

1 State via the internet through its website, www.dirtcheapcig.com. Accordingly, it has
2 transacted and is transacting business within the State of Washington.

3 **IV. ALLEGATION OF NONCOMPLIANCE WITH THE JENKINS ACT**

4 4.1 Washington imposes a retail sales tax on every retail sale. RCW 82.08.020.
5 Generally, the purchaser pays the retail sales tax, but the seller is responsible for collecting it
6 and remitting it to the Department of Revenue. RCW 82.08.060. The state retail sales tax is
7 six and five-tenths percent of the selling price.

8 4.2 If the seller is not required to collect the retail sales tax, the purchaser may then
9 be liable for use tax “for the privilege of using, within the state as a consumer” any article of
10 tangible personal property. RCW 82.12.020. The state use tax rate is equal to the retail sales
11 tax rate of six and five-tenths percent of the selling price. The purchaser is required to remit
12 the use tax to the Department of Revenue.

13 4.3 In addition, there is a cigarette tax “upon the sale, use, consumption, handling,
14 possession or distribution of all cigarettes”. RCW 82.24.020(1)-(3). The wholesaler
15 sometimes collects this tax by adding it into the wholesale sales price of the cigarettes and
16 then remitting it to the Department of Revenue. When it is not added into the wholesale sales
17 price and the wholesaler does not collect it, the purchaser is responsible for remitting the
18 cigarette tax to the Department of Revenue. The cigarette tax rate is 7.125 cents per cigarette.
19 RCW 82.24.080.

20 4.4 Generally, on each retail sale of cigarettes in this State, a retail sales or use tax
21 is due, and a cigarette tax is due. (Some sales are exempt from these taxes, like cigarettes sold
22 by a tribal retailer to a tribal member on the reservation.)

23 4.5 If a Washington resident purchases cigarettes via mail, the out-of-state seller
24 may have paid some cigarette tax to his/her state. If Washington imposes a higher cigarette
25 tax than the out-of-state seller’s state, then the Washington resident purchaser is not liable for
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1 the entire Washington state cigarette tax, but is only liable for the difference between the out-
2 of-state cigarette tax paid by the seller and the Washington state cigarette tax.

3 4.6 In 1955, Congress, as a policy matter, recognized the large and increasing loss
4 of revenue to the States caused by the evasion of sales and use taxes on cigarettes shipped in
5 interstate commerce to customers; the discrimination caused by this evasion against sellers of
6 cigarettes in State having a higher tax than the tax of the seller States; and the fact that this
7 evasion was accomplished through the use of the United States mail.

8 4.7 Given these concerns, Congress enacted the Jenkins Act: 15 U.S.C. § 376,
9 requires that “[a]ny person who sells or transfers for profit cigarettes in interstate commerce,
10 whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes, to other
11 than a distributor licensed by or located in such State, or who advertises or offers cigarettes
12 for such a sale or transfer and shipment, shall—(1) first file with the tobacco tax administrator
13 of the State into which such shipment is made or in which such advertisement or offer is
14 disseminated a statement setting forth his name and trade name (if any), and the address of his
15 principal place of business and of any other place of business; and (2) not later than the 10th
16 date of each calendar month, file with the tobacco tax administrator of the State into which
17 shipment is made, a memorandum or a copy of the invoice covering each and every shipment
18 of cigarettes made during the previous calendar month into such State; the memorandum or
19 invoice in each case to include the name and address of the person to whom the shipment was
20 made, the brand, and the quantity thereof.”

21 4.8 “Whoever violates [the Jenkins Act] shall be guilty of a misdemeanor and shall
22 be fined not more than \$1,000, or imprisoned not more than 6 months, or both.” 15 U.S.C. §
23 377. The State of Washington Department of Revenue does not have the authority to seek
24 these criminal penalties.

25 4.9 Since at least 1994, Dirt Cheap has and/or continues to advertise in
26 Washington and on the Internet as selling cigarettes via the phone or the Internet. On more

1 than one occasion, Washington residents have purchased cigarettes from Dirt Cheap, either
2 via the telephone or the Internet. These cigarettes have been delivered or otherwise shipped
3 into Washington.

4 4.10 Because Dirt Cheap is not engaged in business in Washington and its only
5 contact with Washington consumers is via the Internet, mail, and limited advertisements,
6 Dirt Cheap is not responsible for collecting and remitting the Washington retail sales tax or
7 cigarette taxes.

8 4.11 Because Dirt Cheap is not responsible for collecting and remitting the
9 Washington retail sales tax or cigarette taxes, the ultimate purchaser in Washington (via mail
10 or Internet) is responsible for paying the Washington retail sales/use and cigarette taxes.

11 4.12 The Washington State Department of Revenue has repeatedly notified
12 Dirt Cheap of its obligation to file monthly Jenkins Act reports. These reports enable the
13 Department of Revenue to contact purchasers of Dirt Cheap products with the goal of
14 collecting, from these purchasers, the retail sales/use and cigarettes taxes that are properly
15 due.

16 4.13 Dirt Cheap has consistently failed to comply with the Jenkins Act and refuses
17 to file the monthly reports.

18 4.14 As a result, the State of Washington is not able to collect retail sales/use and
19 cigarettes taxes that are properly due.

20 4.15 The Department of Revenue estimates that the State has lost approximately
21 \$6 million in retail sales/use and cigarette taxes during 2001 by Washington consumers
22 purchasing cigarettes via the mail or Internet and not paying the retail sales/use and cigarette
23 taxes.

24 **V. FIRST CAUSE OF ACTION**
25 **Claim of Injunctive relief**
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