IN THE SUPREME COURT OF THE

STATE OF NEVADA

TITLEMAX OF NEVADA, INC., A NEVADA CORPORATION, Appellant, vs. THE STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION, Respondent.	**Supreme Court No.** 69807 District Court Case No.: A719176

Appeal from Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Valerie Adair, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as required by NRAP 26.1(a). Appellant TitleMax of Nevada, Inc. is a Nevada corporation. It is solely owned by its parent corporation, TMX Finance LLC. TMX Finance LLC is privately held by TMX Finance Holdings, Inc., which is also privately held.

Holland & Hart LLP represents the Appellant in this proceeding. The following attorneys of the law firm Holland & Hart LLP have appeared for the Appellant:

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DATED this 2nd day of August, 2016.

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INTRODUCTION

The issue of this appeal is simple. Appellant TitleMax of Nevada, Inc. d/b/a TitleMax and TitleBucks (collectively "TitleMax") and Respondent the State of Nevada, Department of Business and Industry, Financial Institutions Division ("FID") disagree over the interpretation of Nevada Revised Statutes ("NRS") 604A.210, NRS 604A.445, and Nevada Administrative Code ("NAC") 604A.230. To obtain a resolution on the good faith dispute over the interpretation of law, TitleMax filed an action for declaratory relief in the lower court. Specifically, TitleMax sought a legal determination as to:

(i) The meaning of "additional interest" in grace periods for the purposes of NRS 604A.210 and NRS 604A.445; and

(ii) Whether Nevada Administrative Code ("NAC") 604A.230 prohibits a licensee from accepting a co-borrower on a title loan where that co-borrower does not appear on the title of the vehicle associated with said loan.

Neither legal question required any factual determination. Each determination was purely a question of statutory or regulatory interpretation.

Despite the straightforward legal issues, the FID moved to dismiss the declaratory relief action, arguing that the lower court lacked jurisdiction based upon TitleMax's failure to exhaust administrative remedies. The lower court

agreed, and the ruling was clear error. Two recognized exceptions to the administration exhaustion doctrine applied under Nevada law—when a party seeks an interpretation of a statute and when resort to administrative remedies would be futile. Thus, the dismissal of the action based upon TitleMax's failure to exhaust administrative remedies must be reversed.

JURISDICTIONAL STATEMENT

This matter falls under the jurisdiction of the Nevada Supreme Court pursuant to Rule 3A(b)(1) the Nevada Rules of Appellate Procedure ("NRAP"). The Notice of Entry of the Order Granting Defendant's Motion to Dismiss for Failure to Exhaust Administrative Remedies and Order Denying TitleMax's Motion for Summary Judgment (the "Order") is dated February 3, 2016. Joint Appendix ("JA"), Volume III at 522 – 523. The Notice of Appeal was filed on February 12, 2016. JA, Vol. III at 529 – 538.

ROUTING STATEMENT

This matter involves the interpretation of NAC 604A.230, NRS 604A.210 and 604A.445 and is presumptively reviewable by the Nevada Supreme Court under Rule 17(a)(14) of the Nevada Rules of Appellate Procedure ("NRAP").

ISSUES PRESENTED

1. Did the lower court have jurisdiction to interpret whether NAC 604A.230 bars a licensee from accepting a co-borrower on a title loan where that

co-borrower does not appear on the title to the vehicle?

2. Did the lower court have jurisdiction to interpret whether NRS 604A.210 or NRS 604A.445 bar a licensee from charging any interest whatsoever as a result of entering into a grace period with a customer?

3. Whether the District Court erred by failing to apply the futility exception to the administrative exhaustion doctrine.

STATEMENT OF THE CASE

The FID examined TitleMax in 2014 and 2015. In the FID's Reports of Examination, the FID concluded that TitleMax had violated NRS 604A.210, NRS 604A.445, and NAC 604A.230. JA, Vol. I at 37 and 63. There was no factual dispute as to the business practices in question. Rather, the dispute between the parties turned solely on their respective interpretations of the foregoing rules.

There is no administrative remedy under NRS Chapter 604A or NRS Chapter 233B to challenge findings and conclusions contained in an FID Report of Examination. Therefore, to obtain a resolution on the good faith dispute over the interpretation of law, TitleMax filed a declaratory relief action in the lower court seeking a legal determination as to: (i) whether NAC 604A.230 prohibits a licensee from accepting a co-borrower on a title loan where that co-borrower does not appear on the title of the vehicle associated with said loan; and (ii) whether NRS 604A.210 and NRS 604A.445 bar a licensee from charging any interest whatsoever

as a result of entering into a grace period with a customer. JA, Vol. I at 1 – 5. Neither legal question required any factual determination.

Despite the straightforward legal issues, the FID claimed for the first time that the dispute between the parties required a factual determination, and that the lower court lacked jurisdiction based upon TitleMax's failure to exhaust administrative remedies. The lower court agreed and dismissed the case, concluding that that there were "questions of fact as to what the differences are between a co-borrower and a guarantor" and a "question of fact as to the implementation of these grace periods and whether the total interest charged during the grace period . . . exceeds the amount of allowable interest under NRS 604A.445." JA, Vol. III at 523. The lower court offered no other explanation for its ruling, completely ignored *Malecon Tobacco* in making its ruling, and failed to consider the well-recognized futility doctrine in cases such as this. Accordingly, the lower court's dismissal should be reversed.

STATEMENT OF THE FACTS

I. Examinations of TitleMax and the Good Faith Dispute Over Interpretations of Law.

The FID is an agency of the State of Nevada with regulatory authority over loans made pursuant to NRS Chapter 604A. *See generally* NRS 604A.400 *et seq.* TitleMax is a lender licensed pursuant to NRS Chapter 604A and is a "licensee"

within the meaning of NRS 604A.075. JA, Vol. II at 247. TitleMax offers title loans to its borrowers, which are governed by NRS Chapter 604A and are regulated by the FID and its Commissioner. *Id.*

The current dispute results from the FID's examination of TitleMax in 2014. In 2014, the FID conducted an examination of TitleMax and issued reports of examination (collectively the "2014 ROEs") covering statutory and regulatory compliance at TitleMax's various retail stores located in the State of Nevada. JA, Vol. I at 37. In the 2014 ROEs, the FID stated that TitleMax was in violation of NRS 604A.210, NRS 604A.445, and NAC 604A.230. *Id.* Specifically:

- The FID concluded that TitleMax's acceptance of a co-borrower on certain title loans violated NAC 604A.230, even though NAC 604A.230 only prohibits a licensee from accepting a guarantor on a title loan.
- The FID concluded that TitleMax's Grace Period Deferment Agreement violated NRS 604A.210 and NRS 604A.445 because the grace period resulted in the accrual of interest in that exceeded the amount of interest as disclosed in the original loan agreement.

Notably, the FID's legal position concerning grace periods in 2014 ROEs tracked precisely with a regulation the FID had previously proposed—**but did not adopt**—in 2012.[1] Based upon the examiner's incorrect application of NRS

[1] *See* http://fid.nv.gov/Opinion/Proposed_Regulations (Notice of

604A.210, NRS 604A.445, and NAC 604A.230, the FID issued a "Needs Improvement" rating, thereby indicating that TitleMax had demonstrated less than satisfactory compliance in the examination. JA, Vol. I at 37.

While there was no dispute as to TitleMax's practices that resulted in the rating, there was a dispute as to whether these practices constituted violations of law based upon the parties' differing interpretations of NRS 604A.210, NRS 604A.445, and NAC 604A.230. JA, Vol. II at 322-328. Thus, because the dispute between the FID and TitleMax was solely legal and turned on the statutory interpretation of the applicable law, and because NRS Chapter 604A and NRS Chapter 233B offer no administrative procedure for challenging an FID Report of Examination,[2] TitleMax filed the lower court action to obtain guidance as to the interpretation of these rules.

II. TitleMax's Only Recourse to Challenge the FID's Interpretation of Law was to Seek Declaratory Relief in the District Court.

The FID concluded in the 2014 ROEs that TitleMax violated NRS 604A.210 and NRS 604A.445 when it entered into a certain Grace Period Deferment

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Workshop/Hearing 604A) (Sept. 21, 2012), at Exhibit D (proposing that a grace period could not "exceed the amount of accrued interest and fees as disclosed in the loan agreement" and that "no interest shall accrue and no fees shall be charged after expiration of the loan period.").

[2] NRS Chapter 233B only allows for review of a "contested case," which is defined as "a proceeding, including but not restricted to rate making and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed." NRS 233B.032.

Agreement (the "GDPA") with its customers. JA, Vol. I at 1 - 5. There is no dispute that TitleMax offered a GPDA to its customers, entered into this agreement with certain customers who elected to do so, and followed the terms of said agreement. JA, Vol. I at 37 – 39. Yet, TitleMax disputed the FID's interpretation of NRS 604A.210 and NRS 604A.445 and that those statutes prohibited such a practice.

Next, the FID claimed that TitleMax violated NAC 604A.230 whenever a co-borrower on a title loan was not on the title of the vehicle that secured the loan. JA, Vol. I at 3. There is no dispute that TitleMax did allow customers to be a co-borrower on a title loan when the co-borrower was not on the title. JA, Vol. II at 231 - 253. Yet, TitleMax disputed the FID's interpretation of NAC 604A.230 and that the regulation prohibited such a practice.

Without any administrative recourse to dispute the FID's legal interpretation of NRS 604A.210, NRS 604A.445, and NAC 604A.230, TitleMax filed a Complaint in the District Court that only sought declaratory relief. JA, Vol. I at 1 – 5. Specifically, TitleMax sought: (i) "a declaration that an individual may be a co-borrower on a title loan without violating NAC 604A.230 when said individual is not listed on title of the vehicle associated with said loan"; and (ii) "a declaration that the [Grace Period] Deferment Agreement does not violate NRS 604A.210 or NRS 604A.445." JA, Vol. I at 4.

III. TitleMax's Undisputed Business Practices and the FID's Erroneous Interpretation.

TitleMax and the FID disagree about the interpretation of NRS 604A.210, NRS 604A.445, and NAC 604A.230. These laws govern automobile title loans. The FID maintains that NAC 604A.230 bars TitleMax from having a co-borrower on a title loan, even though the rule says nothing of co-borrowers. Furthermore, the FID posits that NRS 604A.210 prohibits TitleMax from charging **any** interest during or as a result of a grace period, contrary to the statute and its legislative history, as opposed to **additional** interest, and that TitleMax's grace period renders the term of its title loans impermissibly long.

A. The Alleged Violations of NAC 604A.230.

TitleMax allowed co-borrowers to be on a title loan. The FID alleged that TitleMax violated NAC 604A.230(1)(a) anytime a co-borrower was not listed on title of the vehicle associated with said loan.[3] JA, Vol. II at 234. TitleMax never disputed that it did allow customers to be a co-borrower on a title loan when the co-borrower was not on the title. JA, Vol. II at 231 - 253. Rather, TitleMax disputed that this practice violated NAC 604A.230(1)(a).

The regulation at issue states simply that:

1. A licensee shall not:

[3] TitleMax offered this option for customers

> (a) Require or accept a ***guarantor*** to a transaction entered into with a customer.

NAC 604A.230(1)(a) (emphasis added). Thus, by its plain terms, NAC 604A.230(1)(a) has no application whatsoever to co-borrowers.

It is a basic tenet of statutory interpretation that an unambiguous provision must be interpreted according to its plain meaning. *See, e.g., We The People Nev. ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008) (explaining that this court interprets unambiguous language "in accordance with its plain meaning"); *State Dep't of Ins. v. Humana Health, Ins.*, 112 Nev. 356, 360 (1999). It is clear that NAC 604A.230 *only* prohibits "a guarantor" from guaranteeing a title loan. The FID cannot add a separate or additional meaning to this plain and clear regulation. Indeed, when interpreting the plain language of a statute or regulation, Nevada courts "presume that the Legislature intended to use words in their usual and natural meaning." *McGrath v. Dep't of Public Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007). Thus, the existence of a co-borrower cannot trigger a violation of NAC 604A.230(1)(a).

B. The Alleged Violations of NRS 604A.210 and NRS 604A.445.

TitleMax offered a 210-day installment loan product, which the FID agreed complied with the applicable statutes and regulations. JA, Vol. I at 37. At the time of making the title loan, TitleMax unilaterally offered each borrower under the installment loan a grace period of deferment gratuitously (without additional

charge) pursuant to the terms of a GPDA. *Id.* The GPDA was a form agreement and could not be altered from customer to customer. Thus, the GPDA speaks for itself.

TitleMax had a policy of working with borrowers and giving them flexibility to fulfill their contractual obligations and avoid defaults. JA, Vol. I at 38. Indeed, TitleMax's goal is for each customer to repay the loan, not for TitleMax to recover any motor vehicle. *Id.* As such, TitleMax adopted a policy that allowed borrowers a grace period without additional charge. *Id.* There were no additional charges or increased interest; rather, the customer merely had to pay the original interest rate agreed upon. *Id.* The GPDA provided:

> Consideration. You acknowledge and agree that you and we entered into a Title Loan Agreement on ("Loan Agreement."). Under the Title Loan Agreement, we agreed with you that we may subsequently offer you a "Grace Period" which is a **gratuitous period of payments deferment**. You agree that we are offering you a "Grace Period" and you are voluntarily accepting such offer after entering into a Loan Agreement pursuant to the provisions of NRS 604A.70 and NRS 604A.210. Please note that since this is a "Grace Period" it is not an "extension" as defined in NRS. 604A.065. Under the Title Loan Agreement, your obligation to pay simple interest under the Loan Agreement remains unchanged. Other than the interest and fees originally provided for in the Title Loan Agreement, **we do not charge you any additional fees or interest for entering into this Grace Period Payments Deferment Agreement**.

JA, Vol. I at 41 (emphasis added). Under the GPDA, a borrower could, and had

the right to, prepay without penalty.

In addition, the GPDA obtained each borrower's written acknowledgement and agreement that simple interest would continue to accrue as set forth in the loan agreement. JA, Vol. I at 41 - 43. Specifically, it provided:

> Acknowledgment of Simple Interest Accrual. You acknowledge that we use the simple interest method to calculate and accrue the interest owing under the Loan Agreement. Interest is not compounded under the Loan Agreement. You acknowledge that simple interest is charged on the outstanding principal balance. Payments will be applied first to accrued interest, second to outstanding charges, if any, and third to principal. We calculated and estimated the simple interest under the Loan Agreement and disclosed in the "Finance Charge" disclosure assuming you would pay each scheduled payment in the amount scheduled and on the scheduled Payment Dates. **The original Payment Schedule in the Loan Agreement provided for payments which would ratably and fully amortize the entire Principal Amount and interest payable. The interest rate under the Loan Agreement remains unchanged.** You acknowledge that simple interest is charged on the unpaid principal balance of this Loan Agreement at the daily rate of _____% from the date of this Loan Agreement until the earlier of: (i) the due date of your last payment as set forth in the original Payment Schedule; or (ii) payment in full. **Now that the Payment Schedule has changed, you acknowledge that the new Payment Schedule provided for in this Grace Period Payments Deferment Agreement, if followed, will ratably and fully amortize the entire Principal Amount and interest payable over a longer period of time than the original Payment Schedule in the Loan Agreement. As such you acknowledge and agree you will continue to incur interest as provided in the Loan Agreement. You further agree that in setting the amount of the payments**

> **and dates of the payments, we have estimated the accrued interest owing to us assuming you make the payments in the amounts scheduled and on the exact dates set forth in the Grace Periods Payments Deferment Schedule above**. Early payments may decrease the amount of interest you owe. Making a payment in an amount greater than scheduled above may decrease the amount of interest you owe. **Late payments may increase the amount of interest you owe.** The amount of this increase or decrease will be reflected in the final payment. If an early payment is less than the scheduled installment, then you must pay the difference on or before the upcoming installment due date. You may request a payoff at any time (emphasis added).

JA, Vol. I at 43 (emphasis added). Interest was not charged during the grace period. *Id.* at 41-42 (*see* payment schedule in which no interest is charged during payments 8-14).

Even though the law did not require a grace period, TitleMax offered a grace period after loan origination for a variety of reasons. The "grace period" allowed borrowers the opportunity to elect to reduce their monthly obligations and to make informed decisions about their cash flow throughout the loan process. JA, Vol. II at 248. Indeed, one of the benefits a borrower received in entering into a GPDA was that their monthly payment was lower than originally scheduled under the Loan Agreement. *Id.* While paying down debt has its benefits, it is equally important for many borrowers to reduce monthly payment obligations and have flexibility in payments. *Id.* Thus, many of TitleMax's borrowers viewed the reduction in the monthly payment and resulting "cash flow cushion or margin"

created thereby, as not only a valuable option, but also a benefit not afforded by others in the market. *Id.*

TitleMax only made the GPDA available to those borrowers who elected such an option that were not currently in default. JA, Vol. II at 249. TitleMax did not seek to change the terms of the original loan, did not impose charges for offering the grace period, did not impose "additional" interest, and did not exact other concessions, as a traditional lender might when offering to refinance a loan. *Id.* Borrowers could also make their payments as originally scheduled, even though they entered into a GPDA. *Id.* TitleMax charged no type of prepayment penalty for borrowers desiring to pay off early and save interest. *Id.* Likewise, borrowers always maintained the right to make payments under a repayment plan under NRS 604A.475. TitleMax fully complied with NRS 604A.475 for those customers requesting a repayment plan after default.

The FID has taken the position that a licensee is prohibited from charging any interest whatsoever as a result of a grace period. The FID's position is not supported by law. The alleged statute violated, NRS 604A.210, provides:

> The provisions of this chapter do not prohibit a licensee from offering a customer a grace period on the repayment of a loan or an extension of a loan, except that the licensee shall not charge the customer:
>
> 1. Any fees for granting such a grace period; or
>
> 2. Any additional fees or additional interest on the outstanding loan during such a grace period.

NRS 604A.210. To support its interpretation that NRS 604A.210(2) prohibits the accrual of any interest on the outstanding loan during a grace period, the FID must completely strike the word "additional" from the statute. Yet, the FID does not have the power to unilaterally rewrite a statute.

If the Legislature had intended to ban the accrual of "any" interest during the grace period, it would not have inserted the word "additional" before "interest" in NRS 604A.210. Yet, the statute clearly reads "additional interest." Nevada law requires that a statute's provisions must be construed "in a way that would not render words or phrases superfluous or make provisions nugatory." *Southern Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quotation omitted). If it is the FID's position that the prohibition of "additional fees" or "additional interest" means that the total interest on the loan, for the entire period the loan is unpaid, cannot exceed the total interest contracted to be paid within 210 days, it is also misguided. This view would again render the word "additional" meaningless and superfluous, which is contrary to well-settled maxims of statutory construction. *In re Steven Daniel P.*, 129 Nev. —, 309 P.3d 1041, 1043-44 (2013). Without question, the plain reading of the statute allows the original contractual interest on a title loan to accrue during a grace period.

In addition, Nevada law compels the use of common sense when interpreting statutes. *Southern Nev. Homebuilders*, 121 Nev. at 449, 117 P.3d at 173; *Matter*

of Petition of Phillip A.C., 122 Nev. 1284, 1293 (2006). Here, if there is a grace period, by definition, the borrower has not repaid the full contractual interest of a loan. As a result, the total interest for the original term *plus* the grace period would always be higher than the interest accrued only for the original term assuming the loan was repaid pursuant to its original terms. Therefore, under the FID's apparent interpretation, the word "additional" is again rendered meaningless and superfluous, as the Legislature could have just omitted that word and prohibited all interest during the grace period and reached the same conclusion.

Significantly, the legislative history involving NRS 604A.210 supports TitleMax's position. In April 2005, Sections 13 and 23 of Assembly Bill ("AB") 384, were re-written and added to what would ultimately become NRS 604A.210. Section 23 originally prohibited a licensee from charging the following during a grace period:

1. **Any** fees for granting such a grace period; or
2. **Any** fees or interest on the outstanding loan during such a grace period.

JA, Vol. II at 261. The word "additional" was not yet part of the proposed legislation. Yet, the word "additional" was specifically added to a later draft of AB 384 and ultimately enacted into law. This legislative change is not only significant, it alone is dispositive of this matter substantively, because it evidences that the Legislature specifically rejected the notion that no interest could be

charged whatsoever during a grace period. Rather, the statute, as enacted, merely prohibited the charging of **additional** interest. *See Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001). According to the United States Supreme Court, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" *INS v. Cardoza–Fonseca*, 480 U.S. 421, 442 (1987). Thus, "[w]here Congress includes [certain] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended." *Russello v. United States*, 464 U.S. 16, 23–24 (1983); *see also United States v. NEC Corp.*, 931 F.2d 1493, 1502 (11th Cir. 1991) (changes in statutory language "generally indicate [ ] an intent to change the meaning of the statute"); *Southern Pac. Transp. Co. v. Usery*, 539 F.2d 386, 390–91 (5th Cir. 1976); *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*). Here, by adding the word "additional", the Nevada Legislature specifically intended that interest at the original contract rate could continue during the grace period.[4]

The FID also claimed that the GPDA violated 604A.445(3)(b),(c), and (d). Again, the FID's interpretation and application is incorrect. The relevant portion

[4] The FID also fails to recognize that, when a customer restructure his/her payments under the GPDA, interest is charged only during the first seven payments, with principal only being repaid during the grace period. JA, Vol. I at 38. As a result, no interest is charged during the grace period.

of the claimed violated statute, NRS 604A.445, provides:

> ***Notwithstanding any other provision of this chapter to the contrary:***
>
> 3. *The* ***original term of a title loan*** *may be* up to 210 days if:
>
> (a) The loan provides for payments in installments;
>
> (b) The payments are calculated to ratably and fully amortize the entire amount of principal and interest payable on the loan;
>
> (c) The loan is not subject to any extension; and
>
> (d) The loan does not require a balloon payment of any kind.

NRS 604A.445 (emphasis added). By its very terms, NRS 604A.445(3) only governs the "original term" of a title loan. It says nothing about grace periods. As it states very clearly, these loan durations are "***[n]otwithstanding*** any other provision of this chapter to the ***contrary***." *Id.* (emphasis added). NRS 604A.210 very clearly allows for additional time for grace periods. Thus, NRS 604A.210 controls the grace period, not NRS 604A.455—and there is no need to analyze the subsections of NRS 604A.455(3)(a)-(d).[5]

The FID's position is closely related to its argument regarding NRS 604A.210. It contends that, because the GPDA allows 7 additional months of

[5] Moreover, the FID attempts to use this statute as a sword to claim that no loan could ever extend past 210 days, but this provision is not a sword that limits. Rather, it sets forth the time duration "allowed" if certain requirements are met. Indeed, NRS 604A.445 provides that a loan "may be up to 210 days" if four requirements are met. Yet, of course, NRS 604A.445 has no application because NRS 604A.210 controls the duration of a loan that involves a grace period.

principal only payments during the grace period it effectively converts the 210 day loan to a 420 day loan. Yet, the FID ignores the fact that the Nevada Legislature: (1) expressly allowed for grace periods by statute; (2) put no temporal limitation on a grace period; and (3) specifically rejected the proposition that no interest of any kind could be charged during a grace period. Respectfully, it is not the place of the FID to unilaterally rewrite a statute.[6] Nor is this the proper forum to rewrite these statutes. Given that TitleMax is following these rules to the letter, the FID's appropriate remedy is to seek an amendment of these statutes before the Nevada Legislature. Yet, despite TitleMax's urging that it do so, the FID has instead elected to engage in rulemaking by way of executive enforcement. As such, this matter undermines and displaces the careful separation of powers between the executive, legislative, and judiciary branches of government.

PROCEDURAL HISTORY

TitleMax filed a Complaint on June 1, 2015, that sought only declaratory relief. Specifically, TitleMax sought: (i) "a declaration that an individual may be a co-borrower on a title loan without violating NAC 604A.230 when said individual is not listed on title of the vehicle associated with said loan"; and (ii) "a declaration

[6] Again, it is extremely telling that in 2012 the FID proposed—but did not adopt—a regulation containing the exact same interpretation of NRS 604A.210 that the FID has offered in this matter. *See supra* at footnote 2. Plainly, when the FID decided not to adopt that regulation in 2012, it decided to merely rewrite the statute by way of its own unilateral enforcement. However, enforcement is **not** the appropriate avenue for rewriting a statute or regulation.

that the Deferment Agreement [Grace Period Deferment Agreement] does not violate NRS 604A.210 or NRS 604A.445." JA, Vol. I at 1 - 5. Following an "Unsatisfactory" rating in a second set of Reports of Examination in 2015 (the "2015 ROEs) and threats of disciplinary action by the FID against TitleMax, on September 17, 2015, TitleMax filed an Amended Complaint whereby TitleMax included a request for "injunctive relief enjoining the FID from imposing or seeking to impose discipline based upon alleged violations of NRS 604A.210, NRS 604A.445, and NAC 604A.230."[7] JA, Vol. I at 13 – 16.

Twice before, in published opinions, this Supreme Court has rejected the FID's position that administrative remedies must be exhausted before one seeks an interpretation of a statute or before one takes action to prevent against threats of regulatory discipline. *See State v. Check City Partnership,* LLC, 130 Nev. —, 337 P.3d 755, 758 n.5 (2014) (administrative remedies need not be exhausted when interpretation of statute sole issue in proceeding or when licensee faces threat of loss of license or suspension); *State v. Nevada Ass'n Services, Inc.*, 128 Nev. —, 294 P.3d 1223 (2012) (threat of discipline precluded need to exhaust administrative remedies). Despite the fact that the FID was well aware of these authorities, having participated in these cases itself, on October 6, 2015, the FID

[7] TitleMax thereafter filed a Motion for Preliminary Injunction and Ex Parte Application for Order Shortening Time and Order Thereon ("Motion for Preliminary Injunction"). JA, Vol. I at 17 - 43.

moved to dismiss the lower court action for failure to exhaust administrative remedies. JA, Vol. I at 50 - 70. **That same day**, the FID filed its own Administrative Complaint for Disciplinary Action and Notice of Hearing." (the "Administrative Complaint") JA, Vol. I at 96 – 187. In the Administrative Complaint, the FID sought numerous remedies, including **revocation or suspension of TitleMax's license** in accordance with NRS 604A.820(2). JA, Vol. I at 108. The FID also sought maximum fines and a finding of "willful" violations—over-the-top remedies sought in retaliation for the filing of the declaratory relief action, even though TitleMax's declaratory relief action sought no damages, attorney's fees, or even costs of any kind. Plainly, the FID was angry that TitleMax had dared to disagree with the FID over its interpretation of the law, and was seeking to "forum shop" by filing an administrative complaint after the commencement of the lower court action.

The lower court inexplicably dismissed TitleMax's declaratory relief action. JA, Vol. III at 522 – 523. In its order of dismissal, the lower court ignored the futility doctrine, despite the fact that the FID's position regarding NRS 604A.210, 604A.445, and NAC 604A.230 was unmovable. *Id.* The lower court also failed to recognize that TitleMax had no administrative remedy to challenge the FID's legal conclusions contained in the 2014 ROEs in the first place. *Id.* In addition, the lower court ignored the binding precedents of *NAS* and *Check City*, and in doing so

failed to take into account the fact that the FID filed an administrative complaint against TitleMax **seeking the suspension or revocation of TitleMax's license under NRS 604A820(2)** after commencement of the lower court action. JA, Vol. I at 108. Finally, the lower court also made no mention of *Malecon Tobacco*, despite the fact that the parties' dispute turned solely on their differing interpretations of the law. *Id.*

SUMMARY OF THE ARGUMENT

While a party ordinarily must first exhaust available administrative remedies before benefiting from district court relief from an agency decision, Nevada recognizes that there are exceptions to this exhaustion requirement. *See Malecon Tobacco, LLC v. State ex rel. Dept. of Taxation*, 118 Nev. 837, 839, 59 P.3d 474 (2002) citing *State, Dep't of Taxation v. Scotsman Mfg. Co.*, 109 Nev. 252, 254, 849 P.2d 317, 319 (1993). Two notable exceptions to the exhaustion doctrine are when a party seeks an interpretation of a statute and "when a resort to administrative remedies would be futile." *Malecon Tobacco*, 118 Nev. at 839, 59 P.3d at 476. To oppose dismissal, TitleMax presented overwhelming evidence and law that both exceptions applied to allow TitleMax to seek its declaratory relief in the lower court. In ruling that TitleMax failed to exhaust its administrative remedies, the lower court completely ignored the futility exception and invented factual issues to avoid the dictates of *Malecon Tobacco*. The lower court similarly

ignored that there was no administrative procedure providing the relief that TitleMax requested. The dismissal based upon a failure to exhaust administrative remedies is clearly erroneous and should be reversed.

STANDARD OF REVIEW

There is a *de novo* review of the Dismissal Order, which dismissed the action for lack of jurisdiction due to TitleMax's failure to exhaust administrative remedies. *See Benson v. State Engineer,* 131 Nev. ——, ——, 358 P3d 221 (2015); *Webb v. Shull,* —Nev. ——, ——, 270 P.3d 1266, 1268 (2012) (applying *de novo* review to questions of statutory interpretation); *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) (applying *de novo* review to an order granting a motion to dismiss for lack of subject matter jurisdiction).

ARGUMENT

I. TitleMax Had No Administrative Remedy to Object to the FID's Activist Legal Interpretations.

In the Dismissal Order, the lower court ignored the critical fact that TitleMax lacked an administrative remedy to dispute the FID's legal conclusions contained in the 2014 ROEs. The Dismissal Order presumes that there actually is an administrative remedy to object to the FID's misapplication of law in a report of examination. Yet, there is none.

NRS 604A.700 *et seq.* contains specific provisions for the FID's ability to

investigate and conduct examinations of licensees. The FID thereafter provides a written report of each examination to the licensee. However, there is no Nevada statute or regulation that allows for an administrative review of a written report of examination. NRS 604A.700 *et seq.* NRS Chapter 233B offers no such review, either, as a report of examination is plainly not a "contested case" within the meaning of NRS 233B.032. TitleMax therefore had no ability to seek administrative review of the FID's determination that TitleMax had "violated" Nevada law.

While the FID would like to pretend that a licensee may seek administrative review of a report of examination, there is no ability to do so under the Nevada Revised Statutes or Nevada Administrative Code. As the FID is an administrative agency of legislative creation, it may not act outside of the scope of its specific duties—it "acts without authority when it promulgates a rule or regulation in contravention of the will of the legislature as expressed in the statute, or a rule or regulation that exceeds the scope of the statutory grant of authority. *Scott v. Angelone*, 771 F. Supp. 1064, 1066-67 (D. Nev. 1991). And, as a basic matter of due process, the FID may not simply fabricate a procedure without any written standards for review of a report of examination.

Thus, based upon the Nevada Revised Statutes and Nevada Administrative Code, TitleMax was presented with two options. One, seek a judicial interpretation

of these laws, as it did. Or, two, place its license at risk by waiting for the FID to seek administrative discipline. In direct contradiction of the precedent in Nevada, the Dismissal Order stripped TitleMax of its ability to seek a judicial interpretation and placed TitleMax at the mercy of the FID's discipline. *Department of Bus. & Indus., Fin. Inst. Div. v. Check City Partnership, LLC*, 130 Nev. Adv. Op. 90, 337 P.3d 755, 758 n.5 (Nev. 2015), and *Department of Bus. & Indus., Fin. Inst. Div. v. Nevada Ass'n Servs., Inc.*, 1223128 Nev. Adv. Op. 34, 294 P.3d 1223, 1228 (2012). Indeed, this Court in *Check City Partnership, LLC*, held that a district court may not decline to interpret the law and foist the latter option upon a licensee against its will. 337 P3d at 758 n.5 (" the possibility of a license suspension—a consequence Check City might have faced if it failed to comply with the FID's interpretation of NRS 604A.425—may constitute irreparable harm for the purpose of granting a preliminary injunction...which would be sufficient to form a justiciable case or controversy"). Indeed, the very same day the FID moved to dismiss the lower court action for failure to exhaust its administrative remedies, it filed an administrative complaint seeking suspension and/or revocation of TitleMax's license. JA, Vol. I at 96. Based upon the foregoing, the Dismissal Order should be reversed and the lower court should rule on the parties' good faith dispute regarding the interpretation of NRS 604A.210, NRS 604A.445 and NAC 604A.230.

/ / /

II. The Lower Court Manufactured Factual Issues to Prevent TitleMax From Seeking An Interpretation of Legal Issues.

Nevada law is clear—a party is not required to exhaust administrative remedies when it is seeking the interpretation of a statute or regulation. *See Malecon Tobacco, LLC v. State ex rel. Dept. of Taxation*, 118 Nev. 837, 839, 59 P.3d 474 (2002) citing *State, Dep't of Taxation v. Scotsman Mfg. Co.*, 109 Nev. 252, 254, 849 P.2d 317, 319 (1993). Here, TitleMax was seeking an interpretation of statutes and a regulation. In the Amended Complaint, TitleMax asserted only one claim for relief—Declaratory Relief under NRS Chapter 30. Nevada law provides as follows:

> **NRS 30.030 Scope.** Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.
>
> **NRS 30.040 Questions of construction or validity of instruments, contracts and statutes.**
>
> 1. **Any person** interested under a deed, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, **may have determined any question of construction** or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.
>
> 2. A maker or legal representative of a maker of a will, trust or

> other writings constituting a testamentary instrument may have determined any question of construction or validity arising under the instrument and obtain a declaration of rights, status or other legal relations thereunder. Any action for declaratory relief under this subsection may only be made in a proceeding commenced pursuant to the provisions of title 12 or 13 of NRS, as appropriate.

NRS 30.030 and NRS 30.040 (emphasis added). Specifically, TitleMax sought a legal determination as to:

(i) Whether NAC 604A.230 prohibits a licensee from accepting a co-borrower on a title loan where that co-borrower does not appear on the title of the vehicle associated with said loan; and

(ii) Whether TitleMax's GPDA violated NRS 604A.210 or NRS 604A.445.

JA, Vol. I at 1 – 5. Neither legal question required any factual determination. Indeed, the questions presented were pure questions of statutory and regulatory interpretation. To avoid jurisdiction, the Dismissal Order improperly and incorrectly created unexplained issues of fact that do not exist, as set forth below. JA, Vol. III at 523.

A. <u>There Are No Factual Issues To Prevent the Legal Interpretation of NAC 604A.</u>

The FID deemed that there was a violation of NAC 604A.230(1)(a) whenever a co-borrower on a title loan was not listed on the vehicle's title.

TitleMax sought a declaration from the lower court that an individual may be a co-borrower on a title loan without violating NAC 604A.230(1)(a) when said individual is not listed on title of the vehicle associated with said loan. A ruling on this straight-forward issue did not require any factual information whatsoever.

The regulation at issue is unambiguous and should be interpreted according to its plain language. *See, e.g., We The People Nev. ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008) (explaining that this court interprets unambiguous language "in accordance with its plain meaning"); *State Dep't of Ins. v. Humana Health, Ins.*, 112 Nev. 356, 360 (1999). The regulation states simply that:

> 1. A licensee shall not:
>
> (a) Require or accept a ***guarantor*** to a transaction entered into with a customer.

NAC 604A.230(1)(a)(emphasis added). Thus, by its plain terms, NAC 604A.230(1)(a) has no application whatsoever to co-borrowers. Rather than interpret the regulation, however, the lower court concluded that there were "questions of fact as to what the differences are between a co-borrower and a guarantor" and, thus, TitleMax must exhaust its administrative remedies.

The lower court did not explain what those "questions of fact" were, nor could it, as the difference between a co-borrower and a guarantor is not a factual

issue—it is a legal issue. JA, Vol. III at 523. Co-borrowers and guarantors are legal concepts, and the distinction between the two is solely a legal distinction. Indeed, the most legal poignant difference between a co-borrower and a guarantor is a co-borrower is a principal obligor, while a guarantor is a secondary obligor. *See, e.g.,* RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 15. A co-borrower is primarily liable on the loan, and whether his or her fellow debtor defaults or has defenses is not pertinent to his or her obligation to repay. A guarantor, on the other hand, is not liable at all, unless the principal obligor defaults. Indeed, to collect on a guaranty, a lender would have to prove the default by the underlying borrower, which, of course, is not the case with the co-borrower arrangement. *See, e.g.,* RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 22. This basic legal distinction between a co-obligor and a guarantor is a legal concept outside the purview of a finder of fact, and certainly does not require an administrative hearing to distinguish. Thus, the lower court's conclusion that a question of fact prevented its interpretation of the law is erroneous.

B. There Are No Factual Issues To Prevent the Legal Interpretation of NRS 604A.210 and 604A.445.

The lower court claimed it could not rule on whether the GPDA violated NRS 604A.210 and 604A.445 based upon two issues of fact. JA, Vol. III at 523. The first was "a question of fact as to the implementation of these grace periods."

JA, Vol. III at 523. The second was "whether the total interest charged during the grace period plus the interest charged during the term of the loan (with extensions) exceeds the amount of allowable interest under NRS 604A.445". JA, Vol. III at 523. Neither of these are actual questions of fact, but mere inventions by the lower court to avoid making a judicial interpretation of these laws.

First, TitleMax's GPDA was a form agreement, and there was no dispute that TitleMax's borrowers could request and execute a GPDA after taking out a title loan. JA, Vol. 1 at 38. Moreover, the GPDA was an option presented to customers, not required as a part of the transaction. Thus, there was no dispute as to the "implementation" of these agreements. The real issue is whether the contractual terms violated NRS 604A.210 or NRS 604A.445. Contract interpretation presents a question of law for the district court to decide. *Galardi v. Naples Polaris, L.L.C.*, 129 Nev. Adv. Op. 33, 301 P.3d 364, 366 (2013) (quoting *Ellison v. Cal. State Auto. Ass'n,* 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)); *see also Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003) (noting that the task of interpreting a contract is a question of law). Accordingly, it was incorrect for the lower court to find that there was a question of fact that prevented a legal interpretation.

Second, there was no factual dispute as to "whether the total interest charged during the grace period plus the interest charged during the term of the loan (with

extensions) exceeds the amount of allowable interest under NRS 604A.445". This so-called "factual issue" is nonsensical and pretextual. First, NRS 604A.445 does not even discuss a limit of an amount of allowable interest. Rather, NRS 604A.445 deals with the duration of the original loan—not the amount of interest charged. NRS 604A.445. Additionally, and critically, NRS 604A.445(3) only governs the "original term" of a title loan. It says nothing about grace periods, and does not apply to them. As it states very clearly, these loan durations are "***[n]otwithstanding*** any other provision of this chapter to the ***contrary***." *Id.* (emphasis added). Grace periods are therefore governed separately by NRS 604A.210, which very clearly allows for additional time for grace periods. And, NRS 604A.210 controls the duration of and limitations upon the grace period agreement, not NRS 604A.455. There is therefore no need to analyze the subsections of NRS 604A.445. This issue is a statutory interpretation question. Yet, the lower court balked at interpreting the statute.

III. The Lower Court Ignored the Futility Exception to Administrative Exhaustion.

The other exception to the administrative exhaustion doctrine arises "when a resort to administrative remedies would be futile." *Malecon Tobacco*, 118 Nev. at 839, citing *Karches v. City of Cincinnati*, 526 N.E.2d 1350, 1355-56 (Ohio 1988) (where pursuit of administrative remedies would be futile or unusually onerous, it

was unnecessary to exhaust administrative remedies in order to challenge the constitutionality of a zoning ordinance as applied to a specific parcel of property) and *Memorial Hosp. v. Dept. of Rev. & Tax.*, 770 P.2d 223, 226 (Wyo. 1989); *see also State v. Scotsman Mfg. Co.*, 109 Nev. 252, 255, 849 P.2d 317, 319 (1993) ("Neither will the exhaustion doctrine deprive the court of jurisdiction where initiation of administrative proceedings would be futile."); *see also Engelmann v. Westergard*, 98 Nev. 348, 353, 647 P.2d 385, 389 (1982). Resorting to administrative remedies is "futile" if there is certainty of an adverse decision or the agency has "evidenced a strong position on the issue together with an unwillingness to reconsider." *James v. United States*, 824 F.2d 1132, 1139 (D.C. Cir. 1987); *Randolph-Sheppard Vendors v. Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986). Here, it would be futile for TitleMax to pursue an administrative remedy from the FID. There is no dispute concerning the material facts of the pending proceeding. Rather, it is merely a dispute as to how Nevada law should be interpreted and the FID's position will not change.

The Dismissal Order ignored two recent, binding, and published Nevada Supreme Court cases that are directly on point and in which the FID was a party litigant. In both *State v. Check City Partnership, LLC*, 130 Nev. Adv. Op. 90, 337 P.3d 755, 758 n.5 (2014), and *State v. Nevada Ass'n Servs., Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223, 1228 (2012), the FID argued that the administrative exhaustion

doctrine barred attempts by a licensee to seek court action involving the interpretation of a Nevada law. The FID lost both of these cases on these points. Specifically, in *Check City*, a licensee of the FID filed a complaint for declaratory relief seeking an interpretation of NRS 604A.425. The FID filed a motion to dismiss, arguing that Check City had not exhausted its administrative remedies. The district court rejected these arguments, and the Nevada Supreme Court specifically upheld this portion of the district court's decision. The Court stated unanimously as follows:

> The FID argues that Check City has not exhausted its administrative remedies and that this matter does not present a justiciable case or controversy. We disagree. Exhaustion is not required where, as here, the only issue is the interpretation of a statute. *Malecon Tobacco, LLC v. Dep't of Taxation*, 118 Nev. 837, 839, 59 P.3d 474, 475–76 (2002). Additionally, the possibility of a license suspension—a consequence Check City might have faced if it failed to comply with the FID's interpretation of NRS 604A.425—may constitute irreparable harm for the purpose of granting a preliminary injunction, *see Dep't of Bus. & Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc.*, 128 Nev. ——, ——, 294 P.3d 1223, 1228 (2012), which would be sufficient to form a justiciable case or controversy, *see Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

337 P.3d at 758 n.5. This precedent was binding against the FID and should have been dispositive of the Motion to Dismiss. Yet, it was completely ignored by the lower court.

Moreover, the lower court ignored the "futility" exception by failing to take into account that the FID's position as to the interpretation of these rules "evidenced a strong position on the issue together with an unwillingness to reconsider." The FID had specifically stated its position in two sets of reports of examination—the 2014 ROEs and the 2015 ROEs. In fact, the very same day it moved to dismiss the lower court action, it brought an administrative complaint against TitleMax. Setting aside the ham-handed attempt at forum shopping, the FID's administrative complaint demonstrated conclusively its steadfast position and that it was unwilling to reconsider its position. Despite this, the lower court failed to even consider the futility doctrine in its Dismissal Order.

IV. The Motion To Dismiss Was Procedurally Improper.

Finally, the FID based its Motion to Dismiss on Rule 12(b)(5) of the Nevada Rules of Civil Procedure (the "NRCP"). Yet, the relief requested did not involve the merits of this dispute and thus did not assert that TitleMax has failed to state a claim upon which relief may be granted. Rather, the FID sought to dismiss based upon the ripeness doctrine and the so-called "failure" to exhaust administrative remedies. This was, in reality, a motion to dismiss for lack of jurisdiction over the subject matter, which would be reviewable only under Rule 12(b)(1). Yet, the FID never moved to dismiss in accordance with NRCP 12(b)(1). Again, the lower court ignored this defect and dismissed the case

anyway. Accordingly, the FID's Motion to Dismiss was procedurally improper.

CONCLUSION

The FID has ventured down a troubling path. Not content with the laws given to it by the Legislature, it has taken it upon itself to rewrite, by way of enforcement, portions of NRS and NAC Chapter 604A. When TitleMax dared to disagree with the FID's interpretations of the law, the FID retaliated by misapplying the administrative exhaustion doctrine (as it has done twice in the past), and by commencing an administrative proceeding against TitleMax during the pendency of the declaratory relief action in which it sought revocation of TitleMax's license.

As a result, this case is not solely about the interpretation of certain provisions of Nevada law—it also is about the separation of powers. It is about the power of the Legislature to write laws. And, equally important, this matter is about the inability of the executive and judicial branch to rewrite laws which they want to change. Yet, the Dismissal Order prevented TitleMax from obtaining basic clarity over how these laws are to be interpreted, in direct contravention of Nevada's clear precedent that allows a party to challenge an agency's interpretation of law without having to first exhaust administrative remedies.

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Accordingly, TitleMax requests that this Court reverse the lower court dismissal and remand for further proceedings.

DATED this 2nd day of August 2016.

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VERIFIED CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, Patrick J. Reilly, being duly sworn, do hereby depose and say:

I certify that I have read this Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. The Brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type-volume limitation stated in NRAP 32(a)(7) because it is presented in a 14-point Times New Roman font, contains 8,735 words, including headings and footnotes, as counted by Microsoft Word—the program used to prepare this brief.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

EXECUTED this 2nd day of August, 2016.

Patrick J. Reilly, Esq.

SUBSCRIBED AND SWORN to before me this 2nd day of August, 2016.

Susann Thompson
Notary Public

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
SUSANN THOMPSON
Appt. No. 04-92131-1
My Appt. Expires Aug. 19, 2016

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the forgoing **APPELLANT'S OPENING BRIEF** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on August 2, 2016.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System:

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