe would support his position. After the WSLCB issued its Final Order, and after the time period for appealing the Final Order or requesting reconsideration of it expired, BJ's received a letter from the Tribe that informed him that the Tribe would not allow BJ's to continue selling alcohol products as a result of the WSLCB's decision to revoke its license. The letter was sent out on July 15, 2010, see, Dec. of Turnipseed, Ex. A., which was after the deadline for appealing or requesting reconsideration of the WSLCB's Final Order. Thereafter, Mr. Turnipseed had a meeting with the Tribal Counsel, and he informed them of the reason for the revocation of BJ's liquor license.

Based on this meeting, and the circumstances surrounding the revocation of BJ's liquor license, the Tribal Council agreed to assist BJ's with attempting to have the decision of the WSLCB reversed. They agreed to do so by having the Chairman of the Tribal Council, Herman Dillon, Sr., submit his declaration on behalf of BJ's. As

previously discussed, Mr. Dillon's declaration sets forth the reasons why the Tribal Council is supportive of BJ's request for its liquor license to be restored. Mr. Dillon makes it clear that the Tribal Council does not believe it is equitable to base the revocation solely on the grounds that Mr. Turnipseed received a felony conviction as a result of the sale of untaxed cigarettes prior to the Agreement.

In addition, BJ's was not aware of the gaming license agreement that was reached between the State and the Tribe. See, Dec. of Lam, Pg. 2. As discussed earlier, the gaming license agreement provides further support for BJ's position that the revocation of its liquor license was improper. It demonstrates special circumstances surround certain criminal convictions received by tribal members, and why those convictions should not be used as the sole basis for denying a license from the State.

Because this evidence was not available to BJ's prior to the WSLCB's decision, this matter should be reopened, and BJ's should be allowed to present this evidence in support of its defense.

4. **Any other Reason Justifying Relief from the Operation of the Judgment.**

Finally, the third provision under CR 60 that is applicable is that there are other reasons justifying relief from the Order of Default and the Final Order. CR 60(b)(11) grants the court discretion to vacate an order for "any other reason justifying relief from the operation of the judgment." *Furrow v. Furrow*, 115 Wn. App. 661, 673, 63 P.3d 821 (2003). Despite its broad language, the use of CR 60(b)(11) should be reserved for situations involving extraordinary circumstances not covered by another section of CR

60(b). *Id.* Furthermore, those circumstances must relate to “irregularities extraneous to the action of the court or questions concerning the regularity of the court’s proceedings.” *Id.* at 673-674.

In *Furrow*, for example, the court decided to vacate an order that terminated the parental rights of a parent when the order had been improperly entered by the lower court. It also found that because the circumstances under which the rights of the parent had been terminated had broader implications than to the parent, and also raised serious public policy concerns, it was appropriate to vacate the order under CR 60(b)(11). Likewise, in this case, the WSLCB’s officers that investigated this matter were aware of the circumstances under which Mr. Turnipseed received his felony conviction. They knew that he had been convicted of a felony resulting from the sale of cigarettes without paying Washington state taxes on those cigarettes and should never have filed the Complaint in the first place. The Indictment and Mr. Turnipseed’s criminal history was part of the record in this matter, but the WSLCB still revoked BJ’s license.

Moreover, the decision by the WSLCB impacts not only BJ’s and Mr. Turnipseed, but it impacts all members of any federally recognized, Washington State Indian tribal member that may have been convicted of a felony under similar circumstances. It is a decision that did not and does not recognize the special circumstances under which Mr. Turnipseed received the felony conviction. It also does not respect the special relationship that the State and the Tribe have vis-à-vis their status as sovereign entities.

While the Tribe acknowledged in its letter to Mr. Turnipseed that it would not allow BJ's to sell alcohol while its license was revoked, Mr. Dillon's declaration makes it clear that the Tribal Council does not believe the revocation of BJ's license as a result of his felony conviction was appropriate or fair nor would it be fair to revoke any Tribal member's liquor license under similar circumstances.

For these unique reasons, the WSLCB should reopen and vacate the Order of Default and its Final Order.

## VI. CONCLUSION

A default judgment [or order] is normally viewed as proper only when the adversary process has been halted because of an essentially unresponsive party. See, *Norton v. Brown*, 99 Wn. App. 118, 126, 992 P.2d 1019 (1999).<sup>1</sup> In this case, BJ's was not unresponsive. Since the first Administrative Violation Notice was issued to BJ's on or about December 31, 2008, BJ's has disputed the WSLCB's decision to revoke its liquor license, and it acted diligently in pursuing its defenses. The inadvertent mistakes it made in disputing the action since April, 2010, should not preclude BJ's from having this matter reopened and the Order of Default and Final Order vacated. This is especially true due to the unique circumstances under which Mr. Turnipseed received his felony conviction. Equity weighs in favor of the WSLCB granting the relief requested

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<sup>1</sup> In *Norton*, after stating this principal, it went on to state that, "This is not the case where Mr. Brown completely failed to respond to Mr. Norton's request for compensation for his injuries. Nor had the adversary process ground to a halt due to Mr. Brown's intransigence. Mr. Brown's insurance company negotiated with Mr. Norton for more than a year in trying to reach a settlement agreement. It was only when the insurer's final offer was deemed unacceptable that Mr. Norton filed his complaint for damages in court. This being the case, Mr. Norton should have understood that Mr. Brown clearly intended to defend the action." *Norton*, 99 Wn. App. at 126.

by Mr. Turnipseed and no prejudice would result to the WSLCB as a result of such a decision.

BJ's would, therefore, respectfully request that this matter be reopened, that the Order of Default and Final Order be vacated, and that BJ's liquor license be reinstated or this matter remanded for a new hearing before the Administrative Law Judge.

Dated this 20<sup>th</sup> day of September, 2010.

DAVIES PEARSON, P.C.



Christopher J. Marston, WSB #30571  
Attorneys for Licensee

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF	)	
	)	
BJ'S II, INC.	)	<b>LCB NO. 23,626</b>
d/b/a BJ'S II	)	<b>CONSOLIDATED WITH</b>
4315 PACIFIC HWY E	)	<b>LCB NO. 23,503</b>
FIFE, WA 98424-2612	)	
	)	<b>OAH NO. 2009-LCB-0040</b>
Licensee	)	
	)	<b>DECLARATION</b>
LICENSE NO. 088476-1S	)	<b>REGARDING</b>
	)	<b>FACSIMILE</b>
	)	<b>SIGNATURE</b>

I, KATHY KARDASH, assistant to Christopher Marston declare under penalty of perjury under the laws of the State of Washington, that the facsimile document attached to this declaration titled, Declaration of David Turnipseed, consisting of sixteen (16) pages including this declaration page, is a complete and legible facsimile that I have examined personally and that was received by me via FAX at the following number: 253-572-3052.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge information and belief.

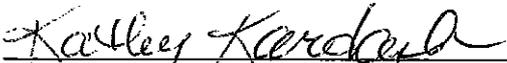
**DECLARATION REGARDING FACSIMILE  
SIGNATURE**

Page 1

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**DAVIES PEARSON, P.C.**  
ATTORNEYS AT LAW  
920 FAWCETT -- P.O. BOX 1657  
TACOMA, WASHINGTON 98401  
TELEPHONE (206) 383-5461  
FAX (206) 572-3052

Signed at Tacoma Washington this 20<sup>th</sup> day of September, 2010.

  
\_\_\_\_\_  
KATHY KARDASH  
Legal Assistant

**DECLARATION REGARDING FACSIMILE  
SIGNATURE**

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BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF	)	
	)	
BJ'S II, INC.	)	<b>LCB NO. 23,626</b>
d/b/a BJ'S II	)	<b>CONSOLIDATED WITH</b>
4315 PACIFIC HWY E	)	<b>LCB NO. 23,503</b>
FIFE, WA 98424-2612	)	
	)	<b>OAH NO. 2009-LCB-0040</b>
Licensee	)	
	)	<b>DECLARATION OF</b>
LICENSE NO. 088476-1S	)	<b>DAVID TURNIPSEED</b>
	)	
	)	

---

I, David Turnipseed, declare:

I am over the age of eighteen. I am competent to testify to the matters contained herein and make this Declaration, based upon personal knowledge.

I. I am the sole shareholder and officer of BJ's II, Inc., d/b/a BJ's II ("BJ's"). I am also a member of the Puyallup Tribe.

II. BJ's II, Inc. ("BJ's"), the Licensee, is a Washington State corporation doing business on Puyallup Tribal land in Pierce County, Washington. BJ's has been in business since 1986 and was incorporated in 1994. BJ's is commonly referred to as a smoke shop because it sells a wide variety of tobacco products to the public,

including members and non-members of the Puyallup Tribe. Since July 28, 2006, BJ's has held a liquor license, and it has sold various alcoholic products from its store.

III. Throughout this time BJ's has been in compliance with the liquor laws of the State of Washington and has complied with its duties as a licensee. According to the Washington State Liquor Control Board Enforcement and Education Division ("WSLCB"), as of February 19, 2009, when it issued a Compromise Not Reached letter to BJ's, BJ's did not have any public safety violations and no conduct violations. In other words, it was an exemplary licensee compared to many businesses that have a Washington State liquor license.

IV. Nevertheless, BJ's received from the WSLCB an Administrative Violation Notice on December 23, 2008. The sole basis for the issuance of the Notice was because I had received a felony conviction on August 29, 2007. Under RCW 66.24.010(2) and WAC 314-07-040(1), this meant that I had accumulated 8 criminal history points. As such, given that the accumulation of 8 criminal history points can be grounds for denial of a licensee's liquor license, the WSLCB moved to revoke BJ's license.

V. The criminal conviction arose out of my involvement in a dispute between the Puyallup Tribe and the State of Washington over the taxation of cigarettes sold on tribal land. The felony was a result of alleged trafficking in contraband cigarettes and the acts complained of occurred prior to 2005. Other tribal members besides myself were charged with trafficking in contraband cigarettes. As a result of the enforcement actions taken against myself and other tribal members, and as a result of the confusion

**DECLARATION OF DAVID TURNIPSEED**

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between federal, state, and tribal law regarding the tax to be imposed on cigarettes sold on tribal land and by tribal members, the Puyallup Tribe entered into a Cigarette Tax Agreement ("Agreement") with the Washington State Department of Revenue on or about April 20, 2005.

VI. The Agreement resolved the long-standing disagreement between the Tribe and the State and has allowed the Puyallup Tribe, its members, and the State to proceed forward with a clear understanding of how the taxation of the sale and distribution of cigarettes would occur by tribal members. Prior to this Agreement, tribal members, such as myself, did not have a clear understanding of how the sale and distribution of cigarettes were to be handled vis-à-vis state and tribal law. As stated, this unfortunately resulted in criminal charges being brought against me and other tribal members, but these charges were based on alleged actions taken by myself and others prior to the 2005 Agreement.

VII. Prior to and since this criminal conviction, I have never been convicted of a felony. Because of the circumstances surrounding my conviction, i.e., that it was an issue between the Puyallup Tribe and the State over who had authority to impose taxes on cigarettes that led to my conviction, I attempted to resolve the matter with the WSLCB, but the WSLCB refused to compromise the matter and sought cancellation of the license as the only agreeable resolution. Under the circumstances, I believed this was unfair to me and BJ's II, and I requested an administrative hearing before an Administrative Law Judge. It was unfair because, as stated, this was not a felony that arose out of any criminal intent on my part. Instead, at the time, I had a genuine and

**DECLARATION OF DAVID TURNIPSEED**

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good faith belief that the State did not have the authority to regulate the sale of cigarettes on tribal land, and the Agreement clearly shows that there was an ongoing dispute between the Tribe and the State prior to 2005.

VIII. From my review of the paperwork that BJ's II received, an Amended – Administrative Violation Notice was served on BJ's on August 10, 2009, which was approximately six months after the initial Notice was provided to BJ's, and a Complaint by the WSLCB was issued on August 25, 2009, to revoke BJ's license. A Statement of Intent to Revoke Liquor License was issued on February 11, 2010. A Request for Hearing, Response to Statement of Intent to Revoke was timely submitted by myself to the WSLCB. I also submitted a Witness and Exhibit List on behalf of BJ's. A telephone, administrative hearing was scheduled for April 15, 2010, before Administrative Law Judge Mary Ellen Goodwin.

IX. All along I was actively pursuing administrative remedies available to BJ's with respect to the decision by the WSLCB to revoke BJ's license. Unfortunately, on April 15, 2010, I was in meetings with my tax advisors and the meetings went longer than expected, and I failed to remember the administrative hearing was scheduled for the same day and time. Not realizing I had missed the administrative hearing, I left on an extended trip out-of-state from May 15th, 2010, through June 10th, 2010. Venita Lam, BJ's manager, was also out-of-state from May 1, 2010, through May 21, 2010, in Hawaii. She was also out of the office from June 7, 2010, through July 6, 2010, because of the sale of seasonal fireworks.

X. With both of us out of the office for significant time periods immediately following the administrative hearing, we did not receive or review the correspondence from the Office of Administrative Hearing or the WSLCB and did not realize that if we failed to contact the WSLCB that BJ's license would be permanently revoked. In addition, until the Puyallup Tribal Council contacted me about the WSLCB's decision, attached hereto as **Exhibit A** is a true and correct copy of the letter I received from the Puyallup Tribe, which was after the time period for moving to appeal or request reconsideration of the WSLCB's Final Order, neither myself or Ms. Lam realized the revocation of BJ's license could result in BJ's violating the Puyallup Tribe's Liquor Ordinance, and therefore, prohibit it from selling alcohol at BJ's.

XI. In addition, I did not realize the State in its agreement with the Puyallup Tribe for the issuance of gambling licenses had agreed not to use convictions for cigarette offenses as grounds for the denial of a gaming license, unless other extenuating factors existed, which I believe has applicability to this matter. Attached hereto as **Exhibit B** is a true and correct copy of pertinent portions of the agreement. And, I did not realize that the Puyallup Tribal Council would support me in my request that the WSLCB not revoke my liquor license until after I had met with the Tribal Council to discuss the WSLCB's decision to revoke BJ's license, which was only approximately two weeks ago.

**DECLARATION OF DAVID TURNIPSEED**

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I declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Executed at Tacoma, Washington on this 20 day of September, 2010.

  
\_\_\_\_\_  
DAVID TURNIPSEED

**DECLARATION OF DAVID TURNIPSEED**

Page 6

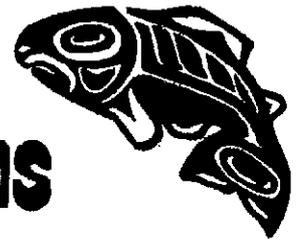
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# **EXHIBIT A**



# Puyallup Tribe of Indians



July 15, 2010

David Turnipseed  
BJ's II Smokeshop  
4315 Pacific Hwy. E.  
Fife, WA 98424

Re: BJ's II, Inc.  
Liquor License

Dear Mr. Turnipseed:

I am writing with notification that BJ's II, Inc., d/b/a BJ's II at 4315 Pacific Hwy E., Fife, Washington, License 088476, must immediately cease any and all sales of liquor in any form to avoid violation of Section 3.08.060 of the Puyallup Tribe's Liquor Ordinance. (In case you are not aware of this new source of information, the official version of the Tribal codes and ordinances is found on the Tribe's website, [www.puyallup-tribe.com](http://www.puyallup-tribe.com), under a link labeled "Tribal Laws.")

This action is based on a ruling from the Washington State Liquor Board dated June 9, 2010, *In the Matter of: BJ's II, Inc.*, LCB Nos. 23,626 and 23,503, a copy of which the Tribe recently received. That ruling indicates that the business's Washington liquor license was terminated effective July 9, 2010.

Section 3.08.060 provides that:

Tribal authorized liquor transactions shall comply with Washington State liquor law standards to the extent required by 18 U.S.C. 1161.

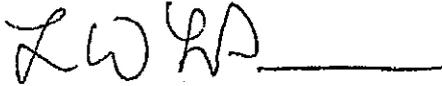
As you know, 18 U.S.C. §1161 is a federal statute that has been interpreted by the United States Supreme Court to require that a tribe or tribal member have both a tribal and a state liquor license to avoid violation of federal law. Without a state liquor license, sales of liquor by your business would be in violation of Washington State liquor law standards and therefore in violation of Section 060 of the Tribe's Liquor Ordinance.

As a result of these events, the Tribe will consider any sales of liquor by BJ's II, Inc., that take place after July 15, 2010, to be in violation of Tribal law. As you know, the penalty for violation of the Tribe's Liquor Ordinance is found in Section 3.08.110 of that Ordinance.

David Turnipseed  
July 15, 2010  
Page 2  
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Feel free to call Sheri Davis if you have any questions about this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "LW LaPointe", followed by a horizontal line.

Lawrence W. LaPointe  
Vice-Chairman  
Puyallup Tribal Council

Sheri Davis,  
Tribal Administrator

# **EXHIBIT B**

not satisfied the conditions, any resulting dispute will be resolved through the dispute resolution procedures set forth in Section XII.B.3.b. of this Compact. An increase in the number of gaming stations, hours of operation, or wager limits beyond that initially authorized during "phase one" of the Class III gaming operations shall be conditioned upon the following criteria:

1. There have been no violations of the provisions of the Compact that have resulted in sanctions imposed by the Federal District Court.

2. There have been no violations of the Compact which are substantial or would be deemed material due to repetition.

3. There have been no material adverse impacts on the public safety or welfare of the surrounding communities in the nature of criminal activities directly related to the operations of the Class III gaming facility.

4. The Tribal Gaming Agency has developed a program of regulation and control demonstrating a level of proficiency sufficient to protect the integrity of the tribal gaming operation, which includes the hiring of trained Tribal Gaming Agents, an independent management and reporting structure separate from that of the Gaming Facility, a system for the reporting of Compact violations, and a consistent presence within the Gaming Facility.

R. Renegotiation/Amendments Moratorium. Section III. F., I., J. and K. will not be subject to renegotiation or amendment until January 26, 1998, unless one of the following occurs: (1) the laws of the State are amended, expanding gaming beyond that which is now allowed under the terms of this Compact; (2) a State or Federal court within the State of Washington or a Federal court interpreting the laws of the State of Washington issues a final and unappealable decision permitting participation in a gaming activity that according to the State's position was not authorized for any purpose by any person, organization, or entity at the time this Compact was executed or not authorized by this Compact; (3) the State compacts or otherwise there is authorized any other tribal or non-tribal gaming facility west of the Cascade Mountains to possess greater levels of wagering, hours of operation, size and/or scope of Class III gaming activities, than authorized by the provisions of this Compact; or (4) another tribe East of the Cascade Mountains obtains, through a Compact approved by the Secretary of the Interior (or procedures approved by the Secretary in lieu of a Compact under 25 U.S.C. 2710(d)(7)(B)(vi)) or an alternative provision under any successor act to IGRA), greater levels of wagering, hours of operation, size and/or scope of Class III gaming activities, than authorized by the provisions of this Compact and the Tribe can demonstrate that such levels have resulted in an adverse economic impact on the Class III gaming operation; Provided, that the Tribe shall not have to demonstrate an adverse economic impact on its Class III gaming operation if the scope of Class III gaming activities is expanded to include the use of any gaming devices, including electronic facsimiles of Class II or Class III gaming, not already authorized by this Compact.

#### IV. LICENSING AND CERTIFICATION REQUIREMENTS

A. Gaming Facility. The gaming facility authorized by this Compact shall be licensed by the Tribal Gaming Agency and relicensed annually. Verification of this requirement shall be made by the Tribal Gaming Agency and the State Gaming Agency

and, as applicable to the satellite wagering facility and operation by the Washington Horse Racing Commission, through a joint pre-operation inspection scheduled at least ten (10) days prior to the scheduled opening to the public. If the facility does not meet the requirements, the Tribal Gaming Agency, State Gaming Agency and/or Washington Horse Racing Commission as applicable, must send a non-compliance letter within seven (7) working days after completion of the inspection. If the Tribal and State Gaming Agencies do not agree on whether the facility meets the requirements, the agencies will meet within ten (10) working days from receipt of the non-compliance letter and work together to resolve concerns. If a dispute regarding this inspection cannot be resolved by the gaming agencies within a reasonable time, the parties may seek resolution pursuant to Section XII.B.3.b.'s final and unappealable arbitration provisions. The reasonable cost of final inspection of the facility by the State Gaming Agency under this section shall be the responsibility of the Tribe.

B. Gaming Employees. Every Class III gaming employee shall be licensed by the Tribal Gaming Agency and relicensed annually. Further every Class III gaming employee shall be certified or issued a permit by the State and recertified annually. Provided, the Tribal Gaming Agency may issue a license if the employee has a current Class III gaming certification issued by the State Gaming Agency, the employee consents to disclosure to the Tribal Gaming Agency of all information held by the state agency, and the State Gaming Agency certifies in writing prior to licensing that the employee is in good standing. If Class II and Class III table games are combined on one Class III gaming area, the Class II table gaming employees shall be certified as if they were Class III gaming employees. This provision, for example, does not apply to employees engaged in activities related to bingo, pull tabs and/or punchboards.

C. Manufacturers and Suppliers of Gaming Services. Each manufacturer and supplier of gaming services shall be licensed by the Tribal Gaming Agency and shall be certified by the State prior to the sale of any gaming services. If the supplier or manufacturer of the services or goods is licensed, certified or issued a permit by the State of Washington, it shall be deemed certified to supply those services or goods for the purposes of this Compact. The licensing and certification shall be maintained annually after initial certification. Upon request of the Tribal Gaming Agency, the State will expedite these certifications to the extent possible. Professional legal and accounting services shall not be subject to the certification and licensing requirements, and neither shall small purchases from local suppliers, see definition of "Gaming Services." Provided, at the discretion of the Director of the State Gaming Agency, the requirement for certification of manufacturers of certain limited gaming services of a non-continuing nature may be waived.

D. Financiers. Any party extending financing, directly or indirectly, to the gaming facility or gaming operation shall be subject to the annual licensing requirements of the Tribal Gaming Agency, and shall be required to obtain State certification prior to completion of the financing agreement and annually thereafter. These licensing and certification requirements do not apply to financing provided by a federally regulated commercial lending institution, the Puyallup Tribal government, or the Federal government. However, the source of all funds will be fully disclosed in accordance with IGRA and a copy provided to the State Gaming Agency and, as applicable to the satellite wagering facility and activities, to the Washington Horse Racing Commission.

## V. LICENSING AND STATE CERTIFICATION PROCEDURES

A. Procedures For Tribal License Applications and State Certification. Each applicant for a Tribal gaming license and for State certification shall submit the completed application along with the required information to the Tribal Gaming Agency. Each completed application shall be accompanied by the applicant's fingerprint card(s), current photographs, and fees required by the State and Tribal Gaming Agencies. Upon receipt of the completed application, the Tribal Gaming Agency may conduct a background investigation of applicants and will thereafter transmit all conditionally approved applications together with a set of fingerprint cards, a current photograph, and the fee required to the State Gaming Agency. For applicants who are business entities, these provisions shall apply to the principals of such entities.

B. Review of Applicants By State. Upon receipt of a completed conditionally approved application and required fee for State certification, the State Gaming Agency shall conduct the necessary background investigation to ensure the applicant is qualified for State certification. Upon completion of the necessary background investigation, the State Gaming Agency shall either issue a State certification to the applicant, or deny the application. In either event a copy of the certificate or denial statement shall be sent to the Tribal Gaming Agency. If the application for certification is denied, a statement setting forth the grounds for denial shall be forwarded to the applicant in accordance with the provisions of Chapter 230-50 WAC with a copy forwarded to the Tribal Gaming Agency. The State shall not apply more rigorous standards than those actually applied in the approval of state licenses/certifications in gaming activities regulated exclusively by the State.

C. Right To Hearing For Denial Of State Certification and Tribal License. If the State Gaming Agency denies the request for certification, the Tribal Gaming Agency shall not issue a license and the applicant may appeal the Tribal Gaming Agency's refusal to issue a license as provided in the Tribal Gaming Code; provided, that the applicant may appeal the State's denial of certification directly to the State Gaming Agency, in which case the Tribal Gaming Agency shall stay its proceeding pending the final outcome of the state appeal. A successful tribal appeal does not substitute for a State decision within the State appeals system, nor does a successful state appeal substitute for a Tribal decision. The right to take action to suspend or revoke a license or certification through State or Tribal court or administrative processes is retained as herein provided.

D. Right To Hearing For Revocation or Suspension Of State Certification and Tribal License. If either the Tribal or State Gaming Agencies revokes or suspends the license or certification of any person, that person is deemed to have both his or her license and certification so revoked or suspended, and that person may appeal the Tribal Gaming Agency's revocation or suspension of a license as provided in the Tribal Gaming Code; provided, that person may appeal the State's revocation or suspension of his or her certification directly to the State Gaming Agency, in which case the Tribal Gaming Agency shall stay its proceeding pending the final outcome of the state appeal. A successful tribal appeal does not substitute for a State decision within the State appeals system, nor does a successful state appeal substitute for a Tribal decision.

E. Grounds for Revocation, Suspension or Denial of State Certification. The State Gaming Agency may revoke, suspend or deny a State certification under the provisions of RCW 9.46.075, and rules promulgated thereunder, for any reason it deems to be in the public interest. For example, these reasons shall include, but shall not be limited to, when an applicant or holder of certification or principal of an entity:

1. Is determined to be a person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the effective regulation of gaming or create or enhance the chances of unfair or illegal practices, methods and activities in the conduct of the gaming activities permitted pursuant to this Compact; or the person has violated, failed or refused to comply with the provisions, requirements, conditions, limitations or duties imposed by any provision of a Tribal/State Compact.

2. Has failed to provide any information reasonably required to investigate the application for state certification or to reveal any fact material to such application, or has furnished any information which is untrue or misleading in connection with such application.

3. Has had a Tribal or State gaming license revoked or denied during the twelve (12) months prior to the date of receipt of the application; is currently on probation; or has demonstrated a willful disregard for compliance with gaming regulatory authority in any jurisdiction, including offenses that could subject the individual or entity to suspension, revocation or forfeiture of a gaming license.

For the purpose of reviewing any application for a state certification and for considering the denial, suspension or revocation of any state certification, the State Gaming Agency may consider any prior criminal conduct or current probationary status of the applicant or holder of certification and the provisions of RCW 9.95.240 and of Chapter 9.96A RCW shall not apply to such cases.

Notwithstanding anything herein to the contrary, in the absence of other violations, it shall not be automatic grounds for revocation, suspension or denial for an Indian from a federally recognized Indian tribe to have been charged and convicted of the following non-gambling related offenses, the occasion of which occurred prior to Supreme Court rulings on the subject: (1) fishing or hunting offenses; (2) cigarette, fireworks or alcohol sales offenses; or (3) cases involving the exercise of trust or treaty rights. In the absence of other violations, activities or factors which would warrant denial, revocation or suspension, these Indian individuals shall not be barred solely as a result of such activities from certification.

For enrolled members of the Tribe who apply for or receive Class III gaming certification and licensing, the State Gaming Agency will consult with the Tribal Gaming Agency prior to revoking, suspending or denying certification to such members who do not meet the criteria for certification. The Tribal and State Gaming Agencies may waive, by mutual agreement, through a provisional or conditional certification, certain criteria for such enrolled tribal members if the waiver does not pose an appreciable risk to the public or the lawful operation of the gaming facility. If the Tribe can show extenuating circumstances why an enrolled tribal member who does not meet all criteria should be further considered for a provisional or conditional certification, the Tribal and State Gaming Agencies may agree to a temporary certification, based on specific conditions and a further detailed review of the

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF	)	
	)	
BJ'S II, INC.	)	<b>LCB NO. 23,626</b>
d/b/a BJ'S II	)	<b>CONSOLIDATED WITH</b>
4315 PACIFIC HWY E	)	<b>LCB NO. 23,503</b>
FIFE, WA 98424-2612	)	
	)	<b>OAH NO. 2009-LCB-0040</b>
Licensee	)	
	)	<b>DECLARATION</b>
LICENSE NO. 088476-1S	)	<b>REGARDING</b>
	)	<b>FACSIMILE</b>
	)	<b>SIGNATURE</b>

---

I, KATHY KARDASH, assistant to Christopher Marston declare under penalty of perjury under the laws of the State of Washington, that the facsimile document attached to this declaration titled, Declaration of Venita Lam, consisting of four (4) pages including this declaration page, is a complete and legible facsimile that I have examined personally and that was received by me via FAX at the following number: 253-572-3052.

**DECLARATION REGARDING FACSIMILE  
SIGNATURE**

Page 1

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**DAVIES PEARSON, P.C.**  
ATTORNEYS AT LAW  
920 FAWCETT -- P.O. BOX 1657  
TACOMA, WASHINGTON 98401  
TELEPHONE (206) 383-5461  
FAX (206) 572-3052

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge information and belief. Signed at Tacoma Washington this 17<sup>th</sup> day of September, 2010.

  
KATHY KARDASH  
Legal Assistant

**DECLARATION REGARDING FACSIMILE  
SIGNATURE**

Page 2

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TELEPHONE (206) 383-5461  
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BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF	)	
	)	
BJ'S II, INC.	)	<b>LCB NO. 23,626</b>
d/b/a BJ'S II	)	<b>CONSOLIDATED WITH</b>
4315 PACIFIC HWY E	)	<b>LCB NO. 23,503</b>
FIFE, WA 98424-2612	)	
	)	<b>OAH NO. 2009-LCB-0040</b>
Licensee	)	
	)	<b>DECLARATION OF</b>
LICENSE NO. 088476-1S	)	<b>VENITA LAM</b>
	)	
	)	

---

I, Venita Lam, declare:

I am over the age of eighteen. I am competent to testify to the matters contained herein and make this Declaration, based upon personal knowledge.

I. I am the manager for BJ's II, Inc. ("BJ's"). I have been the store manager since 2006.

II. As part of my duties as the store manager, I receive and process the mail received by BJ's. Shortly after Mr. Turnipseed inadvertently missed the original April 15, 2010, administrative hearing, I left on vacation to Hawaii from May 1, 2010, through May 21, 2010. Then, upon my return, I was not part of the daily operations

**DECLARATION OF VENITA LAM**

Page 1

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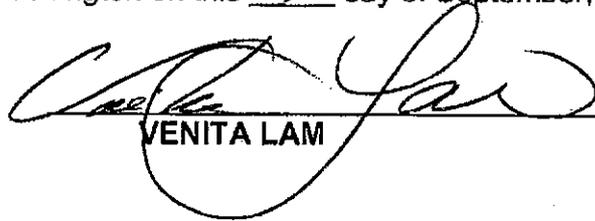
from June 7, 2010, through July 6, 2010, because I was involved in the seasonal sale of fireworks.

III. Upon my return to BJ's, I did not realize the severity of the action taken by the Washington Liquor Control Board until we received a letter from the Puyallup Tribal Counsel, which was on or about July 16, 2010.

IV. We then diligently began to try to address this matter with the Puyallup Tribal Council and our attorneys to address the adverse decision filed by the Washington Liquor Control Board.

V. We received a copy of the gambling agreement around July 29, 2010, from David Bean, one of the Tribal Council members.

Executed at *Sife*, Washington on this 17 day of September, 2010.

  
VENITA LAM

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF

BJ'S II, INC.  
d/b/a BJ'S II  
4315 PACIFIC HWY E  
FIFE, WA 98424-2612

Licensee

LICENSE NO. 088476-1S

)  
)  
) LCB NO. 23,626  
) CONSOLIDATED WITH  
) LCB NO. 23,503  
)

) OAH NO. 2009-LCB-0040  
)

) **DECLARATION OF HERMAN**  
) **DILLON, SR.**  
)  
)  
)

---

I, HERMAN DILLON, SR., declare:

I am over the age of eighteen. I am competent to testify to the matters contained herein and make this Declaration, based upon my personal knowledge stated to the best of my belief.

I. I am the Chairman of the Puyallup Tribal Council, the elected governing body of the Puyallup Tribe of Indians. I have been a member of the Tribal Council for approximately twenty (23) years. The Puyallup Tribe is a federally-recognized sovereign tribal government.

II. The Tribal Council is informed that on July 9, 2010, the Liquor Control Board ("LCB") revoked the liquor license held by BJ's II, Inc. ("BJ's"). We are informed that the basis for that action was a federal criminal conviction, entered approximately August 29, 2007, on the record of David Turnipseed, an enrolled member of the Puyallup Tribe and the corporate officer of BJ's. We are further informed that the

conviction was a result of a charge of trafficking in contraband cigarettes and that the acts on which the charge was based took place before 2005.

III. As the Board knows, the Tribe entered into a Cigarette Tax Agreement with the State of Washington (through its Department of Licensing) effective April 20, 2005. A copy is attached to this Declaration as **Exhibit A**. I was the Chairman of the Tribal Council at that time and signed the Agreement on behalf of the Tribe. I am familiar with its purpose and terms. The negotiation of that Agreement took place off and on over a period of more than ten years. That process included an earlier version that was negotiated by representatives of our two governments but rejected by the Washington Legislature. When the current Agreement was finally settled and approved by both governments, it put to rest a long and tumultuous period and process.

IV. As the Agreement's Preamble indicates, the document's main purpose was to resolve a longstanding disagreement between the State and the Tribe over the taxation of cigarettes by the Tribe and members of the Tribe. That dispute had gone on for more than thirty years and had resulted in constant litigation between the State and the Tribe and between the United States and Tribal members. The Agreement provides that retail cigarette sales made in compliance with the terms of the Agreement will not be deemed a violation of state law and that the State will not assert that such sales violate federal law. The Agreement also provides the State with, among other things, a previously unavailable way to insure that the applicable cigarette tax is collected on sales of cigarettes made to non-Indian customers.

V. The Agreement has worked very smoothly for the five plus years that it has been in effect. As a result, there is no longer a dispute between Tribal licensees and the State over tax issues and no further sales of cigarettes by those licensees that the State considers unlawful. The good news is that the Agreement has put behind both sovereign governments, the Tribe and the State, the days of seizures and litigation.

VI. The criminal prosecutions that took place as a result of activities before the Agreement went into effect are not in danger of being repeated. They resulted from the Tribal members' (and the Tribe's) strongly held belief that it was not properly respectful of the Tribe's sovereign authority for the State to assert taxing authority over those businesses. These Tribal members were not and are not people inclined to break the law. They were individuals standing up for principles they believed strongly in.

VII. We are informed that the LCB's reason for revoking liquor licenses that are held by individuals with felonies is to protect the public. It is the Tribal Council's view that a criminal conviction resulting from the dispute between our two governments does not indicate any likelihood that Mr. Turnipseed will break the law in the future, does not cast any doubt on his fitness to hold a liquor license and manage a business, and should not be used to deny him an opportunity to conduct business activities now that the underlying dispute is settled. While we understand that consideration of felony convictions is generally an important element in determining fitness to hold a liquor license, this particular conviction, considering its origin, is not one that should disqualify him from holding a license. That would be inequitable to both Mr. Turnipseed and other Tribal members.

VIII. To summarize, the Tribal Council vigorously supports reconsideration of the Board's decision to revoke Mr. Turnipseed's license and urges the Board to reinstate that license. We appreciate very much the Board's consideration of our input.

I declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Executed at Tacoma, Washington on this 10 day of September, 2010.

  
HERMAN DILLON, SR., Chairman,  
for the Puyallup Tribal Council

# **EXHIBIT A**

**CIGARETTE TAX AGREEMENT**

**Between**

**THE PUYALLUP TRIBE OF INDIANS**

**And**

**THE DEPARTMENT OF REVENUE**

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## PREAMBLE

WHEREAS, the Puyallup Tribe of Indians ("Tribe") is a federally-recognized Indian tribe and sovereign Tribal government, pursuant to the Treaty of Medicine Creek with the United States of America (10 Stat. 1132), and the Tribe's Constitution and Bylaws; and

WHEREAS, the state of Washington ("State") is a state within the United States of America, possessed of full powers of state government; and

WHEREAS, the body of federal law and policy recognizes the right and the importance of self-determination for tribes, the authority of a tribe to tax certain activities, and the need for tribal economic development; and

WHEREAS, the State has committed to the political integrity of the federally-recognized tribes within the state of Washington and has formally recognized that the sovereignty of each tribe provides paramount authority for the tribe to exist and to govern; and

WHEREAS, a long-standing disagreement exists between the Tribe and the State over questions regarding jurisdiction over and the taxation of the sale and distribution of cigarettes; and

WHEREAS, the State and the Tribe will benefit from resolution of that disagreement by the change in focus from enforcement and litigation to a focus on the administration of and compliance with this Cigarette Tax Agreement; and

WHEREAS, the Tribe and State will benefit from resolution of that disagreement by the tax base this Agreement will enable; taxation being an essential attribute of tribal sovereignty and a tool of self-sufficiency; and

WHEREAS, the State and the Tribe will also benefit by the exercise of the attributes of sovereignty and from the improved well-being of enrolled members that will result from economic development by the Tribe and its members; and

WHEREAS, both the Tribe and State desire a positive working relationship in matters of mutual interest and seek to resolve disputes and disagreements by conducting discussions on a government-to-government basis; and

WHEREAS, the mutual interests of the State and the Tribe brought these two governments together to pursue their common interest in resolving this tax disagreement; and

WHEREAS, nothing herein shall waive the sovereign immunity from suit of the Tribe or the State, nor shall anything herein waive, alter, or diminish any rights, privileges, or immunities guaranteed by the Treaty of Medicine Creek; and

NOW THEREFORE, the Puyallup Tribe by and through its Chairman, and the state of Washington by and through its Governor, do hereby enter into this Agreement for their mutual benefit.

**PART I**  
**Recitals**

**1. Sovereign Immunity**

Nothing in this Agreement shall be construed as a waiver, in whole or in part, of either party's sovereign immunity.

**2. Tribe Does Not Submit to State Jurisdiction**

By entering into this Agreement, the Tribe does not concede that the laws of the State, including its tax and tax collection provisions, apply to the Tribe, its members, or agents regarding activities and conduct within or outside of Indian country.

**3. State Does Not Concede Tribal Immunity**

By entering into this Agreement, the State does not concede that the Tribe has any immunity from its tax and tax collection provisions.

**4. Agreement Does Not Create any Third Party Beneficiaries**

No third party shall have any rights or obligations under this Agreement.

**5. Tobacco Master Settlement Agreement**

This Agreement is not intended to impact the State's share of proceeds under the Master Settlement Agreement entered into by the State on November 23, 1998. The Tribe recognizes the State has an interest regarding nonparticipating manufacturers. The State recognizes the Tribe has an interest in the Master Settlement Agreement. The Tribe agrees that it will not impede the State's efforts to secure compliance of the nonparticipating manufacturers, and the Tribe reserves its rights regarding these matters. Nothing in this Agreement supercedes or replaces chapters 70.157 or 70.158 RCW.

**6. Jurisdiction**

This Agreement does not expand or limit the jurisdiction of either the Tribe or the State.

**PART II**  
**Definitions**

1. "Agreement" means this Agreement entered into by the State and the Puyallup Tribe.
2. "Carton" or "carton of cigarettes" means, unless otherwise indicated, a carton of two hundred (200) cigarettes.
3. "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

4. "Department" means the Washington State Department of Revenue.
5. "Essential government services" means services provided by the Tribe, including, but not limited to, administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development.
6. "Indian country," consistent with the meaning given in 18 U.S.C. 1151, means:
  - a. All land within the limits of the Puyallup Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the Reservation; and
  - b. All Indian allotments or other lands held in trust for an enrolled Tribal member or the Tribe, the Tribal titles to which have not been extinguished, including rights of way running through the same.
7. "Liquor Control Board" or "Board" is an agency of the State with a mission to prevent the misuse of alcohol and tobacco through education, enforcement, and controlled distribution.
8. "Non-Indian" means an individual who is neither a Tribal member nor a nonmember Indian.
9. "Nonmember Indian" means an enrolled member of a federally recognized Indian Tribe other than the Puyallup Tribe.
10. "Parties to the Agreement" or "parties" means the Puyallup Tribe and the State.
11. "Puyallup Indian Reservation" or "Reservation" means the area recognized as the Puyallup Indian Reservation by the United States Department of the Interior.
12. "Retail selling price" means the ordinary, customary, or usual price paid by the consumer for each package or carton of cigarettes, which price includes the Tribal cigarette tax.
13. "State" means the state of Washington.
14. "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking. "Tobacco products" do not fall within the definition of "cigarettes."
15. "Tribal member" means an enrolled member of the Puyallup Tribe. For purposes of this Agreement, a member of another federally recognized Tribe who is the spouse of an enrolled Puyallup Tribal member shall be treated the same as an enrolled member of the Puyallup Tribe.

16. "Tribally-licensed retailer" means a tribal member who has a business license from the Puyallup Tribe to sell cigarettes at retail from a business located in Indian country.
17. "Tribal cigarette tax" means the tax enacted as a provision of Tribal ordinance on cigarettes sold at retail, expressed as a flat amount in cents per cigarette and units of packs and cartons, as more fully set forth in Part IV of this Agreement.
18. "Tribe," or "Tribal," means or refers to the Puyallup Tribe.
19. "Wholesaler" means a person who purchases, sells, or distributes cigarettes for the purpose of resale.

### **PART III**

#### **Applicability of the Agreement**

#### **1. Execution of Agreement**

This Agreement shall become effective upon completion of three steps: (a) authorization for the Governor's signature by enactment of the Washington Legislature; (b) approval by the Tribal Council as indicated by the signature of the Tribal Chairman, and (c) approval by the State as indicated by the signature of the Governor. This Agreement shall be executed in duplicate originals, with each party retaining one fully-executed duplicate original of the Agreement.

#### **2. Application**

From its execution, and contingent on the imposition of the Tribal cigarette tax pursuant to a Tribal resolution meeting the terms of Part IV of this Agreement, this Agreement shall apply to the retail sale of cigarettes by the Tribe as a retailer and by Tribally-licensed retailers. Sales subject to the Tribal cigarette tax imposed pursuant to this Agreement are those in which delivery and physical transfer of possession of the cigarettes from the retail seller to the buyer occurs within Indian country. If the Tribe desires to pursue mail order and/or internet sales of cigarettes, the Tribe and State agree to negotiate in good faith mutually acceptable terms and conditions of a memorandum of understanding concerning the taxation of such sales.

#### **3. Scope Limited**

This Agreement is limited in scope to the selling of cigarettes by the Tribe and its members. This Agreement does not affect the tax obligations or tax treatment of:

- a. Cigarettes sold at retail by non-Indians or nonmember Indians;
- b. Tobacco Products as defined in Part II of this Agreement; and
- c. Cigarettes manufactured by the Tribe or its enterprises within Indian country.

**PART IV**  
**Imposition of Tribal Cigarette Taxes**

**1. Tribally-Licensed retailers**

- a. The Tribe shall require, by enactment of Tribal law, that each Tribally-licensed retailer comply with the terms of this Agreement. The Tribe agrees that it will maintain and enforce a requirement that any Tribal member selling cigarettes at retail on the Puyallup Indian Reservation must first obtain a business license from the Tribe. The Tribe agrees to provide to the Department and the Board upon execution of this Agreement a list of Tribally-licensed retailers, and to provide the Department and Board with an up to date version of the list. The Tribe agrees that any cigarette retailer wholly owned by Tribe is subject to this Compact. The Tribe and the State agree that compliance efforts in regard to such retailers shall be in accordance with Part IX of this Agreement.
- b. The Tribe shall enact policies regarding Tribal access to records of Tribally-licensed retailers. Such policies shall be in accord with and in furtherance of Part IX of the Agreement.

**2. Tax Imposed on Retail Sales by Tribally-Licensed Retailers and the Tribe**

- a. Subject to Part VI, Section 1, concerning retail sales to Tribal members, the Tribe, by ordinance and in accord with the requirements of this Part, shall impose Tribal cigarette taxes on all sales by the Tribe as retailer and by Tribally-licensed retailers of cigarettes to retail purchasers within Indian country.
- b. Beginning no sooner than the date this Agreement is signed by both parties, and subject to enactment of a Tribal ordinance authorizing the imposition of a Tribal cigarette tax, the Tribe shall impose and maintain in effect a tax on the retail sale of cigarettes equaling no less than 5.875 cents per cigarette (eleven dollars and seventy-five cents per standard carton).
- c. During the term of this Agreement, upon any future increase in the State cigarette tax, the Tribal cigarette tax shall increase by no less than the dollar amount of the increase in the State tax. Upon any future decrease in the State cigarette tax, the Tribe may decrease its cigarette tax in a similar manner.
- d. During the term of this Agreement the State agrees that State taxes are not applicable to transactions that comply with the requirements of this Agreement. The State waives its right to collect the State cigarette, sales, and use taxes as to those transactions from the Tribe, Tribally-licensed retailers, state licensed wholesalers from which they purchase, or retail buyers. In addition, the State agrees that enforcement of this Agreement shall be done in accordance with the conditions set forth in this Agreement.

**3. Revenue-Sharing**

The Tribe shall provide to the State, on a quarterly basis, thirty percent (30%) of the revenue that the Tribe receives from the collection of the Tribal cigarette tax imposed under this part.

**PART V**  
**Purchase and Sale of Cigarettes by Tribal Retailers**

**1. Wholesale Purchases – Requirements**

By Tribal ordinance, the Tribe shall maintain and enforce a requirement that the Tribe as a retailer and Tribally-licensed retailers acquire cigarettes only from wholesalers or manufacturers licensed by the State to sell cigarettes at wholesale in the State; or the Tribe, subject to the requirements of Part VII, section 2 of this Agreement.

**2. Delivery of Cigarettes to Tribal Retailers Outside of Indian Country**

Cigarettes bearing the tax stamp required by this Agreement may be delivered or transferred within or outside of Indian country by a wholesaler to the Tribe or a Tribally-licensed retailer. Deliveries may be made by commercial carriers. Invoices identifying the cigarettes as Puyallup Tribe cigarettes must accompany such cigarettes.

**3. Retail Sale – Pricing Requirements**

The retail selling price of any cigarette must not be less than the price paid by the retailer for the cigarette, and such price must include the full amount of cigarette tax imposed on the cigarettes.

**PART VI**  
**Tax Stamps**

**1. Tax Stamp Required**

- a. Tribal retailers may not possess unstamped cigarettes. All cigarettes sold by Tribally-licensed retailers and the Tribe shall bear a Tribal tax stamp meeting the requirements of part VI.
- b. The Tribe agrees to require Tribally-licensed retailers to post a notice advising that cigarettes may not be purchased for resale.
- c. The Tribe agrees it will impose a tax on sales to members.

**2. Creation and Supply of Tribal Tax Stamp**

- a. The Tribe shall arrange for the creation and supply of a Tribal tax stamp by an appropriate manufacturer. Tribal tax stamps will have a serial number or some other discrete identification so that stamps may be traced to the wholesaler.
- b. The Tribe shall purchase stamps from a nationally recognized stamp manufacturer.

**3. Stamp Vendor Contract**

- a. The Tribe shall contract with a bank or other appropriate vendor to distribute tax stamps. The stamp vendor shall distribute stamps to wholesalers, upon payment by the wholesaler to the vendor of the Tribal cigarette tax and remit the collected taxes to the Tribe. The contract shall provide that the Tribe shall purchase a supply of Tribal tax stamps from the manufacturer and make them available for purchase by wholesalers through the stamp vendor. The Tribe may, at its option, select as the stamp vendor the bank with which the Department contracts for that service, or some other third party stamp vendor satisfactory

to both the Tribe and the Department. The Tribe agrees to provide the Department of Revenue with a copy of its stamp vendor contract.

- b. The Tribe shall require the stamp vendor to:
  - i) Remit to the Tribe all revenue collected from the Tribal cigarette tax (such amount being less a reasonable administrative fee for stamping wholesalers);
  - ii) Provide to the Tribe and to the Department timely reports detailing the number of Tribal tax stamps sold, and make its records available for auditing by the Tribe and the Department;
- c. This agreement contemplates that the Tribe may at some point in the future act as its own stamp vendor. In the event that the Tribe decides to act as its own stamp vendor, it agrees to first enter into a memorandum of agreement with the Department regarding this activity.

**4. Requirements for Affixation of Stamps by Wholesalers**

- a. Wholesalers shall affix the tax stamps to the smallest container of cigarettes that will be sold or distributed by the Tribally-licensed retailer. Stamps shall be affixed so that the stamps may not be removed from the package without destroying the stamp.
- b. Wholesalers may only possess unstamped cigarettes for as long as is reasonably necessary to affix tax stamps to the packages for sale. It is presumed that any such possession in excess of seventy-two (72) hours (excluding Saturdays, Sundays, and Holidays) is in contravention of this Agreement. The term "holiday" is limited to the following holidays: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas.
- c. For the purposes of this Section 4 of Part VI, any business outlet selling cigarettes at retail, including an outlet wholly owned and operated by the Tribe, is not a wholesaler. The Tribe agrees to purchase for and sell from any retail outlet that it owns and operates only stamped cigarettes acquired from the sources listed in Part V of this Agreement.

**5. Wholesaler Obligation Under State Law**

Affixing of the tax stamps, retention and production of records required by state law (in the case of state licensed wholesalers) and by this Agreement (in the case of Tribe acting as a wholesaler and subject to Part VII (2) of this Agreement), and compliance with other requirements in this Agreement, shall be deemed to satisfy the State cigarette excise tax obligation of a wholesaler.

**6. State Agreement Regarding Compliance with State and Federal Law**

The State agrees that all transactions that conform with the requirements of this Agreement do not violate state law and that it will not assert that any such transaction violates state law for the purpose of 18 U.S.C. § 2342 or other federal law specifically based on violation of state cigarette laws or other tax laws.

**PART VII**  
**Wholesalers**

**1. Wholesalers Licensed by the State**

Wholesalers licensed by the State are subject to the requirements as set forth in Title 82 RCW and any rules adopted thereunder, and therefore must maintain adequate records detailing which cigarettes are subject to State tax and which cigarettes are subject to the Tribal cigarette tax.

**2. Tribe as Own Wholesaler**

The Tribe may sell stamped cigarettes to Tribally-licensed retailers for sale at retail under the terms of this Agreement. If the Tribe, by itself or through a wholly-owned and operated Tribal enterprise, sells cigarettes at wholesale to Tribally-licensed retailers, that wholesale activity does not require a memorandum of agreement under this Section. However, the Tribe agrees that it will be subject to the same buying restrictions as wholesalers licensed with the state of Washington, including the provisions of chapters 70.157 and 70.158 RCW, and RCW 19.91.300. In addition, the Tribe agrees that it will notify the State in advance of initiating business as a wholesaler and will work in conjunction with the Department of Revenue and the Liquor Control Board to assure that all necessary steps and controls are in place to assure security of the stamping process, handling of tax receipts, and integrity of the overall function.

**PART VIII**

**Enforcement Authority Program**

**1. Intent**

It is the intent of the parties that responsibility for enforcement of the terms of this Agreement shall be shared by the State and the Tribe. The State shall have primary responsibility, exercised by its Liquor Control Board, for enforcement against non-Tribal and non-Tribal member wholesalers, to the extent allowed under law. The Tribe shall have primary responsibility for enforcement against Tribal member retailers. The parties shall work cooperatively by providing each other with relevant information and in other necessary ways to facilitate their respective enforcement responsibilities.

**2. Commercial Carriers**

The State recognizes that wholesalers who meet the requirements of this Agreement may make shipments of cigarettes by commercial carrier. Such shipments must be accompanied by documents required under this Agreement and are subject to advance notice requirements.

**3. Notification**

If the Tribe has elected to act as a wholesaler, the Tribe or its designee shall notify the Department seventy-two (72) hours in advance of any shipments of unstamped cigarettes to the Tribe. Such notice shall include who is making the shipment (meaning who is the wholesaler), detail regarding both quantity and brand, and the invoice order number. Transportation of the cigarettes without the notice required by this section subjects the

cigarettes to seizure. The State and the Tribe may enter into a memorandum of agreement addressing the Tribe's activity as a wholesaler, in which case, this advance notice provision is not applicable and is supplanted by the terms of the memorandum of agreement.

## **PART IX**

### **Compliance and Enforcement Program**

#### **1. General**

The parties wish to provide assurance and ongoing confirmation that they are in compliance with the terms of this Agreement. This Part will provide a process for regular verification of that compliance. The verification process is intended to reconcile data from all sources that make up the cigarette stamping, selling, and taxing activities under this Agreement. Both parties acknowledge that the requirement to purchase cigarettes from wholesalers licensed with the State provides the State access to wholesaler records and provides both parties certainty in regards to stamping of cigarettes and collection of taxes.

#### **2. Compliance Program**

- a. The Tribe agrees to establish, in consultation with the Liquor Control Board and the Department of Revenue, a retailer compliance program. The purpose of the program is to monitor compliance with this Agreement and the ordinances enacted to implement this Agreement. The program shall include measures to monitor and investigate retailers in regard to:
  - i) Sales to minors;
  - ii) Sales of unstamped cigarettes;
  - iii) Sales of cigarettes obtained from unauthorized sources;
  - iv) Pricing compliance; and
  - v) Other factors agreed to by the parties.
- b. The Tribe agrees it will provide monitoring, sampling, investigation, reporting, and related activities necessary to carry out the retailer compliance program, either by contract with an independent third party or by the Tribe's Cigarette Tax Enforcement Department ("CTED"). These functions will be conducted either by CTED or by a third party under contract with the Tribe. The choice between those two options and the identify of the third party, if any, is subject to the approval of the State.
- c. The Tribes agrees that it will require in its contract with the third party that all reports be shared simultaneously with the Tribe, the Department of Revenue, and the Board. The Tribe, Board, and Department of Revenue working together shall establish the frequency for reports and criteria for timeliness of reporting and sharing information regarding violations. Except in cases of suspected and/or documented violations of the Agreement or Tribal law, the reports will not reveal the identities of retailers who are the subjects of the reports, other than to verify that all Tribally-licensed retailers have been monitored within the period of time specified by the parties as appropriate.

#### **3. Tribal Auditor to Review Government Records**

- a. For the purposes of any audit involving its government accounts and enterprise activities, the Tribe may use the same independent auditor that it uses to perform its routine

government audits. The Tribe agrees that the auditor will be a certified public accountant in good standing. The Auditor will review records on an annual basis, consistent with the Tribe's fiscal year, to verify the requirements of this Part unless otherwise specified. The Tribe will retain the Auditor and bear the costs of the auditing services. The Tribe shall be entitled to communicate freely with the Auditor.

- b. The Auditor shall review records for all years during the current appropriate audit cycle, and may review records for earlier years after the date of the signing of the Agreement only as necessary for an internal reconciliation of the Tribe's books. The purpose of the audit is to reconcile tax collections and to provide the State timely and accurate information regarding compliance with this Agreement.
- c. The Auditor will compile and provide to the Department of Revenue, the Liquor Control Board, and the Tribe, a separate report containing timely and accurate information on the following topics:
  - i. Overall tax collection;
  - ii. Revenue sharing;
  - iii. Stamp inventory and stamp purchases (in order to reconcile tax collections);
  - iv. A determination of whether the Tribe has expended revenue from the cigarette tax on essential government services.
- d. The Auditor shall provide a report on these topics to the Tribe, the Department, and the Liquor Control Board, once a year, covering the just concluded fiscal year, and shall be delivered no later than 90 days after the end of the Tribe's fiscal year. The first required review shall cover the period from the effective date of the tax through the end of the Tribe's fiscal year. The Department and the Board shall be entitled, by operation of this Agreement, to the Auditor's report as outlined in this subsection, but not to a copy of the Auditor's complete audit of the Tribe's books and records.

## **PART X**

### **Dispute Resolution**

#### **1. General**

- a. The Tribe and the State wish to prevent disagreements and violations whenever possible, and to quickly and effectively resolve disagreements and violations when they arise. It is the parties' expectation that most disagreements and violations should and will be resolved most effectively through informal discussion. The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this Part.
- b. As used in this Part "days" means business days, unless otherwise specified.

#### **2. Summary**

The parties intend, as spelled out in greater detail below, that the dispute resolution process will include the following elements:

- a. Notification of Violation;
- b. Meeting(s) and informal discussion seek resolution of dispute;
- c. Mediation; opinion and recommendation of mediator;
- d. Correction of violation;

- e. Termination of Agreement under defined circumstances.

### **3. Notification of Violation**

- a. If a party believes that there has occurred or is occurring a violation covered by this Part X, it shall notify the other party in writing, stating the nature of the alleged violation and any proposed corrective action or remedy ("Notice of Violation"). Violations that are subject to this Part include violations of (a) this Agreement or (b) applicable law that either party has undertaken in this Agreement to enforce, committed by (x) either party, (y) a Tribally-licensed retailer, or (z) a state-licensed wholesaler. An error made by the Auditor in any of its reports is also an appropriate subject for the dispute resolution procedure in this Part X.
- b. The parties shall meet within 14 days after receipt of a Notice of Violation, unless the parties agree on a different date, and on such further occasions as they shall agree to meet. They shall attempt to resolve the issue(s) raised by the Notice of Violation and to provide an opportunity to implement any agreed corrective action.

### **4. Mediation**

- a. If the parties are unable to resolve the disputed issues through joint discussions under Section 3 of this Part, either party may request mediation by giving the other party a written mediation demand ("Mediation Demand"). The parties shall attempt to agree on a mediator. If they cannot agree on a mediator within 30 days of the Mediation Demand, each party shall select a mediator and the two mediators selected by the parties shall jointly select a third mediator. Mediation shall occur within a reasonable time of selection of the mediator(s). The parties shall bear their own attorneys fees but shall share equally the other costs of conducting the mediation, including the fees of the mediator.
- b. The parties recognize that disagreements and violations of the terms of this Agreement caused by actions of any retailer or wholesaler may take longer to resolve. With respect to that part of a disagreement or dispute involving a member retailer, the parties must wait at least 45 days after the sending of the Notice of Violation before delivering a Mediation Demand. The parties recognize that in cases where the appropriate remedy for a violation is enforcement action against the retailer or wholesaler, that action, even though initiated within 45 days, may take longer than that period of time to complete. It is the expectation of the parties that the parties will work together diligently during this period to arrive at a solution.

### **5. Opinion, Recommendation, Remedies**

Within a reasonable time after completion of the mediation session(s), the mediator(s) shall render an opinion as to whether a violation has occurred, including any recommended corrective action to remedy the violation. The mediator(s) shall not render an opinion or make a recommendation as to any issue on which the parties have reached agreement. Recommended remedies may include audit of relevant Tribal, a retailer's, or a wholesaler's records, interpretation of Agreement terms, changes in reporting, recordkeeping, enforcement practices, business practices, action by one or both parties to enforce the requirements of this Agreement or of applicable law, or similar actions. Recommended remedies shall not

include an award of monetary damages or costs of any kind, or the disclosure of any records not specifically subject to disclosure under this Agreement.

#### **6. Termination of Agreement**

- a. It is the parties' intent that in cases where, in the mediator(s) opinion, there has been a substantial violation of this Agreement, the offending party be given a reasonable time to initiate and complete corrective action. A "reasonable time" will vary with the circumstances, but shall in general be the time that would ordinarily be required for a government, taking immediate action pursued with due diligence, to correct the violation or obtain compliance. A "substantial violation" is any violation that deprives either party of an important element of what it bargained for in this Agreement and includes, but is not necessarily limited to, the following violations:
- i) Ongoing, significant retail sales of unstamped cigarettes during the term of this Agreement;
  - ii) Failure to submit to mediation as required by this Part;
  - iii) Failure of the Tribe to establish a compliance program;
  - iv) A breach of the confidentiality provisions of Part XIII of this Agreement;
  - v) Failure of the Tribe to meet the revenue sharing obligations under this Agreement;
  - vi) The State's violation of Part IV, Section 2(d) or Part VI, Section 6 of this Agreement;
  - vii) The Tribe's refusal to allow or require the Auditor access to records it needs to conduct its audit; and
  - viii) Failure of the Tribe to enforce the terms of this Compact in regards to member-retailers.
- b. If the party in violation has not corrected the problem or obtained or sought compliance within a reasonable time after receipt of the mediator(s) opinion finding a substantial violation of the Agreement, the aggrieved party may, in its discretion choose to terminate this Agreement. If the aggrieved party chooses not to terminate the Agreement at that time, it does not waive its right to terminate the Agreement subsequently at any time if the violation remains uncorrected.

#### **7. Notification of Sales to Minors Violation**

The Department and/or the Liquor Control Board shall immediately notify the Tribe if an allegation is made that a Tribally-licensed retailer has made sales to minors in violation of Part XIV, Section 2 of this Agreement. Upon such notification, the Tribe shall take enforcement action according to the provisions of Tribal law. Upon the third or subsequent violation within any calendar year, the provisions of Sections 2 through 5 of this Part shall apply.

#### **8. Notice Requirements**

For the purposes of this Agreement, notice shall be by certified mail, return receipt requested, unless both parties agree in writing to accept notice by facsimile. Notice shall be deemed to be given three (3) working days after the date written notice is sent. Notice shall be given as follows:

To the Department: Director  
Washington State Department of Revenue  
P.O. Box 47454  
Olympia, WA 98504-7454

To the Tribe: Chairman, Puyallup Tribal Council  
1850 Alexander Avenue  
Tacoma, WA 98421

With a copy to: Legal Department  
Puyallup Indian Tribe  
1850 Alexander Avenue  
Tacoma, WA 98421

#### **PART XI**

#### **Responsibilities of the Tribe, the Department of Revenue, and the Liquor Control Board**

The Parties recognize that this Agreement describes a mutual undertaking with shared responsibilities and further recognize the responsibilities of the Tribe, the Department of Revenue, and the Liquor Control Board to be as follows:

**1. Tribe**

The Tribe is responsible for the administration of the Agreement, a compliance program, audit and recordkeeping, and dispute resolution, as well as negotiation of its terms.

**2. Liquor Control Board**

This Agreement does not alter the Liquor Control Board's responsibility under chapter 82.24 RCW. The Board is responsible to provide input and expertise to the Department during negotiations and to work together with the Department of Revenue and the Tribe to ensure compliance with this Agreement.

**3. Department of Revenue**

The Department is responsible for the administration of the Agreement, audit procedures and recordkeeping, and dispute resolution, as well as negotiation of its terms, on behalf of the State.

#### **PART XII**

#### **Term of this Agreement - Amendment**

This Agreement may remain in effect no longer than eight (8) years from its effective date, subject to the termination provisions of Part X of this Agreement. Amendments or extensions to the Agreement shall be considered upon the written request of either party. Disputes regarding

requests for amendment of this Agreement shall be subject to the dispute resolution process in Part X of this Agreement.

### **PART XIII Confidentiality**

All information under the terms of this Agreement received by the Department or open to Department review is "return or tax information" and is subject to the provisions of RCW 82.32.330, the tax information "secrecy clause." All other information that is subject to review by the Auditor or review by the mediator or certified public accountant is confidential and shall not be disclosed to anyone, in any forum, for any purpose.

### **PART XIV Miscellaneous Provisions**

- 1. Periodic Review of Agreement Status**
  - a. Representatives of the Tribe and the Department shall meet at mutually agreeable times and places upon the reasonable request of either party to review the status of this Agreement and any issues that have arisen under the Agreement.
  - b. It is the expectation of the parties that the Tribe, the Department, and the Liquor Control Board will meet freely to discuss jurisdictional issues, expectations, and protocols, and to share enforcement and compliance information.
- 2. Sales to Minors**

Neither the Tribe nor a Tribally-licensed retailer shall sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen (18) years.
- 3. Essential Government Services**

Tribal cigarette tax revenue shall be used for essential government services. The Auditor shall certify the use of such revenue under the process set forth in Part IX of this Agreement.
- 4. Rule 192 -- Application**

This Agreement is a "cooperative agreement" as that term is used in WAC 458-20-192 (Rule 192).
- 5. Other Retail Sales within Indian Country by Tribal Members**

Under Puyallup Tribal law, only licensed Tribal retailers are permitted to make retail cigarette sales within Indian country. The Tribe agrees to provide through tribal ordinance for suspension or revocation of such license in those instances where after notice is given and opportunity to comply is provided, the retailer's sale of cigarettes remains out of compliance with the requirements of this Compact.

**6. Subsequent State Legislative Enactments**

If the State Legislature enacts a law that provides more favorable terms for the Puyallup Tribe, the parties shall amend the Agreement to reflect such terms.

**7. Severability**

If any provision of this Agreement or its application to any person or circumstance is held invalid, the remainder of the Agreement is not affected.

THUS AGREED THIS 20<sup>th</sup> day of April, 2005

**PUYALLUP TRIBE**

**STATE OF WASHINGTON**

By:

Herman Dillon, Sr.

Herman Dillon, Sr.,  
Chairman  
The Puyallup Tribe

By:

Christine Gregoire

Christine O. Gregoire,  
Governor  
State of Washington

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF	)	
	)	
BJ'S II, INC.	)	<b>LCB NO. 23,626</b>
d/b/a BJ'S II	)	<b>CONSOLIDATED WITH</b>
4315 PACIFIC HWY E	)	<b>LCB NO. 23,503</b>
FIFE, WA 98424-2612	)	
	)	<b>OAH NO. 2009-LCB-0040</b>
Licensee	)	
	)	<b>DECLARATION OF</b>
LICENSE NO. 088476-1S	)	<b>CHRISTOPHER J.</b>
	)	<b>MARSTON</b>
	)	

I, Christopher J. Marston, declare:

I am over the age of eighteen. I am competent to testify to the matters contained herein and make this Declaration, based upon personal knowledge.

I. I am one of the Licensee's attorneys herein.

II. After the Licensee requested that its counsel assist it with the adverse ruling by the Washington State Liquor Control Board ("WSLCB"), which was after the date for appealing or requesting reconsideration of the WSLB's Final Order, the Licensee and its counsel have been proceeding as quickly as possible with obtaining additional evidence to support the Licensee's Motion to Reopen and Vacate the Order of Default and Final Order.

**DECLARATION OF CHRISTOPHER J.  
MARSTON**

Page 1

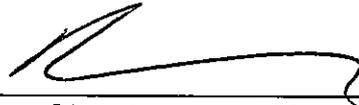
**DAVIES PEARSON, P.C.**  
ATTORNEYS AT LAW  
920 FAWCETT -- P.O. BOX 1657  
TACOMA, WASHINGTON 98401  
TELEPHONE (206) 383-5461  
FAX (206) 572-3052

III. As set forth in Vanita Lam's declaration, she received a copy of the gambling agreement around July 29, 2010, from David Bean, one of the Tribal Council members. While this Agreement was helpful, Mr. Turnipseed was proceeding with meeting with the Tribal Council to discuss the matter.

IV. After he met with the Tribal Council, and they offered to support his position, I discussed the matter with one of the Tribal Council's attorneys in the last week of August. Thereafter, a declaration was prepared for Mr. Herman Dillon, Sr.

V. I received his original, executed declaration on Wednesday, September 15, 2010. Thereafter, the motion and declaration of Ms. Lam were finalized. As such, the Licensee has been proceeding as quickly as possible to bring this matter back before the WSLCB in order for it to review Licensee's motion to reopen.

Executed at TACOMA, Washington on this 20<sup>th</sup> day of September, 2010.



**Christopher J. Marston**

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF	)	
	)	
BJ'S II, INC.	)	<b>LCB NO. 23,626</b>
d/b/a BJ'S II	)	<b>CONSOLIDATED WITH</b>
4315 PACIFIC HWY E	)	<b>LCB NO. 23,503</b>
FIFE, WA 98424-2612	)	
	)	<b>OAH NO. 2009-LCB-</b>
Licensee	)	<b>0040</b>
	)	
LICENSE NO. 088476-1S	)	<b>NOTICE OF</b>
	)	<b>APPEARANCE</b>
	)	
	)	
	)	
	)	

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TO: Washington State Liquor Control Board

COMES NOW the Licensee, BJ'S II, Inc., d/b/a BJ'S II,, and enters herewith its appearance by Christopher J. Marston of Davies Pearson, P.C., attorneys undersigned, and directs that all future pleadings or papers in the above entitled cause, exclusive of original process, be served upon the said Licensee by leaving a copy with its attorneys undersigned. The Licensee expressly reserves all rights and defenses herein including, but not limited to,

NOTICE OF APPEARANCE

Page 1

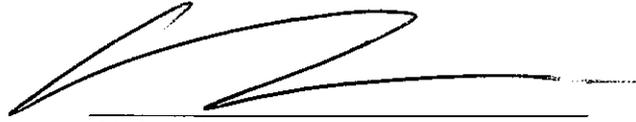
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**DAVIES PEARSON, P.C.**  
ATTORNEYS AT LAW  
920 FAWCETT -- P.O. BOX 1657  
TACOMA, WASHINGTON 98401  
TELEPHONE (206) 383-5461  
FAX (206) 572-3052

insufficiency of service of process and lack of personal and subject matter jurisdiction.

DATED this 20<sup>th</sup> day of September, 2010.

DAVIES PEARSON, P.C.



Christopher J. Marston, WSB #30571  
Attorneys for Licensee

NOTICE OF APPEARANCE

Page 2

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**DAVIES PEARSON, P.C.**

ATTORNEYS AT LAW  
920 FAWCETT -- P.O. BOX 1657  
TACOMA, WASHINGTON 98401  
TELEPHONE (206) 383-5461  
FAX (206) 572-3052

**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

BJ'S II, INC.  
d/b/a BJ'S II  
4315 PACIFIC HWY E  
FIFE, WA 98424-2612

LICENSEE

LICENSE NO. 088476-1S

LCB NO. 23,626  
CONSOLIDATED WITH  
LCB NO. 23,503

OAH NO. 2009-LCB-0040

FINAL ORDER OF THE BOARD

The above entitled matter coming on regularly before the Board, and it appearing that:

1. A telephone hearing commenced on April 15, 2010 at the licensee's timely request for an administrative hearing.
2. The Liquor Control Board's Complaint dated August 25, 2009, alleged that on August 29, 2007, David Turnipseed, the sole corporate officer of BJ's II, was convicted of a felony, making him ineligible for a liquor license under RCW 66.24.101(2), WAC 314-12-020(3) and 314-07-040.
3. On February 11, 2010, the Liquor Control Board's Licensing Director issued a Statement of Intent to Revoke Liquor License based on David Turnipseed's August 29, 2007 felony conviction which accumulated 12 criminal record points. Based on RCW 66.24.010 (2) and WAC 314-07-040 (1) a criminal history of eight points is grounds for license denial.
4. The Appellant did not appear for the hearing nor request a continuance. The Education and Enforcement Division of the Board was represented by Assistant Attorney General Brian Considine.

5. On May 7, 2010, Administrative Law Judge Mary Ellen Goodwin entered her Initial Order, ordering that the appellant was in default and dismissing the appeal.
6. No request to vacate the default was filed.
7. The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises;

NOW THEREFORE;

IT IS HEREBY ORDERED that the Statement of Intent Not to Renew Liquor License for case 23,636 is adopted by the Board;

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case 23,503 is sustained;

AND that the liquor license privileges granted to BJ's II, Inc. d/b/a BJ's II at 4315 Pacific Hwy E, in Fife, Washington, License 088476, are hereby permanently revoked effective July 9, 2010.

DATED at Olympia, Washington this 9 day of June, 2010.

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Foster  
Rutnam Kewese  
David J. Bremer

Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Washington State Liquor Control Board, Attn: Kevin McCarroll, 3000 Pacific Avenue Southeast, PO Box 43076, Olympia, WA 98504-3076, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board's office.

RCW 34.05.010(6). A copy shall also be sent to Mary M. Tennyson, Senior Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Stay of Effectiveness. The filing of a petition for reconsideration does not stay the effectiveness of this Order. The Board has determined not to consider a petition to stay the effectiveness of this Order. Any such request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

Judicial Review. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

**STATE OF WASHINGTON  
BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE WASHINGTON STATE LIQUOR CONTROL BOARD**

**In The Matter of:**

**DAVID R. TURNIPSEED, DBA BJ'S II,  
INC., DBA BJ'S II**

**4315 PACIFIC HIGHWAY EAST.  
FIFE, WA 98424-2612**

**LICENSEE**

**LICENSE NO. 088476**

**Docket No. 2009-LCB-0040**

**LCB No. 23,626  
consolidated with  
LCB No. 23,503**

**INITIAL ORDER**

**RECEIVED**

**MAY 11 2010**

**LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION**

STATEMENT OF THE CASE

Administrative Law Judge Mary Ellen Goodwin commenced a telephone hearing on April 15, 2010, at 9:10 a.m., pursuant to due and proper notice to all interested parties. The parties were advised in the Third Prehearing Conference Order and Notice of Hearing to call the Office of Administrative Hearings 10 minutes before the time scheduled for hearing to advise of the telephone number where they could be reached. Because the licensee, David R. Turnipseed, dba BJ's II, Inc. had not contacted the Office of Administrative Hearings by 9:00 a.m., I waited until 9:10 a.m. to start the hearing. David R. Turnipseed failed to appear. Mr. Turnipseed did not request a continuance or otherwise contact the Office of Administrative Hearings. The Licensing Division and the Enforcement Division of the Liquor Control Board Department were represented by Brian Considine, Assistant Attorney General. Alan Rathbun, Director of the Licensing and Regulation Division of the Liquor Control Board, testified on behalf of the Licensing Division. AAG Brian Considine moved to dismiss Mr. Turnipseed's appeal(s) based on his failure to appear for hearing. The motion was granted and David Turnipseed, dba BJ's II, Inc. was held in default.

Docket No. 2009- LCB-0040, (LCB No. 23,503) is an enforcement action brought by the Liquor Control Board to revoke the license of David Turnipseed, dba BJ's II, Inc., based on David R. Turnipseed's 2007 federal felony conviction for Trafficking in Contraband Cigarettes. Exhibit 3

Docket No. 2009 LCB-0040, (LCB No. 23, 626) is a licensing action brought by the Liquor Control Board to revoke the license of David R. Turnipseed, the sole corporate officer of BJ's II, Inc., because Mr. Turnipseed is ineligible for a license based on his accumulation of 12 criminal record points resulting from his 2007 federal felony conviction.

The enforcement and licensing actions were consolidated at the time of the Third Pre-Hearing Conference on March 2, 2010. On April 15, 2010, Assistant Attorney General, Brian Considine, moved to dismiss the enforcement action before proceeding to hearing on the licensing action. The motion to dismiss the enforcement action (LCB-23,503) was granted.

### FINDINGS OF FACT

1. David Turnipseed, dba BJ's II, Inc. at 4315 Pacific Highway East, Fife, WA. is the sole corporate officer of BJ's II, Inc. Exhibit 6, p. 1.
2. David Turnipseed, dba BJ's II, Inc., has held liquor license No. 088476 since July 28, 2006. Exhibits 1 and 6.
3. On March 24, 2005, David Turnipseed was indicted on felony charges by the grand jury for the U.S. District Court, Western District of Washington. Exhibit 2.
4. On August 29, 2007, David Turnipseed plead guilty to the federal felony charge of Trafficking in Contraband Cigarettes. Exhibit 3.
5. As a result of his 2007 felony conviction, David R. Turnipseed accumulated 12 criminal record points. Exhibits 1 and 5.
6. Alan Rathbun, the Director of the Licensing and Regulation Division of the Washington State Liquor Control Board, oversees the issuance, renewal, cancellation and revocation of liquor licenses. Testimony of Alan Rathbun.
7. On December 31, 2008, Lisa Rod, CHRI Coordinator, sent an interoffice communication to The Board and to Officer Jim Sawyers of the Tacoma Enforcement Office recommending cancellation of David Turnipseed's liquor license because of his August 29, 2007 felony conviction which resulted his accumulating 12 criminal record points. Exhibit 5.
8. On January 25, 2010, Sergeant L.J. (Jim) Sawyers of the Tacoma Enforcement Division sent an Interoffice communication to Captain Lisa Reinke of Region 1, recommending cancellation of David Turnipseed's liquor license because he was the sole corporate officer for BJ's II, Inc. and had accumulated 12 criminal record points as the

result of his guilty plea on August 29, 2007 to Trafficking in Contraband Cigarettes. Exhibit 6.

9. On February 8, 2010, Alan Rathbun approved the Enforcement Division's request for cancellation of BJ's II, Inc. License No. 088476, 4315 Pacific Highway East, Fife, WA 98424, UBI No. 601 521 458 001 0001. Exhibit 6 and testimony of Alan Rathbun.

10. On February 11, 2010, the Washington State Liquor Control Board issued the Statement of Intent to Revoke Liquor License. Exhibit 1

11. On March 2, 2010, the Liquor Control Board received David Turnipseed's, dba BJ's II, Inc., Request for Hearing and Response to Statement of Intent to Revoke. Exhibit 1, pp. 3 and 4.

12. On March 3, 2010, the Office of Administrative Hearings mailed a Notice of Hearing to David R. Turnipseed dba BJ's II, Inc., which stated: **Default:** Any party who fails to attend or participate in a hearing or other state of an adjudicative proceeding may be held in default in accordance with RCW 34.05.434

13. On April 15, 2010, David R. Turnipseed, dba BJ's II, Inc. was offered the opportunity to participate in a hearing before the Office of Administrative Hearings. Because David R. Turnipseed, dba BJ's II, Inc. failed to appear and participate in the hearing, he was held in default.

14. The Washington State Liquor Control Board Licensing Division established by a preponderance of the evidence that David Turnipseed dba BJ's II, is not eligible for a liquor license because of he has 12 criminal record points.

### CONCLUSIONS OF LAW

1. I have jurisdiction over the persons and subject matter herein pursuant to chapter 34.12 RCW.

2. The Washington State Liquor Control Board has jurisdiction over David R. Turnipseed, dba BJ's II, Inc., 4315 Pacific Highway East, Fife, WA 98424, who holds liquor license No. 088476 issued July 28, 2006 pursuant to chapter 66.24 and subject to the provisions of RCW 66.24.010.

3. In the case of a corporation, fingerprinting and criminal history record information checks may be required of its present and any subsequent officers, manager, and stockholders who hold more than ten percent of the total issued and outstanding stock of the applicant corporation...For the purpose of reviewing any application for a license and for considering the denial, suspension, revocation, or renewal or denial thereof, of any

license, the liquor control board may consider any prior criminal conduct of the applicant including an administrative violation history record with the board and a criminal history record information check. RCW 66.24.010(2)

4. The restrictions on license issuance specified in RCW 66.24.010(2) shall be construed to be continuing conditions for retaining an existing license and any licensed person who ceases to be eligible for issuance of a license under RCW 66.24.010(2) shall also cease to be eligible to hold any license already issued. RCW 66.24.010(3)

5. Per RCW 66.24.010(1), a liquor license must be issued in the name(s) of the true party(ies) of interest.

6. For purposes of this title, "true party of interest" means for a privately held corporation, all corporate officers or persons with equivalent title. All stockholders who hold more than 10% of the issued or outstanding stock. (Note: In order for the liquor control board to identify the true parties of interest, we will need to know all parties who have been issued or will be issued corporate stock.) . . . Any entity Any person who is in receipt of, or has the right to receive, more than ten percent of the gross or net sales from the licensed business during any full or partial calendar or fiscal year. For the purposes of this chapter: "Gross sales" includes the entire gross receipts from all sales and services made in, upon, or from the licensed business. "Net sales" means gross sales minus cost of goods sold. WAC 314.07.035 (1)

7. Because he is the sole corporate officer of BJ's II, Inc., David R. Turnipseed, is the true party of interest in this proceeding.

8. The board may conduct an investigation of any person or entity who exercises any control over the applicant's business operations. WAC 314.07.035 (4)

9. When the Board processes a criminal history check on an applicant, it uses a point system to determine whether the person qualifies for a license. The Board will not normally issue a license to a person who has accumulated eight or more points. A felony conviction results in the accumulation of 12 criminal record points for a period of ten (10) years. WAC 314.07.040(1)

10. RCW 34.05.440 states that failure to attend or participate in a hearing or other stage of an adjudicative proceeding may result in the default of the appellant.

11. Because David R. Turnipseed, dba BJ's II, Inc., failed to appear on April 15, 2010 and participate in the hearing, his appeal(s) in OAH Docket No. 2009-LCB-0040, should be dismissed.

## NOTICE TO THE PARTIES

Either the licensee or permit holder or the assistant attorney general may file a petition for review of the initial order with the liquor control board within twenty (20) days of the date of service of the initial order. RCW 34.05.464 and WAC 10-08-211, 314-29-010(4)(b) and 314-42-080(1).

The petition for review must:

- (i) Specify the portions of the initial order to which exception is taken;
- (ii) Refer to the evidence of record which is relied upon to support the petition; and
- (iii) Be filed with the liquor control board and within twenty (20) days of the date of service of the initial order.

A copy of the petition for review must be mailed to all of the other parties and their representatives at the time the petition is filed. Within (10) ten days after service of the petition for review, any of the other parties may file a response to that petition with the liquor control board. WAC 314-42-080(3). Copies of the reply must be mailed to all other parties and their representatives at the time the reply is filed.

The administrative record, the initial order, and any exceptions filed by the parties will be circulated to the board members for review. WAC 314-29-010(4)(c).

Following this review, the board will enter a final order. WAC 314-29-010(4)(d). Within ten days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. RCW 34.05.470 and WAC 10.08.215.

The final decision of the board is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598.

12. The Director of the Licensing Division of the Liquor Control Board properly exercised his discretion in determining that David R. Turnipseed, dba BJ's II, Inc., is ineligible for liquor license because he accumulated 12 criminal record points as a result of his 2007 federal felony conviction.

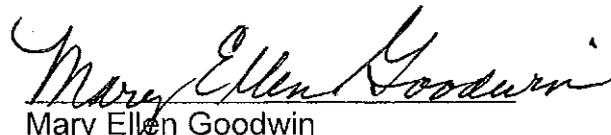
12. The determination of the Director of the Washington State Liquor Control Board Licensing Division to revoke License No. 088476-15 from David R. Turnipseed, dba BJ's II, Inc., should be affirmed.

### INITIAL ORDER

1. It is ORDERED that the Appellant is in DEFAULT pursuant to RCW 34.05.440 and his appeal(s) of LCB No. 23,626 and LCB 23,503, OAH Docket No. 2009-LCB-0040 are hereby DISMISSED.

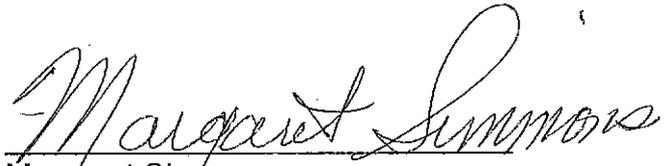
2. In the alternative, the decision of the Director of the Washington State Liquor Control Board's Licensing Division to revoke liquor license No. 088476 of David R. Turnipseed, dba BJ's II, Inc., is correct and is AFFIRMED.

Dated this 7th day of May 2010 at Olympia, Washington.

  
Mary Ellen Goodwin  
Administrative Law Judge  
Office of Administrative Hearings  
2420 Bristol Court SW  
PO Box 9046  
Olympia, WA 98507-9046

**CERTIFICATE OF SERVICE**

I hereby certify that true and exact copies of the Initial Order in OAH Docket No. 2009-LCB-0040 were mailed to the following parties, postage prepaid, this 7<sup>th</sup> day of May, 2010 at Olympia, Washington.

  
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Legal Secretary

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