NO. 50791-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

EVERI PAYMENTS INC., successor in interest to, and formally known as GLOBAL CASH ACCESS, INC.,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Everi Payments, Inc. (Everi) is a non-Indian business selling ATM services to non-Indian customers. Washington has authority to impose the business and occupation (B&O) tax on the gross income of non-Indians, like Everi, doing business in Indian Country. Thus, the fact that the ATMs are located in tribal casinos does not render the transactions exempt from state taxation. Nor is the State's tax preempted by the Indian Gaming Regulatory Act, the Indian Trader Statutes, or by implied federal preemption. ATM services do not constitute class III gaming and are no more essential to the casino enterprise than slot machines or casino buildings, which the Second and Ninth Circuit Courts of Appeals have held are not preempted from state taxation.

Everi relies on a body of Indian case law disconnected from the fact that the transactions at issue here involve a non-Indian business and non-Indian customers. Under modern case law, taxes imposed on non-Indians like Everi for reservation activities "have been upheld unless expressly or impliedly prohibited by Congress." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989). The Court's preemption inquiry focuses on the party and activity on which the tax is imposed, and is "primarily an exercise in examining Congressional intent." *Id.* at 176.

Everi also mischaracterizes the transactions at issue in this case as between Everi and the tribes. This conflicts with the undisputed facts in the record. The taxed activities are cash access services Everi provides directly to non-Indian customers. The tribes have no direct involvement in these ATM transactions, and the tribes' revenues from Everi for the privilege of operating in the casinos are not subject to state taxes. Everi's contracts with the tribes recognize that Everi would be liable for taxes on Everi's gross receipts. Finally, there is no evidence that Everi's payment of B&O taxes on revenue from non-Indian customers had any impact on tribal or federal interests.

The superior court properly granted the Department of Revenue (Department)'s motion for summary judgment and rejected Everi's preemption arguments. This Court should affirm.

II. RESTATEMENT OF ISSUES

1. Is Washington's B&O tax on Everi's revenue from ATM transactions permissible under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, because the transactions are not a class III gaming activity?

2. Are the Indian Trader Statutes, 25 U.S.C. §§ 261-64, inapplicable to the taxed transactions, which involve a non-Indian business providing cash access to non-Indian customers?

3. Is the inquiry under *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980) ("*Bracker*"), inapplicable to Washington's B&O tax on Everi's revenue from ATM transactions when there is no evidence that tribes or tribal members are parties to the taxed transactions?

4. If the *Bracker* inquiry applies, is Washington's B&O tax permissible when the tax affects no federal or tribal interests, and the State has a strong interest in collecting the tax from the non-Indian businesses to provide government services to Everi and its customers?

5. Does WAC 458-20-192(7) permit Washington's B&O tax on Everi's business activity of providing cash access to non-Indians?

6. Did Everi fail to raise a claim that it could exclude a percentage of revenue from its gross income that Everi claims it collected for and passed through to the tribes?

7. Is Everi precluded from excluding a percentage of revenue from its gross income that Everi claims it collected for and passed through to the tribes, when the record lacks any evidence that Everi was acting as the tribes' collection agent or that Everi's customers owed those amounts to the tribes?

III. STATEMENT OF THE CASE

A. Statement of Facts

Everi Payments, formerly known as Global Cash Access, Inc., is a Delaware for-profit corporation headquartered in Las Vegas, Nevada. CP 56. Everi's business focuses on casinos and other gaming properties in the United States, Europe, Canada, the Caribbean, Central America, and Asia. CP 63. Everi's products, employees, and on-demand services are located at tribal and non-tribal casinos in Washington. CP 1275-78, 1354.

Everi is engaged in multiple business activities from which it earns income, many of which are closely related to tribal gaming. However, the only income at issue in this tax refund action is the income from fees Everi charges customers for accessing cash services at Everi's ATMs or kiosks. CP 56-64. "Cash access services" are the following types of ATM transactions: (i) withdrawing cash, (ii) advancing cash from a credit card, or (iii) performing a debit card transaction. CP 6, 119-20. Everi admits that its cash access transactions are not games of chance or class I, II, or III games. *See* CP 1373-75.

1. Everi provides the cash access services to the general public at self-service ATM terminals in casinos.

Everi provides its cash access services at self-service ATM machines and multifunction kiosk cabinets that include cash access ATM

service functions. CP 1384; *see* CP 1217-19 (machine diagrams); CP 1266-67 ("we integrate our services onto that kiosk"). As Everi points out in its briefing (Br. at 8), there are other functions in the kiosks such as ticket redemption or bill breaking that interact with the casino's slot systems. But those functions are separate from the cash access systems. CP 1160-61. The two distinct sets of functions do not mix, a fact that Everi obscures in its briefing.

In particular, there are two computers: one that processes the ATM/cash access transactions and another dedicated strictly to the ticketing and slot information. *See* CP 1146, 1194, 1272-73. Additionally, the telecommunications lines connecting the ATM computer to third-party processors facilitating the cash access transactions are separate from the networking equipment connecting the computer dedicated to the casino slot systems. CP 1144 (external telecommunications for ATM); CP 1146 (casino switched Ethernet). Everi admits that the devices providing cash access services, such as the multifunction kiosks, are not providing games of chance to casino patrons. *See* CP 1373-75.

2. Customers pay Everi a fee to receive the cash access service.

To initiate a cash access transaction with Everi, a customer approaches one of the self-service Everi ATMs or kiosks. The customer

begins the transaction by swiping or inserting a debit or credit card. CP 1386. Once the terminal recognizes the swiped or inserted card as valid, Everi's software on the cash access computer initiates a program to start the cash access transaction process. CP 1163, 1386-87. If using a debit card, the customer enters a PIN. CP 1387. The computer requests the customer to enter the amount of money to be withdrawn. *Id.* After the customer enters the amount, the machine indicates that a fee will be charged for the transaction and asks the customer if he or she agrees to this fee. CP 1388.

The amount of the fee varies by transaction type and casino. The fee assessed to customers for an ATM cash withdrawal is a fixed dollar amount per transaction (e.g., $5.00 fee). CP 1279. For a credit card cash access transaction or point-of-sale debit card transaction, the fee could be a fixed dollar amount, calculated as a percentage of the amount requested (e.g., two percent of amount requested), or some combination thereof depending on the contract with the casino. CP 57-58. Regardless, the ATM or kiosk informs the customer of the applicable cash services fee and asks the customer if he or she agrees to pay it. If the customer selects "no," then the transaction is canceled. No fee is collected, and no cash is dispensed. CP 1287-89. If the customer selects "yes," then the transaction

proceeds to the next step. Everi sends a request for approval for the cash amount to be withdrawn, plus the fee. CP 1388.

Within a few seconds, the request for approval is transmitted from the Everi terminal to a third party with which Everi contracts to facilitate the processing of the transaction. During the period relevant to this case, the third-party processor was InfoNox, a company based in California. CP 1289-90. The third-party processor requests approval from the credit card network associated with the customer's debit or credit card (VISA, MasterCard, etc.) before routing the transaction to the customer's card issuing bank. CP 1293. The issuing bank validates its records to approve or decline the requested transaction. CP 1293. If approved, the bank transmits an approval message back through the credit card networks and the third-party processor. CP 1295-96. The customer's bank also sends the amount requested plus the fee to Everi's bank account. CP 1296.[1]

Once the ATM or kiosk receives the approved message, it dispenses the cash requested by the customer. CP 1295-97. The machine dispenses either Everi-supplied cash or cash supplied by the casino

[1] The processing of the cash access transaction is governed by the standards set forth by the various credit card networks and state and federal banking regulations. CP 70 (Network and Card Association Regulations), CP 1350 (card networks define coding scheme and industry standards). The tribes have no involvement in regulating the transactions with the card processing in the VISA or MasterCard networks, or with the banks. CP 1422-24.

operation. CP 1295-97. If the cash is supplied by the casino operation, Everi reimburses the casino's bank the amount of cash dispensed to the customer. CP 1295-97. Everi earns fee revenue for each cash access transaction. In addition, Everi earns revenue from the transaction through reverse interchange fees paid by the customer's issuing bank to Everi. CP 1282-84.

During the period at issue in this appeal, 2012 through 2015, Everi's gross revenue exceeded $90 million in Washington surcharges and interchange fees. *See* CP 15.[2]

3. Everi pays a commission to the tribes in exchange for the right to operate ATMs in the casinos.

In return "for the right to operate on its premises," Everi pays the casinos a commission. *See* CP 58, 1280-81. Everi negotiated the commission amounts, which vary by casino, in contracts with the tribes. CP 1282-84. The amounts are typically a percentage of the gross surcharge revenue, and sometimes include a portion of the reverse interchange fee income. *Id.* Everi pays the tribes in the month following

[2] Everi also earns income from its other business activities, which include: (i) selling, renting and maintaining casino gaming systems, casino games, gaming cabinets, gaming systems, ticket machines and lottery systems (CP 59-60, 61-62); (ii) credit reporting, anti-money laundering, and tax compliance (CP 60); or (iii) selling, renting, maintaining and supplying hardware or software, including ATM machines or multifunction kiosk cabinets (CP 60-61, CP 1384); or (iv) "other" miscellaneous transactions such as processing fees (CP 120). *See generally*, CP 5-13 (complaint). For many of these activities, the revenue Everi received was from the tribe, not the casino patrons, and that income is not the subject of this dispute.

the calendar month in which the transactions accrued. CP 1223. The commissions are a significant cost of Everi's business at casinos, constituting approximately 65-67 percent of revenue generated by all cash access transactions. CP 100, 654; *see, e.g.*, CP 1223; CP 1236 (Commission Calculation Sheet). The Department did not tax the tribes on their gross revenue from commissions. CR 205.

Everi's contracts with the tribes identify the different rates charged to the customer depending on whether the customer uses a credit card or debit card. CP 1229. The contracts do not describe the relationship between Everi and the tribes as an agent/principal in collecting and remitting the amounts to the tribes; rather, it is simply that a portion of Everi's revenue earned from ATM services is paid to the casino as to a landlord.

Further, the contracts specifically state that Everi is not excused from federal and state taxes based on its "net income, capital or gross receipts." CP 1240 (describing that the casino would pay sales and use tax, but would be excluded from paying taxes based on Everi's "net income, capital or gross receipts"); *see* CP 1257 (Tribal Rider: "does not excuse EVERI from complying with its own obligations with respect to payment of taxes, license fees, etc.").

B. Proceedings Below

Since 2000, the Department has issued two prior assessments as to the B&O tax liability of Everi (as its predecessor Global Cash Access). First, the Department audited and assessed Everi on several of its business activities, including cash access services, for January 1, 2004, through December 31, 2007. After an administrative appeal, the Department concluded that Everi's cash access services were subject to B&O tax at the "Service and Other Rate." CP 1427, 1432.[3] The Department again audited and assessed Everi on several of its business activities for January 1, 2009, through June 30, 2012. The Department again concluded that Everi's cash access services was taxable under the "Service and Other Rate." CP 1440.

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[3] Everi asserts that the Department characterized Everi's activities as "gaming services" or '[g]ambling' services" in its assessment. Br. at 5, 13-14; CP 1003. This is not true. The Department's assessment classified these activities as "service and other" activities. CP 773-74, 777-78. The fact that the Department's computer-generated form includes multiple categories, including games of chance income totaling less than $50,000, in the same line item as "service and other activities" does not mean the Department classified Everi's activities as gaming. *See* Department of Revenue, *Games, Gambling and Similar Income*, https://dor.wa.gov/get-form-or-publication/publications-subject/tax-topics/games-gambling-and-similar-income (January 5, 2017) ("The lower rate classification shares the line with the Service and Other Activities classification on the excise tax return. The higher rate classification has its own line on the return.").

Everi clearly made more than $50,000 between 2009 and 2012, and had the Department intended to classify Everi's revenue as gambling, the assessment would have applied the higher rate applicable to gambling activities in excess of $50,000. *See* WAC 458-20-131 (Department's Rule discussing "gambling activities" and "$50,000 a year or greater tax classification.").

Everi filed the instant action in Thurston County Superior Court protesting taxes B&O reported and paid to the Department from January l, 2012, to December 31, 2015. CP 7. The complaint lists two causes of action: a "refund of tax paid on tribal casino transactions based on federal law" and a "refund of tax paid on tribal casino transactions, based on Washington State Law." CP 10-11. The latter action discusses only WAC 458-20-192. The relief requested under either cause of action is a full refund of $1,420,849.91 in taxes paid, plus interest. CP 12.

With regard to the issue Everi raises in its brief as an alternative basis for relief seeking a remand, its complaint did not allege any cause of action based on the theory that it acted as a "pass through" agent for the tribes, and thus is entitled to a remand for recalculation of the tax. CP 5-12. Everi did not amend its complaint, nor did it request to do so.

After discovery concluded, both parties moved for summary judgment. CP 17-19, 20-22, 23-43, 623-49, 666-700. Everi based its summary judgment motion on preemption claims under the Indian Gaming Regulatory Act (IGRA), Indian Trader Statutes, and *Bracker* balancing, and on the application of WAC 458-20-192. *See* CP 671. The Department cross-moved for summary judgment on the same claims. CP 32-40. Everi did not raise any argument in its motion for summary judgment that it was merely acting as a "pass through" agent for the tribes

in relation to reducing the amount of the tax based on what it pays to the tribe. CP 23-43, 675-99. It was not until its response brief to the Department's motion that Everi contended for the first time that the "amount of gross income" received was in dispute. CP 838.

The Court ruled in favor of the Department on the merits. In its oral ruling, the Court first emphasized that Everi's customers for the business activities at issue are the cardholders, not the tribes.

> The court finds the surcharge and interchange fees constitute gross income of its business activities and are therefore subject to the B&O tax. The users of the ATMs and/or kiosks are customers of Everi. The state may not tax Indian tribes nor Indians in Indian country as a general rule.
>
> Here, none of the transactions at issue are between Everi and the tribe. Even if the plaintiff, Everi, has collected a fee from an enrolled member, patron, or a user, Everi bears the burden of establishing the existence and the amount of those fees.

VRP 85. The Court then concluded that federal law does not preempt the State's B&O tax on business activities between non-Indians. VRP 85-86. The Court subsequently issued its written order, granting the Department's motion for summary judgment, denying Everi's motion for summary judgment, and dismissing the tax refund action. CP 939. Everi timely filed its appeal. CP 934-35.

IV. ARGUMENT

This Court should affirm the superior court's order granting the Department's motion for summary judgment. CP 939. This Court reviews orders on summary judgment de novo. *Cashmere Valley Bank v. State*, 181 Wn.2d 622, 631, 334 P.3d 1100 (2014). Issues of law are also reviewed de novo. *Id.* Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). A defendant is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Here, the superior court properly concluded that the Department was entitled to judgment as a matter of law, and properly dismissed Everi's complaint.

A. States Generally Have Authority to Apply Nondiscriminatory Generally-Applicable Taxes to Non-Indians Performing Otherwise Taxable Functions Within Indian Reservations.

Under well-settled United States Supreme Court precedent, states may impose nondiscriminatory, generally applicable taxes on non-Indians performing otherwise taxable functions within Indian reservations. *Ariz.*

Dep't of Rev. v. Blaze Constr. Co., 526 U.S. 32, 34, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999) ("a State generally may impose a nondiscriminatory tax upon a private company's proceeds from contracts with the Federal Government . . . when the federal contractor renders its services on an Indian reservation"); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989) ("a State can impose a nondiscriminatory tax on private parties with whom . . . an Indian tribe does business"); *see Sac & Fox Nation v. Okla. Tax Comm'n*, 967 F.2d 1425, 1429-30 (10th Cir. 1992) (state could tax income of tribe's non-Indian employees), *vacated on other grounds*, 508 U.S. 114 (1993); *Neah Bay Fish Co. v. Krummel*, 3 Wn.2d 570, 571-72, 578, 101 P.2d 600 (1940) (state could impose B&O taxes on non-Indians for business done with non-Indians within Indian reservation).

Despite this, Everi, a non-Indian company, argues for a contrary rule—a presumption that federal law preempts state taxes on Everi's activities within Indian reservations. Br. at 17-20. Not so. The Supreme Court "long ago" departed from the view that state laws "have no force within reservation boundaries." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142, 100 S. Ct. 2578, 65 L. Ed. 665 (1980); *see Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481-83, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976); *Utah & N. Ry. Co. v.*

Fisher, 116 U.S. 28, 6 S. Ct. 246, 29 L. Ed. 542 (1885). Today, the Court avoids reliance on "platonic notions of Indian sovereignty" such as those Everi espouses, and "recognize[s] the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992) (citations omitted).

"The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax," that is, who has the legal obligation to pay it. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995). If the legal incidence of the [state] tax rests on non-Indians, no categorical bar prevents enforcement of the tax. *Id.* at 459. Where, as shown next, it is clear that the legal incidence of the tax falls on a non-Indian company engaged in transactions with non-Indian customers, the tax is valid absent federal preemption. *See Blaze Constr.*, 526 U.S. at 36; *Neah Bay*, 3 Wn.2d at 578.

B. The B&O Tax Falls on Everi's Gross Income from Cash Access Transactions with Non-Indian Customers.

The "tax incident" for a B&O tax is the act or privilege of engaging in business activities in the taxing jurisdiction. *Ford Motor Co. v. City of Seattle, Exec. Servs. Dep't*, 160 Wn.2d 32, 40, 156 P.3d 185 (2007). Each business's "activity is separate and each may be taxed." *Impecoven v. Dep't of Rev.*, 120 Wn.2d 357, 364, 841 P.2d 752 (1992). Income from most services, such as cash access services, and other business activities is typically taxed at the rate for service or other business, often referred to as a "catchall" rate. *See* RCW 82.04.290(2)(a)-(b) (tax on account of rendering a service activity is equal to gross income from activity multiplied by rate); *see also Steven Klein, Inc. v. State, Dep't of Rev.*, 183 Wn.2d 889, 899-900, 357 P.3d 59 (2015) (the income of each activity taxed at the "service and other" catchall rate is a discrete business activity).

Here the subject of the B&O tax in this case was the cash access service business activity, measured by the income from that activity multiplied by the service and other rate. As explained below, the Court correctly determined, for application of relevant Indian law cases, that (1) Everi, a non-Indian had the legal obligation to pay B&O tax; and (2) the parties to the cash access transactions were both non-Indians. These

conclusions are consistent with statutes, common law, and the undisputed material facts.

1. Everi, a non-Indian business, bore the legal incidence of the B&O tax on income received on account of its cash access transactions.

Who bears the "legal incidence" of a tax is determined through a legal interpretation of the tax statute. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005) ("We have suggested that such 'dispositive language' from the state legislature is determinative of who bears the legal incidence of a state excise tax") (quoting *Chickasaw*, 515 U.S. at 461).

For the B&O tax, the business who engages in the business activities subject to the tax, bears the burden of the B&O tax imposed on the income from each of its activities. RCW 82.04.220(1); *see also* RCW 82.04.140, .150, (definitions of "business" and "engaging in business"). Here Everi bears the burden of the B&O tax. Everi is engaged in business activities in Washington. Everi received cash access fees and interchanges fees in exchange for providing cash access services in Washington. These cash access services were classified as "service and other" activities, and Everi's gross income on account of these activities was taxed at the "catchall" rate for such activities. RCW 82.04.290(2); CP 1439 (final agency action on Everi's assessment of "service & other activities").

Additionally, Everi's contracts with tribes states that Everi bears the burden of taxes on its gross receipts. CP 1240.

The casinos also earn commission income from Everi for being the exclusive provider of cash access services at the casino, and each casino bears the burden of the B&O tax on the income from the commission activity, measured by gross income received times the applicable rate. However, the Department considers the gross income of the tribal casinos as not taxable, under federal law and thus the tribal casinos do not pay the B&O tax on the commission amounts Everi pays to them. CP 205.

It is also clear that Everi is not a federally recognized Indian Tribe or a member of any tribe. Everi is a Delaware for-profit corporation headquartered in Las Vegas, Nevada with worldwide clientele. CP 56, 63; CP 1375. Everi is non-Indian for purposes of tax preemption analysis. *See Blaze Constr.*, 526 U.S. at 34 (Montana-based Indian-owned company performing work in Arizona Indian reservations was "the equivalent of a non-Indian for purposes of this case").

There is no genuine dispute that Everi, a non-Indian, bears the legal incidence of the tax on its cash access transactions measured by gross income received on account of such activities multiplied by the service and other rate.

2. The cash access transactions at issue are between Everi and non-Indian customers.

As a matter of law, when Everi provides a cash access service to a non-Indian customer, Everi is engaged in a transaction with that customer, not the tribes. Under the Electronic Fund Transfer Act (EFTA),[4] and Regulation E,[5] the customer using the machine is the "consumer" of the electronic fund transfer and Everi is the "operator" of the machine. 12 C.F.R. § 205.2(e), (g), 12 C.F.R. § 205.3(b), 12 C.F.R. § 205.16(a), (c)(1), (e); *see also* 12 C.F.R. § 205.1(b) (purpose of Regulation E); CP 69 (EFTA requires Everi to notify casino patrons of fees). Tribes are not parties to the transactions from which Everi receives the revenue that determines its tax obligation. The tribes are not withdrawing cash or agreeing to pay fees to Everi.

There is no genuine dispute that all of the customers who used Everi's machines were non-Indians. Everi does not contend that any tribal members used its machines, and the record contains no evidence that would support such a contention. CP 1334 (admission that Everi is "unable to identify individual transactions by tribal members"). The superior court correctly ruled that "if the plaintiff, Everi, has collected a

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[4] Pub. L. No. 90-321, 92 Stat. 3728 (1978) (codified as amended at 15 U.S.C. §§ 1693-1693r (2006).

[5] 12 C.F.R. pt. 205 (promulgated pursuant to 15 U.S.C. § 1693(b)).

fee from an enrolled member, patron, or user, Everi bears the burden of establishing the existence and the amount of those fees." VRP 85; *see Young*, 112 Wn.2d at 225; RCW 82.32.180 (statutory refund action requires proving tax was incorrect and correct amount of tax). Everi does not challenge that ruling on appeal.

Everi, however, challenges the superior court's ruling that Everi's transactions were between Everi and individual casino patrons rather than with the tribes. Br. at 33 ("Everi provides cash access services on behalf of tribes" and "Everi has no contracts with individual casino patrons"). This mischaracterization of the record and undisputed facts should be rejected. Everi forms a contract with its customers each time a customer accepts Everi's offer to process the requested cash access transaction for a fee by clicking the "YES" or "I AGREE" button. This is all the law requires to create a contract. 25 DAVID K. DEWOLF, ET. AL., WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE §§ 2:2, 2:7, 2:19 (3d ed. 2014) (offer, acceptance, and consideration). That customer pays the fee, not the tribe.

Thus, the fact that Everi also has a contractual relationship with tribes does not change the fact that the taxed transactions at issue here take place between Everi and non-Indian customers. Everi's contracts with the tribes recognize that Everi will also be doing business with "its patrons." CP 1238 ("**Services.** [Everi] shall provide one or more Services to the

Service Center *and its patrons*") (emphasis added); *see also* CP 1222, 1226, 1230. Neither the ATM interaction between Everi and the customer, nor the contract between Everi and the tribes recognizes any contractual privity between the tribes and the customer for the surcharge or interchange fee. Furthermore, Everi's contracts recognize that the tribes may be immune from taxes, but to avoid any "doubt" the contract "does not excuse EVERI from complying with its own obligations with respect to payment of taxes." CP 1257 (paragraph 1).

In summary, Everi is a non-Indian business that bears the legal incidence for the B&O tax on the gross income from its cash access transactions. The superior court correctly ruled that these transactions are with non-Indian customers, not the tribes or tribal members. VRP 85.

C. Federal Law Permits State Taxation of Everi's Cash Access Transactions at Issue in this Case.

Everi argues its cash access transactions are exempt from state B&O tax under three theories of preemption: the Indian Gaming Regulatory Act, Indian Trader Statutes, and implied preemption under the balancing test of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). As shown below, Everi fails to show that any federal law has preempted this taxing power.

1. The Indian Gaming Regulatory Act does not preempt the state tax.

Everi argues that IGRA precludes the State from imposing any tax on Everi unless a tribal-state gaming compact specifically allows it, because Everi is an "entity authorized by an Indian tribe to engage in a class III activity." Br. at 27-28, n.14. That argument ignores the language of IGRA, decades of case law, and the facts of this case. The Second and Ninth Circuit Courts have considered similar arguments and rejected those tax preemption challenges. *See Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008). This Court should do the same.

Though IGRA occupies the field of Indian gaming and thus may preempt some state taxes, the test for its preemptive effect depends on whether taxes are "targeted at gaming." *Mashantucket Pequot*, 722 F.3d at 470 (IGRA did not preempt state property tax on lessors of slot machines used by tribe at casino); *cf. Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 435 (9th Cir. 1994) (IGRA preempted state tax on off-track betting activities at tribal facilities). The B&O tax in this case is not targeted at gaming. It is a generally-applicable, nondiscriminatory tax on the revenue from ATM fees that Everi receives from its customers who withdraw cash from their bank accounts. The mere fact that the

withdrawals happen in a casino, and that the customer may use the cash to gamble afterwards, does not turn them into "gaming." *See* Kevin K. Washburn, *Recurring Issues in Indian Gaming Compact Approval*, 20 Gaming L. Rev. & Econ. 388, 394-95 (2016) ("Most gaming operations have additional amenities that are connected in a business sense to the casino operation and are co-located with a casino, but do not themselves constitute gaming").

Finding that this tax is not targeted at gaming is also consistent with U.S. Department of the Interior views that "gaming" involves only those activities that involve some type of game of chance:

> Although IGRA does not define "gaming," except to distinguish among three distinct classes of gaming, it is clear from both the statute and the legislative history that "gaming" involves some type of game of chance for a prize or award of value. *See* 25 U.S.C. § 2703(6), (7) (defining Class I and Class II gaming). None of the examples of Class III gaming given in the legislative history – e.g., banking cards, slot machines, horse and dog racing — are of a like kind to parking vehicles. *See, e.g.*, Indian Gaming Regulatory Act, S. Rep. No. 100-446, at 7 (1998), reprinted in 1988 U.S.C.C.A.N. 3071, 3077. . . . [T]he Board concludes that parking by casino patrons does not constitute "gaming" under IGRA.

California v. Acting Pac. Reg'l Dir., 40 IBIA 70, 77, 81 (2004);[6] *see* *Michigan v. Bay Mills Indian Cmty.*, __ U.S. __, 134 S. Ct. 2024, 2032,

[6] Interior Board of Indian Appeals, 40 IBIA 70 (Aug. 10, 2004), www.oha.doi.gov/IBIA/IbiaDecisions/40ibia/40ibia070.pdf (last visited January 5, 2018).

188 L. Ed. 2d 1071 (2014) ("'class III gaming activity' is what goes on in a casino—each roll of the dice and spin of the wheel.").

Everi admits, cash access services and the patron facing devices (ATMs and kiosks) that provide them are not "games of chance" or "class I, II or III" playable games or gaming. CP 1373-75. There is no evidence that "cash access services" are "gaming." Everi points to its tribal licenses, Br. at 13, but those prove nothing. Most of them do not specify the services or goods they authorize. Some are tribal "business permits," not "gaming" licenses. CP 355-56. One license even says it is a "non-gaming vendor" license. CP 370.

Everi also points to its licenses from the Washington State Gambling Commission, but again, they have nothing to do with Everi's ATM services. CP 429-30. They are not "gaming service provider" licenses, as Everi erroneously claims. Br. at 12-13. Everi is not licensed as a gaming or gambling service supplier in Washington.[7] This is not surprising because ATM services are not considered gambling services under state law. *See* WAC 230-03-210 (list of gambling related services requiring a license).

[7] The Gambling Commission maintains lists of licensees on its website: www.wsgc.wa.gov/licensing/search-license/licensees (last visited Jan. 8, 2018).

Everi does hold a "manufacturer" license from the State Gambling Commission, but that license has nothing to do with Everi's ATM services. CP 429-30. It authorizes Everi to sell "gambling devices," such as "games of chance" and kiosks that interface to tribal lottery systems. RCW 9.46.0241; RCW 9.46.310; *see* WAC 230-03-185. But the sales and services related to those kiosk functions (i.e., storage of cash and ticket redemption) are not in dispute in this case. *See* CP 1337-38. They are not the business activities at issue here (CP 1317-18), and the computer and telecommunications that processes the ATM functions are separated from the casino-slot systems. *See* CP 1146, 1194.

Next, in an argument that would grossly expand the scope of IGRA preemption, Everi argues that ATMs are essential to the very existence of casino operations. Br. at 27. This is not the proper test for preemption. Moreover, it again confuses the patron's use of cash at the casino with its business of charging fees for providing ATM services to Everi customers.

Finally, these arguments fail because Everi provided no evidence that the tax interferes in any way with any tribe's governance of gaming. *Cf. Mashantucket Pequot*, 722 F.3d at 470 (mere ownership of slot machines does not qualify as gaming under IGRA, and state tax on such ownership does not interfere with tribal governance of gaming). Everi

provided no evidence that the taxation of surcharges actually prevented any cash access transactions from occurring at any tribal casino.

Nor did Everi provide any evidence that any tribe experienced depressed tribal gaming revenue due to Everi having paid state taxes on the surcharges collected from customer patrons of casinos. And Everi's contracts with the Tribes specifically contemplate that Everi will be responsible for all state or federal taxes based on Everi's gross or net revenue from providing the service. *See, e.g.*, CP 1240 (casinos will pay taxes "excluding taxes based on [Everi]'s net income, capital or gross receipts.").

Everi also argues that a particular subsection of the Tribal State Compact for Class III Gaming Provision in IGRA bars the taxes in this case. Br. at 2-3, 25-26 (25 U.S.C. § 2710(d)(4)). But the plain language of that section in IGRA does not bar any tax. It is simply a disclaimer. It says "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." 25 U.S.C. § 2710(d)(4). Both the Second and Ninth Circuits have rejected Everi's reading of 25 U.S.C. § 2710(d)(4), holding that the plain language of this

section neither bars nor permits state taxes. *Mashantucket Pequot*, 722 F.3d at 469; *Cabazon,* 37 F.3d at 433-34.

2. Everi's arguments ignore and mischaracterize relevant case law.

Everi argues that no court has held that a state may tax a category it invents called "tribally-licensed gaming-related service provided inside a casino" and claims that one case held "just the opposite." Br. at 28 (*Flandreau Santee Sioux Tribe v. Gerlach*, No. CV 14-4171, 2017 WL 4124242 at *2 (D.S.D. Sept. 15, 2017)). Everi's statement is misleading and ignores relevant case law.

Courts have repeatedly upheld state taxes and regulations that have significant relationships to tribal gaming, but are not targeted at gaming. For example, in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005), the Court upheld a state tax on fuel a non-Indian distributor supplied to a tribal gas station next to a casino, even though fuel sales at the gas station were an integral and essential part of the tribe's on-reservation gaming enterprise. *See also Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 756, 958 P.2d 260 (1998) (IGRA did not preempt Washington public records act as applied to records related to tribal-state gaming compacts); *Mashantucket Pequot*, 722 F.3d at 470 (IGRA did not preempt state

property tax on lessors of slot machines used by tribe inside casino); *Barona Band*, 528 F.3d 1184 (IGRA did not preempt state sales tax on construction materials purchased by non-Indians and used to construct tribal casino); *cf.*, *Casino Res. Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 439 (8th Cir. 2001) (IGRA did not preempt state common law contract and tort claims as applied to gaming service and management contract between two non-Indians); *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481 (9th Cir. 1998) (IGRA did not preempt state public records law as applied to report concerning casino).

Everi also mischaracterizes what happened in *Flandreau*. The Flandreau Santee Sioux Tribe challenged South Dakota's authority to impose state use taxes (akin to sales tax) on non-Indians who purchased goods and services *from the Tribe* at the Tribe's casino, and to require *the Tribe* to remit the revenue to the state. *Flandreau Santee Sioux Tribe v. Gerlach*, No. CV 14-4171, 2017 WL 4124242, at *2 (D.S.D. Sept. 15, 2017).[8] Additionally, South Dakota denied the Tribe's liquor licenses for failing to remit the tax. *Id.* The court found that the "transactions the State seeks to tax are not merely tangentially related to tribal gaming but would not exist but for the Tribe's operation of a casino." *Flandreau Santee*

[8] The defendant South Dakota officials filed a Notice of Appeal on November 16, 2017, but it has not yet been docketed in the Eighth Circuit because a post-judgment motion has not yet been resolved in the district court.

Sioux Tribe, 2017 WL 4124242 at *7, *see id.* at 8-9 (most of the transactions the State seeks to tax "are not of the kind in *Harrah's Entm't* [243 F.3d 435] that would occur between non-Indians regardless of the existence of the Casino").[9] Because of Flandreau's remote location, "the Casino simply could not operate in order to further the self-sufficiency of the Tribe" without the associated goods and services the Tribe was providing. *Id.* at *9. For those reasons, that trial court held that IGRA preempted state use taxes on goods and services the Tribe provided to non-Indian patrons at its casino.

This case is much different. First, the cash access transactions at issue are between Everi and non-Indian customers. The tribe is not the seller. Instead, Everi's contracts with Indian tribes make Everi responsible for "complying with its own obligations with respect to payment of taxes," CP 1257, including taxes on its "gross receipts," CP 1240. Moreover, ATM transactions between non-Indians regularly exist regardless of the casino, because of the electronic telecommunications infrastructure used to support ATMs, banking systems, and the credit and debit card

[9] A district court "is not controlling authority in any jurisdiction, much less in the entire United States, and falls far short of a robust consensus of cases of persuasive authority." *Segaline v. State Dep't of Labor & Indus.*, 199 Wn. App. 748, 768, 400 P.3d 1281 (2017) (quoting, *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (internal quotation and citation omitted). Accordingly, though this Court accords great weight to recognizing to Circuit Court decisions, it need not accept the Court's logic in *Flandreau*.

networks. They are conducted pursuant to the Electronic Fund Transfer Act (EFTA) and Regulation E, and they occur every day at bank ATM, supermarkets, convenience stores, and gas stations, and they occur just about everywhere a consumer wants to be.

The *Flandreau* court itself recognized that IGRA did not preempt state taxes on sales to non-Indians at the tribe's convenience store because, "though [the Store] may benefit from its proximity to the Casino, [it] is not in existence but for the tribe's operation of a Casino and it cannot be said that the only substantial purpose of a convenience store is to facilitate gaming." *Flandreau*, 2017 WL 4124242 at *10.

Flandreau is also wrongly decided in creating and applying an "existence of the casino" test. The Second Circuit did not rely on an "existence of the casino test," nor would such a test have supported its conclusion. There would be no slot machines at Foxwoods' casinos if the casino gaming enterprise "did not exist." *Mashantucket Pequot,* 722 F.3d at 459-60 (applying the *Bracker* preemption test and concluding that federal law did not preempt casino slot machine rentals from state taxation); *see also Barona Band*, 528 F.3d 1184 (upholding state tax on casino building materials).

For these reasons, this Court should hold that IGRA does not preempt state B&O tax on Everi's cash access transactions.

D. The Indian Trader Laws Do Not Preempt the State Tax.

The Court should reject Everi's erroneous reading of the Indian Trader Statutes which, like its reading of IGRA, is overbroad and not supported by case law. The United States Supreme Court has never held that the Indian Trader Statutes preempt a state tax on non-Indian transactions with other non-Indians.

Under the Indian Trader laws, which were enacted to prevent fraud and abuse by persons trading with Indians, any person desiring to trade with Indians in Indian Country must obtain a license from the Commissioner of Indian Affairs and comply with federal regulations. 25 U.S.C. §§ 261, 262; 25 C.F.R. § 140.1; *Cent. Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 163-64, 100 S. Ct. 2592, 65 L. Ed. 2d 684 (1980). This case falls outside that statute. The tax here is on Everi, arising from fees it receives from non-Indian customers when they withdraw cash from Everi's ATMs. *See State ex rel. Ariz. Dep't of Rev. v. Dillon*, 170 Ariz. 560, 826 P.2d 1186, 1192 (Ct. App. 1991) (Indian Trader Statutes did not apply to licensed trader's sale of cigarettes to non-Indians within Indian reservation); *Neah Bay*, 3 Wn.2d at 578 (non-Indians doing business with non-Indians were subject to state B&O tax, "even though doing business under license within an Indian reservation"). The Supreme Court has never held that the Indian Trader statutes preempt state taxes on

transactions between non-Indians. *See Dep't of Taxation & Fin. of New York v. Milhelm Attea & Bros.,* 512 U.S. 61, 114 S. Ct. 2028, 129 L. Ed. 2d 52 (1994); *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172-75 (10th Cir. 2012).

Nor is there any merit to Everi's argument that, because it is providing ATM services in tribal casinos in accordance with contracts with Indian tribes, the Indian Trader Statutes apply and preempt any state taxes. First, the Indian Trader Statutes do not wholly immunize traders from all state laws. *Milhelm Attea & Bros., Inc.,* 512 U.S. at 74-75; *see also Mashantucket Pequot Tribe*, 722 F.3d at 468-69 (Indian Trader Statutes neither expressly nor by implication preempt a state or local personal property tax imposed on a non-Indian who leases slot machines to a tribal-owned casino); *Sac & Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 581-82 (10th Cir. 2000) (Indian Trader Statutes did not preempt state fuel tax imposed on non-Indian distributors who supplied fuel to tribal fuel retailers).

Finally, the Indian Trader Statutes regulate "trade with the Indians." 25 U.S.C. § 262; 25 C.F.R. § 140.1. The U.S. Supreme Court has held that the law preempts state taxes on income from traders' on-reservation retail sales directly to reservation Indians. *Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965).

The Court has cautioned, however, that *Warren Trading Post* does not stand for the proposition that "the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians." *Moe*, 425 U.S. at 482. This case falls outside the preemptive domain of the Indian Trader Statutes because it does not involve a tax on income that Everi receives from retail sales to tribes or their members.

E. The *Bracker* Analysis Does Not Apply in This Case.

The Court has never extended the *Bracker* preemption inquiry beyond the circumstance of persons directly engaging in transactions with a tribe or tribal members. "[W]e have applied the balancing test articulated in *Bracker* only where 'the legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members,' on the reservation." *Wagnon*, 546 U.S. at 110 (quoting *Blaze Constr.*, 526 U.S. at 37). The court explained, "[l]imiting the interest-balancing test exclusively to on-reservation transactions between a nontribal entity and a tribe or tribal member is consistent with our unique Indian tax immunity jurisprudence." *Id.* 546 U.S. at 111.

The Ninth Circuit has applied the *Bracker* analysis to activities or transactions between non-Indians, but only where the Indian Tribe was a party asserting its own interests, and most of these cases were decided prior to the Supreme Court's decision in *Blaze*. *See, e.g., Yavapai-Prescott*

Indian Tribe v. Scott, 117 F.3d 1107, 1113 (9th Cir. 1997) (Tribe brought action, court held business transaction taxes on non-Indian room rentals, food and beverages not preempted); *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1240 (9th Cir. 1996) (Tribe brought action, holding privilege tax on non-Indian sale of tickets and concessionary items on reservation not preempted); *Salt River Pima-Maricopa Indian Cmty. v. Ariz.,* 50 F.3d 734, 739 (9th Cir. 1995) (Tribe brought action, holding sales taxes on non-Indian goods sold on reservation land by non-Indian sellers to non-Indian buyers not preempted).

Everi, in contrast, is taxed for its business of engaging in transactions with non-Indian customers obtaining cash from an Everi ATM kiosk. The customers enter into an agreement with Everi to authorize the surcharge fee and any related fees charged by the customer's bank. No tribe is involved in this transaction between the customer and Everi.

Accordingly, post-*Blaze*, it is doubtful that *Bracker* balancing applies to transactions between non-Indians. *But see*, *Tulalip Tribes v. Washington*, 2017 WL 58836 (W.D. Wash. Jan. 5, 2017).[10] It is especially

[10] In January 2017, a federal district court denied a motion for summary judgment on the issue of whether the *Bracker* balancing test applies to taxation of non-Indians at the Tulalip reservation.

Notably, the pending action in *Tulalip Tribes* involves an action brought by the Tribe against the State, where the Tribe asserts its sovereign interests in imposing future

doubtful where no tribe is a party in the case. As Everi apparently concedes (Br. at 16 n.10) non-Indian companies such as Everi, lack standing to assert the rights of Indian tribes as a basis for avoiding their own obligations under state law. *E.g.*, *Baker Elec. Coop., Inc. v. Pub. Serv. Comm'n*, 451 N.W.2d 95, 97-98 (N.D. 1990); *see Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032 (1987) (plaintiffs lacked standing to assert equal protection rights of nonparties).

1. The federal interests represented by IGRA do not apply.

Even if *Bracker* applies, there are no significant interests warranting preemption. Everi cites to various federal interests represented by federal statutes, but it primarily relies upon IGRA to represent the federal interest. Br. at 36-38. The federal interests reflected in IGRA do not apply to this tax. The Court need only look at two federal cases that dispose of this argument, and then ask if taxation on building a casino or renting slot machines is not preempted, why would ATM services be preempted?

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taxes on non-Indian incidents (e.g., activities and property) to the exclusion of future State taxation. In contrast, no Tribe has joined the instant case or requested the court consider any tribal interest in taxing Everi's activities. Nor has Everi provided evidence that it paid tribal taxes on its revenue from cash access services.

In *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1190-93 (9th Cir. 2008), the court held that a non-Indian contractor who purchased construction materials from non-Indian vendors for use in a tribal casino was not exempt from California's sales tax. The Barona Band planned a $75 million expansion of its casino and hotel. *Id.* at 1187. The parties devised a method to circumvent the state's sales tax on the tribe's contractor by scheduling all deliveries to occur within the reservation. *Id.* After California assessed a subcontractor who failed to remit sales tax, the subcontractor sought indemnification from the Tribe and the Tribe challenged the assessment. Like Everi, the Tribe argued that the tax was preempted under *Bracker* because federal interests under IGRA outweighed the state's interests. *Id.* at 1192. The court rejected this argument, holding that the federal interests under IGRA did not apply because IGRA regulates gaming, not building construction. *Id.* Similarly, the federal interest under IGRA would not apply to the State's B&O tax on Everi's activities for supplying cash access machines in tribal casinos. IGRA regulates gaming, not banking.

This same analysis was followed by the Second Circuit in *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013). In *Mashantucket*, the town imposed a personal property tax on the lessors of slot machines used by the Tribe at Foxwoods Casino. 722 F.3d

at 459. The Tribe and the lessors made the same three preemption arguments advanced by Everi. The appellate court rejected each of these arguments. In applying the *Bracker* analysis, the court determined that "nothing within IGRA reveals congressional intent to exempt non-Indian suppliers of gaming equipment from generally applicable state taxes that would apply in the absence of the legislation." *Id.* at 473. The court said that IGRA's preemptive effect extends to the governance of gaming, but not to property taxes on non-Indian equipment suppliers. *Id.*

The same analysis applies here. If a personal property tax can be imposed on non-Indian vendors who supply slot machines to Indian casinos, a B&O tax can be imposed on a non-Indian vendor who charges non-Indians fees for ATM services supplied through those machines.

2. The tribal interests do not apply, and even if they applied, they would be minimal.

Everi argues that the tribes have a strong economic and regulatory interest. Br. at 38-42.[11] Tribal economic interests are minimal because the B&O tax is not imposed on the tribe; it is imposed on Everi's business activities. Those taxes had no effect on the amounts the Tribes received

[11]Everi also lacks standing to raise any tribal interest. The Standing Doctrine prohibits a litigant from raising another's legal rights. *E.g.*, *Haberman*, 109 Wn.2d at 138; *N. Border Pipeline Co. v. State*, 237 Mont. 117, 772 P.2d 829, 835-36 (Mont. 1989) (company lacked standing to assert a violation of tribal sovereignty as a basis for challenging a state tax imposed on it).

from Everi in commissions. This is because Everi's contracts base the commission on the gross surcharges and interchange fees Everi collects.

Even if the Court were to examine Everi's argument that the taxes at issue interfere with tribal interests in self-sufficiency, these identical arguments were rejected in *Barona* and *Mashantucket*. As in those cases, the record contains no evidence that tribal interests in economic development are harmed. *See Barona*, 528 F.3d at 1192; *Mashantucket*, 722 F.3d at 474. Furthermore, the tribes do not regulate the electronic transfers, Visa, MasterCard, or the issuing banks, or otherwise seek to regulate the cash access transactions through the networks themselves. CP 1417, 1422.

3. The State has a strong interest in imposing its tax on business by non-Indians.

The final factor examines the State's interest in imposing its tax. The non-Indians who utilize Everi's cash access machines receive state services, such as roads, schools, courts, and general government services. Those factors weigh against preemption. *See Cotton Petroleum*, 490 U.S. at 185 (allowing state taxation of oil and gas extraction on reservation because of state's services to and interest in regulating that industry); *Mashantucket Pequot*, 722 F.3d at 476 (applying *Bracker*, the court upheld taxes on slot machine leases because the "Town and State have

more at stake than the Tribe"); *Barona*, 528 F.3d at 1193 ("We conclude that California's tax of [non-Indian subcontractor on casino construction project] is a valid exercise of state power under the *Bracker* test"); *Salt River Pima-Maricopa Indian Comty. v. State of Arizona*, 50 F.3d 734 (9th Cir. 1995) (applying *Bracker*, the court upheld the state's tax that was imposed on sales and rentals by non-Indian businesses selling products and services to non-Indians at a shopping mall located on an Indian reservation.)

Here, Washington State has a significant interest in Everi and Everi's use of state resources for providing cash access services to cardholders at these casinos. Everi's customers who use their PIN on Everi machines have accounts from banks with branches in Washington and use debit and credit cards issued by Washington banks. CP 767-69. The customer's banks play a role in approving or denying a transaction and remitting funds. CP 1293-96. Customers use Washington roads to get to and from the casino where these ATMs are located and avail themselves of the benefits of the Washington legal system. When providing a cash access service Everi transmits signals across Washington telecommunications infrastructure to and from their processing vendor in California. CP 1144-46, 1291-93, 1295.

Everi is also licensed by Washington's Business Licensing Services. CP 786. Everi had resident employees who lived and worked in Washington to directly support its business at casinos. CP 1331-33, *see* CP 790-92, 801-03. These employees live in Washington residences, travel in Washington licensed vehicles, and travel across Washington roads.

Everi also had non-resident employees who visited the State to sell and maintain cash access services. CP 792-94, 798, 1129, 1308-09. For example, when employees visited, they utilized Washington State roads to travel to and from Seattle-Tacoma Airport or from another state to the casino located in Washington, and while using these roads they were both subject to or benefitted from law enforcement services (including a traffic ticket from Washington State Patrol). CP 792-93. They fly over Washington State airspace, and use Seattle-Tacoma Airport resources. *Id.* They eat at restaurants and stay at hotels located in Washington, but not on the reservation. *Id.*

In summary, even if the Court were to apply the factors outlined under *Bracker*, Everi fails to demonstrate any federal or tribal interest that outweighs the state's interest in imposing a tax that supports governmental services to the casino patrons who are state residents or visitors.

F. Rule 192 Permits State Taxation of Everi's Cash Access Transactions.

Everi seeks an exemption from the B&O tax obligations based on its relationship with Indian tribes. Anyone claiming a tax benefit, exemption or deduction from a taxable category has the burden of showing that they qualify for it. *Rent-A-Car of Washington-Oregon, Inc. v. Wash. Dep't of Rev.*, 81 Wn.2d 171, 174-75, 500 P.2d 764, 767 (1972). The Department's rule, WAC 458-20-192, is its interpretation of federal case law in Washington as it relates to the taxation of business activities in Indian Country. This rule supplies Everi no greater refuge than the case law discussed above.

Accordingly, the Department's rule acknowledges the general rule that under federal law the state may not tax Indians or Indian tribes in Indian Country. WAC 458-20-192(1)(a). However, it also notes that "[g]enerally, a nonenrolled person doing business in Indian country is subject to tax." WAC 458-20-192(7). As explained above, this case involves a non-Indian doing business in Indian country.

The rule also explains there are some situations in which federal law preempts the state from imposing tax on a nonmember doing business in Indian Country with an Indian or Indian tribe. WAC 458-20-192(1)(a). It provides some specific examples of nonmembers doing business with

Indians, including application of the *Bracker* balancing inquiry. *See* WAC 458-20-192(7)(a)-(e).

However, that situation is not present in this case simply because, as explained above, the business activities at issue in this case are between non-Indians. Moreover, as explained above, the activities involved are not gaming; Everi is not operating or managing a gaming operation. And furthermore, a balancing test weighs in Washington's favor.

G. This Court Should Reject Everi's Untimely Request to Exclude Portions of the Transaction Fees from Its Taxable Gross Income As "Pass Through" Amounts.

Everi argues in the alternative that if federal law does not preempt the B&O tax, then the Court should remand the matter for recalculation of its taxable gross income. Contrary to the trial court ruling, Everi argues that the portion of its receipts from cash access transactions that it pays to the tribes as commissions does not constitute gross income of its business subject to the B&O tax. Br. at 47-49; *see also* VRP 85 (oral ruling that surcharge and interchange fees constitute "gross income of [Everi's] business activities and are therefore subject to the B&O tax"). According to Everi, the commissions it pays the tribes represent amounts that merely "pass through" Everi from the patrons when they access their kiosks because Everi collects the fees from the patrons on behalf of the tribes as

the tribes' agent. Br. at 47-48. Everi claims it is taxable only the amounts it "actually retained." Br. at 49.

Everi's claim is untimely and entirely without merit.

1. The Court should reject Everi's "pass through" argument because Everi failed to timely plead or raise it.

Everi failed to plead that it was acting as the tribes' agent and that the amount collected was incorrect. The complaint lists two causes of action: a "refund of tax paid on tribal casino transactions based on federal law" and a "refund of tax paid on tribal casino transactions, based on Washington State Law." CP 10-11. The latter cause of action specifically discusses only WAC 458-20-192, which is the Department's rule regarding taxation in Indian Country, not the calculation of gross income under the B&O tax. The relief requested for either cause of action is a full refund of $1,420,849.91 in taxes paid, plus interest. CP 12. There is no cause of action based on "pass through" as the tribe's agent. CP 5-12. At no time has Everi amended nor requested to amend the complaint. Instead, Everi raised this claim in response to the Department's motion for summary judgment. CP 23-43, 633. Thus Everi did not plead the claim initially, did not raise the claim until the motion, and did not undergo the process for properly adding the claim afterwards.

Washington is a notice pleading state, which requires a simple concise statement of the claim and the relief sought. CR 8(a). Complaints in tax cases must "set forth the amount of the tax imposed upon the taxpayer which the taxpayer concedes to be the correct tax and the reason why the tax should be reduced or abated." RCW 82.32.180. Everi did not state anywhere in its complaint that it was an agent for the tribe or that the amount taxed was incorrect. Its complaint asked for a refund of the entire amount. Everi's complaint failed to give the Department fair notice of the claim asserted and therefore is insufficient and untimely. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999) (a party who fails to plead a cause of action "cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along").

Additionally, Everi raised the issue in response to the motion for summary judgment. CP 633. A plaintiff is not permitted to raise new legal theories in response to a motion for summary judgment without first amending the complaint, for which leave would be required. CR 15; *Camp Fin., LLC v. Brazington,* 133 Wn. App. 156, 162, 135 P.3d 946 (2006). Everi's new argument is untimely and should not be considered.

2. Everi fails to establish, and cannot establish, that it acts as a collection agent on behalf of the tribes.

Everi argues that it should be able to exclude from its gross income the amounts it pays tribes on the grounds that the amounts represent "pass-through" income collected from the patrons for the tribe in return for using the ATM kiosk. Br. at 47-48. It is true that both the Department and Washington courts have recognized circumstances in which a taxpayer acting as another person's agent will be allowed to exclude from taxable gross income amounts handled by the agent solely in the capacity as an agent for its principal. *See, e.g., Wash. Imaging Servs., LLC v. Wash. Dep't of Rev.*, 171 Wn. 2d 548, 252 P.3d 885 (2011); WAC 458-20-111. But those circumstances are not present here.

Everi's principal argument is that it acts as a collection agent for the tribes. Everi compares itself to taxpayers in two published administrative decisions, a billing service for a medical partnership and a magazine subscription sales agent. Br. at 48 (citing Det. No. 88-377, 6 WTD 439 (1988) and Det. No. 91-210, 11 WTD 389 (1992)). For some reason, Everi ignores the Washington Supreme Court's 2011 decision in *Washington Imaging*, which directly addresses this very issue. In *Washington Imaging*, the Court held that to prevail on the argument that the business is merely acting as a collection agent, a taxpayer must collect

money that third parties/debtors owe to the taxpayer's principal. *Washington Imaging*, 171 Wn.2d at 557 ("For Washington Imaging to prevail on the argument that it acted only as a collection agent of Overlake, it must have collected money *owed to Overlake*.") (Emphasis in original.) The Court rejected the collection agent argument in that case because patients contracted solely with Washington Imaging to pay for medical imaging services and had no separate obligation to pay Overlake (the radiologists). *Id.*

The same is true here. The evidence shows that patrons entered into an agreement with Everi Payments and the patrons' banks to access cash. CP 1163, 1287-89, 1388. No evidence indicates that the amount charged a patron was a commission charged by the Tribe. Rather than patrons owing those amounts to the tribes, the fee agreement between the tribes and Everi establishes that *Everi* owed the commission to the tribes. *See e.g.*, CP 1229. Thus, as a matter of law as explained in *Washington Imaging*, Everi cannot exclude that income.[12]

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[12] The B&O Tax is a tax on the gross income, not a tax on net income. *Rho Co. v. Dep't of Rev.*, 113 Wn.2d 561, 566, 782 P.2d 986 (1989). Accordingly, a service provider may not deduct any of its own costs of doing business, including its labor and administrative costs, from its gross income unless an express statutory deduction applies. *See Pilcher v. Dep't of Rev.*, 112 Wn. App. 428, 49 P.3d 947 (2002); RCW 82.04.080 (definition of "gross income of the business"). One of Everi's non-deductible costs was paying the required commissions to the tribes under the tribal contracts. CP at 1222-23, 26, 29, 30, 34, 46.

Everi also cites two cases in support of its pass-through argument: *Walthew, Warner, Keefe, Arron, Costello & Thompson v. State Dep't of Rev.*, 103 Wn.2d 183, 186, 691 P.2d 559 (1984); *City of Tacoma v. William Rogers Co., Inc.*, 148 Wn.2d 169, 175, 60 P.3d 79 (2002)). These cases actually discuss the situation of a taxpayer seeking to exclude income from "gross income of the business" as a *purchasing* agent of services for a client. The Department has addressed that situation in WAC 458-20-111, which both of those cases discuss and apply. Under Rule 111, amounts that merely "pass through" a business in its capacity as an agent are not attributed to the business activities of the agent and therefore are not subject to tax.

For Rule 111 to apply to an advance or a reimbursement, three conditions must be present: "(1) the payments are "customary reimbursement for advances made to procure a service for the client;" (2) the payments "involve services that the taxpayer did not or could not render;" and (3) the taxpayer "is not liable for paying the associate firms except as the agent of the client." *Washington Imaging*, 171 Wn. 2d at 561-62. All three conditions must satisfied, and the third prong can be only satisfied if (a) a "true agency relationship" exists and (b) the agent's duty to pay constitutes "solely agent liability." *Id.* at 562; *see also William Rogers*, 148 Wn.2d at 178; *Walthew*, 103 Wn.2d at 188.

The record lacks any evidence that a portion of the surcharge or interchange fee is intended as an advance or reimbursement of a fee the customer ultimately owes to the tribes. Everi, not the tribes, is the provider of the ATM's cash access service and charges customers the surcharge fees. CP 56, 1222, 1325. Everi, not the tribes, has the contractual right against card processors or card networks to process the transaction and to collect fees. CP 57-69, 1289-90, 1325. Additionally, Everi has completely failed to cite any evidence that it is acting solely as an agent of the tribes and has no liability to the tribes other than as an agent. The evidence does not exist because Everi has primary liability to the tribes for those amounts. As a matter of law, Everi's commission payments to tribes are a part of Everi's cost of doing business and cannot be excluded under Rule 111 and related cases, or under a collection agent theory.

Everi's alternative argument to obtain a refund of a portion of its receipts was clearly an afterthought. The Court should reject it as untimely and without any legal or evidentiary support.

V. CONCLUSION

Nothing in federal or state law preempts the state from imposing its B&O tax on Everi Payments' gross receipts on transactions from non-Indians seeking cash from one of Everi Payments' ATM machines. The

Superior Court correctly granted summary judgment in favor of the Department. This Court should affirm.

RESPECTFULLY SUBMITTED this 8th day of January, 2018.

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